Bills Committee on
Evidence (Miscellaneous Amendments) Bill 2002

Response by the Administration to Issues raised by members at the meeting on 14 February 2003 on Part I of the Bill

During the meeting held on 14 February 2003, Members raised the following issues in respect of part I of the Bill:

(a) why the age of "a child of the family" to whom the proposed section 57 of the Criminal Procedure Ordinance applied should be set at the age of under 16 years, and why the new section did not apply to a person who was over the age of 16 years but not in a position to give evidence, e.g. mentally incapacitated persons;

(b) more information be provided on the case of Trezesinski v Daire (1986) 21 A Crim R 247 in south Australia in which the court has refused to grant exemption to the spouse of the accused from the obligation to give evidence against the accused; and

(c) the proposed section 57(3) of the Criminal Procedure Ordinance might not be necessary in view of the proposed section 57A which provided for the right of the spouse of an accused to apply to the court for exemption from obligation to give evidence for the prosecution.

Age of "child of the family" and mentally incapacitated persons

2. Under the proposed section 57(3) of the Criminal Procedure Ordinance, the husband or wife of an accused shall be compellable to give evidence for the prosecution or on behalf of a co-accused if the offence charged involves causing the death of, an assault on, or an injury or threat of injury to, a child of the family who was at the material time under the age of 16 years or if the offence is a sexual offence alleged to have been committed in respect of a child of the family who was at the material time under the age of 16 years.

3. The Administration, in proposing the new section 57 of the Criminal Procedure Ordinance, follows the recommendation of the Law Reform Commission ("LRC") that the age of "a child of the family" should be set at the age of under 16 years. It is considered that a child of the family under the age of 16 years may have difficulty in giving evidence in court, especially when he or she is required to testify against a close family member. The LRC did not deliberate on why the age of a child of the family should be set at the age of under 16 years in its report. However the LRC obviously considered and followed this aspect of the provisions in the Police and Criminal Evidence Act 1984 of the United Kingdom. The United Kingdom Act was based on the recommendations of the United Kingdom Criminal Law Review Committee set out in its 11th Report on Evidence (General)(HMSO, Cmnd 4991). In proposing compelling the spouse of an accused to testify against the accused for offences of violence or sexual nature towards children under the age of 16 belonging to the same household as the accused, the United Kingdom Criminal Law Review Committee also held the view that such cases would be harder to prove in court especially if the child was unable to give evidence.

4. During the meeting held on 14 February 2003, it was suggested to the Administration that the proposed section 57(3) should also apply to a person who was over the age of 16 years but not in a position to give evidence, e.g. mentally incapacitated persons. The Administration agrees that mentally incapacitated persons should be covered by the proposed section 57(3) but considers that they should be limited to a child of the family as defined in the Bill.

5. The scope of the compellable offences in the proposed section 57(3) is confined to offences inflicting physical violence on the spouse of the accused or a child of the family under the age of 16 years or to sexual offences against a child of the family under the age of 16. The proposal in section 57(3) follows the recommendation of the LRC which considers that the rationale for compelling the spouse of the accused to give evidence for the prosecution, i.e., to protect the immediate family members of the accused from physical violence and sexual abuse, is consistent with the concept of upholding the institution of marriage. While the Administration agrees to cover mentally incapacitated persons under the proposed section 57(3), it is considered that the rationale outlined above should be adhered to since the same is supported by the LRC and also by most of the submissions from those who responded to the public

consultation on the proposal to implement the recommendations of the LRC. The Administration therefore proposes that the scope of the compellable offences under the new section 57(3) may be extended to cover also a child of the family who is mentally incapacitated, regardless of his or her age, rather than all mentally incapacitated persons.

The case of Trezesinski v Daire

6. In the case of Trezesinski v Daire 21 A Crim R 247 (copy attached), the accused was charged with possession of cannabis. The prosecution sought to compel his wife to give evidence that only she, her husband, and their two children had lived in the premises where cannabis was found, that she was not aware that cannabis was on, or being grown on the premises, and whether or not the accused had made admissions to her about the cannabis. The wife of the accused applied, through counsel, to be exempted from giving evidence for the prosecution because it would prejudice their marital relationship and that the charge was not sufficiently serious to warrant the taking of that risk. The magistrate ruled that there should be an exemption in relation to admissions which the accused may have made to his wife, but not in relation to the other evidence sought.

