SUPREME COURT OF QUEENSLAND

CITATION:	*Callanan v B* [2004] QCA 478
PARTIES:	**JOHN DAVID CALLANAN** (applicant/respondent) **v** **B** (respondent/appellant)
FILE NO/S:	Appeal No 3960 of 2004 SC No 8448 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 December 2004
DELIVERED AT:	Brisbane
HEARING DATE:	3 September 2004
JUDGES:	McMurdo P and McPherson and Jerrard JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed with costs, including the costs of and incidental to the hearing before the primary judge** **2. Orders 2, 3 and 4 made by the primary judge on 8 April 2004 are set aside and instead it is declared that Mrs B was entitled, and so had a reasonable excuse, to refuse to answer questions put to her by Mr Callanan at the hearing on 1 August 2003 insofar as they asked her whether she knew anything of the involvement of her husband, Mr B, in dangerous drug related activities**
CATCHWORDS:	PROCEDURE – CONTEMPT, ATTACHMENT AND SEQUESTRATION – CONTEMPT – WHAT CONSTITUTES – OTHER CONTEMPTS – investigation by Crime and Misconduct Commission into criminal activities – where respondent declined to answer questions asked by the Commission concerning the involvement of the respondent's husband in the criminal activity under investigation – where respondent declined to answer on the basis that she had a reasonable excuse for not doing so – where that reasonable excuse spousal privilege – whether respondent had a reasonable excuse for not answering questions EVIDENCE – spousal privilege – whether there is a common

law privilege against spouse incrimination – whether abrogated by s 190(2) *Crime and Misconduct Act* 2001 (Qld)

Crime and Misconduct Act 2001 (Qld), s 190(2)(b); s 194(3), s 195

Bank of Valletta plc v National Crime Authority and Another (1999) 164 ALR 45, cited
Cartwright v Green (1803) 8 Ves. Jun 406 (32 ER 412); 2 Leach 952 (168 ER 574), cited
Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission (2002) 213 CLR 543, cited
Hawkins v Sturt [1992] 3 NZLR 602, cited
Hoskyn v Metropolitan Police Commissioner [1979] AC 474, cited
Leach v The King [1912] AC 305, cited
McGuiness v Attorney-General of Victoria (1940) 63 CLR 73, cited
Pyneboard Pty Ltd v Trade Practices Commission (1983) 152 CLR 328, cited
R v Inhabitants of All Saints Worcester (1817) 6 M & S 194 (105 ER 1215), cited
R v Kabbabe (1997) 6 CR (5th) 82, cited
Riddle v The King (1911) 12 CLR 622, cited
Sorby v The Commonwealth (1983) 152 CLR 281, cited
Trammel v United States (1980) 445 US 40, cited

COUNSEL: P E Smith for the appellant
A J MacSporran for the respondent

SOLICITORS: A W Bale & Son for the appellant
Crime and Misconduct Commission for the respondent

[1] **McMURDO P:** I agree with McPherson JA that, for the reasons he gives, the appeal should be allowed with costs, including the costs of and incidental to the hearing before the primary judge. Orders 2, 3 and 4 made by the primary judge on 8 April 2004 should be set aside and instead it should be declared that Mrs B was entitled, and so had a reasonable excuse, to refuse to answer questions put to her by Mr Callanan at the hearing on 1 August 2003 insofar as they asked her whether she knew anything of the involvement of her husband, Mr B, in dangerous drug related activities.

[2] **McPHERSON JA:** The questions before the Court in this appeal are narrow in scope, but in one respect may nevertheless be of some general importance. They are whether the common law recognises a distinct privilege or immunity from what has been called spouse incrimination; and, if so, whether it has been abrogated by s 190 of the *Crime and Misconduct Act* 2001 in the context of a crime investigation being conducted under that Act.

