1961
Oct. 5, 19
Nov. 1, 6
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ANDREAS GEORGHIOU ALIAS NAYLON
v.
THE POLICE

[O' BRIAIN, P., ZEKIA, VASSILIADES, and JOSEPHIDES, J.J.]

ANDREAS GEORGHIOU ALIAS NAYLON,

Appellant,

v.

THE POLICE,

Respondents.

(Criminal Appeal No. 2399).

*Evidence in criminal cases—Husband or wife—Not a competent witness against the other—Subject to certain exceptions—The Evidence Law, Cap.*9, *section* 14(1) *and* (2)—*Husband charged with common assault against wife contrary to section* 242 *of the Criminal Code, Cap.* 154—*Common assault does not necessarily come within the exceptions provided in section* 14(2) *(a) of Cap.* 9 *so as to render the one spouse a competent witness against the other.*

*Criminal law—Common assault as distinct from battery—The Criminal Code, Cap.*154, *sections* 242 *and* 243—*Common assault—Meaning—The same as in English law, by virtue of section* 3 *of the Criminal Code.*

The appellant was convicted on a charge of common assault contrary to section 242 of the Criminal Code, mainly on the evidence of the complainant, his wife. By section 14 of the Evidence Law, Cap. 9, it is provided:

"(1) Subject to subsection (2), in criminal proceedings against any person, the husband or wife, as the case may be, of such person shall not be a competent witness for the prosecution against that person nor a compellable witness against any other person jointly charged with him or her.

(2) The husband or wife of a person charged—

(a) with inflicting or attempting to inflict any bodily injury or violence upon him or her or upon any of his or her children;

(b) with an offence under any of the sections of the Criminal Code, set out in the Schedule to this Law, or under section 54 of the Children Law, shall be a competent witness for the prosecution against the person so charged and a compellable

witness against any other person jointly charged with him or her.

(3)......................."

What is remarkable in this case, is that on its facts it was open to the prosecution to charge the appellant with battery contrary to section 243. The charge, however, as laid was as follows:

Statement of offence: "Assault common, contrary to section 242 of the Criminal Code, Cap. 154. PARTICULARS OF OFFENCE: The accused on the.. .... at .... did unlawfully assault C.A. of Limassol". By section 3 of the Criminal Code "...... expressions used in it shall be presumed, so far as is consistent with their context and except as may be otherwise expressly provided to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith". By section 242 of the Criminal Code it is provided: "Any person who unlawfully assaults another is guilty of a misdemeanour,........ and is liable to imprisonment for a term not exceeding one year, or ...." And by section 243: "Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for three years".

Held: (ZEKIA *and* JOSEPHIDES, *JJ. dissenting*):

(1) Applying the English principles, the charge of common assault does not, *per se*, clearly involve the element of bodily injury or violence. It follows that to charge a person with common assault and nothing more, does not, of itself, allege against the accused the infliction of bodily harm or violence, or an attempt to inflict bodily harm or violence, within the exceptions of section 14(2) (a) of the Evidence Law, Cap.9 (*supra*). Therefore, as the charge stood at the time when the complainant (wife) was called, the case did not clearly fall within the class of exceptions under paragraph (a) of sub-section 2 of section 14 of Cap. 9 (*supra*) with the certainty required in criminal proceedings, to bring the matter within the exception to the general rule laid down in sub-section (1) that the wife is not a competent witness in a criminal trial against her husband or *vice versa*.

(2) Consequently the appeal is allowed and the conviction quashed.

Held: (*Per ZEKIA, J. in his dissenting judgment, JOSEPHIDES, J. concurring*): (1) It is true that common assault as a legal term comprises offences not necessarily involving bodily injury, violence or attempt to commit either. But in the ordinary language and in the verbal sense as used in the charge the word "assault" definitely indicates battery or attempt to commit battery. A charge is expected under section 39(c) of the Criminal Procedure Law, Cap.155, to be framed in the ordinary language and there is no reason to assume, therefore, that the words "did unlawfully assault" occurring in the charge preferred against the appellant meant anything else than causing bodily injury or violence to his wife or an attempt to commit either. Had the nature of the assault charged been a mere technical one, I would have expected a clear indication to that effect in the indictment.

Appeal allowed by majority. Conviction quashed.

Cases referred to:

R. v. Rolfe 36 Cr. App. R.4;

R. v. Lapworth 22 Cr. App. R. 87;

Leach v. R. (1912) A.C. 305..

