IN THE HIGH COURT OF AUSTRALIA **No: A15 of 2011**

ADELAIDE REGISTRY

ON APPEAL FROM THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA

BETWEEN: **P, GA**

Appellant

10

v.

THE QUEEN

Respondent

20 **APPELLANT'S SUBMISSIONS**

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: CONCISE STATEMENT OF ISSUES

2.1. The first issue is whether a common law rule should be created (as was done in *R v L* 30 (1991) 174 CLR 379) to the effect that, whenever there is a judicial change to (or a fresh interpretation of) the common law, it does not have the substantive effect of criminalising conduct which previously was not criminal.

The reasoning in *R v L* (at 390), concerned with the fairness of the common law and the fact that it should not be permitted to become "out of keeping with the view society now takes", is relied on in support of this contention.

This issue includes the "prospective overruling" argument.

40 2.2. The second issue is whether the appellant is liable to be found guilty of the offences of rape of his wife in 1963, and in particular whether this Court's decision in *R v L* is or is not authority for the proposition that a husband is liable to be found guilty of the rape of his wife regardless of how long ago the alleged offence may have occurred.

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2.3. The third issue is whether the development of the common law as to the offence of rape in South Australia was incapable of further development following the enactment of the *Criminal Law Consolidation Act Amendment Act 1976 (SA)* (No.83 of 1976).

PART III: SECTION 78B NOTICES

3. The appellant considers that section 78B notices are required in this appeal.

PART IV: REPORTED REASONS FOR THE JUDGMENT IN THE COURT BELOW

4. The reasons for the judgment of the Court below are reported at (2010) 109 SASR 1.

PART V: RELEVANT FACTS

5.1 The appellant (Mr P) was charged, on an Information dated 5 July 2010, with a number of offences, including two counts of rape contrary to section 48 of the *Criminal Law Consolidation Act 1935 (SA)*.

5.2 The first count of rape was alleged to have occurred between the 22nd of March 1963 and the 25th of March 1963 and the second count on about the 14th of April 1963.

5.3 The alleged victim was Mrs P, the then wife of Mr P. They were lawfully married in September 1962 and at the time of the alleged offences were cohabiting as husband and wife. There were no court orders, agreements or undertakings affecting the marital relationship.

PART VI: APPELLANT'S ARGUMENT

6.1 A common law rule should be created (as was done in *R v L* (1991) 174 CLR 370) to the effect that, whenever there is a judicial change to (or a fresh interpretation of) the common law, it does not have the substantive effect of criminalising conduct which previously was not criminal.

The reasoning in *R v L* (at 390), concerned with the fairness of the common law and the fact that it should not be permitted to become "out of keeping with the view society now takes", is relied on in support of this contention.

This issue includes the "prospective overruling" argument.

6.2 The appellant contends that, at the time of the commission of the alleged offences in 1963, the common law, in both England and Australia, had not developed to such an extent as to provide for rape to occur by a husband of his wife, except in very limited circumstances which were not applicable to him.

The appellant relies on the use of the word "now" in the crucial passages in *R v L*. Attitudes in 1963 (when homosexuality was still a crime, when there was no such thing as "sexual harassment", when we still had the "white Australia policy", when Aboriginals were not counted as part of the population for certain purposes, when

there was no prohibition on racial discrimination and when divorce only occurred on proof of matrimonial fault (not including 12 month's separation)), were very different to attitudes in 1991. The "marital rape" bastion fell well after all of these.

Set out below is a summary of the relevant case law both before and after the date of the commission of the alleged offences.

Also set out below is a summary of the law in the States where the law had been codified.