7. The accused was convicted of the charge and he appealed to the Supreme Court of South Australia against his conviction, challenging the ruling of the magistrate in refusing exemption in relation to the evidence by his wife on the formal matter of the relationship between her and the accused, the occupation of the premises and her knowledge of cannabis on the premises.

8. Prior J of the Supreme Court decided that the magistrate was in error in refusing the exemption on the basis that no harm was proven because the statutory test under section 21(3) is substantial risk of harm, rather than actual harm. It was, however, found that there was neither substantial risk of serious harm to the marital relationship nor to the wife. Even assuming that there was such a risk, exposure to such a risk was justified by the nature and gravity of the offence and the importance of her evidence. It was held that while the magistrate made errors in this matter, the result reached was proper.

Necessity to retain the proposed section 57(3)

9. The Administration understands that the question was made on the basis that because of the proposed section 57A, spouse of an accused should be compellable in all cases to testify for the prosecution or on behalf of a co-accused, instead of being compellable only in respect of the limited scope of offences as set out in the proposed section 57(3). The Administration, however, has reservation in further extending the scope of compellability of the spouse of an accused to testify for the prosecution or on behalf of a co-accused.

Arguments against general compellability for the prosecution or on behalf of a co-accused

10. The LRC considered the question whether a spouse of the accused should also become a generally compellable witness for the prosecution against the accused. The LRC declined to recommend a general rule of compellabilty for the prosecution noting –

> "We see serious objections to such a dramatic change as to make spouses compellable against each other. To suggest that a compelled spouse is spared the fear of recrimination from a belligerent accused spouse seems rather naïve. The bitterness and resentment felt, for example, by the husband who has been sent to prison because of his wife's testimony, is more likely to be directed against the wife whom he saw testifying against him in court, than against the system which compelled her to be there. The system, did not, after all, compel her to say what she did say in the way in which she said it, or at least that is how husband will view matters, most probably. In any event, any argument which relies upon speculation as to what a wife will not fear or what a husband will or will not do seems far too conjectural to provide a base on which to found an inroad of this kind." (Paragraph 14.5 of LRC's report)

11. The Administration agrees with the LRC that the question of whether there should be a general rule of compellability involves a balancing of interests. On the one hand, there is the interest of society in upholding the institution of marriage and in recognising the privacy of the marital relationship,

and on the other hand, there are the interests of society in prosecuting and convicting offenders. It is considered that the interests of the community and the existing social fabric of Hong Kong would be best served by not making spouses compellable to testify against each other.

Reasons for proposing section 57(3)

12. The LRC recommends that there are certain exceptional circumstances in which compellability for the prosecution or on behalf of a co-accused is necessary. The LRC's view is that a spouse of an accused should be compellable to testify against the accused where the family itself was threatened by the accused because of violence against the spouse or a child or sexual molestation of a child. The LRC therefore recommends that the spouse should be compellable in cases of –

(a) assault on, or injury or threat of injury to, the spouse or a child of the family under 16 years of age;
(b) sexual offences against a child of the family under 16 years of age; or
(c) attempting, conspiring to commit, aiding, abetting, counselling or procuring the commission of such an offence.

Reasons for proposing section 57A

13. Nevertheless, there is still concerns on compelling the spouse to testify against the accused in the exceptional cases. For instance, in compelling the wife to testify against her husband in exceptional cases, there was a concern that, quite apart from fears for her own or her children's safety or for their future financial security, she may not in fact want him to be prosecuted. However badly she may have been treated by her husband, he may nevertheless be a good husband at other times and she may therefore not be prepared to pursue a course of action that could result in the break-up of the marriage and the loss to the children of their father. Her primary concern, once the immediate crisis is over, may be to try to preserve the marriage and the family unit, rather than to ensure that her husband is punished for his behaviour. In such circumstances, there is also a public interest in preserving the family unit which, those who are against compellability would argue, outweighs the

public interest in the prosecution of crime.