[3] Very briefly, the facts are these. Mr J D Callanan, who is the respondent to this appeal, is an Assistant Commissioner (Crime) of the Crime and Misconduct Commission. In 2002 the Commission undertook the investigation of certain

criminal activities relating to drugs engaged in by an identified criminal "network". Those in the network included a Mr B, who has been charged with offences under the *Drugs Misuse Act 1986* of producing, supplying and trafficking in methylamphetamine, and with using things in connection with it. Mr Callanan is a person to whom authority was delegated by the Commission to conduct hearings in relation to the criminal network being investigated. His authority, and the process by which he was invested with it, are set out in detail in Mr Callanan's affidavit forming part of the appeal record before the Court.

[4] In July 2003 Mr Callanan issued an attendance notice under s 270 of the Act of 2001 requiring the attendance at a hearing before him on 1 August 2003 of Mrs B. She is the wife of Mr B, having been married to him in 1985. When Mrs B attended on that date, Mr Callanan asked her whether she knew anything of the involvement of various persons, including her husband Anthony B, in dangerous drug related activities. Mrs B, who was legally represented, declined to answer the question saying that she had a reasonable excuse for not doing so. The hearing was adjourned to 21 August 2003, when, as required by the Act, Mr Callanan gave reasons for his decision that Mrs B had no reasonable excuse for not answering the question put to her, and he proceeded to certify her refusal to do so as a contempt.

[5] Section 195 of the Act confers on a person a right to appeal with leave to the Supreme Court against a decision of that kind, and Mrs B exercised her right to do so. The matter came before Douglas J, who granted leave but dismissed her appeal. He ordered or declared that Mrs B was in contempt of Mr Callanan for refusing to answer the question or questions asked of her on 1 August 2003. This appeal is brought by her to this Court against his Honour's decision.

[6] The first question is, as I have said, whether there is a common law privilege against spouse incrimination. His Honour held that there was not. I would have been disposed to agree with that conclusion were it not for having seen a very recent paper by Mr David Lusty published in 2004 in vol 27 of the *University of New South Wales Law Journal* 1, entitled "Is there a Common Law Privilege against Spouse Incrimination?". Mr Lusty's answer, which he supports by cogent authority and careful research, is that the common law has recognised such a "spousal privilege" for a very long time, going back to the 17th century and beyond. It would be an act of temerity on my part to attempt to summarise what he has written, which is available in full in the journal referred to; but its substantial starting point is the statement by Michael Dalton in *The Countrey Justice* (1618), at 261, that a wife "is not bound to give evidence, nor be examined against her husband". Dalton's *Countrey Justice* has, as Mr Lusty points out, been judicially recognised as a work of the highest authority; and I may perhaps venture to add that it was immensely influential in the United States in both the colonial and post-colonial period. Many of the later treatises published on the subject were local adaptations of that work.

[7] Coming to more recent times, a wife has been held not to be a compellable witness in criminal proceedings against her husband for an offence of wounding her. That was held to be so in *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474, in which the House of Lords relied on statements in their earlier decision in *Leach v The King* [1912] AC 305, where Lord Loreburn LC referred to the "fundamental and old principle" that "you ought not to compel a wife to give evidence against her husband in matters of a criminal kind" ([1912] AC 305, 309). In the same case, Lord Atkinson said:

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

In Australia, Griffith CJ in *Riddle v The King* (1911) 12 CLR 622, 626-628 treated as correctly stating the law some of the principal common law decisions that have recognised such a privilege. See also *Hawkins v Sturt* [1992] 3 NZLR 602, 610, where Tompkins J repeated that "the fundamental common law principle that a spouse is not to be compelled to give evidence against the other spouse" is not to be overturned "save by a clear, definite and positive enactment to that effect". In the United States, the existence of such a privilege was accepted by the Supreme Court in *Trammel v United States* (1980) 445 US 40, 53.

