IN THE SOUTHWARK CROWN COURT

R

- v -

VASILIKI PRYCE

REASONS : MARITAL COERCION

Introduction

1. For the avoidance of doubt, I now withdraw the Order made under s.4(2) of the Contempt of Court Act 1981 prohibiting the reporting of this judgment.

2. The defendant is charged with doing acts tending and intended to pervert the course of public justice. It is alleged, in short, that in 2003 she took the points for a speeding offence committed by her then husband the politician Christopher Huhne.

3. There is no dispute that:
   (1) On 12 March 2003 Mr Huhne committed a speeding offence on the M11.
   (2) Thereafter a course of justice began the purpose of which was to discover the truth as to who was driving when the offence was committed, and to impose the appropriate punishment upon that person.
   (3) That course of justice included the sending of forms by the authorities, first to Mr Huhne and then to Ms Pryce.

(4) In early May 2003 Ms Pryce signed the form addressed to her, which was then sent back to the authorities, thereby falsely informing them that she had been the driver.

(5) In the result, Ms Pryce was punished for the offence (a fine of £60 and 3 points) which thereby enabled Mr Huhne, in consequence, to avoid prosecution and punishment.

(6) Thus Ms Pryce did an act which had a tendency to (and indeed did) pervert the course of justice and, when doing so, she intended to pervert the course of justice.

4. It follows that there is no dispute that all the elements of the offence alleged against Ms Pryce have been proved by the Prosecution. There is also no dispute that Mr Huhne is guilty of the offence. Indeed it is admitted that he has pleaded guilty to it.

5. Ms Pryce has, however, raised the defence of marital coercion. It is thus the critical issue in this case.

6. Section 47 of the Criminal Justice Act 1925 ("the 1925 Act") provides that:
"Any presumption of law that an offence committed by a wife in the presence of her husband is committed under the coercion of the husband is hereby abolished, but on a charge against a wife for any offence other than treason and murder it shall be a good defence to prove that the offence was committed in the presence of, and under the coercion of, the husband".

7. On 11 February 2013, after the effective completion of all the evidence in the first trial, I heard extensive legal argument in relation to the issue.

8. In the event, it became clear that there was no dispute between the parties that, as to the elements of the defence, I was bound by the combination of the decisions of the Court of Appeal in *Shortland* [1996] 1 Cr.App.R.116 and *Cairns* [2003] 1 Cr.App.R. 662, which make clear (amongst other things) that the elements of marital coercion are, in certain respects, different to those involved in the defences of duress and necessity, but also recognise that (like

those defences) marital coercion decriminalises what would otherwise be a criminal offence – see also e.g. Lord Bingham at para. 22 of the judgment in *Z (Hasan)* [2005] AC 467.

9. Thus it was common ground that the law recognises, via the defence of marital coercion, that a wife is morally blameless if she committed an offence (other than murder or treason) **only** because her husband was present and coerced her - that is put pressure of some sort on her to commit the offence in such a way that, as a result, her will was overborne (in the sense that she was impelled to commit the offence because she truly believed that she had no real choice but to do so). There was also no dispute that, as to the wife's will being overborne, the issue is entirely subjective.

10. It was equally common ground that a wife's will would not have been overborne (in the sense that I have just described) if, for example, she was persuaded by force of argument to choose (albeit reluctantly) to commit the offence rather than to take another course, or if she was persuaded (albeit reluctantly) to commit the offence out of love for, or loyalty to, her husband or family, or to avoid inconvenience (whether to herself or others). Her will must have been overborne (i.e. overcome) in the sense that she was impelled (i.e. forced) to commit the offence because she truly believed that she had no real choice but to do so.

11. However, against the background that it was also agreed that there was no consideration in either *Shortland* or *Cairns* (or in any other reported case) of the effect of sections 3 & 6 of the Human Rights Act 1998 combined with Article 6(2) of the European Convention on Human Rights, and that thus I was required to consider that effect, there was a stark disagreement between the parties as to whether the reverse burden provided by s.47 of the 1925 Act should remain a persuasive burden (as construed in *Shortland* and *Cairns*) or whether I was required to read it down as being an evidential burden. It was therefore that issue upon which the argument concentrated.

12. In the result, on 12 February 2013, I ruled in favour of the Defence argument that I was required to read down s.47 as placing only an evidential burden on the defendant, and I directed the jury accordingly (providing them with written directions in the process).

13. I now set out my reasons for that ruling. It is necessary first to set out, in summary, the evidence of Ms Pryce and the rival cases of the parties - which were clear at the time of the argument and were later underlined in closing speeches.

The evidence of Ms Pryce

14. Ms Pryce's evidence was to the effect that, in the spring of 2003, she was aged 51 and the Director General and Chief Economist at the Department of Trade and Industry. She and Mr Huhne had been married for some 19 years, with three children of their own (the youngest of whom was aged 10/11 at that time). She also had two older daughters by her first husband who were, by then, living away from home. Mr Huhne was, at that time, in his late 40s and an MEP with strong ambitions to gain the Lib Dem nomination for the Eastleigh constituency (just outside Southampton). Albeit that he had strong political ambitions, and (from her perspective) a good deal of intellectual arrogance, the marriage was essentially a happy one. There had never been, and there never was, any sort of physical mistreatment, or the threat of it, by him.

15. In about March 2003 Mr Huhne had told her, after he had received the relevant Notice in the post, that he had been caught speeding and couldn't afford to get any more points. He wanted her to accept the points for the speeding offence, but her answer was a resounding "no". There were arguments over a number of days (or perhaps a couple of weeks on and off). His arguments, she said, included that he wouldn't be able to drive around; that it would affect his image; that he wouldn't be selected for Eastleigh; that his career would be destroyed and that others (including his assistant Jo White) had taken points for him, so why couldn't Ms Pryce. Despite that, she

said, her answer remained a resounding "no". Then it all went quiet and she presumed that the issue had gone away.