14. To address these concerns, the Administration proposes that a spouse of an accused should have the right to apply to the court to be excused from testifying against the accused. The court will have a discretion to excuse the spouse witness, taking into account such factors as the risk of harm to the spouse and to the relationship that might be caused by such testimony, and the broader interests of justice.

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to be very much less, however, when he makes an unsworn statement from the dock than when he gives his account in a fashion giving rise to the sanction of perjury and allowing by cross-examination an investigation of its real value. It is also to be recalled that the High Court pointed out in *Simic* (1986) 144 CLR 319 at 411,

> "... it is obvious that whether evidence of good character will be of any avail to an accused person depends on the strength of the evidence supporting the charge".

These propositions are evident enough when one remembers that the essential purpose of evidence of good character is not to change facts (as the learned judge remarked in his charge), but to suggest "a different complexion on the facts from that which they might bear without such evidence": (*Bassett*) I do not say that a specific direction to the jury on the bearing that evidence of the accused's previous good character might have on his credit could never be appropriate when he makes an unsworn statement. If the giving of the direction is properly done, however, it might in such a case react unfavourably to the accused rather than beneficially to him. I think that is very likely to have been the case here if the judge had acceded to counsel's submission to redirect. What would the gist of the redirection have been? It could not sensibly have involved merely a suggestion to the jury that they use the evidence of good character in assessing the credibility of the accused's unsworn statement. Why should that particular statement be singled out as being inherently more reliable, on account of the accused's previous good character, than the other statements he had made to the police about the circumstances of the deceased man's death and which were at variance with the unsworn statement? At least two statements made by the accused in his interview with the police on 17 July 1983 were startlingly and vitally opposed to what he said in court. These were, first, that the deceased had said "nothing at all" to the accused after stabbing him and, secondly, that when asked "Why did you go to your bedroom?", the accused replied, "Because I wanted to scare him you know, to get my shotgun and break his legs, that is all." A balanced redirection of the kind sought by counsel for the applicant as to the use the jury might make of evidence of character going to credit could, in my opinion, scarcely have omitted a reference to the other statements; otherwise the judge would in effect have been inviting the jury to be unwarrantably selective in the application of evidence that was said to go to the applicant's credibility. The effect which these two statements, if accepted, could have had on the matter of the accused's particular intent and on the matter of provocation is obvious. In summary, I consider that the applicant really lost nothing from the judge's refusal to redirect on the question. He was, with respect, wise to take the course he did. I am of opinion, accordingly, that this ground is not sustained.

[His Honour agreed with his brother judges that grounds 2, 4, 5 and 6 had not been made out by the applicant.]

Appeal dismissed

Solicitors for the applicant: *Galbally and O'Bryan.*

CRW

[SUPREME COURT, SOUTH AUSTRALIA]

TRZESINSKI v DAIRE

Prior J

23 January, 14 February 1986

Evidence — Compellability — Spouses — Risk of harm to marital relationship and/or spouse — Importance of evidence and gravity of offence — Whether spouse should be compelled to give evidence — Evidence Act 1929 (SA), s 21.

The accused was charged with possession of cannabis. The prosecution sought to compel his wife to give evidence that only she, her husband, and their two children had lived in the premises where the cannabis was found, that she was not aware that cannabis was on, or being grown on the premises, and whether or not the accused had made admissions to her about the cannabis. The magistrate adjourned the hearing to enable the wife to be separately represented. Counsel for the wife submitted that she should be given an exemption from giving evidence because that course would prejudice their marital relationship and that the charge was not sufficiently serious to warrant the taking of that risk. The magistrate ruled that there should be an exemption in relation to admissions which may have been made, but not in relation to the other evidence sought. On appeal,

Held: (1) The statutory inquiry as to exemption lies solely with the presiding judicial officer, and is not one for any counsel, be that counsel for a party to the proceedings or otherwise. It followed that the magistrate was in error in permitting representation for the spouse in question or the participation of any counsel at all.

