CRIMINAL LAW—HUSBAND AND WIFE—CONSPIRACY

Kowbel v. *R.*,[1] in which it was held in the Supreme Court of Canada that a husband and wife are incapable in law of conspiring together, is a remarkable example of how a court in the present day can be very cautious and conservative, although given the opportunity to clear away some of the "dead wood" existing in the law. The case is noteworthy also in that it illustrates an unusual way in which a rule of law can grow up outside the courts or legislatures.

The accused was convicted on two charges: first, that he conspired with his wife to commit the indictable offence of forgery, and second, that he unlawfully conspired with his wife to commit the indictable offence of uttering, using, dealing with, or acting upon certain documents, knowing the same to be forged, contrary to section 573 of the Crimnial Code.[2] The accused was sentenced to five months in gaol. He appealed to the Ontario Court of Appeal, and his appeal was dismissed.[3] On further appeal to the Supreme Court of Canada, the conviction was quashed. The sole defences that the accused raised were that at common law, a husband and wife cannot be guilty of conspiring together, and that this common law principle is preserved in section 16[4] of the Criminal Code. The basis of the defence was the ancient common law fiction or doctrine of conjugal unity by which husband and wife are considered one person, which prevents them from forming the agreement between two or more persons which is a necessary element in conspiracy. The majority in the Supreme Court of Canada agreed that such a common law defence exists. Taschereau J.[5] quoted, as authority for such a view, a long list of text writers, who have stated that a husband and wife cannot conspire together since they are but one person in law and are presumed to have but one will. Taschereau J. further stated that this common law defence can be raised in Canadian courts, as it is preserved by section 16 of the Criminal Code. He did not think that the words "every one" in section 573 of the Code included husbands and wives because the definition of "every one" in section 2(13)[6] of the Code states that these words apply only to persons "in relation to such acts and things as they are capable of doing." He felt that these words are no more applicable to husbands and wives than they are to children under seven years or to insane persons. Taschereau J. concluded his judgment by stating that, although there are no Canadian judgments on this point,

> . . . I think it is well settled that since many centuries, it has been the law of England that a husband and wife cannot alone conspire to commit an indictable offence. These views have been expressed during over six centuries, and I would be slow to believe that the hesitations of a few modern writers could justify us to brush aside what has always been considered as the existing law.

It can be seen that Kowbel's conviction was quashed solely because an old and dusty legal fiction was raised as a defence. It is apparent that this fiction of conjugal unity has outgrown its usefulness in this twentieth century. McCardie J., in *Gottliffe* v. *Edelston*,[7] said:

> I find it difficult to see how the old and conventional doctrine of unity can be said to

operate at the present day. There is . . . no physical unity, save in the most limited and occasional sense. There is no mental unity in any just meaning of the word. Husbands and wives have their individual outlooks. They may belong to different political parties, to different schools of thought. A wife may be counsel in the courts against her husband. A husband may be counsel against his wife. Each has a separate intellectual life and activities. Moreover . . . the modern notion is that it is one's right to assert one's own individuality. . . . We are probably completing the transition from the family to the personal epoch of woman. Upon the . . . matter of spiritual unity . . . husband and wife may belong to different sects, or even to different creeds.

Not only has the doctrine of conjugal unity lost its meaning in the social, economical and religious sense; it has also lost much of its effect on the legal relations of husband and wife. Glanville Williams states:[8]

With the intervention of equity and later of statute, it became crystal clear that a woman on marriage retained a legal personality distinct from that of her husband. Husband and wife are now totally distinct legal persons in the law of contract and the law of property. They can even contract with each other, or make leases to each other. . . . There are, however, still some special rules pertaining to husband and wife in the law of evidence, crime, tort, conflict of laws, status, income tax, and insurance; and some of these may appear, at least at first sight, to be due in whole or in part to the fiction of unity.

After reviewing these fields of law, Dr. Williams concludes that,[9]

The picture presented by these different departments of the law is a somewhat complex one, and it cannot be said dogmatically that the fiction of unity is or that it is not part of modern English law. All that can be observed by way of generalisation is that the fiction has been applied in certain contexts, but that in almost all of them it has subserved public policy, or at least humanitarianism. A doctrine that thus enables the judges to mould other rules of law in accordance with public policy or humanitarianism is not lightly to be cast aside; but it is submitted that it ought to be used only to bolster up a decision arrived at on other grounds, and it is not in itself a satisfactory basis of decision.

We may conclude then that it would be desirable to avoid the use of this doctrine in the *Knowbel case*. To layman and lawyer alike, the decision in the case seems ridiculous. Years ago when a wife was actually subservient to her husband, and without the capacity to contract or make an agreement with him or anyone else, the fiction of conjugal unity was applicable to the crime of conspiracy since an agreement is of the essence of the crime. But such is not the case today.

How then could the Supreme Court of Canada have avoided quashing the conviction?

