[TRIANTAFYLLIDES, P., STAVRINIDES, L. LOIZOU, HADJIANASTASSIOU, A. LOIZOU, MALACHTOS, JJ.]

NICOSIA POLICE,

Applicants,

v.

THEODOROS PAPASAVVA,

Respondent.

(*Case Stated No.* 167).

Evidence—Husband and wife—Husband charged with common assault against wife contrary to section 242 *of the Criminal Code, Cap.* 154—*Wife a competent witness—Proper course for deciding whether she is a competent witness is to look at the charge as framed—Section* 14(1) *and* (2) *of the Evidence Law, Cap.* 9. 5

Wife—Competence as witness—Husband charged with common assault against her—See, also, under "Evidence".

The respondent in these proceedings was charged* with common assault against his wife. On the application of Counsel for the prosecution the trial Court referred, by means of a Case 10 Stated under section 149 of Cap. 155, the following question of Law:

" Whether the charge of common assault charges the accused husband (the respondent in these proceedings) of the complainant with inflicting or attempting to inflict 15 any bodily injury, or violence upon her, in the sense of section 14(2)(a) of the Evidence Law, Cap. 9".

The trial Judge answered this question in the negative.

Section 14(1) and (2) of the Evidence Law, Cap. 9 reads as follows: 20

"14.(1) Subject to subsection (2), in criminal proceedings

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* The relevant charge read as follows:
"Common assault, contrary to section 242 of the Criminal Code, Cap. 154.
Particulars of offence:
The accused at the time and place in count 1, hereof mentioned, did unlawfully assault one Themis Papasavva of Nicosia".

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) ....".

Held, per Triantafyllides, P., L. Loizou and Malachtos, JJ. concurring:

(1) That the proper course for deciding whether a wife, in a case of this nature is a competent witness is to look at the charge as framed, because it is not really feasible to link the matter of her competence as a witness with the particular circumstances of each individual case.

(2) That in construing the said section 14(2)(a) it is useful to refer to the corresponding situation in England because s. 3 of Cap. 9 provides that ".................... every Court, in the exercise of its jurisdiction in any civil or criminal proceeding, shall apply, so far as circumstances may permit, the law and rules of evidence as in force in England on the 5th day of November, 1914" (*R.* v. *Wakefield*, 168 E.R. 1154 at p. 1156; The *King* v. *Lapworth* [1931] 1 K.B. 117 at p. 121 and *R.* v. *Blanchard* [1952] 1 All E.R. 114 at p. 115 cited with approval).

(3) That among the primary objects of a provision such as section 14(2)(a) must be the protection of both the interests of the wife as well as the interests of justice, especially in cases where the wife is the only witness against her husband.

(4) That it is sufficient, in order to render the wife a competent witness under section 14(2)(a), if the charge discloses prima

facie that the accused husband has inflicted or attempted to inflict bodily injury, or violence on her (see *Naylon* v. *Police*, 1961 C.L.R. 254 at pp. 260, 261 per Zekia, J.); that the charge as framed against the respondent should be treated as charging him with inflicting or attempting to inflict bodily injury, or violence upon his wife, as the complainant; and that, accordingly, she is a competent witness by virtue of s. 14(2)(a) of Cap. 9.

Per Hadjianastassiou, J.:

That having regard to the offence, which itself is concerned with "bodily injury", and to the wording of the charge and having regard to the case-law, which lays down that in actual assaults the evidence of the wife against her husband is admissible, the trial Judge came to a wrong determination regarding the meaning of the word "assault"; that in the circumstances of this case it would be reiterated that in the ordinary language and in the verbal sense as used in the charge, the word "assault" definitely indicates battery actually committed or an attempt to commit battery (opinion of Zekia J. in *Naylon* v. *Police*, 1961 C.L.R. 254 at pp. 260–261 adopted).

Per A. Loizou, J.:

(1) That the threat to inflict unlawful force upon another which is contained in the offence of common assault, brings this offence within the exceptions set out in section 14(2)(a) of Cap. 9, and in particular, within the alternative of "attempting to inflict any bodily injury or violence upon him or her....."