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The origin of the common law position - the English authorities

6.3 Sir Matthew Hale, in his History of the Pleas of the Crown, 1st Edition (1736) Vol.1, Ch.58, p.629, stated the common law position to be as follows:-

> *"But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind to her husband which she cannot retract."*

6.4 In 1888, Hale's pronouncement of the common law was accepted as sound by a
20 majority of the judges sitting as the Court of Crown Cases Reserved in *R v Clarence.* [1] However, the matter did not involve a charge of rape and the comments were *obiter dicta.*

6.5 Between 1736 and 1948, there are no recorded cases in England of a husband being prosecuted for raping his wife.[2]

6.6 Hale's pronouncement was modified to provide for some limited exceptions in situations where the parties had separated.[3] But in a series of cases during the 1970s and 1980s the pronouncement, with those exceptions, was reaffirmed.[4]

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6.7 In England the common law was altered by the Court of Appeal in March 1991 and that Court's decision upheld by the House of Lords in *R v R* [5] on 23 October 1991, which held that there was no longer a rule of law that a wife was deemed to have consented irrevocably to sexual intercourse with her husband and therefore a husband could be convicted of the rape of his wife.

6.8 In deciding to alter the common law rule, the Court of Appeal did so having considered *"today[s] acceptable behaviour"* and *"the true position of a wife in present day society".*[6] It did not question the correctness of the decisions of English

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[1] (1888) 22 QBD 23
[2] *R v Miller* [1954] 2 QB 282 at 286 per Lynskey J
[3] *R v Clarke* [1949] 2 All ER 448, *R v O'Brien* [1974] 3 All ER 663
[4] *R v Cogan & Leak* [1976] 1 QB 217, *R v Steele* (1976) Cr App R 22; *R v Steele* (1976) Cr App R 22; *R v Roberts* [1986] Crim LR 188; *R v Kowalski* (1988) 86 Cr App R 339
[5] [1992] 1 AC 599
[6] [1992] 1 AC 599 at 610

courts of the 1950s, 1970s and 1980s, but accepted the exceptions recognised to the rule in those cases as a legitimate application of the flexibility of the common law.[7]

6.9 The appellant contends that the views expressed by both the Court of Appeal and the House of Lords in *R v R* support the view that in 1963 the common law of England, albeit with some qualifications, still accorded with Hale's proposition.

South Australia

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6.10 In 1963 rape was a common law offence in South Australia. Section 48 of the Criminal Law Consolidation Act 1935 (SA) provided:-

> *"Any person convicted of rape shall be guilty of a felony, and liable to be imprisoned for life and may be whipped."*

6.11 Whether or not a person had committed the offence of rape was determined by the rules laid down at common law.

20 6.12 There are no known reported cases in South Australia dealing with the issue of marital rape before 1975. *Obiter dicta* in several cases after that time accepted the correctness of Hale's proposition.[8]

The other Australian common law jurisdictions

6.13 In both Victoria and New South Wales the common law was stated to be the same as that stated by the courts in the United Kingdom.[9] The Supreme Court of Tasmania also considered those statements to reflect the common law position.[10]

The position in the Code States of Australia

30 6.14 In Queensland, Western Australia and Tasmania the relevant sections of the Criminal Codes[11] defined the crime of rape so as to exclude carnal knowledge of a person who is the wife of the accused.

Canada and New Zealand

6.15 Canada's Criminal Code originally defined rape to include the spousal exemption.[12] When the Criminal Code was updated in 1970, the immunity was retained. In New Zealand the position appears to have been the same as in England.[13]

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[7] [1992] 2 AC 599 at 610 See also *CSR Ltd v Eddy* (2005) 226 CLR 1 at [95] per McHugh J "...that the utility of the common law requires it to be constantly updated to serve the current needs of society."