I submit that they could easily have concluded that it has never been the law of England or Canada that the fiction of conjugal unity applies to a charge of conspiracy between husband and wife. There has never been a case in England or Canada on this point,[10] and thus there was no precedent to stop the Supreme Court from making a realistic decision. The textbook writers, of course, deserved consideration, and the majority of them[11] do state that there is such a rule that husband and wife cannot conspire together. But, as Fauteux J. points out in his dissenting judgment in the Supreme Court, all these writers trace this supposed rule to Hawkins' Pleas of the Crown, on whose authority it rests, yet the only case which Hawkins himself relies on is a case reported in 1365, written in Norman, which is not on point since a third party was charged with the husband and wife, and the question of whether a husband and wife can conspire by themselves alone was not decided. But Taschereau J., speaking for the majority, chose to say that "this case is most useful to show what was the state of the law at that time, and how it was understood by the lawyers of

England over 600 years ago." After discussing the importance of tradition, he states, "Since then it has been generally recognized that a husband and a wife were legally incapable of conspiracy." To this writer, this reasoning is a most unusual example of a court's elevation of an archaic principle cited in legal literature to the status of binding law.

Even if the court is correct in giving such weight to the propositions laid down by the text writers, it should be pointed out that many modern writers deny that such a "rule" exists today. Eversley[12] states, ". . . but it is doubtful now whether that proposition would be held to be good law if it were shown that the agency of the wife was as active as that of the husband."

A second line of reasoning could have been used by the Supreme Court of Canada to allow them to conclude that Kowbel was guilty. The court might have found that even if the common law did contain such a rule, the rule is inconsistent with the provisions of the Criminal Code, and therefore inapplicable by virtue of section 16 of the Code.[13] Section 573, the section under which the accused was charged, reads, "Every one is guilty . . . who conspires with any person to commit an indictable offence." Section 2(13) defines "every one" as including everyone in relation to such acts as they are capable of doing. It could be argued that this means that only those who are capable of having a *mens rea* can be guilty of conspiracy. Fauteux J. in his dissenting judgment used this approach. He stated that children under fourteen and persons labouring under natural imbecility, disease of the mind or under specific delusions would therefore be excluded from section 573, but husband and wife would be included as they are capable of having a *mens rea*. It follows that the common law "rule" is inconsistent with the Code, and thus not applicable to charges laid under section 573. (Nowhere in the Code is express provision made for the preservation of the supposed common law defence.) Further strength is added to the argument that, if such a common law defence exists, it is inconsistent with the Code, when section 21[14] of the Code is considered. Section 21 states that "no presumption shall be made that a married woman committing an offence does so under compulsion because she commits it in the presence of her husband." This section was enacted to negative the old common law presumption, which afforded a defence that the prosecution could overcome only by proving that the wife acted independently. Both Laidlaw J.A. in the Court of Appeal and Fauteux J. in the Supreme Court of Canada were of the opinion that section 21 indicates that the doctrine of conjugal unity is negatived by the Code.

It is this writer's opinion that, on either of these grounds, the accused should have lost the appeal. Of course, it must not be forgotten that the purpose of the courts differs in criminal cases from civil actions. In civil proceedings, the courts are justified in changing the existing law, by the employment of well-known devices, to make the law conform with changing conditions. The courts are not so justified in criminal cases, where it is considered that the accused is entitled to as much protection as possible. It is the function of the legislature, and the legislature alone, to make changes in the criminal law which take away existing defences and protections for an accused.

But these considerations, in my opinion, are not applicable to the *Knowbel* case if the above arguments are sound.

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[1][1954] 2 S.C.R. 498, [1954] 4 D.L.R. 337, 110 C.C.C. 47.

[2]Cf. s. 408(1)(d) of the new Criminal Code, which changes only the punishment on conviction.

[3][1953] 3 D.L.R. 809, 106 C.C.C. 65.

[4]S. 16 allows common law defences to be raised. Cf. s. 7(2) of the new Code, which is substantially the same.

[5]Kerwin, Estey and Cartwright JJ. concurred with Taschereau J.

[6]Cf. s. 2(15) of the new Code, which is substantially the same.

[7][1930] 2 K.B. 378, at p. 384.

[8]"The Legal Unity of Husband and Wife" (1947), 10 Mod. L.R. 16, at p. 18.

[9]*Ibid.*, p. 30.

[10]Some American courts have stated such a rule, and such is the rule in New Zealand, as laid down by *R. v. McKechie*, [1926] N.Z. L.R. 1.

[11]Hawkins, Stephen, Kenny, Archbold, Phipson and others.

[12]Eversley on Domestic Relations, (6th ed.), p. 150.

[13]S. 16 reads: "All rules and principles of the common law which render any circumstances a justification or excuse for any act or a defence to any charge, shall remain in force and be applicable to any defence to a charge under this Act except in so far as they are hereby altered or are inconsistent herewith."

[14]The same section is re-enacted in the new Code as s. 18.