Appeal against conviction

The appellant was convicted on the 14th July, 1961, at the District Court of Limassol (Criminal Case No. 6914/61) on one count of the offence of assault common, contrary to section 242 of the Criminal Code, Cap. 154, and was sentenced by Limnatitis D.J., to 9 months' imprisonment.

Appellant in person.

E. Munir for the respondent.

Cur. adv. vult.

The facts sufficiently appear in the judgments of O'BRIAIN, P. and VASSILIADES, J.

O' BRIAIN, P.: The appellant in this case was not represented by a counsel, either in this Court or in the trial court. For this reason this Court considered that it was

incumbent upon them to scrutinise with great care the record of the trial, lest any point in the appellant's favour should be overlooked. The convicition of the appellant is based mainly upon the evidence of his wife and it seemed to this Court that it was open to question whether or not our law permits, in the circumstances of this case, the wife to give evidence against her husband. Accordingly, the case was adjourned to enable Counsel for the Republic to look into and argue the point, but, unfortunately, this Court has not had the assistance of Counsel to argue the case contra.

In Cyprus the matter is governed by Statute; the Evidence Law, Cap.9 section 14 (1) expressly provides that -

> "Subject to sub-section (2) in criminal proceedings against any person the husband or wife, as the case may be, of such person shall not be a competent witness for the prosecution against that person............"

This is broadly a re-statement of the present law in England which itself drives from the common law. In the House of Lords in *Leach's* case (1912) A.C. 305, at p. 311, Lord Atkinson during the argument referred to a wife as being "unlike all other witnesses" and, in his opinion, used the words "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........" Section 14, sub-section 2 (a) and (b) of our Law defines two categories of cases which are exceptions to this general rule. Only (a) requires consideration in the present case. It reads -

> "2. The husband or wife of a person charged -
>
> (a) with inflicting or attempting to inflict any bodily injury or violence upon him or her, or upon any of his or her children..........
>
> shall be a competent witness for the prosecution against the person so charged.........."

It is to be noted that the two categories are defined with relation to the charge preferred against the spouse.

In this case the charge is set out in the statement of offence as follows:-

> "Assault common, contrary to section 242 of the Criminal Code, Cap. 154.

PARTICULARS OF OFFENCE: The accused on the 28th day of May, 1961, at Limassol in the District of Limassol, did unlawfully assault Chrysanthi Andreou of Limassol".

It seems to me, therefore, that the question for determination is whether or not this count as laid by the Attorney-General clearly brings the case within the category where the charge is within the exception defined in section 14, 2(a). To put the matter in another way, the question is, does the charge of common assault as laid in the information, *per se*, clearly involve the element of bodily injury or violence? That question must be answered by ascertaining what is the meaning of "assault" in the English criminal law, because the Criminal Code of Cyprus under which the accused was charged provides expressly in section 3........

"........expressions used in it shall be presumed, so far as is consistent with their context and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith".

The meaning of assault in English law is, in my opinion, correctly and authoritatively set out in Russel on Crime, 11th Ed. Chapter 37, in the section headed "Definitions". The learned author says -

"An assault, as distinct from battery, is a threat by one man to inflict unlawful force (whether light or heavy) upon another ; it constitutes a crime at common law when the threatener, by some physical act, has intentionally caused the other to believe that such force is about to be inflicted upon him. The *actus reus* of assault thus consists in the expectation of physical contact which the offender creates in the mind of the person whom he threatens. The *mens rea* consists in the realisation by the offender that his demeanour will produce that expectation. The crime is constituted notwithstanding that the threatener did not intend to apply the threatened force".

And in a recent case *R. v. Rolfe* 36 Cr. App. R. 4, at p. 6, Goddard, L.C.J., used these words -

"The offence of assault is often confused with the offence of battery. An assault can be committed without touching a person. One always thinks of an assault as the giving

of a blow to somebody but that is not necessary. An assault may be constituted by a threat or a hostile act committed towards a person.........."

Indeed, the unsavoury facts of that case constitute a striking illustration of a case of an assault completely lacking the elements of bodily injury or violence.

If this view of the law be correct, it must follow, in my opinion, that to charge a man with common assault, and nothing more, does not, of itself, necessarily allege against the accused the infliction of bodily harm or violence. An attempt to inflict bodily harm or violence involves the intention to inflict bodily harm or violence, but, as has been pointed out above, a person committing assault not merely need not have the intention but may, indeed, affirmatively intend the contrary, namely not to apply any force.

The Court has been pressed by Counsel for the Republic with an observation of Avory J. in the case of *R. v. Lapworth*, 22 Cr. App. R. 87, at p. 89:

"........ a wife was always a competent witness on a charge against her husband of having assaulted her".