[8] *R v Brown* (1975) 10 SASR 139 at 141 per Bray CJ and 153 per Wells J, *R v Wozniak & Pendry* (1977) 16 SASR 67 at 71 per Bray CJ, *R v Sherrin (No 2)* (1979) 21 SASR 250 at 252 per King CJ, *Questions of Law Reserved (No. 1 of 1993)* (1993) 59 SASR 214 at 230 per Perry J

[9] *R v McMinn* [1982] VR 53 at 55 per Starke ACJ, 57-59 per Crockett J and 61 per Mc Garvie J; *R v C* (1981) 3 A Crim R 146 at 148-150 per O'Brien CJ

[10] *R v Bellchambers* (1982) 7 A Crim R 463 at 465-466

[11] Section 347 of the Criminal Code Act 1899 (Qld); Section 325 of the Criminal Code 1913 (WA); Section 185 of the Criminal Code Act 1924 (Tasmania)

Text Book References

6.16 Further, an examination of the text books reveals a similar position, namely the acceptance of Hale's proposition that a husband could not be charged with the rape of his wife, other than in the limited circumstances described in the case law.[14]

Legislative Reforms in South Australia and the other States

6.17 In March 1976 the Criminal Law & Penal Methods Reform Committee of South Australia provided a Special Report to the Attorney-General upon the law relating to Rape and Other Sexual Offences. The Committee was chaired by the Honourable Justice Mitchell.

6.18 The Committee accepted the pronouncements as to the position at common law stated in the English authorities [15] and recommended amendments to the legislation that accorded with the development of the common law in England to that point in time.

6.19 In 1976, the South Australian Parliament amended the *Criminal Law Consolidation Act 1935*.[16] The Parliament went further than the Committee's recommendations, but in doing so, chose not to remove, entirely, the presumption as to consent within marriage.[17]

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[12] Criminal Code, Ch. 29, 266 (1892)

[13] Rape Law Reform Rosemary Barrington Women's Studies Int Forum, Vol 9 No. 1 pp57-61 (1986); The injustice of the marital rape exemption: a study of common law countries, Sonya Adamo, (1989) 4 American Univ. J. Int'l Law & Policy 555

[14] *Archbold, Pleading, Evidence & Practice* 35th Edition 1963 at [2880]; *Halsbury's, The Laws of England* 3rd Edition Vol.10 (1955) at [1437]; *Stephen, A Digest of the Criminal Law (Indictable Offences)* 1947 at 273; *Russell on Crime* Vol.1 12th Edition (1964) at 708; *Kenny's Outlines of Criminal Law* 18th Edition (1962) at 192; *Wigmore, Evidence in Trials at Common Law* Vol. 8 (1961) at 246; *Howard, Australian Criminal Law* 1st Edition (1965) at 145-147; *Harris's Criminal Law* 12th Edition (1960) at 244; *Brett &Waller Cases & Materials in Criminal Law* (1962) at 219-226; *Roulston, Introduction to Criminal Law in NSW* (1975) at [703]-[705]; *Bourke, Annotated Acts Victoria* (1959) at p43; *Hamilton & Addison, Criminal Law and Procedure NSW* 6th Ed. (1956) at 88; *Smith & Hogan, Criminal Law* 6th Ed. (1988) at 430-432; *Finlay, Family Law in Australia* (1972) at 150, 305, 399

[15] Paragraphs 6.2 and 6.2.1 of the Committee's recommendations

[16] *Criminal Law Consolidation Act Amendment Act 1976*, sections 4 & 12, Proclaimed 9 December 1976

[17] "*73. (1) For the purpose of this Act, sexual intercourse is sufficiently proved by proof of penetration.*

(2) No person shall, by reason of his age, be presumed incapable of sexual intercourse.

(3) No person shall, by reason only of the fact that he is married to some other person, be presumed to have consented to sexual intercourse with that other person.

(4) No person, by reason only of the fact that he is married to some other person, be presumed to have consented to an indecent assault by that other person.

(5) Notwithstanding the foregoing provisions of this section, a person shall not be convicted of rape or indecent upon his spouse, or an attempt to commit, or assault with intent to commit, rape or indecent assault upon his spouse (except as an accessory) unless the alleged offence consisted of, was preceded or accompanied by, or was associated with –

(a) assault occasioning actual bodily harm, or threat of such an assault, upon the spouse;

(b) an act of gross indecency, or threat of such an act, against the spouse;

(c) an act calculated seriously and substantially to humiliate the spouse, or threat of such an act; or

(d) threat of the commission of a criminal act against any person."

