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

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v.

THE QUEEN

Respondent

APPELLANT'S SUBMISSIONS IN REPLY

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1. The following issues arise out of the several responses to the appellant's written argument:
   1. what does the evidence suggest the common law rule was in 1963?
   2. does or should the common law rule stated in R v L apply retrospectively?
   3. does "prospective" overruling have any role to play in criminal matters?

2. Each of those issues is dealt with below.

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The common law rule in 1963

3. As to the first issue, it is important to draw the distinction between what *the material* suggests **was** the position and what is now argued should have been the position based upon decisions subsequent to that time. The relevant material consists of the cases referred to, the South Australian Mitchell Commission's work, the subsequent amendment to the Criminal Law Consolidation Act 1935 and the provisions in the Code States. However repulsive it may seem today - a husband did not commit rape in 1963 if he had intercourse with his wife without her consent.

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4. The reasons given by the respondents for asserting the contrary are, with respect, and subject to one exception (*R v R*, which the appellant submits ought not to be followed in Australia) based either upon later views of various superior courts dealing with events occurring well after 1963 or upon an attempt to rationalise the two early decisions in *R v Clarence* and *R v Jackson*.

10 5. The submissions for the Attorney-General for the Commonwealth rely upon *R v Jackson* [1891] 1 QB 671 for the proposition that, since 1891, a husband had no right to use physical coercion upon his wife. The problem with the Commonwealth's submission is that it necessarily equates the absence of consent with the use of physical coercion but the two situations are not co-extensive. Not all sexual intercourse between a man and a woman without her consent involves the use of physical coercion. It may take place, for example, while she is asleep or otherwise unconscious in the face of a previously expressed general refusal.

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Retrospectivity of the common law

6. The next issue is whether the common law rule pronounced in *R v L* applies retrospectively. For the reasons advanced in the appellant's principal submissions, this question should be answered in the negative. The reasons advanced by the respondent and the Attorney-General for South Australia and by the Attorney-General for Queensland at [31] are unpersuasive
30 because in *R v L* the High Court explicitly stated that it was not determining what the law was before 1991. The plurality at 390 and Dawson J at 405.3 expressly left open what the position was at common law. Brennan J (as he then was) held that the common law was as stated by Hale (at 402.1).

40 **Prospective overruling**

7. There is a distinction between prospective overruling and applying a common law rule retrospectively. First, prospective overruling is concerned to address the question whether a decision giving rise to a (new) rule of the common law ought only to apply from that case onwards to cases involving events taking place after that case but not to past events (including the facts of the case before the court). For the reason given in *Ha's case*, such an approach would be incompatible with the exercise of judicial power conferred by Chapter III of the Constitution. If the universe of discourse only concerns the applicability of common law rules to future cases coming before the courts, the question does not arise. The decision in *R v L* should be regarded as being so limited (except, in relation to the facts before the court in that case).

8. It is asserted that the same (new) rule applies to events that occurred before the new rule came into existence because either (a) the declaratory theory of the law requires it (South Australia's position) or (b) the application of the specific rule to the facts before the court arises from the elucidation of principle at a high level of abstraction (Queensland's position). Each position rests upon an assertion about the way in which the common law evolves. Neither is a rule containing normative content - that is, neither prescribes (in the criminal law area) a rule of conduct prohibited by the law with a sanction if the rule is not observed.

9. The appellant's point is that conduct which was not prohibited at the time that it occurred by a normative rule of the common law cannot now be the subject of such a rule and the attendant sanction because to make it so would conflict with another fundamental principle of legal systems i.e. that it is contrary to general considerations of fairness to now criminalise behaviour that was not criminal at the time. *Ha's case* supports that fundamental principle (to adopt Queenland's taxonomy).

10. In this context the question is what does the material establish was *the rule* at the time? Was intercourse with a wife without her consent prohibited by *a rule* of the common law? On the evidence available the answer is: that, at the time, there was no common law rule which prohibited a husband from having intercourse with his wife without her consent and declared such conduct to be criminal[1]. Whether the law ought to have been different is not for this Court to determine.

Dated 7 September 2011

David Bennett

David Bennett
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[1] *In this regard, the passage quoted from R v C at [22] of the Commonwealth's submissions, insofar as at [23] it suggests that in South Australia in 1963 a solicitor could be expected to advise a client that the supposed immunity of a husband might be recognised to be a legal fiction , attributes a degree of foresight that seems unrealistic (and certainly was not something that occurred to the Mitchell Committee as a possibility when it considered the law some years later).*