CASE NOTE

DEMIROK v. THE QUEEN

Criminal Law — Evidence — Witnesses — Competence and Compellability of Spouse — Crimes Act 1958 (Vic.), s. 400.

Recently the High Court had an opportunity to consider, for the first time, the meaning of, and procedure involved in, section 400(2) of the Crimes Act 1958 (Vic.)[1]

A. HISTORICAL BACKGROUND

On 5 May 1975, Duran Demirok was charged in the Supreme Court of Victoria with the murder of Ibrahim Ozdemir and also with wounding the deceased's wife, firstly with intent to murder and, secondly, to do her grievous bodily harm.

[1] The relevant provisions of the Crimes Act 1958 (Vic.) are:

399. Every person: charged with an offence, and the wife or husband (as the case may be) of the person so charged, shall be a competent witness for the defence at every stage of the proceedings whether the person so charged is charged solely or jointly with any other person:

Provided that—

(a)

(b) the failure of any person charged with an offence, or the wife or husband (as the case may be) of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution or unless the person elects to make a statement not on oath by the judge or justice;

400(1) Where the person is charged with an offence, whether indictable or punishable on summary conviction, the husband or wife of the person charged shall be a competent witness for the prosecution without the consent of the person charged but save as otherwise expressly provided in sub-section (3) or in any other Act may not be compelled to give evidence.

(2) Where the husband or wife of the person charged is a competent witness for the prosecution but may not lawfully be compelled to give evidence for the prosecution, the presiding judge magistrate or justice shall before the witness gives evidence and, where the proceedings are being conducted before a jury, in the absence of the jury, inform the witness that he or she is not compelled to give evidence if unwilling to do so.

(3) The husband or wife of a person charged with any of the following offences may be compelled to give evidence for the prosecution in the same manner as if he or she were not the husband or wife of the person charged, namely:

(a) an offence mentioned in sections 3, 5, 6, 11, 12, 13, 14, 16, 17, 19, 19A, 20, 21, 22, 23, 24, 25, 27, 37, 44, 45, 52, 54, 55, 63A, or 68 or an offence against sub-section (4) of section 69 of being a male person who in public or in private committed or was a party to the commission of any act of gross indecency with another male person wherever it is alleged that any of those offences was committed against a person who was under the age of sixteen years at the time of the time of the commission thereof;

(b) an offence against sections 46, 47, or 48 or sub-section (1) of section 69;

(c) an offence against section 71 of the *Childrens' Welfare Act 1958;* or

(d) an offence on the prosecution of which the wife or husband of the person charged might lawfully have been compelled to give evidence before the 14th day of December 1915.

(4) Nothing in this section shall in any way affect the operation of section 27 of the Evidence Act 1958.

The wife of the accused was jointly presented with him on two counts of wounding Mrs Ozdemir. At the first trial,[2] before Fullagar J., the accused was convicted on all three charges. His wife, however, was acquitted of the charges against her.

The accused appealed successfully to the Full Court, which ordered a retrial.[3] As a result of this decision, the Crown sought special leave to appeal to the High Court. This application was unanimously and unceremoniously rejected.[4]

On 7 May 1976, Demirok stood trial before Harris J. On this occasion he was presented on his own and again he was convicted on all three charges. An application for leave to appeal was dismissed by the Full Court.[5] Undeterred, the accused made an application to the High Court for special leave to appeal.[6] Special leave was granted and the appeal allowed, the result being that the matter was remitted to the Supreme Court for a third trial. From recent reports,[7] at this trial before Starke J., which commenced on 1 August 1977, His Honour is reported to have discharged the jury, after they had failed to reach a verdict. A fourth trial is pending.

B. THE FACTS

The Crown alleged that on 27 August 1974, the Demiroks visited the Ozdemirs' flat. Duran Demirok was said to have accused the deceased of making sexual advances to Mrs Demirok. These allegations were flatly denied. Nevertheless, both the Ozdemirs were attacked with a small hammer-like instrument. As a result, Mr Ozdemir died and his wife suffered severe head injuries.

At the second trial,[8] the prosecution sought to call Mrs Demirok pursuant to section 400 of the Crimes Act 1958 (Vic.). The procedure adopted by the trial judge was to have the witness sworn in the absence of the jury; then to allow her to be examined by the Crown in order to determine her name, address, and marital status. At this stage of the examination the judge intervened and informed her that she was not compelled to give evidence for the prosecution if she did not so wish. Mrs Demirok elected not to testify. The jury was recalled and the above procedure repeated in their presence.