6.20 In 1992, the *Criminal Law Consolidation Act 1935(SA)* was further amended [18] and finally abolished a husband's immunity from prosecution for the rape of his wife in South Australia.

6.21 Each State and Territory legislated to modify the law to reflect the common law developments that had taken place in England and later totally to abolish the immunity.[19]

6.22 That the Legislatures of each State and Territory had acted in this way is a further indication that the state of the common law, at that time, was still to recognise the immunity.[20]

Legislative reforms in New Zealand, Canada and England

6.23 The marital rape exemption was abolished from 1 February 1986 in New Zealand [21] and from 1983 in Canada. In 1994 the UK Parliament passed legislation [22] which effectively removed the common law presumption.

R v L

6.24 The common law presumption of consent to sexual intercourse by a spouse was considered by this Court in *R v L,* [23] with judgment being delivered on 3 December 1991.

6.25 The reason for the Court embarking on a consideration of Hale's proposition was to examine the correctness of his statement in relation to the concept of an irrevocable consent to intercourse by a wife upon marriage.

6.26 The Court compared Hale's statement with the laws of marriage, as they had developed in the ecclesiastical and matrimonial courts, in order to determine what was encompassed in the concept of conjugal rights and concluded that Hale's proposition was in conflict with those statements.

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[18] Act No.9 of 1992 which was proclaimed on 14 April 1992 struck out subsection (5) of section 73 and substituted the following subsection:-

"(5) For the purposes of the provisions of this Act dealing with sexual offences, agreement to an act on the basis that it is necessary for the purpose of medical diagnosis, investigation or treatment, or for the purpose of hygiene, is not consent to that act for another purpose."

[19] *Criminal Code 1913* (WA) s325 was amended on 9 December 1976 and later repealed on 1 April 1986 to abolish the immunity; *Crimes Act 1958* (Vict) s62 was replaced from 1 March 1971 and later amended from 22 January 1986 to abolish the immunity ; *Crimes Act 1900* (NSW) s61A(4) was amended from 14 July 1981 to abolish the immunity; *Criminal Code Act 1924* (Tas) s185 was amended to abolish the immunity from 26 November 1987; *Criminal Code Act 1899* (Qld) s347 was amended to abolish the immunity from 3 July 1989

[20] *CSR Ltd v. Eddy* (2005) 226 CLR 1 at [54] per Gleeson CJ, Gummow and Heydon JJ

[21] *Crimes Act 1961* (NZ) s128(4); *Criminal Code* (Canada), Chapter 125, s246.8

[22] *Criminal Justice and Public Order Act 1994* (UK) s142

[23] (1991) 174 CLR 379

6.27 The majority of the Court considered that it was appropriate to reject the existence of Hale's proposition "*as now being part of the common law of Australia*" [24] and later added, that *"if it ever was the common law that by marriage a wife gave irrevocable consent to sexual intercourse by her husband, it is no longer the law."* [25]

6.28 This statement of the law by the Court suggests either a change to, or a fresh interpretation of the common law. However, it does not directly address the issue of the manner in which any such change or re-interpretation is to operate.

10 The declaratory theory of the common law: its content

6.29 According to the declaratory theory of the common law, when judges declare the common law, they are not making law but are really only "revealing" what the law is and has always been [26] - this part of the theory has natural law overtones. This aspect of the declaratory theory is also said to have it origins in the writings of Blackstone [27] and Hale. [28] It follows that, when the law is declared, it will apply to all cases regardless of how long ago the incidents giving rise to those cases may have taken place.

20 6.30 But judges of ultimate appellate courts have for some time rejected this component of the theory as something of a "fairytale."[29]. The views expressed by Lord Reid have been mirrored by extra-judicial writings in this country and elsewhere.[30]

6.31 The declaratory theory is not itself a rule of the common law that requires immutable application. [31] Indeed there appears to be no case which says so, but it is one way of explaining or accounting for the role or approach of judges in the application and formulation of the common law's rules.[32]

6.32 As a "theory" it may still have some utility or role to play but as a means of
30 determining the answer in a given case, it is lacking the normative content and precision of other rules of law.