It has been submitted that this is authority for the proposition that in English law on a charge of common assault a wife is a competent witness against her husband. The words quoted are only part of a sentence. The words immediately preceding are "in such circumstances" and the whole passage commences with the sentence (*supra* at p. 88):

"The short point is whether in a case of personal violence having been used by a wife towards her husband or by a husband towards a wife, etc."

The context, I think, makes it clear that Avory J. was dealing with cases where violence was charged against the accused. In any event I agree with my brother Vassiliades J. that, in Cyprus, the matter is governed now by express statutory provision.

In conclusion I would like to say that I have some doubt as to whether a mere technical battery would satisfy the requirements of the section which speaks of inflicting "bodily injury or violence" and I desire to reserve this point for consideration if and when it arises in an appropriate case. But in this case it was indubitably open to the Republic to charge

the accused with having inflicted actual bodily harm upon his wife and if that had been done no question could have arisen about the competency of the wife to give evidence against the accused. The Prosecution chose not to take that course and, as a consequence, they are, in my opinion, faced with the prohibition in section 14, sub-section 1 of the Evidence Law. I would allow this appeal upon this ground.

ZEKIA, J.: In this case the appellant was convicted for assaulting his wife and was sentenced to nine months imprisonment. No doubt the conviction can stand only if the evidence of the wife was properly received.

The point raised in this appeal was whether the complainant's wife was competent under section 14 (2) of the Evidence Law to give evidence against her husband, the appellant. That section renders it a prerequisite for the competency of a husband or wife in a case against his or her spouse to be called as a witness that such husband or wife has to be charged with either bodily injury, violence or attempt to do either. If, therefore, the charge preferred against the appellant was not for bodily injury, violence or attempt to commit either, the wife was not a competent witness and her evidence against the appellant ought not to have been received.

I do not think, however, that the charge as it stands does not disclose bodily injury, violence or attempt to commit the one or the other. It is true that the common assault as a legal term comprises offences not necessarily involving bodily injury, violence or attempt to commit either but in the ordinary language and in the verbal sense as used in the charge the word "assault" definitely indicates battery, actually committed, or attempt to commit battery.

A charge is expected under section 39 (c) of the Criminal Procedure Law to be framed in the ordinary language and there is no reason to assume therefore that the words "did unlawfully assault" occurring in the charge preferred against the appellant meant anything else than causing bodily injury or violence to his wife or an attempt to commit either.

Archbold in connection with an indictment for common assault gives the particulars for the offence as follows:

"A.B. on the..................day of.............
.... in the County of ....
..............assaulted G.N."

That also indicates to my mind that the word "assaulted" is normally used in the ordinary language as meaning beating or attempting to beat.

I would indeed have expected a clear indication in an indictment had the nature of assault with which a person is charged been a technical one such as false imprisonment or unlawful detention.

For the above reasons I am of the opinion that the appeal should be dismissed.

VASSILIADES, J.: This appeal turns on a short point of law: whether the wife of the appellant was, or was not, a a competent witness, when called to give evidence for the prosecution at the trial. The answer to this question decides the appeal as the conviction is based upon her evidence.

Appellant was tried and convicted on a charge of common assault under section 242 of the Criminal Code (Cap. 154). As the contents of the charge are material for the purposes of this appeal, I shall set it out in full :-

"STATEMENT OF OFFENCE: Assault common, contrary to section 242 of the Criminal Code, Cap. 154".

"PARTIGULARS OF OFFENCE: The accused on the 28th day of May, 1961, at Limassol in the District of Limassol, did unlawfully assault Chrysanthi Andreou of Limassol".

Appellant pleaded not guilty to this charge, and the Police-prosecutor called evidence. The first witness called, was a Medical Officer who testified that on the day of the offence (28.5.61) he examined" a certain Chrysanthi Andreou" ....and prepared a report which he produced and read in Court. This was admitted as exhibit 1 and the material part of it reads:-

"RESULT OF EXAMINATION
Examined on 28.5.61 at 9.5 p.m.

1) Irritation. The skin of cycle on her right shoulder caused probably by teeth, but not with force.

2) Another two irritations very superficial, the skin of a cycle caused by the same instrument".

After this evidence, which was not contested, the prosecution called the complainant named in the charge, whose first words from the box, according to the record, were that the accused was her husband.

Upon this statement the question immediately arises whether the witness was, in law, competent to give evidence against her husband, in this case.

The accused was not represented, and the matter apparently escaped the attention of both the prosecutor and the Judge. The wife was allowed to continue with her evidence, which, in due course, formed, as I have already said, the basis of the conviction, the subject-matter of this appeal.