[8] The last two decisions recognise the privilege as applying reciprocally to husband witnesses as well as to wives. Indeed, if it did not do so, the rule would nowadays almost certainly be consigned to oblivion. Instead, the trend is, as Mr Lusty's survey suggests, in the direction of retaining it. Nor do I consider that anything can be made of the fact that the proceedings before Mr Callanan were investigative in character. In his reasons at first instance, Douglas J considered that, historically, the common law privilege did not extend beyond the court room to broader investigations of the kind taking place here. The reason his Honour gave was that at common law there would have been no occasion to invoke it against an investigator because "there was no obligation to answer the investigator's questions". However, in *McGuinness v Attorney-General of Victoria* (1940) 63 CLR 73, 98, Dixon J said that until the 19th century it still remained a matter of doubt whether the Crown might not confer coercive powers on investigators by means of a special commission of inquiry issued under the prerogative. Historically, the decisive authority against its doing so was probably *Re Colenso, Lord Bishop of Natal* (1864) 3 Moo PC (NS) 115, 152, which is referred to by Starke J in the same case (63 CLR 73, 90). The Quebec decision in *R v Kabbabe* (1997) 6 CR (5th) 82 and, in New Zealand, the decision of Tompkins J in *Hawkins v Sturt* [1992] 3 NZLR 602 both involved evidence before non-judicial tribunals. Cf also *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 341. If, as I think, it is in the prevailing idiom a form of "free standing" privilege, there is therefore authority for saying that Mrs B is entitled at common law to claim it in the investigation being conducted by Mr Callanan. This accords with the justification currently assigned for maintaining the privilege, which is that it is founded on the preservation of matrimonial harmony between spouses (27 *UNSW Law Journal* 1, at 14, 39-41).

[9] The next question is whether the privilege has been abrogated by statute in Queensland. It was conceded by Mr MacSporran for Mr Callanan that, in the form in which it stood at the time when Mrs B was asked the relevant question, s 11 (as it was) of the *Evidence Act 1977*, read together with the definition in that Act of "proceeding", did not determine the issue before us. That section, which limited the compellability in criminal proceedings of husbands and wives to disclose communications between them during their marriage, has since been repealed; but the presumption that, upon repeal of a statute, the common law revived is now displaced by s 20(2)(a) of the *Acts Interpretation Act 1954*. In any event, the

common law privilege goes beyond mere communication, and extends to what is observed as well as what one is told.

[10] Here the critical issue therefore is whether the spousal privilege has been abrogated by s 190(2) of the *Crime and Misconduct Act 2001*. Section 190 is in s 190(1) introduced by the statement that a witness at a commission hearing must answer a question put by the presiding officer. Section 190(2) goes on to provide:

> "(2) The person is not entitled-
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> (a) to remain silent; or
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> (b) to refuse to answer the question on a ground of privilege, other than legal professional privilege."

If matters had stood there, there can be little doubt that spousal privilege at common law would have been abolished by s 190(2)(b), and that Mrs B was bound to answer the question put to her by Mr Callanan. She, of course, did not remain silent but said she had under s 194(3) a "reasonable excuse" for not answering the question.

[11] The clarity of the provision in s 190(2)(b) is, however, marred by the definition of "privilege" in Schedule 2 of the Act. The term privilege is defined there in the statutory "Dictionary" as follows:

> **"privilege,** in relation to an answer means… privilege recognised at law on the ground of -
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> (i) self incrimination; or
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> (ii) legal professional privilege;".

Interpreting s 190(2)(b) in the light of that definition by substituting it for the word "privilege" in that provision produces the following result:

> (2) The person is not entitled -
>
> (a) …
>
> (b) to refuse to answer the question [in the context of a crime investigation] on the ground of:-
>
> (a) self-incrimination; or
>
> (b) legal professional privilege, other than legal professional privilege.