16. However, she said, she had then received a form addressed to her, which indicated that she had been nominated as the driver. She then exploded in front of the family, probably using Greek swear words, and had said that they were not her points. She had left the form on the table in the hallway. Then a couple of days later she had come downstairs to find Mr Huhne standing by the table in the hallway pen in hand. The form had already been filled in to some extent. He had said that she had to fill in the rest "right now". She said in evidence that she had already been nominated as the driver, which it appeared the police had accepted; she had no chance to take in the details of the form; it looked like a fait accompli and so she did not think that she could give the police different information. It put her, she said, in an impossible position – there were implications for Mr Huhne's image; there was the resultant inconvenience if he was disqualified; and the likelihood that he wouldn't get the nomination at Eastleigh. Mr Huhne had implied that she had no choice and so (as she put it) although she had done "reasonably well" in her professional career, family came first and so, screaming and protesting, she had submitted and signed the form and filled in her driving licence number. She had, she said, no choice.

The Prosecution case

17. The Prosecution case is that Ms Pryce was not pressured by Mr Huhne to such an extent that her will was overborne. She did not, they say, truly believe that she had no real choice but to commit the offence. The Prosecution point out that, at the time of the offence, this was a loving marriage. There was no history of abuse - whether physical or mental. The worst that could be said, if true, was that he had prevailed upon her to have an abortion in 1990, but that was counterbalanced by the fact that, despite his then wishes and his presence on the relevant morning, she had decided, if true, against another abortion in 1992 – with a happy ending all round. The Prosecution assert that, at the material time, Ms Pryce was one of the most powerful, intelligent and trusted women in the country. The commission of the offence benefited both of them.

In particular, to her and the family's benefit, it enabled him to pursue his political ambitions and it enabled her to avoid suffering the considerable inconvenience of driving him around (which is what she did suffer when he was banned, a few months later, in October 2003).

18. The crime was, the Prosecution say, the product of a choice made by Ms Pryce (albeit possibly against her better judgment) at a time when she and her husband could be confident that their crime would never be discovered. Ms Pryce's undoubted and continued support for Mr Huhne's career thereafter, until they broke up, is telling (it is submitted) in that regard. The Prosecution go on to say that, in any event, Ms Pryce's evidence about having been coerced was plainly false. The Prosecution say that after they broke up in 2010, and after the failure of her first plan to "nail" Mr Huhne by the publication of what was a false story about Jo White (to the effect that Mr Huhne had bullied her into taking points), the claim of herself having been bullied into taking the points was invented in order to enable her to use what was in truth their joint offence to bring him down whilst protecting herself in the process (which she initially tried to do by remaining hidden as the source of the story). Putting all the blame on him and getting revenge on a free ride (waiting until after her divorce settlement had been secured before doing so) as it was put.

19. The Prosecution also rely, amongst other things, on what they assert were important inconsistencies in Ms Pryce's account which, they say, demonstrate its falsity. In particular, her failure to mention vital parts of the account that she gave in evidence to her daughter in 2003, to journalists in 2010 / 2011, and to the police in interview in 2011. The Prosecution also rely upon lies which they assert that Ms Pryce told - particularly during the course of her evidence – as revealed, it is said, by a number of emails in 2010 / 2011.

The Defence case

20. The Defence case is that Ms Pryce's evidence is true and demonstrates that her will was overborne. The Defence argue that, overall, the evidence clearly and overwhelming demonstrates that she was coerced. The Defence rely on Ms

Pryce's positive good character, her integrity, and the fact that she founded the Good Corporation (in order to help companies to act ethically) as underlining that she was not the sort of person to commit an offence unless she was put in a position where she truly believed that she had no real choice but to commit it. She was not, the Defence argued, a powerful woman at the material time, and the jury should avoid stereotyping and oversimplifying. The events in 2010 / 2011 are, the Defence submit, of very little relevance beyond the fact that they showed that Ms Pryce could be very vulnerable when in a very stressful situation. To the extent that Ms Pryce did anything inappropriate in 2010 / 2011 it was, the Defence submit, understandable given the humiliation that she suffered at Mr Huhne's hands when and after his affair was revealed. The suggestion that she has told lies is, by reference to the emails said to demonstrate that fact, ridiculous. She did not tell The Mail on Sunday that she had taken the points. She had believed that the Jo White story was true.

21. The Defence submit that the evidence shows that Mr Huhne was fiercely intelligent, ruthlessly ambitious (with a politician's rhino hide), and that he belittled Ms Pryce's intellect. Whilst there was never any question of any physical threat, and there were undoubtedly good times, the Defence submit that Ms Pryce was dominated by Mr Huhne – albeit that she loved him. It is pointed out that, for example, it was always her who changed jobs to accommodate his career, and her who had the abortion that he wanted in 1990. Hence taking the points was consistent with that history - the more so as disqualification would have had a detrimental effect on his prospects in the imminent contest for the Lib Dem nomination at Eastleigh. The time period between the sending and return of the first form and common sense are consistent, it is argued, with Ms Pryce's account of pressure at that stage. Mr Huhne had then nominated her as the driver behind her back, and had thereafter coerced her into committing the offence.

The materials and authorities

22. During the course of the argument, both written and oral, I was variously referred to the relevant passages in the current editions of Smith & Hogan, Blackstone and Archbold, together with an article by J Edwards entitled

"Compulsion, Coercion and Criminal Responsibility" (1951) 14 Modern Law Review 297, another by P Pace entitled "Marital Coercion – Anachronism or Modernism" [1979] Crim.L.R. 82, another by Professor Horder entitled "Occupying the moral high ground? The Law Commission on duress" [1994] Crim LR 334; and an article by Professor Dennis entitled "Reverse Onuses and the Presumption of Innocence" [2005] Crim LR 901.