(2) That the fact that a common assault is constituted notwithstanding that the threatener did not intend to apply the threatened force, does not change the position, as the actus reus of assault, consists in the expectation of physical conduct which the offender creates in the mind of the person whom he threatens and the mens rea consists in the realisation by the offender that his demeanour will produce that expectation (see Russel on Crime, 11th ed. Chapter 37); and that it is an offence which involves as such, the infliction or an attempt to inflict injury or at least violence on the person and as such, when it is committed as against a spouse, it falls within the exception.

Ruling of trial Judge set aside;
case remitted to him with opinion
that wife is a competent witness.

Cases referred to:

R. v. *Wakefield and Others*, 168 E.R. 1154 at p. 1156;

King v. *Lapworth* [1931] 1 K.B. 117 at p. 121;

R. v. *Blanchard* [1952] 1 All E.R. 114 at p. 115;

5 *Naylon* v. *Police*, 1961 C.L.R. 254 at pp. 257, 258, 259, 260, 261;

Reeve v. *Wood* [1864] Cox. C.C. 58 at p. 59;

Leach v. *Rex* [1912] A.C. 305 at pp. 309;

Director of Public Prosecutions v. *Blady* [1912] 2 K.B. 89 at pp. 90, 91, 92;

10 *R.* v. *Lord Mayor of London* [1885–1886] 16 Q.B.D. 772 at p. 775.

Case Stated.

Case Stated by Boyiadjis, S.D.J. (a Judge of the District Court of Nicosia) relative to his decision dated the 7th October, 1976 in Criminal Case No. 18402/76 whereby he ruled that the 15 wife of the accused in a criminal case is not a competent witness against her husband, as an accused person charged with common assault against her.

Cl. Antoniades, Counsel of the Republic, for the applicants.

E. Markidou (Mrs.), for the respondent.

20 *Cur. adv. vult.*

The following decisions were read:–

TRIANTAFYLLIDES, P.: In the present case the Supreme Court is dealing with a point of law which has been referred to us for our opinion by means of a Case Stated under section 149 25 of the Criminal Procedure Law, Cap. 155, on the application of Counsel for the Attorney-General of the Republic, in criminal case No. DCN 18402/76.

The point of law in question is whether a wife—in the present instance the wife of the accused in the aforementioned criminal 30 case—is a competent witness against her husband, as an accused person charged with the offence of common assault against her, contrary to section 242 of the Criminal Code, Cap. 154.

The relevant legislative provisions are subsections (1) and (2) of section 14 of the Evidence Law, Cap. 9, which read as 35 follows:–

"14.(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 the 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 has to be decided on the present occasion is whether the charge of common assault, involved in the above criminal case before the District Court of Nicosia, amounts to charging the accused husband (who is the respondent in the present proceedings before us) with "inflicting or attempting to inflict any bodily injury or violence upon" his wife, as the complainant in the case, in the sense of subsection 2(a) of section 14 of Cap. 9.

The learned trial judge answered this question in the negative, as follows:-

" I, being of opinion that, unless a case as charged can be clearly brought within one of the two classes of exceptions in Section 14(2) of the Evidence Law, a wife or husband is an incompetent witness against her or his spouse, have ruled that the offence of common assault examined per se with reference only to the charge as framed in these proceedings does not fall within the aforesaid exception with the certainty required in criminal proceedings so as to by-pass the prohibition set out in section 14(1) of Chapter 9.

In arriving at the aforesaid opinion I considered myself bound to follow the interpretation of Section 14(2) of the Evidence Law Cap. 9 and of the word 'assault" accepted by the majority decision in the case of *Andreas Georghiou alias Naylon* v. *The Police* (1961) C.L.R. 254".

In *Naylon, supra,* the then High Court of Justice held, on appeal, by majority, that a charge of common assault does not,

per se, clearly involve the element of bodily injury or violence and, consequently, to charge a person with common assault and nothing more, does not, by itself, allege against the accused the infliction of bodily harm or violence, or an attempt to inflict bodily harm or violence, in the sense of section 14(2)(a) of Cap. 9; and that, therefore, in such a situation, the wife, as a complainant, is not a competent witness in a criminal trial against her husband, as the accused.

The majority in that case was a "technical one", in that the Members of the High Court were equally divided on this point; the President, O'Briain P. and another Member, Vassiliades J., as he then was, were of the above opinion, but two other Members, Zekia J., as he then was, and Josephides J. were of the contrary view; and the majority was secured because its President had, under Article 153.1 of the Constitution, two votes.