In any event, it is necessary to see if this Court has adopted the view that, whenever the common law changes, it must operate retrospectively, even if this results in the

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[24] At 389
[25] At 390
[26] See Barwick CJ in *Atlas Tiles v Briers* (1978) 144 CLR 202 at 208 and *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 586 and also Simpson, "The Common law and legal theory" in Simpson (ed) Oxford Essays in Jurisprudence (2nd series) (1973) p777.
[27] Blackstone's Commentaries (1765) vol 1, pp 69-71.
[28] Hale's Common Laws of England 6th ed. (1820) p. 90 referred to by Lord Goff of Chieveley in *Kleinwoirt Benson Ltd v Lincoln CC* [1999] 2 AC 349 at 377.
[29] Lord Browne-Wilkinson in *Kleinwoirt Benson Ltd v Lincoln CC* [1999] 2 AC 349 at 359 referring to Lord Reid writing extra-judicially and see also Lord Lloyd of Berwick at 394B.
[30] See for example, Cardozo, The Nature of the Judicial Process, Lectures III and IV, published by Legal Classics Library 1982.
[31] *Giannarelli v Wraith* (1988) 165 CLR 543 at 586.3 per Brennan J.
[32] See *Giannarelli v Wraith* (1988) 165 CLR 543 at 584-585 per Brennan J and *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 267 per Brennan J.

possible imposition of criminal liability. The short answer is that there has been no pronouncement to that effect.

The declaratory theory and the cases

6.33 The position revealed by case law is more complex than the declaratory theory of the law postulates.[33] It is possible to attempt something of a grouping of cases.

6.34 For example, sometimes a court will declare what the common law rule is for civil cases and what it has always seemed to be because the underlying principle has come to light after a number of cases have been decided.[34] From that point in time onwards, the principle is applied to the resolution of all cases coming before the courts, unless a statute or some other rule of the common law requires otherwise.

6.35 On other occasions, judges recognise that social values have changed and that the legal rules enunciated and followed for a considerable period of time no longer respond to present social values and consequently the common law rule ought to be re-expressed to take account of such matters, or be declared to be no longer correct, [35] or that it is for Parliament to formulate a new rule.[36] In such circumstances, the old rule is not applied to new cases coming before the courts, but may still be applied to cases that were before the courts for resolution at an earlier point in time.

6.36 On other occasions, judges have recognised that the legal rule as formulated will work an injustice unless it admits of some exception(s) and will accordingly formulate an exception.[37] The exception can then be applied to new cases coming before the courts.

6.37 The underlying or guiding principle would appear to be that where the application of a newly formulated common law rule will work an obvious injustice in the case before the court the new rule is not applied. The circumstances in which such an injustice will manifest itself cannot be identified in advance because of the complexity of human affairs and for that reason the underlying rule or principle can only be expressed at a certain level of abstraction, with its normative content being worked out over time.

The declaratory theory is an approach not a rule of the common law

6.38 The move away from the application of the declaratory theory is a recognition by judges that the development of the common law and its principles or rules cannot be simply explained by adherence to such a theory. Indeed, the genius of the common law lies not in its blind adherence to theories, but in its incremental or case by case approach to the development of legal principles or rules, the debate in the cases about the content of such principles or rules, the priniciple's or rule's adaptation to changing

[33] *Giannarelli v Wraith* (1988) 165 CLR 543 at 584-585 per Brennan J.
[34] For example, *Atlas Tiles Ltd v Briers* (1978) 144 CLR 202 at 208 per Barwick CJ; and also *Dugan v Mirror Newspapers* (1978) 142 CLR 583 at 586 per Barwick CJ.
[35] For example, *The Queen v L* (1991) 174 CLR 379 at 390. *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 623.
[36] *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617.
[37] One such example may be *Trident General Insurance Co. Ltd v McNiece Bros. Pty Ltd* (1987-1988) 165 CLR 107 at 123-124 per Mason CJ and Wilson J; 172 per Toohey J; 176-177 per Gaudron J.

circumstances and the exposure of a court's reasoning process, whereby it takes a particular view of the principle or rule. That is the approach which has commended itself to this Court in nearly all areas of the law.