Morgan (unreported, 22 October 1984), applied.

(2) Despite the fact that counsel has no legitimate interest in the issue, a defendant is entitled to challenge the ruling on appeal.

(3) The magistrate was in error in refusing the exemption on the basis that no harm was proven because the statutory test is risk of harm. Further, the magistrate made errors in his interpretation of the statute. Nevertheless, it is now the law that spouses of parties are both competent and compellable in criminal and civil cases subject only to the statutory exemption. In this case: (a) there was neither substantial risk of serious harm to the marital relationship nor to the wife, and (b) even assuming that there was, exposure to such a risk was justified by the nature and gravity of the offence and the importance of her evidence. Therefore, while the magistrate made errors in this matter, the result reached was proper.

Observations on the content and practice of an application for exemption.

APPEAL AGAINST CONVICTION

M J Sykes, for the appellant.

M A Stevens, for the respondent.

Cur adv vult

14 February 1986

PRIOR J. The appellant's wife was called as a witness for the prosecution in a matter heard by a magistrate, sitting as a court of summary jurisdiction at Adelaide. The husband was charged with knowingly having in his possession cannabis, in breach of s 31 of the *Controlled Substances Act* 1984 (SA). The

evidence actually given by the wife was that only she and her husband [and their two children] had been living for some eight and a half years at the premises where the cannabis was found on 24 June 1985, and that she was not aware of any Indian hemp being grown on the premises, or any Indian hemp being located in the rear shed.

Before the witness was sworn, the prosecutor informed the magistrate that besides calling her to say that no persons other than her husband, herself and two small children, resided at the place where the Indian hemp was found, he might also ask questions about any admissions the defendant may have made to his wife relevant to the charge.

Section 21 of the *Evidence Act* 1929 (SA) provides:

"(1) A close relative of a person charged with an offence shall be competent and compellable to give evidence for the defence and shall, subject to this section, be competent and compellable to give evidence for the prosecution.

(2) Where a person is charged with an offence and a close relative of the accused is a prospective witness against the accused in any proceedings related to the charge (including proceedings for the grant, variation or revocation of bail, or an appeal at which fresh evidence is to be taken) the prospective witness may apply to the court for an exemption from the obligation to give evidence against the accused in those proceedings.

(3) Where it appears to a court to which an application is made under subsection (2)—

(a) that, if the prospective witness were to give evidence, or evidence of a particular kind, against the accused, there would be a substantial risk of—

(i) serious harm to the relationship between the prospective witness and the accused;

or

(ii) serious harm of a material, emotional or psychological nature to the prospective witness;

and

(b) that, having regard to the nature and gravity of the alleged offence and the importance to the proceedings of the evidence that the prospective witness is in a position to give, there is insufficient justification for exposing the prospective witness to that risk, the court may exempt the prospective witness, wholly or in part, from the obligation to give evidence against the accused in the proceedings before the court.

(4) Where a court is constituted of a judge and jury—

(a) an application for an exemption under this section shall be heard and determined by the judge in the absence of the jury;

and

(b) the fact that a prospective witness has applied for, or been granted or refused, an exemption under this section shall not be made the subject of any question put to a witness in the presence of the jury or of any comment to the jury by counsel or the presiding judge.

(5) The judge presiding at proceedings in which a close relative of an accused person is called as a witness against the accused shall satisfy himself that the prospective witness is aware of his right to apply for an exemption under this section.

(6) This section does not operate to make a person who has himself been charged with an offence compellable to give evidence in proceedings related to that charge.

(7) In this section—

'close relative' of an accused person means a spouse, parent or child:

'spouse' includes a putative spouse within the meaning of the *Family Relationships Act*, 1975."