A perusal of the judgments in the *Naylon* case, *supra*, shows that Vassiliades J., reached his conclusion because he was "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" (see p. 264); on the other hand, all the three other Members of the Court based their opinions mainly on the charge itself.

I am of the view that the proper course for deciding whether a wife, in a case of this nature, is a competent witness is to look at the charge as framed, because it is not really feasible to link the matter of her competence as a witness with the particular circumstances of each individual case. That the contents of the charge have to be regarded as the determining factor becomes plainly obvious when one invisages a case in which the husband is charged with common assault against his wife and the wife is the only witness for the prosecution: In such a case either she is to be treated as a competent witness and she will testify as to what has happened or if she is treated as an incompetent witness then the case cannot be proceeded with at all due to the absence of evidence; it is, therefore, necessary to decide, on the basis of the charge, whether or not she is a competent witness.

In the present instance the relevant charge is the second count in the charge sheet, and it reads as follows:-

" Common assault, contrary to Section 242 of the Criminal Code, Cap. 154.

PARTICULARS OF OFFENCE

The accused at the time and place in count 1, hereof

metioned, did unlawfully assault one Themis Papasavva of Nicosia".

The question of law to be answered is whether the above charge of common assault charges the accused husband of the complainant with inflicting or attempting to inflict any bodily injury, or violence upon her, in the sense of section 14(2)(a) of Cap. 9.

As it is provided by section 3 of Cap. 9 that "Save in so far as other provision is made in this Law or has been made or shall be made in any other Law in force for the time being, every Court, in the exercise of its jurisdiction in any civil or criminal proceedings, shall apply, so far as circumstances may permit, the law and rules of evidence as in force in England on the 5th day of November, 1914" it is useful to refer to the corresponding situation in England in trying to construe the terms used in our own section 14(2)(a) of Cap. 9.

In *R.* v. *Wakefield and others*, 168 E.R. 1154, Hullock B. said (at p. 1156):-

> ".....A wife is competent against her husband in all cases affecting her liberty and person. This was decided in *Lord Audley's* case, having been, before that, for a long while doubted: but it has since been established by a long series of cases, that she may prosecute, exhibit articles of the peace, & c.
>
> 'It would be unreasonable to exclude the only person capable of giving evidence in certain cases of injury: our law recognises witnesses ex necessitate; and it would be strange, indeed, that the husband should be allowed to exercise every atrocity against the wife, and her evidence not be admitted' ".

In *The King* v. *Lapworth*, [1931] 1 K.B. 117, Avory J. said (at p. 121):-

> "The question that has been raised and argued before us is whether in a case charging personal violence as having been used by a wife to her husband or by a husband to his wife, the husband or wife, as the case may be, is not only a competent but a compellable witness for the prosecution. There is no doubt that at common law the husband or wife was always a competent witness in such a case, and by the

very nature of things it must have been so, for otherwise, where the assault was committed in secret by one spouse upon the other, there would be no means of proving it. Whatever the reason, we are satisfied that at common law 5 the wife was always a competent witness for the prosecution when the charge against her husband was one of having assaulted her".

In *R.* v. *Blanchard*, [1952] 1 All E.R. 114, Ormerod J. said (at p. 115):-

10 " The object of the exception is that in cases of this kind—cases where violence is offered, for instance, by a husband to a wife—it must frequently happen that the only person able to give evidence against the husband is the wife herself. If she were not a competent witness, clearly the ends of 15 justice would be defeated".

It appears from the above judicial exposition in England that among the primary objects of a provision such as our own section 14(2)(a) must be the protection of both the interests of the wife as well as the interests of justice, especially in cases 20 where the wife is the only witness against her husband; and it must be stressed, in this respect, that the said section 14(2)(a) renders the wife a competent witness also in cases where the victims are her children.

In construing, therefore, the wording of section 14(2)(a), the 25 said primary objects must not be lost sight of, and it is for this reason that I am of the view that it is sufficient, in order to render the wife a competent witness under section 14(2)(a), if the charge discloses prima facie that the accused husband has inflicted or attempted to inflict bodily injury, or violence on her.

30 The above view is, in my opinion, clearly supported by what Zekia J. said in the *Naylon* case, *supra* (at pp. 260, 261):-

" 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 35 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".

