

1953

*Present : K. D. de Silva J.**S. ARUMUGAM et al., Appellants, and SEETHEVI, Respondent**S. C. 264-268, with Application 118—M. C. Point Pedro, 16,335**Evidence—Criminal intimidation—Competency of spouse of accused to give evidence—
Penal Code, s. 486—Evidence Ordinance, ss. 100, 120.*

Under section 120 (4) of the Evidence Ordinance the wife is a competent witness for the prosecution where a husband is charged under section 486 of the Penal Code with intimidating his wife.

APPPEALS, with application in revision, from a judgment of the Magistrate's Court, Point Pedro.

C. E. Jayewardene, with S. J. Kadirgamer, for the accused appellants.

Cecil N. Gunawardene, Crown Counsel, as amicus curiæ.

Cur. adv. vult.

August 25, 1953. K. D. DE SILVA J.—

In this case the complainant-respondent charged the five appellants with committing offences punishable under sections 433, 314 and 486 of the Ceylon Penal Code. Muthan Sivapackiam the 4th accused-appellant is the husband of the complainant, and at the times material to these proceedings they were living in separation. The story for the prosecution in brief is as follows: On December 16 last year at about 12 noon Arumugam the brother of the complainant was going past the house of the 1st accused when he met a crowd of people some of whom were these accused. On seeing him one person in the crowd shouted out "get hold of Arumugam we will murder him". Through fear Arumugam ran into the complainant's house and took shelter there. The crowd pursued him and these five accused entered the complainant's compound and threatened to murder him and the complainant. These accused also began to cause damage to the house. When the complainant raised cries the 1st, 2nd and 3rd accused assaulted her. After trial, the Magistrate convicted all the accused under sections 433 and 486, while the 1st, 2nd and 3rd accused were also convicted of the charge under section 314 of the Ceylon Penal Code. On each of the counts under sections 433 and 486 the accused were fined Rs. 10 each while on the other count the 1st, 2nd and 3rd accused were fined Rs. 30 each. All the five accused have appealed from the conviction and sentence. The 1st, 2nd and 3rd accused have also applied in revision that the conviction and sentence be set aside. In the petition of appeal it was submitted that the prosecution had failed to establish the charge under section 486 and that therefore the learned Magistrate had no jurisdiction to try the case. This submission was certified as a point of law by the Proctor for the appellants. But I see no merit in that contention. There was quite sufficient evidence for the Magistrate to hold that the charge under section 486 of the Ceylon Penal Code had been established.

When this appeal was argued, Mr. Advocate C. E. Jayawardene, who appeared for the appellants, raised an interesting point of law. He contended that as the learned Magistrate acquitted the 4th accused on the charge of causing simple hurt to the complainant, the other charges against the 4th accused should have been dismissed, the reason being that the complainant, who is the wife of the 4th accused, was not a competent witness against the latter in respect of such charges. He based this argument on section 120 of the Evidence Ordinance (Cap. 11). Sub-sections (2), (3), (4) and (5) of that section deal with the competency of a person to give evidence in criminal proceedings in which his or her spouse is a party. Sub-section (2) entitles a person charged with an

offence to call his or her spouse as a witness for the defence. According to sub-section (3) "in criminal proceedings against a husband or wife for any bodily injury or violence inflicted on his or her wife or husband, such wife or husband shall be a competent and compellable witness". Sub-section (4) reads "In criminal proceedings against a husband or wife for any attempt to cause bodily injury or violence on him or her wife or husband, such wife or husband shall be a competent witness for the prosecution". Sub-section (5) provides that a person is entitled to give evidence against his or her spouse on a charge of bigamy.

Mr. Jayawardene argued that a wife or husband is not entitled to give evidence against her or his spouse in criminal proceedings outside the scope of the sub-sections 2 to 5 of section 120. The charges under sections 433 and 436 of the Ceylon Penal Code he maintained are not covered by these sub-sections and that, therefore, the evidence of the complainant against the 4th accused in support of those two charges is inadmissible. I may here observe that even if the complainant's evidence is eliminated, those two charges have been established by the evidence of Arumugam whom the Magistrate accepted as a truthful witness. But I do not propose to dispose of the appeal on that ground. The point of law raised by the Counsel is of some importance and should be decided after consideration.

According to section 118 of the Evidence Ordinance (Cap. 11) all persons are competent to testify unless they suffer from certain physical disabilities referred to therein. The provisions of section 120 restrict the operation of section 118 in so far as the competency of a person to give evidence for or against his or her spouse is concerned. This restriction is primarily based on an English Common Law principle, the reasons for the origin of which can be gathered from the following passage—" Husband and wife, say our books, are considered as one and the same person in law, and to have the same affections and interests ; from whence it has been established as a general rule that the husband cannot be a witness for or against the wife, nor the wife be a witness for or against the husband, by reason of the implacable dissension which might be caused by it, and the great danger of perjury from taking the oaths of persons under so great a bias, and the extreme hardship of the case " (Best on Evidence—12th Edition—page 164, paragraph 175). This principle in certain circumstances was calculated to cause injustice and hardship, and therefore its application was relaxed by creating exceptions by common law as well as by statute. The competency of a person to give evidence against his or her spouse in the case of personal injury is one of those exceptions which arose out of Common Law (Taylor on Evidence—12th Edition—page 861, paragraph 1370). The Criminal Evidence Act, 1898 (61 and 62 Vict. C 36) also created a number of exceptions to this rule, but those exceptions are not relevant to the decision of this case. Section 120 of the Evidence Ordinance would appear to incorporate the common law principle as well as the exception relating to personal injury. The charge of intimidation, in my view, would come under sub-section (4) and is covered by the words " attempt to cause any bodily injury or violence ".

Strictly construed, it is true, the offence of intimidation is not an attempt to cause bodily injury or violence but it has been held in England that " a threat of personal violence " comes within the exception to the general principle. " To this branch also exceptions are not wanting. When one of the married parties used or *threatened personal violence* to the other, the law would not allow the supposed unity of person in husband and wife to supersede the more important principle that the State is bound to protect the lives and limbs of its citizens " (Best on Evidence, paragraph 176 at page 165). A similar view is expressed at page 140 of Roscoe's Criminal Evidence in the following passage " a spouse witness is compellable for the prosecution or for the defence of the spouse when the offence charged is personal injury (including threats and attempts) or forcible abduction and marriage, and only in those cases ". If sub-section (4) of Section 120 of the Evidence Ordinance is not wide enough to include a charge of intimidation, the provisions of Section 100 of that Ordinance can be invoked to bring in the English Law of Evidence to operate on this point. Therefore I hold that the evidence of the complainant was correctly admitted to prove the charge under Section 486 of the Ceylon Penal Code. I agree with Mr. Jayawardene that if the complainant's evidence was not admissible as against her husband the 4th accused, her evidence would not have been admissible against the other accused as well in these proceedings. The 4th accused was also convicted on the charge of criminal trespass. That charge, however, cannot be maintained against him by the complainant. Therefore I set aside the conviction of the 4th accused under Section 433 of the Ceylon Penal Code. Subject to that variation the appeals and the application in revision are dismissed.

Appeals mainly dismissed.