[12] The result is obviously clumsy; but, in defining **privilege** in Schedule 2, the provision uses the word "means", and not simply "includes" or some other perhaps less specific or direct expression. It is true that s 32A of the *Acts Interpretation Act* 1954 declares that definitions in an Act apply "except so far as the context or subject matter otherwise indicates or requires". There is, however, nothing in either the context or subject matter of the Act that indicates or requires that the definition in Schedule 2 is not to apply. It is also true, as Mr MacSporran pointed out, that the Dictionary definition comprises three separate paragraphs (a), (b) and (c) each dealing in a different way with a separate "context", and that this may have been why it was thought necessary to define **privilege** in the Act. Thus, for example, in the context (b) of a misconduct (as distinct from a crime) investigation, self-incrimination is omitted and public interest immunity and parliamentary privilege are added in; while in the context (c) of a confiscation-related investigation, self-incrimination is once again included. It is evident that some care was taken to define the term **privilege** differently in each context. There is, however, nothing in any of this to indicate or require that in s 190(2)(b) the term bears a meaning

different from its meaning as defined in para (a) of the Dictionary meaning of the word.

[13] It may be accepted that, viewing s 190(2)(b) in isolation, the intention was to abrogate all forms of privilege from answering questions except legal professional privilege. The problem created by the intrusion of the Dictionary meaning is that, possibly inadvertently, it produces a limiting effect on s 190(2)(b). Instead of simply restricting the surviving privilege to legal professional privilege, it incorporates, but only to abolish, another specified ground of privilege, namely self-incrimination. Paragraph (a) says nothing about other forms of privilege recognised at law, such as public interest immunity or parliamentary privilege. What is more, it leaves the stated exception ("other than legal professional privilege") to qualify only legal professional privilege, leaving it with no useful function to perform. Interpreted literally, however, it has the consequence of disentitling a person from refusing to answer a question only on the ground of self-incrimination or legal professional privilege, while allowing other forms of privilege recognised at common law, including spousal privilege, to remain untouched.

[14] It seems improbable that this was the legislative intention. Our attention was called to the provisions of s 4 and s 5 of the *Crime and Misconduct Act*, in which one of the main purposes of the Act is stated to be "to combat and reduce the incidence of crime", and to arm the Commission with investigative powers not ordinarily available to the police service. This, however, is not to say that all forms of privilege were intended to be abolished, and indeed s 190(2)(b), standing alone, shows it was not the legislative intention. But the superimposition of the definition of privilege in Schedule 2 renders it uncertain precisely which forms of privilege were intended to be abolished and which of them preserved. The Explanatory Notes to the Bill were relied on. In relation to clause 190 of the Bill, now s 190 of the Act, the Notes state that a witness at a Commission hearing "may only refuse to answer on the ground of legal professional privilege". If nothing more than that had been said, the intention would have been clearly expressed; but it ceases to be so once the definition is applied.

[15] In any event, the question here is not simply one of discerning the legislative intention however obscurely or confusingly it may be expressed. The problem is that the legislative expression in s 190(2)(b) has, by force of the definition of privilege, been rendered ambiguous. Whatever else may be said about it, it is certainly not clear. It follows that the Act cannot be said to have overturned the principle that a wife is not to be compelled to give evidence against her husband by a "clear, definite and positive enactment", to adopt the terms used by Lord Atkinson in *Leach v The King* [1912] AC 305, 311, and applied by Tomkins J in *Hawkins v Sturt* [1992] 3 NZLR 602, 610. Although there is no specific Australian authority precisely in point, the principle or rule of interpretation applied in those cases accords with the recent statement in the High Court in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 553, that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or necessary implication to that effect. The relevant statutory provisions in this instance fall well short of satisfying that prescription.

[16] In the result, therefore, I am persuaded that Mrs B was entitled, and so had a "reasonable excuse", to refuse to answer the question that was put to her by

Mr Callanan at the hearing on 1 August 2003 in so far as it asked her whether she knew anything of the involvement of her husband Anthony B in dangerous drug related activities. The appeal should be allowed with costs including the costs of and incidental to the hearing before Douglas J. There should be a declaration of Mrs B's entitlement in the terms I have stated it. I agree with the form of the orders as they are proposed by the President.

[17] **JERRARD JA**: In this appeal I have had the benefit of reading the reasons for judgment of McPherson JA and respectfully agree with those, and with the orders proposed by the President.

