

**PANNELL v. R.**

COURT OF APPEAL (Neill P., Russell and Waite, JJ.A.):  
March 12th, 1998

*Evidence—competence and compellability—spouse of accused—under Criminal Procedure Ordinance, s.68(1), spouse not competent witness without accused's consent if offence (e.g. inflicting grievous bodily harm) absent from Schedule 3*

The appellant was charged in the Supreme Court with causing grievous bodily harm with intent.

The appellant seriously assaulted a young man whom he believed had committed adultery with his wife. Following an argument with his wife, the appellant had gone out drinking until the early hours and returned home to find the man with his wife in an adjacent apartment. The appellant admitted punching and kicking the victim in the face but pleaded self-defence, saying that the man had threatened him with a knife and followed him to his own apartment, where a second assault took place.

The appellant's wife said that she did not witness the attack but gave evidence that the victim had merely been asleep in the adjacent apartment when her husband returned home and that nothing improper had occurred. The appellant was convicted and sentenced to five years' imprisonment.

On appeal he submitted that since the Crown did not obtain his consent to calling his wife as a witness, as it was required to do by virtue of the Criminal Procedure Ordinance, s.68, and since her evidence had contradicted his so as to discredit him in the eyes of the jury, his conviction was unsafe and should be set aside.

The Crown submitted in reply that the verdict should be allowed to stand, since the jury had properly assessed the appellant's evidence and found his defence unconvincing.

**Held**, allowing the appeal:

Since, under s.68 of the Criminal Procedure Ordinance, the Crown was permitted to call the wife of an accused to give evidence against him without his consent only in respect of offences listed in Schedule 3 to the Ordinance, and since inflicting grievous bodily harm was not such an offence, the appellant's wife should not have been called as witness for the Crown. The wife's evidence was crucial in this case, since the jury might have preferred her version of events regarding the victim's presence in the apartment and, in consequence, also disbelieved his

evidence that the attack occurred in self-defence. Accordingly, the admission of her evidence was an irregularity going to the heart of the case, and the conviction would be quashed. Ordinarily, the proper course of action would be to order a retrial. However, since the appellant's wife had subsequently died and the victim had sustained further injuries rendering him unable to give evidence, this was not possible and the appellant would be released (page 256, lines 14–33; page 256, line 39 – page 257, line 19).

**Legislation construed:**

Criminal Procedure Ordinance (1984 Edition), s.68(1): The relevant terms of this sub-section are set out at page 256, lines 17–21.

*D.G. Hughes* for the appellant;

*A.A. Trinidad, Senior Crown Counsel*, for the Crown.

**RUSSELL, J.A.**, delivering the judgment of the court: On June 13th, 1997 before Pizzarello, A.J. and a jury, this appellant, Michael Pannell, was convicted of inflicting grievous bodily harm with intent and sentenced by the learned judge to a term of five years' imprisonment. He appeals to this court against his conviction.

The facts in their barest outline were as follows. On October 12th, 1996 the appellant and his wife, Janet Pannell, quarrelled. It seems that the appellant believed that his wife was regularly spending too much of her time in the company of other men. At all events, after the quarrel the appellant left the matrimonial home and he went out drinking whilst Mrs. Pannell did what she had done before, namely, moved out of the matrimonial home into accommodation immediately below it. During the course of the evening the appellant was told that his wife was having a party with a number of men present. His reaction to that was to utter a threat directed against whoever was with his wife. He continued to drink and no doubt the drink inflamed him. At about two o'clock in the morning he returned to the building where he had been living with his wife and there he found, according to him, in the ground-floor flat, his wife, in a state of undress, engaging in some sort of sexual activity with a young man named Christian Gordillo, who was to become the victim of the alleged offence.

According to the evidence of Mrs. Pannell, she did not see what subsequently transpired and therefore there was only the testimony of Gordillo, the victim, and the appellant, alleged by the Crown throughout to be the assailant, in the way of direct evidence. After the appellant arrived in the flat and saw the episode to which we have just referred, there followed a very prolonged and, on any view, very serious episode of violence. It involved, according to the appellant, Christian Gordillo arming himself with a knife. It involved, so far as the appellant was

concerned, on his own admission, repeated blows struck to Gordillo's face, and repeated kicking of Gordillo once he was on the ground. The injuries suffered by Gordillo were very serious indeed and when the violence came to an end the medical evidence suggested that he was left in a state close to death.

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For his part the appellant said that Gordillo threatened him with a knife and was intent upon attacking him with it not once but twice, in two separate episodes of violence, in the middle of which the appellant had gone upstairs to his own home, only immediately thereafter to be confronted for a second time by Gordillo with the knife. The defence therefore predictably was one of self-defence and in addition it was contended on behalf of the appellant that he did not have the requisite intent to justify the charge of inflicting grievous bodily harm with intent.

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It is at this stage that we must refer to a most unfortunate irregularity that occurred in the trial process. Section 68(1) of the Criminal Procedure Ordinance provides as follows:

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“The wife or husband of a person charged with an offence mentioned in Schedule 3 (or which, may by any law, be deemed to be included in that Schedule) may be called as a witness either for the prosecution or defence and without the consent of the person charged.”

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The offence charged in this case was not one to be found in Schedule 3 and so it must follow by necessary inference that Mrs. Pannell could not be called as a witness in proceedings against her husband for the charge we have indicated without his consent.

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Mr. Trinidad, who appeared for the Crown in the court below and in this appeal, frankly concedes that no application was made to the appellant or counsel representing him at the trial to obtain his consent to his wife being called and no consent was tendered by the appellant through his counsel. As it seems to us, therefore, there arose in the trial an irregularity which involved the calling of a witness who, without the consent of the defendant, was an incompetent witness. So much is acknowledged and conceded frankly by Mr. Trinidad.

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What was the effect of that irregularity upon the course of the trial? According to the incompetent witness, Mrs. Pannell, Gordillo was asleep in her flat when her husband arrived and nothing whatever improper was taking place between her and Gordillo. That testimony, of course, was in direct and head-on conflict with the appellant's version of events, which was earlier recounted. The problem arises in this way: Clearly, if the jury accepted the wife's evidence upon this part of the case, it inevitably followed that the appellant's evidence as to what he encountered when he arrived back at the flat would be disbelieved, and if he were disbelieved upon that part of the case, there would be a very real chance that the rest of his testimony would not be accepted by the jury. In our view, therefore, the wife's evidence was crucial so far as the appellant's credibility was

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PANNELL V. R. (Russell, J.A.)

concerned, and therefore the admission of her evidence was an irregularity going to the heart of the case. There was a very real risk that the appellant's testimony to the effect that he was acting in self-defence would not be accepted by the jury on the basis that his credit had been damaged by what his wife had earlier said in the witness-box.

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We can see no alternative to a finding that the verdict, because of the irregularity, was unsafe and unsatisfactory and cannot be sustained. That being so, with a measure of reluctance, we have to indicate that the appeal must be allowed and the conviction quashed. The court has power, where the interests of justice demand it, to order a retrial.

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That was a course which would have been open to this court in the ordinary course of events but we invited counsel for the Crown, Mr. Trinidad, to give his views upon the matter and he told us that a retrial would be inappropriate and impractical. Apparently the victim has since this affair suffered a grievous injury which has left him unfit to give evidence and the wife of the appellant is deceased. Accordingly, we do not make the order which perhaps in the circumstances of this case we would normally have made. There can be no retrial. The conviction being quashed, the appellant must be discharged.

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*Appeal allowed.*

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