PGA v THE QUEEN (A15/2011)

Court appealed from:	Court of Criminal Appeal of the Supreme Court of South Australia [2010] SASCFC 81
Date of judgment:	23 December 2010
Date special leave granted:	8 June 2011

The appellant was charged with a number of offences, including two counts of rape, contrary to s48 of the *Criminal Law Consolidation Act* 1935 (SA) ("the CLCA"), committed between 22 March 1963 and 14 April 1963. The alleged victim in each case was the appellant's wife, whom he married in September 1962. At the time of the alleged offences they were cohabiting as husband and wife. In 1963 s48 of the CLCA provided: "Any person convicted of rape shall be guilty of felony, and liable to be imprisoned for life, and may be whipped". The elements of the offence against s48 were supplied by the common law.

Judge Herriman of the District Court of South Australia reserved the following question of law for determination by the Court of Criminal Appeal: "Was the offence of rape by one lawful spouse of another, in the circumstances [of this case], an offence known to the law of South Australia as at 1963?

The majority of the Court of Criminal Appeal (Doyle CJ and White J) noted that in 1963 it was generally accepted by judges and writers of textbooks that at common law a husband could not be guilty of raping his wife. That proposition appeared to derive from a statement by Sir Matthew Hale in *The History of the Pleas of the Crown* (1736) in the following terms:

> *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 up herself in this kind unto her husband, which she cannot retract.*

The appellant submitted that from 1976 onwards Parliament had, by a series of measures, reformed the law relating to rape, but it did not choose to make any of these changes retrospective. In light of this pattern of measured reform it was not appropriate to recast the common law with retrospective effect, going beyond what Parliament saw fit to do. To accept the submissions of the respondent would be to give rise to a new liability retrospectively. It would be to apply to events in 1963 a statement of legal principle first identified for Australia in 1991 in *The Queen v L* (1991) 174 CLR 379.

In rejecting that argument, the majority found that to accede to the appellant's submission would be to leave in place in South Australia (in relation to events before 1976) a principle of the common law reflecting an attitude to marriage and to the status of women which had been rejected in Australian society well before the decision in *The Queen v L*. Although it could not be said that the statements of law appearing in *The Queen v L* represented long established authority, they did reflect the view that the common law had well and truly

changed by the time of the decision in that case. The majority considered that they could not ignore those observations and they could not reinstate Sir Matthew Hale's opinion as part of the common law. It was for the High Court, not the Court of Criminal Appeal, to decide that the matters advanced by the appellant were sufficient to decide that the statements in *The Queen v L* should not be applied to events before that decision, or before 1976.
Gray J (dissenting) found that at the time of the alleged offending the common law of rape applied in South Australia. At that time, the common law included a presumption of irrevocable consent on the part of a wife to sexual intercourse with her husband. Had the appellant been charged and tried in the years immediately following the alleged offending, the prosecution would have been unable to prove a lack of consent on the part of his wife because of that presumption. The common law in this respect was abolished in 1976. At his trial on the information presented in 2010, the appellant was entitled to have his conduct judged according to the law in force at the time of the alleged offending in 1963. That law included the presumption of consent.

The appellant has served a Notice of Constitutional Matter and the Attorneys-General of the Commonwealth, South Australia and Queensland have given notice that they will intervene in this appeal.

The respondent has filed a proposed Notice of Contention.

The grounds of appeal include:

- The Full Court erred in its answer to the question whether the applicant is liable to be found guilty of the offences of rape of his wife in 1963, the common law at that time not having developed to provide for rape by one lawful spouse of another in circumstances of this case.