23. Reference was also made to Hansard (H.C. Deb. Vol. 188, col. 876) as to the debate on Second Reading in the House of Commons in relation to what became s.47 of the 1925 Act; Law Commission Working Paper No.50 entitled "Inchoate Offences, Conspiracy, Attempt and Incitement" (1973); Report No.3 of the Law Reform Commissioner (Victoria) entitled "Criminal Liability of Married Persons Special Rules" (1975); and Law Commission No. 83 entitled "Report on Defences of General Application" (1977), and the CPS Policy for Prosecuting Cases of Domestic Violence.

24. In addition to *Shortland*, *Cairns* and *Z (Hasan)* (above) I was also referred to *Hall v Hall* (1868) 1 P&D 481, *Caroubi* (1912) 7 Cr.App.R. 149, *Pierce* (1941) 5 JCL 124, *DPP for Northern Ireland v Lynch* [1975] AC 653, *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474, *Richman* [1982] Crim.L.R. 507, *Salabiaku v France* (1988) 13 EHRR 379, *R* [1992] 1 AC 599, *Pepper v Hart* [1993] AC 593, *Lambert* [2002] AC 545, *Royal Bank of Scotland v Etridge* (No.2) [2002] 2 AC 773, *Johnstone* [2003] 1 WLR 1736, and *Sheldrake v DPP* [2005] 1 AC 264.

25. I referred the parties to a Doctoral Thesis written by Gerard McCoy QC (now Professor McCoy) in 2007 entitled "Uxorial Privileges in Substantive Criminal Law; A Comparative Law Enquiry", which (amongst other things) traces the history of the defence of marital coercion in England & Wales and compares the approach to it with that in many other countries; to the summing up of Wilkie J in relation to the defence of marital coercion raised in the trial of *Anne Darwin* in 2008 (which proceeded, it seems without argument, upon the basis that there was a persuasive onus on the defendant), and to *Williams*

[2012] EWCA Crim 2162 (which was the most recent authority that I could find in relation to reverse burdens).

26. In the light of the original written arguments I had also considered Law Commission No.218 entitled "Legislating the Criminal Code: Offences against the Person and General Principles" (1993), Law Commission No.304 entitled "Murder, Manslaughter and Infanticide" (2006), the Report of the Irish Law Reform Commission (2006) which recommended the abolition of marital coercion, and a number of other authorities – in particular *Ditta* [1988] Crim.L.R. 43 (marital coercion), *Attorney-General's Reference (No.1 of 2004)* [2004] 1 WLR 2111 (suicide pacts), *Quayle & others* [2005] 2 Cr.App.R. 34 (necessity), *Selveratnam* [2006) EWCA Crim 1321 (necessity), *Penner* [2010] EWCA Crim 1155 (the end of trial by ambush), *Cowderay v Cranfield* [2011] EWHC 1616 (CH) (an example of the definition of coercion in civil law), and *A(RJ)* [2012] 2 Cr.App.R. 8 (duress).

The defence of marital coercion

27. It is possible to trace the existence of the concept of marital coercion in England and Wales back to the Middle Ages, and thus to a time when a wife was her husband's chattel and he had the power to control her by physical chastisement. As the centuries passed the concept is believed also to have been applied because, unlike a man, a woman could not then claim benefit of clergy (i.e. that they were not subject to the secular courts). However, marital coercion survived the extension of benefit of clergy to women by statute in 1692, and its later abolition altogether in 1827. The concept eventually continued in the form of a presumption (at one stage irrebuttable and not applying to misdemeanours, but later rebuttable) that, if the husband was present at the time of the wife's commission of an offence, the wife had acted under his coercion, and thus had to be acquitted, unless the contrary could be proved by showing that the wife had demonstrated independence and initiative in the commission of the offence.

28. There were various calls for the reform of the law in the 19th century. In 1845 the Criminal Law Commissioners recommended the removal of the

presumption. In 1871 there was an outcry following the acquittal of a Mrs Torpey [12 Cox CC 45] on a charge of robbery of diamonds from a jeweller who she had lured to the house where the robbery was committed, and when she had taken an active part in the robbery itself. It was against that background that in 1879 the Criminal Law Commissioners also recommended, in s.23 of their Draft Code, that the presumption be abolished. Nevertheless, nothing was changed.

29. There were, however, other changes of very considerable significance at the end of the 19th century and the beginning of the 20th – including the Married Women's Property Act 1882, the removal (in 1891) of a husband's right to control his wife by physical chastisement, the Criminal Evidence Act 1898 (which permitted defendants to give evidence in their own defence), the Representation of the People Act 1918 (which finally gave women the right to vote), and the Sex Disqualification (Removal) Act 1919.

30. There was a further public outcry in 1922 following the directed acquittal by Darling J of a Mrs Peel (who was the daughter of a Baronet and charged with fraud) because of the inability of the prosecution to rebut the presumption at a trial in the Central Criminal Court (see *The Times* 8 March 1922). In the result, later that year, the highly distinguished Avory Committee recommended the abolition of the defence altogether. That was part of the backdrop to the passage of what became s.47 of the 1925 Act through Parliament. However, see paragraph 5 above, only the presumption was abolished, and the defence was continued in respect of all offences save murder and treason, with a persuasive burden on the defendant on the balance of probabilities. It appears that the policy upon which the legislation was founded was the view that the relationship between husband and wife was substantially different to any that existed between others, and that therefore it was not unreasonable to allow married women to defend themselves by proving marital coercion.