In the *Naylon* case the charge was as follows (see pp. 257, 258):-

" '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' ".

In the light of all the foregoing I have reached the conclusion in the present case, too, that the charge as framed against the respondent, as an accused person, should be treated as charging the respondent with inflicting or attempting to inflict bodily injury, or violence upon his wife, as the complainant, and, therefore, she is a competent witness by virtue of the aforementioned provisions of Cap. 9.

Consequently, the decision of the trial Judge to the contrary, which has led, in the present instance, to the acquittal of the respondent, in view of the fact that as his wife was treated as an incompetent witness the prosecution failed to establish a prima

facie case against him, is, hereby, set aside, and the matter is remitted to the trial Judge with the opinion that the wife is a competent witness, and the criminal case in question should be proceeded with to be determined by him on that basis.

5 STAVRINIDES, J.: Having ruled that the accused's wife was not a competent witness against her husband the learned trial Judge went on to discharge him on the ground that no prima facie case had been made out against him. The ruling of incompetence was based on the Judge's construction of the
10 "assault" charge, which he rested on what he calls the "majority" decision of the Supreme Court in *Georghiou, alias Naylon* v. *Police*, 1961 C.L.R. 254. I do not propose going into that aspect of the matter, because in my view the statement of the case is incomplete, for in disregard of the requirement of the
15 third paragraph of the form prescribed by the Criminal Procedure Rules, which reads "The facts found by me were: (set out facts so far as necessary to raise any point of law involved)", the Judge simply says "The complainant Themis Papasavva named in the charge is the lawful wife of the accused. This is
20 a fact admitted by all concerned".

In the circumstances I would send the case back to the Judge under s. 149(6)(d) of the Criminal Procedure Law, Cap. 155, for amendment by the addition of the missing information.

L. LOIZOU, J.: I have read in advance the opinion delivered
25 by the President of the Court, with which I am in full agreement, and there is nothing that I can usefully add.

HADJIANASTASSIOU, J.: The question posed in this case stated is whether in a case charging personal violence against the wife by the husband, the wife is a competent witness for the prosecu-
30 tion.

The facts of this case are simple. On 7th October, 1976, the accused, when charged before the trial Judge with threatening violence under s. 91(c) of the Criminal Code Cap. 154, and with common assault under s. 242 of Cap. 154, he pleaded not guilty
35 to both counts. The prosecution sought to call the wife of the accused, who was ready and willing to testify against him in support of the charge, and the question arose whether the wife was a competent witness to give evidence against her husband in a criminal case. There is no doubt that at common law the
40 husband or wife was always a competent witness in such a case,

and by the very nature of things it must have been so, for otherwise, where an assault was committed in secret by one spouse upon the other, there could be no means of proving it.

Counsel on behalf of the accused submitted that this case is governed by s. 14 of the Evidence Law, Cap. 9, and argued that the wife is not a competent witness to give evidence and because the case was not within the provisions of sections 14, which says that:-

> "14.(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."

It appears that for the prosecution to succeed under this subsection 2(b) bodily injury or violence must be proved, and in order to answer this question, one has to look particularly at the wording of the particulars of the offence of common assault where it is stated that the accused did unlawfully assault one Themis Papassava of Nicosia (his wife).

In England, this question has been decided, and the authorities which I propose to quote show that in cases of assault or abduction which involve an injury to the person or to the health or liberty of the wife, a wrong done to her against her will, then the wife could give evidence on the charge.

In *Reeve* (*App.*) v. *Wood* (*Resp.*) [1864] Cox C.C. 58, Crompton J., dealing with the question as to whether a wife is an admissible witness against her husband in support of a charge of desertion of wife and children, said at p. 59:-

"I think in this case that the magistrates decided rightly. In very early times an exception was made to the general rule that a wife was not admissible as a witness against her husband in the case of personal wrongs of the wife. That arose partly on account of the mischief that would result if evidence could not be got in such cases where great brutality may have existed, partly from necessity, and because the wife was the real party prosecuting, and ought to be heard. I do not think, however, that the present case is within that exception. The case of the abduction of a woman is distinguishable, and has been considered as in the nature of a personal injury. In the present case there is nothing that can be called an injury to the person of the wife......"