Section 21 previously provided for some exceptions to the common law rule that a spouse was not a competent witness for the prosecution against his or her spouse. The 1983 version asserts a new general rule of competency and compellability for spouses with exceptions for them and others within the definition of "close relative" in subs (7). By subs (5), the presiding judicial officer is required to satisfy himself that the prospective witness is aware of his right to apply for an exemption under this section. The magistrate speaks of the wife's rights being explained to her. I assume that this was done by him. I agree with the view expressed by Cox J in *Morgan* (unreported, 22 October 1984) that this is not something to be left to counsel. It is a responsibility staying with the presiding judicial officer. It is not one for any counsel, whether that counsel be counsel for one of the parties to the proceedings or otherwise.

The magistrate was aware of earlier remarks and rulings given by Cox J in *Romano* (1984) 36 SASR 283; 14 A Crim R 168. Most of those views were subject to an "unqualified recantation" in *Morgan*. His Honour then said:

"In my opinion, when it appears that a prospective witness is a close relative within the meaning of s 21 of the *Evidence Act*, the prospective witness ought to be brought into court and his right to apply for an exemption under s 21 explained to him by the judge. The witness should then be asked whether any such application is to be made and, if it is, the judge may, and very likely will, ask him questions with a view to discharging his responsibility under subs (3) and making an appropriate decision.

There are two things I would say, particularly, about the procedure as I understand it under this new section. First, I see no reason why the examination of the prospective witness should be made on oath. Secondly, and more importantly, I do not think, on reflection, that it is appropriate to submit the prospective witness to questioning by counsel for the Crown or counsel for the defence. I say that because I do not consider that they have a legitimate interest in the issue that arises under s 21. I do not mean by that, of course, that they may not be very interested, in the ordinary sense of the word, in the result of any exemption application under s 21. Indeed, one could imagine a case in which the success or failure of the prosecution might depend entirely upon whether or not an application for exemption is granted. However, that does not give the parties an interest in the technical sense which is relevant to what I am now saying.

I think the position is in this respect analogous to a privilege claim by a witness who does not want to answer a question on the ground that his answer might incriminate him. The situation also has some similarity

to the discharge by the judge of his responsibilities with respect to a child witness under s 9 and s 12 of the *Evidence Act*.

I conclude then, contrary to the unconsidered view that I took in *Romano*, that the procedure to be followed under s 21 of the *Evidence Act* is one for the judge alone. When he has heard what the witness has to say, he will consider the issues that are thrown up, particularly by subs (3) of s 21, and grant or refuse the prospective witness's application as he thinks proper.

Mention has also been made this morning of the question whether the right of a person who falls within the scope of the section should be explained to him by the judge personally. Mr Brebner, for the Crown, told me on Friday that the position had been explained to this particular prospective witness, but he drew my attention this morning to the procedure followed by two other members of the Court on this matter in earlier trials. In one case the judge accepted the assurance of counsel and did not, apparently, undertake any independent inquiry of the prospective witness for himself. In that second case, a different trial judge took the view that he should himself, at least in that case, explain to the witness his rights under s 21. My own experience in *Romano* leads me to think that the better course is for the judge to undertake this responsibility. . . . I had little doubt in that case, from my knowledge of counsel concerned, that an explanation of the witness's rights had in each case been given to him, but, of course, that does not necessarily mean that the witness understood properly what his rights under the section were. In any event, it is plainly better to avoid raising an issue, at the trial or later, on that particular question. I am of the opinion, therefore, that, at least as a general rule, it is better if the trial judge makes the necessary explanation and inquiries under subs (5) of s 21 for himself, and satisfies himself from the prospective witness' own answers that the witness understands the questions that necessarily arise under s 21 where a close relative is called to give evidence against a person charged with an offence."

Consistent with this approach, I think the magistrate should not have adjourned the hearing to enable the wife to be separately represented after the prosecutor outlined what he intended to elicit from her. He should have made explanation and inquiry himself. The question of legal representation for the prospective witness was alluded to by Cox J in *Romano*. There his Honour expressed "a very real doubt as to whether . . . one should provoke such questions as legal representation and the calling of supporting witnesses". He then also doubted "whether s 21 envisages any degree of elaboration or complexity at all". I share those doubts and conclude that there was no real justification for allowing counsel for the wife here. Rather, the general rule of which Cox J speaks in the passages cited from *Morgan* called for the inquiries to stay with the magistrate without any assistance from counsel.