31. The Law Commission proposed the entire abolition of the defence in both 1977 and 1993 (when the Commission also recommended that the burden of

proof in relation to duress should be on the defendant, rather than the burden of disproof being on the prosecution beyond reasonable doubt, and that no breach of Article 6(2) would be involved in such a change). In 2006 the Law Commission recommended that the defence of duress should be extended to cover both murder and attempted murder, and that (in such cases) the burden of proof should be on the defendant - which would not, it was again suggested, involve a breach of Article 6(2). None of these proposed reforms have been implemented.

32. The defence of marital coercion was introduced in Northern Ireland by s.37 of the Criminal Justice Act 1945 (which was in the same terms as the 1925 Act). The defence has, it appears, never existed in Scotland, has been abolished in Canada and New Zealand, but continues to exist in many other jurisdictions.

33. In *DPP for Northern Ireland v Lynch* (above) Lord Wilberforce (at p.684 D/G) observed that there was considerable obscurity as to the meaning of coercion in s.37 of the 1945 Act, but noted that Professor Glanville Williams had observed that it could be regarded as an incomplete statement of the common law which still existed to supplement its deficiency. Lord Simon (at pp. 693 E/G & 694 C/F) observed that coercion in its popular sense denoted an external force which could not be resisted, and which impelled its subject to act otherwise than they would wish. He further observed that whilst the exact scope and effect of the legislation, and its interrelationship with duress, was obscure in the extreme, the resultant state of mind was the same in both cases – albeit that duress was limited to certain physical threats, whilst coercion was concerned with any type of force which overbore the individual's will. Lord Edmund-Davies (at p.713 A/C) indicated that he also favoured Professor Glanville-Williams' view.

34. In *Ditta* (above) Lord Lane CJ observed that coercion was concerned with physical, moral, psychological or mental processes being brought to bear on the wife.

35. In *Shortland* (above) the court decided, amongst other things, that the burden on the defendant was one of proof on the balance of probabilities (p.117E); that Lord Simon's speech in *Lynch* was a useful start as to what coercion entailed (p.117G); that there had to be a distinction between the defences of coercion and duress (p.118B/C); and that an appropriate formulation in directing the jury was that used at first instance in *Richman* (above) – namely that coercion did not necessarily mean physical force or the threat of physical force, it could be physical or moral, with the wife having to prove that her will was overborne by the wishes of her husband (which was different from having been persuaded out of loyalty) (p.118 A/B).

36. In *Cairns* (above) the court confirmed that participation out of loyalty was not enough, but that the pressure brought to bear on the wife could involve physical or moral force or emotional threats, and that the wife had to prove that her will was so overborne that she was forced to participate unwillingly in the offence.

37. In the trial of *Anne Darwin* in 2008 (above) Wilkie J directed the jury in accordance with *Shortland* and *Cairns* – including directing them that the burden of proof was on the defendant on the balance of probabilities. However, as I have already indicated, in that case too it appears that there was no argument to the effect that the burden should be read down.

38. It was against that broad background that the parties were in agreement, as set out in paragraphs 7-9 above, as to my being bound (in relation to the elements of the defence) by *Shortland* and *Cairns*, and thus as to what (expressed in language reflecting the authorities overall) coercion does and does not involve. It is thus clear that, although the mental element in marital coercion is entirely subjective, the requisite elements are tightly defined.

Duress and necessity

39. *Z (Hasan)* (above) was decided against the background of the recommendation by the Law Commission's in 1993 that a reverse persuasive burden should be imposed in relation to duress. At para. 20 of his speech Lord Bingham

recognised that duress is peculiarly difficult for the prosecution to investigate and to disprove beyond reasonable doubt. He also went on to observe (at para. 21 of his speech) that it was therefore unsurprising that duress had been defined within narrow limits, including the fact that the threat must be one to cause death or serious injury; the threat must be to cause that to the defendant, to his/her family, or to someone else close to him/her; the test is largely stated objectively by reference to the reasonableness of the defendant's perceptions and conduct, rather than by primary reference to the defendant's subjective perceptions; the criminal conduct must be directly caused by the threat(s); no evasive action could reasonably be expected to have been taken; and the defendant must not have voluntarily laid himself or herself open to duress. At para. 22 Lord Bingham further observed that, given the prevalence of the defence, and if policy choices were to be made, he was inclined (against the background of the burden of disproof being on the prosecution) towards tightening rather than relaxing the conditions to be met before duress could successfully be relied upon.

40. Indeed, subsequently in *A(RJ)* (above) the Court of Appeal emphasised that duress could not, and should not, be confused with pressure. It was observed that the circumstances in which people can be pressurised, or can believe that they are being pressurised, are infinite, but that duress involves pressure in extreme circumstances – namely threats of death or serious injury which could not reasonably be evaded.

41. In *Quayle* (above) the Court of Appeal underlined that necessity is concerned with force or compulsion via extreme circumstances (rather than, as in duress, human threats). The court indicated, however, that the arguments of Lord Bingham in *Z (Hasan)* (above), as to the need for the confinement of duress, applied equally in relation to necessity.

42. At para. 73 of the judgment in *Quayle* the court observed that:

"There is therefore considerable authority pointing towards a need for extraneous circumstances capable of objective scrutiny by judge and jury and as such, it may be added, when appropriate, met by other evidence. Lord

Bingham's dictum fits in this regard with the dicta in *Abdul – Hussain*, the decision in *Roger & Rose* and Lord Woolf CJ's dicta in *Shayler* speaking of a "fundamental ingredient" of "some external agency" as well as with the non-counsel decision in *Brown*".