Blackburn, J., delivering a separate judgment, said:-

"I am of the same opinion. The general rule is that a wife is not admissible as a witness for or against her husband, except in civil cases. But in criminal matters, from an early period, beginning with Lord Audley's case, 1 St. Tr. 393, there was an exception to the rule, which went on the principle that where the offence charged touches the person of the wife, and she must be cognisant of it, and may be the only person who is cognisant of it, there the wife is an admissible witness against her husband. That applies to all cases where there is personal violence inflicted by the husband on the wife."

In *Leach* v. *Rex*, [1912] A.C. 305, Earl Loreburn L.C., dealing with the provisions of s. 4 of the Criminal Evidence Act 1898, said at p. 309:-

"...It is very desirable that in a certain class of cases justice should not be thwarted by the absence of the necessary evidence, but upon the other hand it is a fundamental and old principle to which the law has looked, that you ought not to compel a wife to give evidence against her husband in matters of a criminal kind. It is not our duty to-day to consider consequences at all. What we have to consider is the meaning of the law that has been laid down in the Act of 1898.

My Lords, this appellant was indicted and was convicted for an offence under the Incest Act. In the course of that

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trial his wife was called and asked to give evidence; she objected to give evidence for the prosecution, but was directed to do so and compelled to do so. The question is whether this was lawful or not. It is clear that this question must be governed by the 4th section of the Criminal Evidence Act, 1898, which runs as follows: 'The wife or husband of a person charged with an offence under any enactment mentioned in the schedule to this Act may be called as a witness either for the prosecution or defence and without the consent of the person charged.'

Now, my Lords, if it had not been for that 4th section the wife could not have been allowed to give evidence, and the result of that was that the wife could not have been compelled to do so and was protected against compulsion. The difference between leave to give evidence and compulsion to give evidence is recognized in a series of Acts of Parliament. Does then the 4th section, which I have read, deprive the wife of this protection? It is capable of being construed in different ways, and it may hereafter lead, for all I know, to various other difficulties, but the present question is, does it deprive this woman of this protection? My Lords, it says in effect that the wife can be allowed to give evidence, even if her husband objects. It does not say she must give evidence against her own will. It seems to me that we must have a definite change of the law in this respect, definitely stated in an Act of Parliament, before the right of this woman can be affected, and therefore I consider that this appeal ought to be allowed, with what consequences, or how that may be conformable to what is in the true interests of society or the public in this particular case, we are not concerned and are not at liberty to inquire."

In *Director of Public Prosecutions* v. *Blady*, [1912] 2 K.B.D. 89, the defendant was charged before a Court of summary jurisdiction under s. 1 of the Vagrancy Act, 1898, with knowingly living wholly or in part on the earnings of prostitution. The person on the earnings of whose prostitution he was alleged to be living was his wife, and the prosecution was commenced by her. Pickford, J., in deciding that the wife was not an admissible witness for the prosecution, said at pp. 90-91:-

" At common law the rule, whatever its origin might be, was that a wife could not give evidence against her husband. There were exceptions, but they were confined to cases in

which the offence itself concerned the liberty, health, or person of the wife. If we were to extend the exceptions beyond those limits we should be legislating. In the present case the offence does not necessarily involve anything of the kind. It does not necessarily involve a wife in any way. The offence is living on the earnings of prostitution, it may be of a wife or of anybody else, and therefore it does not concern the person, or the liberty, or the health of a wife. Where the prostitution happens to be that of the defendant's wife, it might be very advisable, if permissible, for the prosecution to call the wife in proof of the offence. If the wife were so called as a witness, it might appear that she had been coerced into prostitution, or it might not. In either case the offence would be proved. In other words injury to the person or health of the wife is no part of the offence charged. The fact that a wife has been coerced or ill-treated by her husband does not of itself make her an admissible witness against him where injury to the person, liberty, or health of the wife is no part of the offence with which he is charged. The exception to the rule of common law has never been extended to affect the evidence of a wife whose position is that of a mere witness on a charge against her husband of an offence not involving injury to her person, liberty, or health. Therefore this case does not come within any of the exceptions indicated in any of the cases cited to us, and in my opinion the wife's evidence was not admissible. The magistrate was right and this appeal must be dismissed".