The two grounds which formed the basis of the appeal were:

(a) that the judge was in error in putting Mrs Demirok to her election in the presence of the jury. This amounted to a contravention of section 400(2) of the Crimes Act 1958 (Vic.); and

(b) that in referring (in his charge), to the fact that she had failed to give evidence for the Crown, the trial judge had made a comment of the type prohibited by section 399(b) of the Crimes Act 1958 (Vic.).

C. THE DECISION

The High Court, by a four to one majority,[9] decided that there had been a miscarriage of justice and remitted the matter to the Supreme Court for re-trial.[10]

[2] Unreported, 5 May 1975.
[3] *Demirok v. R.* [1976] V.R. 244.
[4] *R. v. Demirok* (1976) 50 A.L.J.R. 550; (1976) 8 A.L.R. 462.
[5] Unreported, 31 October 1976.
[6] (1977) 14 A.L.R. 199. The members of the High Court were Barwick C.J., Gibbs, Stephen, Murphy and Aicken JJ.
[7] *The Age* (Melbourne), 12 August 1977.
[8] 7 May 1977.
[9] The majority comprised Gibbs, Stephen, Murphy and Aicken JJ. Barwick C.J. dissented.
[10] Mr Justice Murphy, whilst allowing the appeal, made a different order. He directed that the conviction be quashed. His reasons were based on the fact that the accused had already faced two trials which had been irregular and unfair to him and

Gibbs J. delivered the leading judgment.[11] In His Honour's view, the procedure set out in section 400(2) involved two things. Firstly, the spouse-witness must be informed of her right not to testify on behalf of the prosecution. Secondly, this information must be conveyed to her in the absence of the jury and before she gives evidence.

The first of the steps necessarily involves a threshold question, namely: is the witness the spouse of the accused? A question of this nature relates directly to the compellability of the witness, and as such, according to Gibbs J., it is the duty of the judge to determine the answer in the absence of the jury, as he would any question of competence. In his Honour's words:

> . . . it clearly follows that any evidence necessary to be heard on the question whether or not the witness is the wife of the accused — a question that has to be determined before the information is given — must be taken in the absence of the jury.[12]

This led Gibbs J. to conclude that, although the section is silent on the procedure to be followed, once the witness's rights have been explained to her the legislative intention of the sub-section must have been that the witness would, then and there, make her decision known in the jury's absence. As a corollary to this, it must also have been intended that immediate effect be given to the witness's decision not to testify. To recall the witness in the presence of the jury would, on Gibbs J.'s analysis, serve no other purpose than as a tactical move for the prosecution. It is arguable that the only reason Mrs Demirok was called before the jury was to invite them to draw the inference that she was protecting her husband by refusing to testify. Such a motive is clearly illegitimate.

Stephen J. saw another function behind section 400(2). Besides its use as a means of informing the spouse-witness of her rights, it also prevented the jury from abusing the knowledge of the spouse-witness's choice not to give evidence by drawing adverse and possibly unjustified inferences against the accused. According to Stephen J.:

> it would be curious that the accused, protected from comment arising from his own failure to call his spouse,[13] may yet be exposed to the hazard of inferences arising from her refusal to give evidence, should the prosecution, although it may know her to be unwilling to testify against the accused, nevertheless seek to call her as a witness.[14]

Chief Justice Barwick, in his dissenting judgment, accepted the Crown's argument that the purpose of section 400(2) was merely to inform the witness of her rights as the spouse of the accused and that therefore there was nothing wrong in recalling her in the jury's presence:

> No more is directed by the sub-section than that the wife shall be informed of her rights. The sub-section does not require the judge then to ascertain whether or not she is willing to give evidence. The course it proposes avoids the witness learning of her relevant rights for the first time when in the witness box in the presence of the jury: and then having insufficient time to consider whether or not to exercise the privilege she has.[15]

'he should not be subjected to *triple jeopardy*'. (1977) 14 A.L.R. 199, 214. This rather novel extension of the double jeopardy doctrine seems entirely to misconceive the effect of a superior court granting a retrial. See Friedland M. L., *Double Jeopardy* (1969), 222 ff. See also Brett and Waller, *Criminal Law: Cases and Text* (3rd ed., 1971) 116, 754 and *Broome v. Chenoweth*, (1947) 73 C.L.R. 583, 599 (*per* Dixon J.).

[11] Aicken J. concurred with Gibbs J.; Stephen J. expressly agreed with His Honour's reasons.

[12] (1977) 14 A.L.R. 199, 206.

[13] Crimes Act 1958 (Vic.), s. 399(b).

[14] (1977) 14 A.L.R. 199, 210.

[15] *Ibid.* 201-2. 'For these reasons, I cannot read the sub-section as precluding the calling of a wife who has indicated in the absence of the jury that she will not testify'.