43. At para. 75 of the judgment the court continued:

"….On the authorities (para. 73 above) the requirement of an objectively ascertainable extraneous cause has a considerable, and in our view, understandable, basis. It rests on the pragmatic consideration that the defence of necessity, which the Crown would carry the onus to disprove, must be confined within narrowly defined limits, or it will become an opportunity for almost untriable and certainly peculiarly difficult issues, not to mention abusive defences. On that basis, we consider that the Crown's first narrow point, namely that, for the defence of necessity of circumstances to be potentially available, there must be extraneous circumstances capable of objective scrutiny by judge and jury, is valid."

44. In *Selveratnam* (above) the court observed at para. 32 of the judgment that "…the defence of necessity may be regarded as duress by force of circumstance, as opposed to duress applied by direct threat". The court went on (at para. 34) to analyse the judgment in *Quayle* (above) observing that the court in that case had noted that the defence of necessity was only available if an accused could be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury, and that the defence required the court to be able to answer two questions, namely:

(1) Was the accused, or may he have been, impelled to act as he did because, as a result of what he reasonably believed to be the situation, he had good cause to fear that otherwise death or serious physical injury would result?

(2) If so, may a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by acting in the same way that the accused did?

45. Thus the various objective elements required in relation to both duress and necessity, imposed for the clear policy reasons I have outlined, are different to the largely subjective (albeit tightly defined) nature of marital coercion.

46. Hence it is not altogether surprising that in *Z (Hasan)* (above) Lord Bingham observed (at para. 19) that:

"…The only criminal defences which have any close affinity with duress are necessity, where the force or compulsion is exerted, not by human threats but by extraneous circumstances, and, perhaps, marital coercion under section 47 of the Criminal Justice Act 1925".

The arguments

47. In his original Skeleton Argument Mr Edis observed that, were it not for s.47 of the 1925 Act, the Prosecution would have submitted that the common law defence of marital coercion no longer existed – for the same reasons, broadly, as the House of Lords held in *R* (above) that the defence of irrevocable consent to sexual intercourse in marital rape no longer existed. Thus, but for s.47, the Prosecution would have argued that a defence of marital coercion, available to wives not husbands, not available to civil partners or to co-habiting couples, or (in the form of parental coercion) to children, is indefensible in the modern era, and that the only reason that it has not been abolished as recommended by the Law Commission in 1977 and 1993 is because it has no modern relevance - there having been only a handful of cases raising the issue over the last 88 years.

48. That said, and given that s.47 remains in force, Mr Edis recognised (as indicated in paragraphs 8 & 9 above) that:

(1) I am bound by the combination of *Shortland* and *Cairns* (albeit also assisted by the speech of Lords Wilberforce, Simon and Edmund-Davies in *DPP for Northern Ireland v Lynch*).

(2) Thus the defence of marital coercion is different to duress and necessity and its constituent elements are that, at the material time(s) the defendant was married; that her husband was present at the commission of the offence; and that he put pressure of some sort on her to commit the offence such that her will was overborne (in the

sense that she was impelled to commit the offence because she truly believed that she had no real choice but to do so).

(3) The element of the wife's will being overborne is entirely subjective.

(4) The examples that I have given in paragraph 10 above as to when a wife's will would not have been overborne are correct.

49. Thus Mr Edis accepted that he was precluded from seeking to persuade me, although he would clearly have wished to do so if he could, that for the policy reasons referred to in the authorities in relation to duress and necessity, and whether by statutory construction or by way of development of the common law, it is appropriate to import one or more objective elements into the defence of marital coercion.

50. Hence, as I have already touched on, the oral argument centred on the issue of whether the relevant burden in s.47 of the 1925 Act should continue to be a persuasive burden (as construed in *Shortland* and *Cairns*) or whether (given that compatibility with Article 6(2) was not considered in either of those cases) I was now required to read it down as being an evidential burden.

51. On this issue, Mr Edis accepted that the relatively recent case of *Williams* (above) sets out many of the relevant principles, including the identification of the four stages of consideration required, namely:

(1) Does s.47 of the 1925 Act, as a matter of ordinary interpretation under the law of England and Wales impose a legal (persuasive) burden on an accused?

(2) If it imposes a legal (persuasive) burden on an accused, does that involve an encroachment on the Article 6(2) right (the presumption of innocence) of the accused?

(3) If it does represent such an encroachment, is it to be justified as a necessary and proportionate derogation from the presumption of innocence?

(4) If it cannot be so justified, is s.47 to be read down, on an application of s.3 of the Human Rights Act 1998, so as to impose an evidential burden (only) on the accused?

52. As to the first stage, Mr Edis argued that, in the light of *Shortland* and *Cairns*, s.47 must be ordinarily interpreted as imposing a persuasive burden on the accused. That was not disputed.

53. As to the second stage, Mr Edis accepted that, as identified in para. 30 of the judgment in *Williams*, the trend of authority in recent times (see e.g. the speech of Lord Steyn in *Lambert v DPP* (above)) has been to look at such matters rather more broadly than arguments in the past, in some contexts, that when what might be called a statutory defence is provided by the relevant statute there can be no infringement of the presumption of innocence where all the constituent elements of the offence are required to be proved by the prosecution. Here, Mr Edis accepted, the current reverse persuasive burden means that a wife could be convicted when there was a reasonable doubt about whether she had been coerced by her husband, and thus a reasonable doubt as to whether she was morally blameworthy or not. Hence, rightly in my view, Mr Edis accepted that the persuasive burden in s.47 encroached on Ms Pryce's Article 6(2) rights.

54. Thus, as Mr Edis recognised, the crucial stage in this case is the third one – namely the consideration of whether the reverse burden can be justified as a necessary and proportionate derogation from the presumption of innocence.

