# CASE NOTES

## CRIMINAL LAW – SELLING LIQUOR WITHOUT A LICENCE: LICENSING ACT 1928, s. 161 – DEFENCE OF MARITAL COERCION – NO APPLICABILITY

*Ewart v. Fox*[1]

An information laid against the defendant under s. 161 of the Victorian Licensing Act, 1928, charging her with selling liquor without a licence, was dismissed by a Court of Petty Sessions, which held that, since she acted in the presence of her husband, the presumption of marital coercion operated to excuse her. On an order to review, it was held that the presumption did not apply to offences under the Licensing Act. The applicability of the presumption of marital coercion to statutory offences must be determined by examining each particular statute under consideration.

The presumption of coercion operating in favour of a married woman who commits any felony or any misdemeanour in her husband's presence is of very ancient origin. Professor Williams says, 'whether or not the Courts ever seriously regarded the wife as "a marionette, moved at will by the husband", the rule survived because it was a merciful one; and it was found to be a useful way of evading the death penalty for women, at a time when they could not claim benefit of clergy'.[2]

The presumption was applied to all felonies except murder and treason, and was later extended to all misdemeanours. In England it was abolished by the Criminal Justice Act 1925, and it has been similarly abolished in many other jurisdictions, notably in all States of the Comonwealth other than Victoria.[3]

The reason for the abolition of the presumption is quite plain: *cessante ratione legis, cessat ipsa lex.* If the basis of the presumption be the subservience of wife to husband – the idea that she was *sub virga viri sui* – then the passing of the Married Women's Property Act and the concomitant changes in the whole position of the *feme covert* in the law have removed it. On the other hand, if Professor Williams' theory is accepted, then the abolition of the doctrine of benefit of clergy should have logically resulted in the abolition of the presumption. But despite this, the presumption still applies in Victoria in its entirety, and in the present case it was necessary for Hudson A.J., delivering the judgment of the Court, to examine its scope, particularly in relation to statutory offences.

[1] [1955] A.L.R. 34. Supreme Court of Victoria; Gavan Duffy and O'Bryan JJ., Hudson A.J.

[2] Glanville Williams, *Criminal Law: The General Part* (1953) at p. 602 ff.

[3] Its abolition was first recommended in 1845 by the Criminal Law Commissioners – 2nd Rep. (1845), Parlt. Pap. xxiv, 114. Again the Commissioners appointed in 1879 recommended its abolition in their Draft Criminal Code, s. 23.

The state of the law was accurately summarized in 1922 in the following words:

'In the case of crimes committed by the wife in the presence of her husband, the presumption of coercion which excuses the wife has no application to the crimes of murder or treason, but it is held to apply to all other felonies and to all misdemeanours'.[4]

But there is very little authority of any kind in Australia or in England about the applicability of the presumption to statutory offences. The question had arisen three times previously in Australian Courts.

In *Excise Department v. Pearce*,[5] where the facts were similar to those in the present case, the Queensland Supreme Court held that the presumption might arise. However, the remarks about its applicability were clearly *obiter* for the Court found that the magistrate had not considered evidence which had been offered in rebuttal of the presumption, and had remitted the case so that this evidence could be considered.

A Victorian case on similar facts was *Reidy v. Herry*.[6] Williams J. thought the presumption might apply to a summary offence, but that it did not in this instance because the husband was not present at the time of the commission of the offence. There was, in fact, no consideration by the learned judge of the question, because an element necessary to bring the presumption into operation was missing, and the case was decided simply on the basis of an offence against the Act.

Finally, the question was considered by the Supreme Court of South Australia in *Manuels v. Crafter*,[7] where Napier J. held that the presumption did not apply to the statutory offence of selling liquor without a licence. The reason for the decision was that, in the absence of any binding authority, the presumption should not apply to statutory offences created when the basis of the rule's applicability to felonies and indictable misdemeanours had already passed.[8]

In the instant case, Hudson A.J., delivering the judgment of the court, considered all the relevant cases, and based his decision mainly on the view, expressed by Dixon J. in the High Court, in both *Thomas v. R.*[9] and *Proudman v. Dayman*[10] that rules evolved

[4] Report of the Committee on the Responsibility of the Wife for Crimes committed under coercion of the Husband (1922)—Cmd. 1677. And see: *R. v. Torpey* (1871) 12 Cox C.C. 45 and *R. v. Smith* (1916) 12 Cr. App. Rep. 42. In these two cases the presumption was held to apply to the misdemeanours of assault and falsification of accounts.

[5] (1893) 5 Q.L.J. 31. [6] (1897) 23 V.L.R. 508. [7] [1940] S.A. S.R. 7.

[8] Its abolition was advocated as early as 1845, see note 4, *ante*. The presumption was abolished in South Australia in 1940 and Barry, Paton and Sawer in '*An Introduction to the Criminal Law in Australia*' (1948) at p. 34ff., consider that *Manuels v. Crafter* influenced the legislature.

[9] (1937) 59 C.L.R. 279, 304. [10] (1943) 67 C.L.R. 536, 540.

for common law crimes may not apply to statutory offences created to protect the public welfare. In the absence of other binding precedents, Hudson A.J. was able to consider the nature of the Licensing Act 1928, in the light of the *dictum* of Dixon J. The decision must be confined to the Act under consideration, for Hudson A.J. was careful to state that each statute and the offences created in it must always be examined independently.

The Licensing Act, the Court found, was fundamentally designed to regulate the sale of liquor by licensed persons, and to prohibit its sale by unauthorized persons. A married woman licensee would be placed in an enviable position *vis-à-vis* the offences under the Act if all her unlawful acts done in her husband's presence were excused because of the presumption of coercion. This is especially so in the present circumstances of the liquor trade, where a large number of licences are held by married women. So also a married woman without a licence would be able to flout the provisions of the Act if the presence of her husband could excuse her, with the result that the regulation of the liquor trade envisaged by Parliament would be seriously upset.

It is unfortunate that Hudson A.J. did not express a stronger opinion about the whole nature of the presumption, which has so frequently been condemned as outmoded and unsound. However, it may safely be predicted that the presumption will not be in future applied to offences created by other statutes.

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## CONTEMPT OF COURT — PUBLICATION IN NEWSPAPER — MATTER OF PUBLIC INTEREST — PUBLICATION UNLIKELY TO PREJUDICE TRIAL

*John Fairfax & Sons Ltd. v. McRae*[1]
*Consolidated Press Ltd. v. McRae*

The appellant newspapers published statements alleging assaults and injuries caused to private persons by police officers. The statements were made by persons who were arrested by the police officers and against whom charges were pending before the Court of Petty Sessions. The Supreme Court of New South Wales fined the newspapers for contempt of court. On appeal, the High Court held, that, as the statements did not prejudice or interfere with the pending proceedings, there was no contempt of court. Generally speaking, contempt of court can be divided into criminal contempt, consisting of words, writings or acts obstructing or tending to obstruct the

[1] [1955] A.L.R. 265, [1955] A.L.R. 278 High Court of Australia; Dixon C.J., McTiernan, Fullagar, Kitto, and Taylor JJ.