Although it cannot be disputed that section 400(2) does attempt to prevent the spouse-witness having the choice of whether or not to testify thrust upon her in the jury's presence, this interpretation is unrealistically narrow. The illogicality of this construction was made clear by Stephen J. when he pointed out that if Barwick C.J.'s view were to prevail there would be a need for the trial judge to give a clear direction in order to avoid any prejudice to the defence's case. It would be 'strange'[16] if the sub-section made such a direction necessary, 'without which the operation of the section may prejudice the fair trial of the accused'.[17] Barwick C.J. himself realised the prejudicial effects to the accused, for he was of the opinion that the trial judge would be:

> bound to instruct the jury that no inference adverse to the accused could be drawn from the fact of the wife's refusal to testify.[18]

His Honour reasoned that, since the jury must be taken to follow and apply the trial judge's direction, a comment from him would be sufficient to dispel any prejudice accruing against the accused.[19]

With respect, it is submitted that the view of Stephen J. is the better view. It removes from the jury the difficult burden of making a conscious effort to resist drawing adverse inferences against the accused.

The Crown also argued that the prosecution case would be unfairly disadvantaged if it failed to call the wife in the presence of the jury. In addition, there was no protection for the Crown against the defence playing on this omission to bolster their own case. Put briefly, the Crown did not have the same protection as the accused has under section 399(b) of the Crimes Act 1958 (Vic.). This argument was rejected by Gibbs J. It was his view that no comment could be made by the defence. If such a comment were made, the judge would be entitled to give an appropriate direction to correct this infringement.[20]

Barwick C.J. looked more favourably on this argument and it may well have influenced him to construe section 400(2) strictly.[21] He adverted to the possibility that the Crown case might be weakened in the minds of the jury, if the Crown failed to call the wife, she being a potential Crown witness.

Again, the preferable view seems to be that of Gibbs J., since the only real disadvantage to the Crown case can come from a comment by the defence on the failure to call the wife. As regards any other adverse inference, both parties are on equal terms, hence the jury could draw the same inferences against either side, as both the prosecution and the defence are in a position to call the spouse of the accused.

Making it improper for the defence to comment on the prosecution's failure to call the spouse-witness is a far better approach than allowing the Crown to call the witness in the jury's presence and then attempting to eliminate the disadvantage caused to the accused by an appropriate direction from the trial judge.

[16] *Ibid.* 210.
[17] *Ibid.* 200.
[18] *Ibid.*
[19] *Ibid.* 202 (*per* Barwick C.J.), 'Consequently, the manner in which the possibility of disadvantage to the accused is to be met is by a suitable direction by the trial judge'.
[20] *Ibid.* 207 (*per* Gibbs J.), '. . . it does not follow that the defence could comment unfairly on the failure of the prosecution to call the wife of the accused in a case in the course of which the wife had appeared before the judge in the absence of the jury and had indicated that she declined to give evidence for the prosecution. It would be highly improper to criticise the prosecution for failing to call the wife, knowing that the prosecution had endeavoured to call her. If such improper comment were made, the judge would be entitled to correct it by a strong comment of his own'. This, of course, would not prevent a comment by the defence where the Crown has not attempted to call the spouse of the accused at all.
[21] (1977) 14 A.L.R. 199, 201.

Finally, the Crown contended that section 400(2) should be construed in light of the general evidentiary principle that all relevant and admissible evidence should be given in the presence of the jury.[22] In support of this proposition the Crown relied on *R. v. Reynolds*,[23] where the Court of Appeal quashed the conviction of an accused because the trial judge dismissed the jury while he determined the competence to testify of a young child. This case has been criticised on the basis that the questions of competence should be resolved in the absence of the jury.[24]

Gibbs J. disapproved the decision in *Reynolds* and suggested that it should not be followed in Australia. It was His Honour's opinion that the question of a witness's competence is solely for the judge and that there is no reason for the jury to be present to hear evidence relevant only for that purpose,[25] unless the evidence given on the *voir dire* has relevance to some fact in issue, and is admissible. Such evidence may be presented to the jury.[26]

The reasons of Gibbs J. represent those of a majority of the members of the High Court[27] and as such the weight of this dictum is considerable. As a result, all trial judges should now observe the practice of determining a witness's competence on a *voir dire*.

The reasoning of Mr Justice Murphy is curious. His judgment on the central issues is brief. While agreeing with the other members of the majority that there was an infringement of section 400(2), he introduced an alternative ground for his decision. The course taken by the Crown, in His Honour's opinion, amounted to a 'clear breach'[28] of section 400(1).

Since the sub-section prevents a spouse-witness from being compelled to testify for the prosecution unless she consents, Murphy J. reasoned that it was erroneous for the Crown to attempt to examine her once she indicated her unwillingness to give evidence. Such a procedure could form the grounds of an appeal. In the present case, Mrs Demirok, once she entered the witness-box, had expressed a desire not to testify. According to Mr Justice Murphy, the Crown Prosecutor in asking her name, address, and marital status, was compelling Mrs Demirok 'to give evidence' within section 400(1).