55. Mr Edis argued that it can be so justified. In doing so he submitted that:

(1) Whilst the defence is not offence specific, and is thus capable of applying in relation to numerous offences (other than murder and treason) which carry a maximum sentence of life imprisonment, and to numerous other offences which also carry very substantial maximum terms, that ought not to result in a finding that any derogation from Article 6(2) is other than proportionate – after all, in *Lambert* [2002] QB 211 the Court of Appeal upheld the reverse persuasive burden involved in the partial defence to murder of diminished responsibility, and the later substantial amendment of s.2 of the Homicide Act 1957

by s.52 of the Coroners and Justice Act 2009 has retained that reverse persuasive burden.

(2) In any event, the defence also applies in relation to, and is most likely to arise in relation to, relatively minor offences, and therefore it is reasonable to consider whether the reverse burden can be justified as a necessary and proportionate derogation by reference to such offences rather than by reference to those at the top end of the scale of gravity.

(3) The defence of marital coercion is relatively easy for a wife to raise, but will typically be extremely difficult for the prosecution to disprove beyond reasonable doubt – not least because, as in this case, it will often involve the claim that only the husband and wife were present at the material time(s), the husband will be unlikely to be a prosecution witness, and hence it will be extremely difficult for the prosecution to prove that the husband was not present, yet alone to prove, on a purely subjective basis, that the wife's will was not overborne (in the sense that I have indicated).

(4) Hence all the policy reasons (referred to above) that have resulted in the confinement of duress and necessity by the imposition of objective elements (and have likewise resulted in the imposition of objective elements in the partial defence to murder of provocation and in its successor loss of control) provide a strong basis, absent such objective elements in marital coercion, for the continuance of the reverse persuasive burden. Otherwise the law will give wives a ready ability to evade otherwise deserved criminal liability across a wide spectrum of offences, and also fail properly to protect the rights of their victims.

(5) In addition, in a case where a wife fails to prove coercion, but the court takes the view that there was nevertheless an element of forcing by the husband, that can be appropriately reflected in the penalty imposed - thereby avoiding any injustice to the wife.

56. Mr Knowles QC, on the defendant's behalf, reminded me of the familiar passage at para. 28 of the judgment in *Salabiaku v France* (above):

"Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the contracting states to remain within certain limits in this respect as regards criminal law…. Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires states to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."

57. Mr Knowles also reminded me of the summary by Lord Bingham, at para. 21 of the judgment in *Sheldrake v DPP* (above) as to the effect of the Strasbourg Jurisprudence, as follows:

"The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The Convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirement of mens rea. But the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption. Security concerns do not absolve member states from their duty to observe basic standards of fairness. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case."

58. Mr Knowles further pointed out that in *Johnstone* (above), at para. 49, Lord Nichols said that there had to be a "compelling reason why it is fair and reasonable to deny the accused person the protection normally guaranteed to

everyone by the presumption of innocence", and that at paras. 50 – 51 he went on to say that:

"The relevant factors to be taken into account when considering whether such a reason exists have been considered in several recent authorities, in particular the decisions of the House in *R v Director of Public Prosecutions ex parte Kebiline* [2002] AC 326 and *R v Lambert* [2002] 2 AC 545. And there is now a lengthening list of decisions of the Court of Appeal and other courts in respect of particular statutory provisions. A sound starting point is to remember that if an accused is required to prove a fact on the balance of probability to avoid conviction, this permits a conviction in spite of the fact-finding tribunal having a reasonable doubt as to the guilt of the accused: see Dickson CJ in *R v Whyte* (1988) 51 DLR (4^{th}) 481, 493. This consequence of a reverse burden of proof should colour one's approach when evaluating the reasons why it said that, in the absence of a persuasive burden on the accused, the public interest will be prejudiced to an extent which justifies placing a persuasive burden on the accused. The more serious the punishment which may flow from conviction, the more compelling must be the reasons. The extent and nature of the factual matters required to be proved by the accused, and their importance relative to the matters required to be proved by the prosecution, have to be taken into account. So also does the extent to which the burden on the accused relates to facts which, if they exist, are readily provable by him as matters within his own knowledge or to which he has ready access.

In evaluating these factors the court's role is one of review. Parliament, not the court, is charged with the primary responsibility for deciding, as a matter of policy, what should be the constituent elements of a criminal offence. I echo the words of Lord Woolf in *Attorney–General of Hong Kong v Lee Kwong-Kut* [1993] AC 951, 975: 'In order to maintain the balance between the individual and the society as a whole, rigid and inflexible standards should not be imposed on the legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime.' The court will reach a different conclusion from the legislature

only when it is apparent that the legislature has attached insufficient importance to the fundamental right of an individual to be presumed innocent until proved guilty."

59. Against that background, Mr Knowles submitted, amongst other things, that:

(1) Notwithstanding the views of the Law Commission, and the apparent views of the judiciary and most practitioners (see the speech of Baroness Hale at para.72 in *Z (Hasan)* above) Parliament has not reversed the burden of proof in relation to duress, and there is support for the proposition that to do so would not be compatible with Article 6(2) – see e.g. Lord Bingham at para.20 in *Z (Hasan)*, Smith and Hogan, Criminal Law (13th Edition) p. 345 footnote 39, Professor Horder's article (above) at p.336, and (Professor) McCoy at para.193.

(2) In any event, whilst the arguments in favour of a reverse burden in relation to duress are based, in significant part, upon the premise that the facts upon which duress is typically founded are not part and parcel of the incident during which the offence was committed, but will typically have happened well before, and quite separately from, the actual commission of the offence that the prosecution must know about and prove, with consequential difficulty in disproving the unilateral claims of the defendant, that is not the case in marital coercion where the husband must be present at the commission of the offence if the defence is to apply at all.

(3) In that regard marital coercion is closer to self-defence than duress, and it is beyond sensible argument that self-defence provides no insuperable difficulties of disproof (albeit that it contains an objective element).