Lush, J., in a dissenting judgment said:-

"The foundation of the rule which prevented a wife from giving evidence against her husband was the fact that they were one person in the eye of the law. No doubt that rule was applied in every case except where it was necessary either for the safety of the wife or for her wellbeing to relax it. The rule shewed itself in strange ways both in the criminal and in the civil law.

....

Apart from treason, the only cases in which a wife was competent to give evidence in support of a criminal charge against her husband were cases where, if the general rule were not relaxed, the wife would be exposed to the cruelty of her husband. The ordinary case in which the question

arose was where the husband used, or threatened to use, violence to her. If he threatened it, she could exhibit articles of the peace against him; if he used it, she could give evidence of the offence. The rule was not confined to actual assaults .... If by legislation a particular act is made an offence which, when all the facts are known, may, like assault or abduction, involve an injury to the person or liberty of the wife, a wrong done to her against her will, then in my view it is wrong to preclude the wife from giving evidence on the charge. Until it is known what the evidence is it is impossible to say whether this particular offence does or does not involve such an injury to the person, liberty, or health of the wife. It may do so, and that is enough, and if it does it is a wrong which can never be proved or may never be proved unless the wife can give evidence. In my opinion the proper course would have been to admit the evidence of the wife in this case, even though, when admitted, it might establish an offence against the State rather than against the wife. The fact that the evidence may not establish an offence against the wife is to my mind no reason for saying that in a case like this the evidence is not admissible. I think, therefore, that this case falls within the principle of the exception to which I have referred, and that the magistrate was wrong in rejecting the evidence."

In The *King* v. *Lapworth*, [1931] 1 K.B.D. 117, Avory, J. dealing with the question where a husband was indicted for inflicting personal injury on his wife, said at p. 121:-

" There is no doubt that at common law the husband or wife was always a competent witness in such a case, and by the very nature of things it must have been so, for otherwise, where the assault was committed in secret by one spouse upon the other, there would be no means of proving it. Whatever the reason, we are satisfied that at common law the wife was always a competent witness for the prosecution when the charge against her husband was one of having assaulted her."

Then, having quoted from the speeches in the case of *Leach* v. *Rex* (*supra*), he concluded his judgment as follows at pp. 122–123:-

" We are satisfied that in the case of *Leach* v. *Rex* [1912] A.C. 305, the Law Lords had not present to their minds

the case, which is now before this Court, where personal violence was alleged to have been done by a wife to her husband or by a husband to his wife, and that they had no intention of including such a case in their observations.

5 In our opinion the learned Judge at the trial was right in holding that Beatrice Annie Lapworth, the wife of the appellant, was bound to give evidence for the Crown."

In *R.* v. *Blanchard*, [1952] 1 All E.R. 114, Ormerod, J., presiding over the Leeds Assizes, said at pp. 114-115:-

10 " In this case Ernest William Blanchard is indicted for committing an unnatural offence on his wife. Counsel for the accused submits that the wife is not a competent witness against her husband on this charge. He submits that it is a well-established general principle at common law that 15 the husband or the wife of a prisoner is not a competent witness against his or her spouse. There have been certain statutory exceptions to that rule which are set out in ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE (32nd ed.), at p. 477. None of these 20 exceptions affects this case. There are, in addition, certain other exceptions to the rule, and one well-established exception is that the wife is a competent witness against her husband in cases of personal injury to her. The question I have to decide here is whether in this case, where the 25 husband is accused of buggery against his wife, the offence comes within that exception. I am satisfied that it does.

It was decided by BIRKETT, J., in *R.* v. *Leary* (unreported), Leeds Assizes, March 1942, that in a case of this kind the wife is a competent witness against her 30 husband, but I think the principle was established long before that. The object of the exception is that in cases of this kind—cases where violence is offered, for instance, by a husband to a wife—it must frequently happen that the only person able to give evidence against the husband is 35 the wife herself. If she were not a competent witness, clearly the ends of justice would be defeated. That in itself, I think, would be sufficient ground for including an offence of this kind within the exception, but it really goes further than that, because cases of personal injury within 40 the exception have been defined by authority as cases which affect the person or the liberty of the spouse who is being

called on to give evidence. I find it impossible to hold that a charge of this kind, which is certainly an offence against the person of the spouse, can be regarded as *anything other than a case affecting the person, although not* necessarily the liberty, of the spouse. In those circumstances I am satisfied that the wife is competent to give evidence on this charge."