[18] The article published by Mr Lusty examined common law cases, feudal codes, and textbook treatises which described the existence of a common law privilege entitling a wife not to incriminate her spouse, and which developed earlier and quite independently of the privilege against self incrimination. Mr Lusty's article quoted from King Canute's Code (*c* 1020 – 34), in which special provision was made for a wife whose husband had carried stolen goods home to "his" cottage; the wife was given an immunity from prosecution provided the goods were not placed in any of her storeroom, chest, and cupboard, and she had a duty to guard the keys of those places.

[19] A wider immunity was described two centuries later in Bracton's *De Legibus Et Consuetudinibus Angliae* (*c* 1250 – 59), as quoted by Lusty, where the rule was that a wife would not be held liable for stolen property found in the home, apparently because that was in her husband's possession but not hers, and further explained on the ground that:

> "A wife ought not to accuse her husband nor disclose his theft or felony."

[20] At the end of the 13th Century the explanation was that a wife "neither could nor ought to accuse" her husband of a crime to which she was privy;[1] and by 1557 that "a wife cannot be accessory to her husband because by the law divine she ought not to discover him"[2]. Those sources provide support for Mr Lusty's contention that for many hundreds of years English law has recognised the basic principle that a wife is not bound to discover the crime of her husband, an expression which was used in a bankruptcy case referred to by Mr Lusty, cited as *Anonymous* (1613) 1 Brownl & Golds 47; 123 ER 656-657. It was held there that a bankrupt's wife could not be forced to undergo an examination, precisely because she was "not bound to discover her husband's treason". In *Cartwright v Green*[3] a wife's demurrer against discovery was upheld and she was said to be not compellable to make discovery as to acts constituting larceny on the part of her husband. In *R v Inhabitants of All Saints, Worcester*[4], a wife, in a proceeding in which her husband was not on trial for an offence, was held competent to give evidence, although not compellable, when her evidence would disclose bigamy by her husband.

[21] Mr Lusty's article reminds that the comments of Justice Bayley in the latter case, which effectively describe recognition of a common law privilege against spouse incrimination, while obiter, were in accord with historical statements referred to by

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1 The source for that statement is given by Mr Lusty

2 Stanford, *Les Plees Del Cordon* (1557), cited by Lusty from a note by Glanville Williams

3 (1803) 8 Ves Jun 405 (32 ER 412); 2 Leach 952 (168 ER 574)

4 (1817) 6 M & S 194; 105 ER 1215

Mr Lusty, and with earlier cases. The decisions in *R v Inhabitants of All Saints*, and in *Cartwright v Green*, were quoted with approval by Griffith CJ in *Riddle v The King* (1911) 12 CLR 622 at 627-629 when holding that a wife was not a compellable witness at common law. They were quoted approvingly by all members of the House of Lords in *Hoskyn v Metropolitan Police Commissioner*.[5] In *Hoskyn*, the House held that the common law would not compel a wife to give evidence against her husband. Two critical decisions in the development of that proposition, namely *Cartwright v Green* and the *All Saints* decision, were not cases in which a spouse had been called as a witness in a criminal trial, thereby demonstrating the extent of the protection.

[22] The marriage relationship and a wife's position in it has accordingly resulted for at least a thousand years of our written legal history in special protections being available to a wife, including a principle that a wife cannot be compelled to incriminate her husband. This has been applied in proceedings other than his trial. It has included the privilege of committing no offence by concealing his wrong doing from others, such as the rightful owner of property taken by the husband. Such a privilege answers the description in the majority judgment in *Sorby v Commonwealth* (1983) 152 CLR 281 at 309 of being one deeply ingrained in the common law. It is far older than the principle against self incrimination. The authorities Mr Lusty cites support his argument that the privilege is not merely – again to use the words of the majority in *Sorby* – a rule of evidence applicable in judicial proceedings and which cannot be claimed in an executive inquiry; it is one inherently capable of applying in non-judicial proceedings. It was so applied in *Hawkins v Sturt* [1992] 3 NZLR 602.