Cox J's reference to counsel for the Crown and counsel for the defence, not having a "legitimate interest in the issue that arises under s 21" gave rise to a preliminary objection before me from counsel for the respondent. It was submitted that the ruling given by the magistrate in this case is not one that

the appellant can now challenge in this appeal. I reject that submission. The defendant is now entitled to challenge what the magistrate did.

The submission put to the magistrate by counsel for the prospective witness was that if the wife was to give evidence against her husband, there would be prejudice to their close relationship. The magistrate's note of counsel's submission is that the wife lived at home with two young children. Her relationship with her husband was based on mutual trust and open communication and that for this reason she was fearful that the relationship would be harmed if she were "forced to give evidence". There was reference to the fact that the wife had not been served with a summons to give evidence until she came to court on the date of the hearing. It was submitted that the charge was not a serious one and that for those reasons the matter was not worth the risk that harm might be caused to the wife's relationship with her husband from giving evidence. The very fact of giving evidence, it was submitted, would of itself be "a substantial risk of serious harm to the relationship", the language in par (a) of subs (3) of s 21.

In his ruling, the magistrate said that the applicant had:

> ". . . not produced material to satisfy me there would be serious harm to the relationship between her and her husband, by giving evidence in respect to the ownership and occupation of the property. I say at this stage, if she gives evidence it will be restricted to that and not any other evidence of what her husband may or may not have said to her involving the matter."

These words do not reflect the language of par (a). The question then for the magistrate was whether, on the material before him, it appeared that, if the wife was to give evidence or any particular kind of evidence, there would be a substantial risk of serious harm to the relationship between the prospective witness and her husband, the accused. In this part of his ruling, the magistrate appears to speak of failure to discharge some onus of proving serious harm as a reality as opposed to simply a substantial risk of such harm. The section says that if it appears to the court that there would be a substantial risk of serious harm to the relationship between the prospective witness and the accused, the court must then consider, according to par (b) of subs (3), whether there is insufficient justification for exposing the prospective witness to that substantial risk of serious harm, having regard to the nature and gravity of the alleged offence and the importance to the proceedings of the evidence that the prospective witness is in a position to give.

The magistrate could have stated positively that the importance to the proceedings of the evidence that the prosecution *knew* the prospective witness was in a position to give was such that, even if there was a substantial risk of serious harm to the relationship between the husband and the wife, there was sufficient justification for exposing the wife to *that* risk. That would have left for consideration with respect to that evidence, whether there would be any substantial risk of serious harm of a material, emotional or psychological kind to the wife under par (a)(ii), and the nature and gravity of the offence.

However, after saying what is quoted above, the magistrate went on to say:

> "I have had regard to the provisions of subs (3)(b) of s 21 — namely the

seriousness of the offence charged. Having regard to what was said by Cox J in his ruling in the matter of *Romano* I do not think there is material before me which would justify a total exemption for the defendant's wife in giving evidence in the matter. I have power of course to exempt her wholly or in part and I propose to act on this basis. To put it in a positive way I will exempt her from giving evidence in respect to anything which may have been said to her by her husband in respect to his involvement in the matter and clearly evidence of that nature would have a detrimental effect on their relationship in terms of the directives given in subpar (2) of s 21(3).

I therefore exempt her from giving evidence in that respect having regard to all the matters in subs (3), including the fact that the charge is not a really serious one. I would think there would be a substantial risk of serious harm being caused to their relationship if she had to give any evidence of the conversation between herself and the defendant, which would have the effect of implicating the defendant in the matter. I therefore grant the application in a limited sense and rule any evidence she gives be restricted to the formal matter of the relationship between herself and the defendant and the occupation of the premises at 4 Klopper Street, Redwood Park and any information which she gave to the police about knowledge of cannabis on the premises."