In Cyprus, the only case we have is *Andreas Georghiou alias Naylon* v. *The Police*, 1961 C.L.R. 254. This was the case which the learned Judge relied upon and has quoted both from what he thought was the majority and the minority judgment, and reached this conclusion:-

"......... I am in Law bound to follow the majority decision and I, hereby, hold that the offence of common assault, as charged in Count 2, is not covered by the ambit of section 14(2) of Cap. 9 and, therefore, the proposed prosecution witness, being admittedly the lawful wife of the accused, is in law not competent to testify against her husband, on count 2 either."

I think it is necessary for me to state that the four Judges were equally divided in their approach as to whether a common assault does or does not necessarily come within the exceptions provided in s. 14(2) of Cap. 9 so as to render the one spouse a competent witness against the other.

O'Briain, P., delivering the first judgment of the Court with which Vassiliades J. concurred, said at pp. 257-258:-

" The conviction 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 or not our law permits, in the circumstances of this case, the wife to give evidence against her husband."

Then, having referred to s. 14(1) of the Evidence Law, Cap. 9, and having observed that this was a re-statement of the present law in England which itself drives from the common law, proceeded to consider also subsection 2 of the said law, as well as s. 242 of the Criminal Code Cap. 154, and said at p. 259:-

" 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."

Later on he reached this conclusion:-

" 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, thay 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."

On the contrary, Zekia, J., with whom Josephides, J. agreed, *in a dissenting judgment said at pp. 260-261*:-

" 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."

Then, having referred to s. 39(c) of the Criminal Procedure Law, which lays down that a charge is expected to be framed in the ordinary language and 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, he concluded as follows:-

" That also indicates to my mind that the word 'assaulted' is normally used in the ordinary language as meaning

beating or attempting to beat ... (and) For the above reasons I am of the opinion that the appeal should be dismissed."

Counsel for the Police in the case in hand, submitted that the trial Judge wrongly decided that the wife of the accused was not a competent witness against her husband because the charge of assault involves a battery as well as an assault; and that once personal violence was inflicted on the wife, her evidence ought to have been received.

I have considered very carefully the contentions of both counsel and having regard to the offence which itself is concerned with "bodily injury" and directing myself with those judicial pronouncements which lay down that in actual assaults the evidence of the wife against her husband is admissible, I have reached the view, having read the "wording of the charge", *viz.* that "the accused did unlawfully assault one Themis Papasavva" (his wife), that the learned trial Judge came to a wrong determination regarding the meaning of the word "assault".

In reaching this conclusion, I find myself in full agreement with the opinion of Zekia, J. (as he then was), in the case of *Naylon* (*supra*). In the circumstances of this case, I would reiterate that in the ordinary language and in the verbal sense as used in the charge, the word "assault" definitely indicates battery *actually committed or an attempt to commit battery.*

I would, therefore, set aside the determination of the learned trial Judge and remit the matter to him with the opinion of the Supreme Court thereon under the provisions of subsection (6) of s. 149 of the Criminal Procedure Law, Cap. 155.

A. LOIZOU, J.: On the application of the Attorney-General under section 149 of the Criminal Procedure Law, Cap. 155, this case has been stated for the opinion of this Court. The question posed, is whether on a charge of unlawfully assaulting his wife, contrary to section 242 of the Criminal Code, Cap. 154, such wife of the accused, is a competent witness—although not compellable—as coming within the exception provided in section 14(2)(a) of the Evidence Law, Cap. 9, on the ground that it involves either the infliction or an attempt to inflict any bodily injury or violence upon her. Section 14, which reproduces in effect the common law and the basic English statutory provisions on the subject, reads as follows:-

"14.(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.

5 (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 10 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".

15 The trial Judge ruled that unless a case as charged could be clearly brought within one of the two classes of exceptions, a wife or husband, is not a competent witness against her or his spouse and ruled that "the offence of common assault examined per se with reference only to the charge as framed in these 20 proceedings, does not fall within the aforesaid exception with the certainty required in criminal proceedings so as to by–pass the prohibition set out in section 14(1) of Chapter 9".