6.39 In *Giannarelli v Wraith,* [38] Brennan J recognised the declaratory theory "approach" to the common law has much to be said in its favour - but it does not bind the court to reach a result that is in conflict with basic notions of justice: it is not a rule of the common law.[39]

6.40 Very few, if any, cases seem to directly address the problem facing the Court on this occasion. However, there can be no doubt that, in general, the modern view is a person should not be made liable for a crime by the retrospective operation of the law. Such a view is enshrined in major international instruments such as the International Covenant on Civil and Political Rights.[40]

6.41 There are strong policy reasons for this Court not to re-write history by stating that a rule of the common law, today, was also a rule of the common law in 1963, when the evidence against the rule being so at that time is almost overwhelming.[41] Another way of expressing the same point, is that however desirable it may now seem to review or re-state a rule of the common law, the judicial function of authoritatively declaring the common law is itself subject to the constraints of evidence. The available evidence overwhelmingly favours the view, that in 1963, a husband could not be found guilty of the rape of his wife, because the common law considered that (absent particular situations not here relevant) a wife gave her consent to sexual intercourse with her husband upon marriage and the same could not be retracted.

6.42 For all of the above reasons, if the common law *presently* permits the common law, when declared, to operate retrospectively so as to impose criminal liability where none previously existed, such a rule ought not apply in criminal cases, except where specifically mandated by statute or a rule should now be declared that the common law does not operate where it would result in imposing criminal liability restrospectively. Many of the reasons given in *R v L*[42] for developing the common law in that case (current attitudes and mores, justice and fairness and modern statute law) are equally applicable to this development.

6.43 For such a rule to be declared, it follows, in relation to events which have occurred in the past (such as in this case), the legal outcome will be different from that which will ensue in relation to similar events which may take place at some point in the future. This raises the issue of whether this Court is able to declare that changes to, or fresh interpretations of, the common law can be declared to operate only to future events, namely, can the changes operate only prospectively.

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[38] (1988) 165 CLR 543 at 584-586 per Brennan J.
[39] *Giannarelli v Wraith* (1988) 165 CLR 543 at 586.3 per Brennan J.
[40] Article 15.1
[41] *Halabi v Westpac Banking Corporation* (1989) 17 NSWLR 26 at 35 per Kirby P
[42] (1991) 174 CLR 379

6.44 The issue raised by prospective overruling is whether a judicially declared change in the common law (by overruling a prior authoritative decision or otherwise) is to be applied retrospectively (to the facts of the case at hand or to other prior events). Prospective overruling does not alter the outcome of already decided cases. Rather, it declares what the law is (today), and that it is to be applied to future cases coming before the courts but not past cases.[43]

6.45 As is illustrated by the speeches of Lord Nicholls and Lord Hope in, *In re Spectrum Plus Ltd* [2005] 2 AC 680, the question of prospective overruling and the form it takes can involve many different considerations.

6.46 The decision of this Court in *Ha v New South Wales* [44] (*Ha's* case) did not settle the question that arises in the case at hand, namely, whether it should be a rule of the common law that common law principles do not apply retrospectively or to events occurring before the rule changed, if the same could result in the imposition of criminal liability in circumstances where none previously existed.

6.47 *Ha's* case concerned the overruling of an earlier line of authority about the proper interpretation of section 90 of the Constitution and the requirement for compliance with a NSW statute. The comments made by the members of the Court on prospective overruling have to be understood in the light of the arguments addressed to the Court and the question raised for decision in that case. Moreover, the consideration in *Ha's* case that not to overrule an earlier case would expose a person to criminal prosecution [45], makes the very point made by the appellant in this case, namely that to apply a common law rule retrospectively, or to events occurring before the rule changed, exposes him to criminal prosecution.