> A spouse must not be compelled to give evidence for the prosecution on a *voir dire* examination directed, for example, to determine the voluntariness of a confession.[29]

Two points should be made concerning this approach. Firstly, with respect, it is submitted that the learned judge has misconstrued the purpose of the *voir dire* in this case. A *voir dire* examination conducted pursuant to section 400(2) has nothing

[22] Gobbo J.A. (ed.), *Cross on Evidence* (Aust. ed., 1970) 67.

[23] [1950] 1 K.B. 606; [1950] 1 All E.R. 335. *Reynold's* involved a charge of indecent assault on an eleven year old girl. On the question of the child's competence to testify for the prosecution, a *voir dire* was held and a witness was called to testify as to the child's capacity. After the examination and cross-examination had been concluded, the jury returned and the young girl was sworn as a witness.

[24] (1950) 66 L.Q.R. 157. Gobbo J.A. (ed). *op. cit.* 67-8 suggests that since the jury has to consider the weight of all the evidence concerning the facts in issue, the answers to the judge's questions on the matter of competence should be given in their presence because these answers may affect the weight of the witness's evidence when it is finally given. In addition, there is the danger that the jury may think that they are being removed while statements prejudicial to the accused are made. It is therefore argued that it is better for the jury to be left in court while the competence of a witness is determined unless it is likely to hear inadmissible evidence.

[25] (1977) 14 A.L.R. 199, 208.

[26] *Basto v. R.* (1954) 91 C.L.R. 628, 639-40; *Sinclair v. R.* (1946) 73 C.L.R. 316, 326 (*per* Rich J.).

[27] Barwick C.J. and Murphy J. did not decide this point.

[28] (1977) 14 A.L.R. 199, 212.

[29] *Ibid.*

to do with the admissibility of evidence in a direct sense. Rather, as the other majority judges suggested, it is primarily concerned with informing the witness of her rights as the spouse of the accused. Secondly, such a construction ignores the argument put forward by Gibbs J., that the informing of the spouse-witness of her rights necessarily involves a threshold question of compellability.[30] It is therefore necessary for the witness to be asked her name and address, and in particular, whether she is married to the accused. To suggest that such questions would amount to an infringement of section 400(1) is, it is submitted, incorrect.[31]

D. CONCLUSION

It was held in *Demirok*, therefore, that the procedure of recalling a spouse-witness in the presence of the jury and putting her to her election, after she had refused to testify for the prosecution on the *voir dire*, is a breach of section 400(2). The correct procedure is to dismiss the witness once she has indicated her unwillingness to testify and before the jury is recalled.[32]

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[30] *Supra* p. 274.

[31] There may be some scope for arguing that these questions should have been asked by the judge and not the Crown Prosecutor. Although this may well be true, it is submitted that there is not much substance in this approach. Barwick C.J. was not prepared to comment on whether the evidence of a witness commenced with his name, address, etc.

[32] In the course of the judgment of both Gibbs and Murphy JJ. reference was made to section 400(3)(a) of the Crimes Act 1958 (Vic.). This provision allows the Crown to compel the spouse of an accused charged with any of a list of specified offences to give evidence for the prosecution. There has been some speculation as to whether the age restriction in that paragraph applies to all the listed offences, or merely to the offence or offences in section 69(4) of the Crimes Act 1958 (Vic.). It would appear that the point was not argued before the High Court, but both their Honours were to accept that the facts before them did not fall into the exception in that paragraph. It would therefore appear settled, although not definitely decided, that the age limitation applies to all the offences listed, since the deceased in the present case was over the age of sixteen. (1977) 14 A.L.R. 199, 205 (*per* Gibbs J.); *ibid.* 211 (*per* Murphy J.). See also *R. v. De Maio* (unreported, 15 July 1974, *per* Menhennitt J.); *R. v. Papaluca* (unreported, 21 November 1975, *per* McInerney J.); *R. v. Justin* (unreported, *per* Nelson J.); *R. v. Demirok* (unreported, 31 October 1976, *per* Young C.J.). Also see Report Number Six of the Victorian Law Reform Commission, *Spouse-Witnesses (Competence and Compellability)*, (1976). See also Baxt R. (ed.), Annual Survey of Law 1976, 299. This produces absurd results; for example, the spouse of a person charged with murder may be compelled to give evidence for the Crown where the victim is under sixteen years of age, but is not compellable where the deceased is over sixteen. It is submitted the inherent ambiguity of this section requires legislative correction.

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