(4) The position is much the same in relation to provocation / loss of control where, despite the frequent need in such cases to examine a history of events between husband and wife prior to a killing, there are no great difficulties that arise from the burden of disproof being on the prosecution – hence the retention, in relation to loss of control, of only an evidential burden on the defendant and the burden of disproof being

on the prosecution – see s.54(5) of the Coroners and Justice Act 2009 (albeit that, again, objective elements are involved).

(5) The Prosecution's reliance on the approval by the Court of Appeal in *Lambert* (above) of the reverse persuasive burden in diminished responsibility is misconceived - in that the very particular reasons upon which the approval was based, including the need for expert evidence and the impossibility of prosecution experts being able to examine the defendant without his consent, are of no application in marital coercion, and nor are the underlying reasons (which are much the same) for the reverse persuasive burden in insanity of any relevance either.

(6) Rather, looked at simply, the defence of marital coercion relates to a defendant's state of mind at the time when she committed the offence of which she is accused and thus, like proof of mens rea, presents no special problem for a prosecution – particularly because the evidential burden which a reading down would result in will almost inevitably result in the defendant having to give evidence as to her state of mind and other relevant circumstances, which would be susceptible to investigation and challenge by the prosecution during the trial process in the ordinary way (as it has been in this case).

(7) In any event, the Prosecution have greatly overstated the practical difficulties involved if s.47 is read down as providing only an evidential burden – not least in view of the following:

(a) If the defendant has revealed the defence in interview and/or set out in her Defence Case Statement particulars of the matters of fact on which she intends to rely for the purposes of her defence, as required by s.6A(1)(ca) of the Criminal Procedure and Investigations Act 1996 ("the 1996 Act"), then the Prosecution will have ample opportunity to investigate the defence and to deal with it.

(b) If the defendant has failed to mention the defence or any significant aspect of it, in interview with the police, that can be the subject of telling cross-examination, comment and adverse

inference – see e.g. s.34 of the Criminal Justice and Public Order Act 1994

(c) Likewise if there has been a failure to mention in the Defence Case Statement matters of fact later relied upon - see e.g. s.11 of the 1996 Act.

(d) By virtue of s.6C of the 1996 Act the accused must give notice of any witnesses that she proposes to call at trial in support of the defence, thereby giving the prosecution ample opportunity to investigate any such witness's evidence.

(e) Any failure to comply with the provisions of s.6C may, with leave, be the subject of adverse comment – see s.11 of the 1996 Act.

(f) If there is to be any attack on the character of the husband in relation to events which are other than to do with the alleged facts of the offence with which the defendant is charged, and the husband is not a co-defendant in the trial, then (in accordance with s.100(4) of the Criminal Justice Act 2003) an application for leave must be made which will (again) give the prosecution ample opportunity to investigate and deal with any resultant issues.

(8) The Prosecution's overstatement of the practical difficulties is further and graphically illustrated by the facts of this case, in that, although the defendant made no comment throughout her interviews by the police, the prosecution have so much evidence that they have been able to attack the defence on five alternative bases, namely that Mr Huhne was not present at the time of the commission of the offence; that the defendant's claim that she was coerced is a complete invention; that she has lied on oath to such an extent that that her whole account should be rejected; that, if she has not lied, she has exaggerated to such an extent that her account of coercion should be rejected; that, in any event, even on her own account her will was not overborne, and she simply made a choice for her own purposes.

Discussion

60. Clearly, it is no part of my function to express any view, one way or the other, as to the merits or otherwise of the continuance of the defence of marital coercion in our law. Nor am I in a position, being bound in particular by the decisions in *Shortland* and *Cairns*, to consider whether the elements of the defence require development – in particular by the addition of one or more objective elements. However, as the parties agree, absent binding (or indeed any) consideration in the cases cited above of the issue as to whether the reverse persuasive burden in s.47 is justified as a necessary and proportionate derogation from the presumption of innocence provided by Article 6(2), I must decide that issue .

61. To re-state the obvious, the defence of marital coercion applies to all offences other than murder and treason. Thus, rather than being restricted to a particular offence or to just a few offences, it is capable of applying to numerous very serious offences carrying very long maximum terms of imprisonment, as well as to minor offences. Indeed the maximum sentence for the offence of doing acts tending and intended to pervert the course of justice, with which this defendant is charged, is one of life imprisonment – albeit that, if it ever comes to it (and without binding myself) any sentence imposed upon Ms Pryce is more likely to be measured in months than years.

62. Equally obviously, albeit that the state of mind involved is purely subjective, the defence is actually tightly defined and thus, in order to apply requires that:

(1) The defendant was married at the material time(s)

(2) The defendant committed the offence(s) **only** because:

(a) The husband was present at the material time(s); and

(b) He put pressure of some sort on her in such a way that her will was overborne (i.e. overcome) - in the sense that she was impelled (i.e. forced) to commit the offence because she truly believed that she had no real choice but to do so.

63. The tightness of the definition is emphasised by the fact that the authorities make clear that a wife's will is not overborne if she is persuaded by force of argument to choose (albeit reluctantly) to commit the offence, or if she is

persuaded (albeit reluctantly) to commit the offence out of love for, or loyalty to, her husband or family, or to avoid inconvenience (whether to herself or others). Obviously, the tighter the definition of a defence, the more readily it can be disproved.

64. There is also an obvious irony in this particular case in the Prosecution basing its justification, in large part, for the continuance of the reverse persuasive burden on the difficulty of disproof when, as a result of the investigation, the Prosecution has sufficient evidence at its disposal, despite the defendant's failure to answer any questions in interview, to dispute the defence on no less than five alternative bases.

65. As Lord Bingham made clear in *Sheldrake v DPP* (above) the task of the court is never to decide whether a reverse burden should be imposed on a defendant, but always to assess (in the context of the particular case) whether a burden enacted by Parliament unjustifiably infringes the presumption of innocence.