In this passage, the magistrate has not specifically referred to one of the two matters that he was required to have regard to within par (b) of subs (3), if it appeared to him that there would be a substantial risk of serious harm of one of the kinds referred to in subpars (i) and (ii) of par (a), although he purports to do so by asserting that he has had "regard to all the matters in subs (3)". Just before that, the magistrate speaks of "directives given in subpar (2) of s 21(3)". There is no such subparagraph in ss (3) of s 21. Within par (a) of subs (3) there is reference to serious harm to a relationship in subpar (i), but in subpar (ii) serious harm of three particular natures relates to the prospective witness, not to the relationship between the accused and that person. I am not sure what the magistrate was referring to. It seems counsel made no particular submissions as to subpar (ii). However, the magistrate was obliged to consider for himself whether there would be a substantial risk of serious harm of any of the kinds particularised within subpar (ii) of par (a) as well as any under subpar (i). If he intended to do that by his reference to "subpar (2) of section 21(3)", error is reflected in the reference to a relationship. I think it is more likely that he intended to refer to "that risk" in par (b) of subs (3), that risk being not of a "detrimental effect on their relationship" but that identified from subpar (i), "a substantial risk of serious harm to" their relationship.

The first point taken on the appeal was that the evidence elicited from the wife is no different from that which the magistrate exempted. It was put that both "would have a detrimental effect on the relationship". I think the submission, when translated to the proper language, "substantial risk of serious harm", overlooks the combined effect of the factor of importance to the proceedings, not particularised by the magistrate, and the power of exemption being total or partial. The submission for exemption was put on an all or nothing basis by the assertion that the very fact of giving evidence involved a substantial risk of serious harm to the relationship. So, if the risk

was accepted, the magistrate could not proceed to exempt evidence of a particular kind, as opposed to any evidence at all. The argument is misconceived and must be rejected. I must say that the ruling actually made by the magistrate was an appropriate one for these proceedings, even if the consideration of the exemption power in the agony of the moment was not as close and adequate as it should have been.

The magistrate spoke of having regard to the fact that the charge was "not a really serious one". I have difficulty with this view of this offence, but under the terms of par (b) the magistrate was required to consider the "nature and gravity of the alleged offence and the importance to the proceedings of the evidence" sought to be adduced to see if there was "insufficient justification for exposing" the wife to any substantial risk of serious harm of one or more of the kinds within par (a) of subs (3). The *nature* of the offence, however grave it was, when considered with the evidence ultimately allowed, justified a refusal of the application for exemption of that evidence whatever might be said about the exemption sought with respect to any conversations between the spouses.

The importance to the proceedings of the evidence not exempted was obvious. Without it the prosecution was destined to fail. The same could not be said of any communications between the spouses. There were no particulars of what, if any, evidence of the kind actually excluded, the prospective witness was "in a position to give". Communications between spouses may generate a proper basis for an exemption being granted under subs (3). They may, or as the magistrate put it here, "clearly" give rise to a substantial risk of serious harm when other admissible evidence in the same case might not. I think the magistrate, despite what he said in the first passage cited, was only prepared to find that there would be a substantial risk of serious harm with respect to communications. As to the other evidence, if there was any risk it was at most "slight" or "transient", (the words used by Cox J in *Romano*).

From time to time it has been suggested that in addition to rendering the spouse of the parties incompetent, the common law prohibited the disclosure of marital communications by any witness, whether they passed between him and his spouse, or were other people's marital communications overheard by him. *Rumping v DPP* [1964] AC 814 rejected this view, asserting that the only relevant common law rule was that of incompetency. It may be that this erroneous suggestion of privilege conditioned or inspired the submission put to the magistrate, or the ruling he made. There can now be no doubt that the spouses of parties are competent and compellable witnesses in both civil and criminal cases, subject only to the qualification enacted in s 21: cf also, *Dee v Dall* [1919] SALR 167; and ss 16 and 18 of the *Evidence Act* — particularly the amendment to II and removal of III and IV from subs (1) of s 18, at the same time as s 21 as now enacted came into force.