6.48 It would be an odd outcome if the relevant legal principle operated in favour of a person if it is said that prospective overruling of a statute is contrary to judicial power because it might expose the individual to criminal prosecution but against the person if it is said that prospective overruling of a common law rule is also inconsistent with "judicial power".

Judicial power is given its content by the common law rules made by judges. Either it is wrong in principle to expose a person to criminal prosecution through prospective overruling of a statute or the retrospective operation of a common law rule or the relevent principle somehow operates differently in the two different contexts with markedly different results. The potential criminal liability of the individual would thus be dependent upon fortuitous circumstances rather than legal principle.

Considerations of fairness militate against such an outcome. The underlying principle ought be that, in both situations, the result should not expose the individual to potential criminal liability if none previously existed.

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[43] *In re Spectrum Plus Ltd* [2005] 2 AC 680 at [8]-[11] per Lord Nicholls. See also *Chamberlains v Lai* [2007] NZLR 7

[44] (1997) 189 CLR 465 at 503-504.

[45] (1997) 189 CLR 465 at 504.

6.49. Is the appellant liable to be found guilty of the offences of rape of his wife in 1963, and in particular is this Court's decision in *R v L* authority for the proposition that a husband is liable to be found guilty of the rape of his wife regardless of how long ago the alleged offence may have occurred?

The High Court's consideration of the common law position

6.50 In *R v L* this Court was not concerned with ascertaining the elements of the offence of rape in South Australia in the period prior to the 1976 statutory amendments. Neither did it express any opinion as to whether the common law elements of the offence required any change to be made to them (as had been done by the House of Lords in *R v R*).

6.51 In fact, the majority judgment expressly relied on the 1976 statutory changes to the criminal law of the offence of rape, as supporting their view that it was appropriate to also change the common law in relation to consent to sexual intercourse within marriage.[46]

6.52 The recognition by the majority that the statutory amendments had effected a *change* in the law tends to suggest that the majority also accepted that the common law, as to the elements of the offence of rape, did not provide for a husband being guilty of the rape of his wife, except in the limited situations recognised in the case law.

6.53 This issue was addressed more directly in the judgment of Brennan J, who stated that the elements of the common law of rape had, as a result of reliance on Hale's proposition, become so firmly fixed as to prevent a husband from being guilty of the rape of his wife. He considered that this was so, notwithstanding his view that Hale had misunderstood the effect of marriage upon a wife's consent to sexual intercourse.[47]

6.54 Later in his judgment, Brennan J expressly declined to consider the present state of the common law in South Australia as to the elements of the offence of rape.[48]

6.55 The appellant contends that, although the decision in *R v L* is authority for removing Hale's proposition as to consent to sexual intercourse within marriage, it did not go so far as to bring about any changes to the elements of the common law offence of rape.

6.56 As noted previously, [49] by 1991, when this Court decided *R v L*, the Legislatures of all of the common law States had acted to modify the common law in relation to whether a husband could be guilty of the offence of rape of his wife. It was no doubt with

[46] At 390
[47] At 403
[48] At 402
[49] See footnote 19

these developments in mind that the Court refrained from declaring the common law in Australia to have changed in the way the House of Lords in *R v R* had seen fit to do.

6.57 The appellant contends that the position here is substantially akin to that which prevailed in *SGIC v Trigwell* (1979) 142 CLR 617, when this Court considered the common law rule in *Searle v Wallbank*[50]. The test to be applied was correctly stated by Mason J [51] as "the inquiry must be whether the law...was applicable in the colony of South Australia upon its settlement and further, whether the law, if so applicable, *has been varied or abolished by subsequent local legislation.*"[52] (emphasis added).

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6.58 In *Giannarelli v Wraith* [53], Brennan J also recognised that a statute may itself direct that the common law rule to be applied is not the present formulation of a rule but an earlier one.

