

CHAPTER 3: Witnesses: competence, compellability, and various privileges

1. *Apart from a very few limited exceptions, English law proceeds upon the assumption that all witnesses are competent and compellable. In what ways do the rules governing competence and compellability differ in the cases of:*
 - (a) *the accused in a criminal case?*
 - (b) *the spouse of an accused?*
 - (c) *children?*

Each of these three classes of witness is discussed at paras. 3.9-3.10, 3.11-3.25, and 3.3-3.6 respectively.

2. *Mr Stalker is appealing against a conviction for putting a 15-year-old neighbour in fear of violence contrary to the Protection from Harassment Act 1997, s 4. Mrs Stalker, the accused's wife, was called by the Crown to testify against Mr Stalker. During her testimony, the justices informed her for the first time that she was not obliged to give evidence against her husband and that it was most unfortunate that no one had troubled to tell her this before, but that, since she had started, she now had to finish.*

- (a) *Were the justices correct in asserting that Mrs Stalker was not a compellable witness?*
- (b) *If they were correct and if the prosecution also acknowledges that it knew that, given the chance, Mrs Stalker would prove a most reluctant witness, does Mr Stalker have a valid ground of appeal?*
- (c) *Would any of your answers be different if Mr Stalker had instead been prosecuted for publicly displaying indecent photographs of young children in his art gallery contrary to the Indecent Displays (Control) Act 1981?*
- (d) *Would any of your answers to (a)–(c) be different if, by the time of trial, Mr and Mrs Stalker were:*
 - (i) *living apart?*
 - (ii) *living apart, but Mrs Stalker has also since gone through a bigamous form of marriage with Mr Right?*

(iii) *divorced?*

(e) Would any of your answers differ if 'Mr' and 'Mrs' Stalker were, in fact, a same-sex couple who had contracted a civil partnership under the Civil Partnership Act 2004, or were a man and woman who had contracted a civil partnership under the Civil Partnerships, Marriage and Deaths (Registration etc) Act 2019?

- (a) You will need to consider PACE, s. 80, and more particularly, the specified offences enumerated in s. 80(3): paras. 3.16-3.18.
- (b) You will need to consider such cases as *R v. Pitt* [1983] QB 25, *R v. Nelson* [1992] Crim LR 653, and *R v. Birmingham Magistrates' Court, ex p Shields* (1994) 158 JP 845.
- (c) As in part (a), this requires application of PACE, s. 80(3). Your answer should require reconsideration of your answers to both parts (a) and (b).
- (d) (i) and (ii) PACE, s. 80 is concerned exclusively with whether the witness and the accused are either married or civil partners. See notably, *R v. Pearce* [2002] 1 WLR 1553; (iii) See PACE, s. 80(5).
- (e) No, and No.

3. *During a break in proceedings in Bassetshire magistrates' court, Leak, who is seated in a cubicle in the public lavatories, overhears a hushed conversation between the defendant, Gormless, and his solicitor, Seed, during which Gormless makes a number of significant admissions. Leak reports what he has heard to the Crown prosecutor, Vindict. Advise Vindict, who now wishes to call Leak to testify to what he overheard.*

Communications between an accused and his/her legal advisor will normally be treated as privileged (see paras. 3.35-3.40). However, the content of such communications may be provable by other means (see esp. para. 3.51). The case of *R v. Tompkins* (1977) 67 Cr App R 181, and the accompanying commentary, will be relevant to answering this question. See also *Goddard v Nationwide BS* [1987] QB 670, 686 *per Nourse LJ*

4. *What do you understand by the following terms:*

- (a) *'Litigation privilege'?*
- (b) *'Common interest privilege'?*

These concepts are explained at paras. 3.45-3.48 and 3.58 respectively.