66. The matters that I must take into account in that regard are conveniently summarised in the passages that I have cited from the speeches of Lord Bingham in *Sheldrake v DPP* and Lord Nicholls in *Johnstone* at paragraphs 57 & 58 above.

67. I did not find any significant assistance by reference to the reverse persuasive burden that applies in the partial defence of diminished responsibility in cases of murder. As indicated above, it has been upheld for very particular reasons, and (in my view) they have no application to marital coercion. The position is very much the same in relation to the partial defence of suicide pact survival in cases of murder, where in *Attorney-General's Reference (No.1 of 2004)* (above) the reverse burden was upheld because of problems of disproof arising from the fact that that the other person involved in the suicide pact would necessarily be dead, and in order to protect potential victims from murder disguised as a suicide pact.

68. Nor, although it does not involve a reverse burden, did I find any significant assistance from the partial defence to murder of provocation or (as it is now is) loss of control, beyond the fact that, taking loss of control as my example, Parliament has thought it appropriate to tightly define the defence (in that instance with the inclusion of objective elements), and then (against that background) to place only an evidential burden on the accused – notwithstanding the fact that cases in which the defence is raised often involve husbands and wives and the need to consider the history of the relationship.

69. Nor, clearly, is the reverse burden in the general defence of insanity of any significant assistance either in the resolution of the issue that I must decide.

70. The position in relation to marital coercion is that the current reverse persuasive burden permits a conviction in spite of the fact finding tribunal having a reasonable doubt as to the moral blameworthiness, and thus as to the guilt, of the accused. Albeit that the prosecution must first prove the actus reus and any mens rea in relation to the relevant offence, that must colour my approach to the reasons why it is said that, in the absence of a persuasive burden on the defendant, the public interest will be prejudiced.

71. It is also a defence the failure of which may lead to extremely serious punishment, and I therefore reject the Prosecution argument that I should view it only through the prism of minor offences and hence of relatively modest punishment – the more so as the offence with which Ms Pryce is charged is one that carries a theoretical maximum term of life imprisonment. Hence compelling reasons are, it seems to me, required to justify the continuance of the reverse burden.

72. The principal reason advanced by the Prosecution is difficulty of disproof - both factually and in the absence of the sort of objective elements that are to be found in the defences of duress and necessity.

73. However, whilst I am not persuaded by the argument of Mr Knowles that the evidential issues in relation to marital coercion are likely to be confined to the

time of the offence itself (the defendant's reliance, in this case, on matters prior to that time demonstrate the obvious potential for a wider canvas), I am nevertheless wholly persuaded that the Prosecution's arguments as to the difficulty of disproof are significantly overstated.

74. As to difficulty of factual disproof, and as I have already indicated, the evidence available to the prosecution in this case is actually very substantial – and that despite the defendant having made no comment during extensive police interviews. Equally, albeit that the facts relevant to marital coercion will be within the knowledge of the defendant, and it may be that (for whatever reason) the husband will not be a co-defendant at trial, I agree with the arguments of Mr Knowles (as summarised at paragraph 59(6) & (7) above) that an evidential burden will almost inevitably result in a defendant having to give evidence which will be susceptible to investigation and challenge, and that there is, nowadays, a significant armoury of tools available to the Prosecution to ensure that it is not ambushed, or to enable it deal with an ambush if one is attempted – see e.g. *Penner* (above) and the Criminal Procedure Rules.

75. It also seems to me that there is considerable force in Mr Knowles's argument as to the analogy with the Prosecution typically having no insuperable difficulty in proving mens rea or disproving self-defence (albeit that the latter includes an objective element).

76. The clear purpose of the objective elements in the defences of duress and necessity (which, like marital coercion, apply across a large range of offences) is to tightly confine the defences within limits that make it very difficult for defendants to seek to rely upon them to obtain perverse acquittals, whilst at the same time respecting the presumption of innocence by putting only an evidential burden on the defendant and maintaining the burden of disproof on the prosecution.

77. Whilst marital coercion lacks any objective element in relation to the defendant's state of mind, it is nevertheless (as I have already underlined)

tightly defined, and thereby (in my view) also appropriately restrictive of a wife's ability to seek to rely upon it to obtain a perverse acquittal – the more so given the effective lack of ability to ambush the prosecution these days. I am not persuaded by the Prosecution argument that the lack of a persuasive burden will give wives a ready ability to evade otherwise deserved criminal liability, and will also fail properly to protect their victims. Nor, in my view, does the Prosecution argument as to the avoidance of injustice by mitigation of sentence make up for the deficiencies in its other arguments.

78. Against that overall background, and having examined all the facts and circumstances of marital coercion as it applies in this case, including the extent and nature of the matters to be proved and their importance relative to the matters required to be proved by the Prosecution, I concluded that the Prosecution had failed to put forward sufficiently compelling reasons to persuade me that the substance and effect of the reverse burden in s.47 of the 1925 Act is reasonable (proportionate), whereas the Defence had persuaded me by the force of their argument (and contrary to my initial inclination) to reach the ultimate conclusion that the legislature had attached insufficient importance to the fundamental right of an individual to be presumed innocent until found guilty.

79. Accordingly I concluded, in relation to the third stage of consideration identified in *Williams* (above) that the reverse burden in s.47 could not be justified as a necessary and proportionate derogation from the presumption of innocence.

80. Addressing the fourth and final stage of consideration I therefore concluded that, in all the circumstances, it was appropriate to read s.47 down so as to impose an evidential burden (only) on Ms Pryce.

Conclusion

81. It was for those reasons that I ruled in favour of the Defence argument.

Sweeney J

7 March 2013