[23] Accordingly Mrs B had very good reason for excusing herself from answering questions which could incriminate her husband. She was exercising a privilege the common law gave her, and which privilege the curious drafting of the *Crime and Misconduct Act* 2001 has not succeeded in removing. Quite independently from the continued existence of that privilege, I consider she may have had a reasonable excuse for not answering a critical question she was asked. Relevantly that question was:

> "Do you know anything of any involvement of [CT], [MF] or your husband [Mr B] in dangerous drug related activities?"

[24] Mrs B was required by notice dated 23 July 2003 to attend at a Crime and Misconduct Commission hearing. Her husband had been arrested on 16 July 2003 and charged with trafficking in methylamphetamine between 31 October 2002 and 17 July 2003. The police court brief prepared against him alleges he did that with CT and MF. Mrs B would not have been a compellable witness against him in those criminal proceedings, as at the date she was summonsed before the Crime and Misconduct Commission. Nevertheless the proceedings involving her before that Commission were being conducted as an adjunct to the criminal proceedings in which her husband was charged.

[25] In those circumstances, and when the other evidence disclosed a 20 year marriage and two children living with Mr and Mrs B, she may have had a reasonable excuse for not answering the question asked about her husband. The proceedings in which she was to be questioned were being conducted after his arrest, and the police court

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5 [1979] AC 474

brief prepared against him described considerable admissible evidence gained by electronic eavesdropping, covert observation, and other means. The Misconduct Commission hearing appeared designed to fish for other evidence and to circumvent the prosecution's inability to compel her to give any evidence she had at the forthcoming committal hearing, or any subsequent trial.

[26] I respectfully consider that in such cases, when there has already been found enough evidence to justify an arrest on very serious charges, recognising as understandable and legitimate a desire not to incriminate a marriage partner with whom a potential witness has shared much of that person's life, and recognising that desire as a reasonable excuse for declining to give evidence, furthers the important public interest in marital harmony without unduly burdening legitimate law enforcement needs.[6]

[27] In so saying I am respectfully adopting the explanation of the term "reasonable excuse" by Hely J in *Bank of Valletta plc v National Crime Authority* (1999) 164 ALR 45 at [36] – [47]. His Honour concluded after consideration of authority that a reasonable excuse includes any excuse which will be accepted by a reasonable person as sufficient to justify non-compliance (in this case with the demand that Mrs B answer the quoted question about her husband).

[28] Although the fact of Mrs B's marriage to Anthony B on 20 April 1985, and their being parents of two teenaged daughters living with them at the time of her husband's arrest, coupled with the recently laid charges against Mr B and the obvious connection between those charges and the matter about which she was to be questioned, were together capable of providing the basis for an argument that she had a reasonable excuse for not answering questions which would directly or indirectly incriminate him in those charged offences, her affidavit said nothing about whether they had, for example, resided together in the nearly 19 years since they were married, or for longer; or whether there had been periods, perhaps prolonged, in which they had been separated. It did not describe the extent, if at all, to which her finances were intermingled with his, or the degree of their general financial, social, and emotional dependence upon each other, or whether they generally shared the care of their children. Those matters are relevant to the consequences for her of his being convicted of a serious offence, the extent to which his imprisonment would distress and adversely affect her, and the strength and importance to her of their marriage relationship. Those matters are therefore relevant to whether her excuse was reasonable. A 75 year old witness, married for 50 years to, and devoted to, a spouse lately charged with a criminal offence, and who was summonsed as a witness before the Crime and Misconduct Commission in an endeavour by that Commission to elicit possible information strengthening the prosecution case on the charge, would have an excuse for not answering questions that would assist the Commission, which a reasonable person would accept as sufficient to justify non-compliance with the lawful request that the witness spouse answer the question.

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6 *Trammel v United States* (1980) 445 US 40 at 53