In arriving at the aforesaid opinion, he considered himself bound to follow the interpretation of section 14(2) of the 25 Evidence Law, Cap. 9, of the word "assault", accepted by the majority decision in the case of *Andreas Georghiou alias Naylon* v. *The Police*, 1961 C.L.R. 254.

There being no other evidence to establish a prima facie case against the accused he was acquitted and discharged under 30 section 74(1)(b) of the Criminal Procedure Law, Cap. 155.

It has been contended on behalf of the Attorney–General that the offence of common assault involves the infliction or an attempt to inflict bodily injury or violence upon a complainant, and, therefore, it falls within the exceptions provided in the 35 aforesaid section.

The answer to the question posed in this case, a case of common assault, contrary to section 242 of the Code, is that

the wife or husband of the accused, as the case may be, is a competent witness for the prosecution.

As the outcome of the determination of the question raised is, in addition to its importance, a departure from judicial precedent, I have felt that I should give my reasons for arriving at this conclusion.

In the case of *Andreas Georghiou alias Naylon* (*supra*) O' Briain, P. in his judgment with which Vassiliades, J. concurred, took the view that to charge a man 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, but a person committing assault not merely need not have the intention, but may, indeed, affirmatively intend the contrary, namely, not to apply any force. On the other hand, Zekia, J. in his dessenting judgment with Josephides J. concurring, took the view 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, and that the word "assault" is normally used in the ordinary language as meaning beating or attempting to beat.

In the case of *R.* v. *Lord Mayor of London* [1885-1886] 16 Q.B.D. 772 at p. 775, it was stated that—

> "........the exceptions are confined to those cases in which personal injuries have been effected by violence or coercion by the husband upon the wife or wife upon the husband: see Phillips on Evidence, 10th ed. p. 83. It is upon this ground that it has been held that a husband and wife, as the case may be, can prosecute and give evidence against each other in cases of batteries, assaults, and other personal injury".

And it was further stated—

> " The following passage in the judgment of Mr. Justice Blackburn in the case of *Phillips* v. *Barnett*, 1 Q.B.D. 438, is very apposite to the matter in hand.
>
> That learned Judge there says: 'There can be no doubt that if a wife receives bodily injury from the hands of her husband he is liable to criminal proceedings for a felony

or a misdemeanour as the case may be; and in the case of any ordinary assault it is quite clear that the wife has a right for the protection to obtain articles of the peace against her husband' ".

5 As also stated in the recent case of *R.* v. *Blanchard* [1952] 1 All E.R. p. 114 at p. 115, cases of personal injury within the exception have been defined by authority as cases which affect the person or the liberty of the spouse who is being called on to give evidence. And in the case of *D.P.P.* v. *Bladdy* [1912] 10 2 K.B. p. 89 at p. 92, Lush, J. said that "The ordinary case in which the question arose was where the husband used, or threatened to use, violence to her. If he threatened it, she could exhibit articles of the peace against him; if he used it, she could give evidence of the offence. The rule was not confined to actual 15 assaults".

In my view, the threat to inflict unlawful force upon another which is contained in the offence of common assault, brings this offence within the excaptions set out in section 14(2)(a) of the Law, and in particular within the alternative of "attempting 20 to inflict any bodily injury or violence upon him or her...."

The fact that a common assault is constituted notwithstanding that the threatener did not intend to apply the threatened force, does not, in my mind, change the position, as the actus reus of assault, consists in the expectation of physical conduct which 25 the offender creates in the mind of the person whom he threatens and the mens rea consists in the realisation by the offender that his demeanour will produce that expectation. (See Russel on Crime, 11th ed. Chapter 37). It is an offence which involves as such, the infliction or an attempt to inflict injury or at least 30 violence on the person and as such, when it is committed as against a spouse, it falls within the exception.

For all the above reasons I agree that the determination of the learned trial Judge should be set aside and the matter remitted to him with the opinion of the Supreme Court, as above.

35 MALACHTOS, J.: I, also, agree that the decision of the trial Judge to acquit the respondent, by holding that his wife was not a competent witness against him, should be set aside, for the reasons just given by the President of the Court.

TRIANTAFYLLIDES, P.: In the result, the Ruling of the trial

Judge regarding the competence of the wife of the respondent, who is the accused in the case before him, is set aside by majority, and the case is remitted to him, with the opinion of the Supreme Court, for determination.

Order accordingly. 5