As I have already said, communications between spouses may generate a proper basis for an exemption being granted under subs (3). The fact that there was no common law privilege attaching to communications between spouses is not a reason now to deny an exemption under s 21 for such communications, if those communications come within the language used by Parliament to confer a power of exemption. On some occasions, communi-

cations between husband and wife may be known to the prosecution. The situation would then be much different from what it was in this case. The court would then have regard to the importance to the proceedings of that particular item of evidence, as well as the nature and gravity of the offence alleged in considering whether an exception should be made, assuming the demands of par (a) were met in some way. Of course, questions of privilege against self-incrimination might also arise in some cases, too. Here, however, no proper inquiry was made as to any proper basis for exemption with respect to communications at all.

I share the magistrate's view that there was not material before him which would justify a total exemption from giving evidence. I doubt that there would have been a substantial risk of serious harm to the relationship between the wife and the accused from requiring the evidence given to be given. Nor do I think there would be a substantial risk of serious harm of a material, emotional or psychological nature to the wife from that either. However, assuming that there was, having regard to the nature and gravity of the alleged offence and the importance to the proceedings of the evidence the wife was allowed to give, exposing her to any such risk was justified.

The magistrate was entirely correct in not permitting the prosecutor to go on a fishing expedition, as to admissions of guilt from marital communications. The matter could be properly dealt with here by assuming par (a). Doing that, there was insufficient justification for exposing the wife to such a risk having regard to the matters in par (b). The importance to the proceedings of any such evidence was far from obvious on what was put to the court by the prosecutor.

A further submission was put that by enacting s 21 in its present form, Parliament did not intend to extend the compellability of spouses to cases such as this, but "rather to broaden the class of persons who could claim the exemption and to deal with such claims on a case by case basis". Perhaps this latter submission was justified against observations of the kind made by Lord Atkinson in *Leach* [1912] AC 305 at 311:

> "The principle that a wife is not to be compelled to give evidence against her husband is deep seated in the common law of this country, and I think if it is to be overturned it must be overturned by a clear, definite and positive enactment, not by an ambiguous one such as the section relied upon in this case."

The language of subs (1) of s 21 could not be plainer, even if that in subs (3) could be. The spouse of an accused person is now both competent and compellable to give evidence for the prosecution. Any vagaries in the grounds for exemption in subs (3) cannot support this submission of the appellant.

Subsection (3) of s 21 is not the easiest of provisions to apply. In essence, I think it is plain that if it does appear to a court that there is either a substantial risk of serious harm to the relationship between a prospective witness and the accused, or a substantial risk of serious harm of a material, emotional or psychological nature to the prospective witness, if the prospective witness was to give evidence, or evidence of a particular kind, there is an obligation on the court to consider whether that risk is justified, having regard to the matters particularised in par (b) of subs (3). The positive language within par (a) does not sit happily with the negative terms within

par (b). Nevertheless, I think a court is required to do no more than consider whether any substantial risk of serious harm appearing to it, being one of the kinds particularised in par (a) of subs (3), it should permit that perceived risk to continue or become a reality by not granting, wholly or in part, an exemption in favour of the witness who seeks it, *having* regard to the matters alluded to in par (b).

The words "have or (having) regard to":

> "... have generally been construed ... as requiring the authority concerned to take the stated matters into account and consider them and give due weight to them, but without being bound to comply with them. Ultimately, the authority's discretion remains unfettered: see *Ishak v Thowfeek* [1968] 1 WLR 1718 at 1725; *Rathborne v Abel* (1964) 38 ALJR 293 at 295." (Cox J in *South Australian Planning Commission v Dorrestijn* (1984) 36 SASR 355 at 371.)

In this case, with respect to marital communications, there was very little beyond an assumed privilege to have regard to. However, the assumption made with respect to that does not compel exemption of the evidence ultimately admitted.

Whilst error can be identified in the magistrate's consideration of the application for exemption, my own review of the material before him does nothing to make the evidence admitted the proper subject of an exemption. The appeal must therefore be dismissed.

Appeal dismissed

Solicitors for the appellant: *Sykes Bidstrup.*

MRG