Learned Counsel for the Republic contended, in support of the conviction, that the wife was, in the circumstances, a competent witness. He referred to a statement of the law on the point, at present, in England, as set out in paragraphs 1334 and 1335 in Archbold (34th Ed.); and relied on statements made in the judgment of *R. v. Lapworth* (22, Cr. App. R. 87) a case in point, decided in England in 1930.

Counsel referred to passages in the judgment of the Court of Criminal Appeal, delivered by Avory J., to the effect that "in a case of personal violence having been used" by one spouse against the other, the injured party, at common law, has always been a competent and compellable witness against the other. "Whatever the reason be", (the eminent Judge is reported to have said at p.89) "I am satisfied that at common law, in such circumstances, a wife was always a competent witness on a charge against her husband of having assaulted her".

Learned Counsel, however, conceded that in Cyprus the matter is regulated by statute, - (sect. 14 of the Evidence Law, Cap.9) - which, he submitted, is a codification of the common law of England. And he contended that sec. 14(2) of our statute provides that the husband or wife of a person charged with inflicting or attempting to inflict any bodily injury or violence upon him or her........ shall be a competent witness for the prosecution, against the person so charged.

In this case the appellant was charged with assault, which must be taken to include, counsel argued, cases of inflicting or attempting to inflict injury or violence to the person.

The argument is attractive, and on the face of it appears to be convincing. Common assault covers also cases of battery, which may be said to be a form of violence. In any case common assault may be an "attempt" to inflict violence, counsel argued.

But on going deeper into the question, I have reached a different conclusion.

The dicta in *Lapworth's* case (*supra*) were made in a case where personal violence had been used by one spouse against the other ; and presumably charged accordingly.

In Halsbury's Laws of England (3rd Ed. Vol.10, para. 883 at p. 483) the position is stated as follows:-

> "At common law the wife or husband of a defendant could not give evidence for the prosecution or for the defence on the trial of the defendant, except in cases of offences committed by the defendant against the person or liberty of the other party to the marriage".

Coming now to our law, there can be no question that the matter is regulated by s.14 of the Evidence Law, (Cap.9). The first part of the section provides that:

> "....in criminal proceedings against any person, the husband or wife, as the case may be, of such person, shall not be a competent witness for the prosecution against that person, nor a compellable witness against any other person jointly charged with him or her",

excepting for the cases in sub-section (2) where the wife or husband is a competent witness against the other spouse, and a compellable witness against any other person jointly charged.

The legislator, for obviously good reasons considering conditions in Cyprus, put the matter on the footing that spouses shall not be competent to give evidence against one another, unless the case falls within the well defined exceptions in subsection (2).

These are : (a) the cases where the husband or wife is charged with

> "inflicting or attempting to inflict any bodily injury or violence upon him or her, or upon any of his or her children;" and

(b) the cases where the other spouse is charged under

any of the sections of the Criminal Code specifically listed in the schedule attached to the statute or under s.54 of the Children Law".

Now, clearly, this case with a charge for common assault under s.242 of the Cr. Code, does not fall in class (b) of the exceptions.

And equally clearly, if the charge were one for assault causing actual bodily harm under s.243 of the Code (which appears to have been the proper charge to cover the complaint of the wife) the case would fall in class (a) of the exceptions; or, if the particulars of the offence charged, were to show that the assault caused bodily injury to the wife, as she complained, one might perhaps still say that the charge, as a whole, fell within class (a).

But as the charge stood at the time when the wife was called, the case did not clearly fall, in my opinion, within class (a) with the certainty required in criminal proceedings, to bring the matter within the exception to the general rule laid down in the first part of the section ; that the wife is not to give evidence in a criminal trial against her husband, or *vice versa.*

Having reached this conclusion, I am inclined to the view that in the circumstances of this particular trial, the wife was not a competent witness at the time she was called ; and the conviction resting on her evidence, cannot be sustained.

As a matter of general proposition resulting from this appeal, I may add that I take the view that a wife or husband as the case may be, should not be called as a witness against the other party to the marriage, with the consequence which may follow such a step on their family life, unless the case, as charged, can be clearly brought within one of the two classes of exceptions in sect. 14 (2) of the Evidence Law (Cap.9).

JOSEPHIDES, J.: I agree with the judgment delivered by my brother Zekia, J. that the particulars of offence in this case disclosed sufficiently that the appellant was charged with inflicting or attempting to inflict bodily injury or violence on his wife, within the provisions of section 14(2) of the Evidence Law, Cap. 9. I would dismiss the appeal.

Appeal allowed by majority.
Conviction quashed.