6.59 In that regard, section 16 of the *Acts Interpretation Act 1915 (SA)* would seem to have a role to play. In effect, section 16 may be seen as a Parliamentary recognition against the retrospective operation of rules which would deprive a person of some status or privilege or benefit conferred under an earlier enactment.

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6.60. Is the common law as to the offence of rape in South Australia incapable of further development following the enactment of the *Criminal Law Consolidation Act Amendment Act 1976 (SA)* (No.83 of 1976)?

6.61 It is accepted that in Australia there is only one common law [54] and that the content of the common law does not vary from one State to another.

6.62 However, it is also the case that the common law does not operate uniformly
30 throughout Australia because the Parliaments of each State can legislate to change or abolish the common law.

6.63 In the Code States changes or developments in the common law since the enactment of the Codes had no effect on the development of the law in those jurisdictions. For example, in the case of the offence of rape, the modifications to the common law as developed in England, [55] as to the whether the offence can apply to parties to a marriage who are separated, had no effect on the law in the Code States.[56]

6.64 Although it is accepted that the common law supplied the elements of the offence of
40 rape in 1963, the offence is nevertheless one created by statute. The statutory offence was relevantly amended by the South Australian Parliament in 1976 and following the commencement of those amendments in relation to offences occurring *after* that time the relevant law was that provided for in section 73 of the *Criminal Law Consolidation*

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[50] [1947] AC 341
[51] With whom Barwick CJ (at page 623), Gibbs J (at 624), Stephen J, (at 628) and Aickin J (at 653) agreed.
[52] At 634
[53] (1988) 165 CLR 543 at 586.3 per Brennan J.
[54] *CSR Ltd. v Eddy* (2006) 226 CLR 1 at [54]
[55] See footnote 3 above
[56] *R v Bellchambers* (1982) 7 A Crim R 463 at 466

Act 1935 (SA), as it then stood. From that time on the offence no longer relied upon the common law to define its elements.

6.65 It was no longer open for the common law to operate so as to extend the circumstances in which a husband could be guilty of the rape of his wife beyond the circumstances set out in that section. To do so would mean that there is a common law principle permitting the retrospective imposition of criminal liability in circumstances when the Legislature has already altered the elements of the offence of rape. There are many and obvious reasons why such a principle ought not form part of the common law. Times change, and the social or political reasons for the imposition of criminal liability sometimes no longer resonate when the principle comes to be reconsidered. If change is to occur, it is generally accepted that it is for Parliament to say what the law is.

6.66 In relation to offences committed *before* the date of operation of that amendment, it is accepted that the common law, as it then stood, would still be applicable and that it is the duty of the court to ascertain the content of the law, as at the time of the alleged offending, irrespective of how many years later the trial of the offence was to take place.

6.67 However, it is not accepted that as at the date of trial, the court is at liberty to develop or change the common law to take into account changes in society's attitudes to reflect what the content of the law would have been, but for the statutory intervention of Parliament and then apply that law to the circumstances of offending alleged to have occurred long before those changes in attitudes had come about.[57] Such an approach has the support of the majority of the Privy Council (for the reasons given by Lord Nicholls) in *A-G v Holley* [2005] 2 AC 580 at 593 [22] and was accepted by Gray J (at [150]), in the court below.

6.68 If a court was not so constrained, it would lead to the anomalous outcome that a man could be guilty of the rape of his wife up until 1976 in all circumstances, but between 1976 and the later amendments in 1992, in only a more limited set of circumstances.

PART VII: APPLICABLE STATUTORY PROVISIONS

Criminal Law Consolidation Act 1935 (SA) ss 48, 73
Acts Interpretation Act 1915 (SA) s16

[57] See *A-G v Holley* [2005] 2 AC 580 at 593 per Lord Nicholls

PART VIII: ORDERS SOUGHT BY THE APPELLANT

(1) The appeal be allowed

(2) The matter be remitted to the Full Court of the Supreme Court of South Australia to answer the question of law reserved in accordance with these reasons.

Dated: 6 July 2011

David Bennett

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