

Competence and compellability of witnesses

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Competence and compellability of witnesses * A person to give evidence in court has to be legally competent, subject to the rules of admissibility. * A witness is compelled to give evidence, even if it's against his will. * Failure to do so will result in contempt of court. However it is also contempt of court for a witness to refuse without lawful authority to answer questions put to him. * The modern test for the competence of witnesses varies, depending what type of case it is (civil or criminal). * And also the status of the witness (child, adult, accused, accused spouse, person of defective intellect). * Contempt of court meaning criminal offence. * The general rule is that a witness is competent if he may lawfully give evidence and compellable if he may lawfully be required to give evidence. Section 53 (1) of the YJCEA 1999, which applies to all witnesses, provides: * " At every stage in criminal proceedings all persons are (whatever their age) competent to give evidence. " * Competent witnesses are usually but not necessarily compellable. * The judge decides on the competency of a witness by examining him on a voir dire (a trial within a trial) or by evidence aliunde (i. e., by other and different evidence through television link or expert opinion). * It must be noted, however, that rules of competency and therefore compellability are now enacted in and modified by the YJCEA 1999, and different rules apply to different categories of vulnerable witnesses.

Exceptions for a person not to give evidence. * Person is not competent to give evidence in criminal proceedings if it appears to the court that he is not a person who is able to understand questions put to him as a witness and give answers to them which can be understood section 53(3). * A person charged in criminal proceedings is not competent to give evidence in the

proceedings for the prosecution (whether he is the only person, or is one of two or more persons, charged in the proceedings) section 53 (4). Civil case law * *Omychund v Barker* (1975) abolished the rule of incompetence, all adults who do not suffer from defective intellect are competent and compellable to testify in civil proceedings. * Sovereigns and diplomats are not compelled to testify. * The judge has to be satisfied that a witness is both: * Capable of speaking coherently and, * Understands what it means to speak the truth, but also the seriousness of the occasion and the added obligation to speak the truth in court. * This test was subject to exception to accommodate the evidence of children. * This test is known as the Hayes test (*R v Hayes* 1977). * This test is only used for civil proceedings. * Case involved the indecency of four small boys, issue being whether a child is competent to give a sworn testimony, COA decided he was competent to give evidence (Bridge LJ). * *Fawcett* 1976 (small girl, receiving religious instruction) which Hayes overruled because it was ridiculous. Unsworn evidence. * Current position of competence in civil cases is that the witness is required to give sworn evidence or make a solemn affirmation. Exception * S. 96 of the Children Act 1989 authorising the admissibility of unsworn evidence of children provided that they are able to give sworn evidence. * S. 96 (2) of the 1989 Act. * A child for this purpose is a person who is under the age of 18 (S. 105). Criminal cases * The rules for competence are governed by the Youth Justice and Criminal Evidence Act 1999. * S53 (1) All persons are competent * S53 (a, b) Sets out the general test where a witness's competence is called into question. * Two- tiered test laid down in S53 (3), judge will rule on issue of competence, in the absence of a jury. * The legal

burden of proof that the witness is competent to testify lies on the party calling the witness and the standard of proof is based on the 'balance of probabilities'. * S55 (1) Open both to the party and the Court to question the competence of the witness. * S53 (1) of the YJCE Act 1999 lays down the competence of the defendant and other witnesses. * A person who is charged is not treated as a competent witness (S53 (4)). * S53(5) a person charged is a person who is currently on trial in indictment or summarily and pleads not guilty. The compellability of a witness * As a general rule, competent witnesses are treated as compellable, that is may be constrained to testify. * If they refuse to give evidence then it is contempt of court. * Sovereigns and diplomats are not compellable in any proceedings. * There are occasional signs in civil courts where they hold the right to hold non compellable witnesses — Morgan v Morgan 1977- wife lump sum. * The general rule is that an accused is not a competent witness for the prosecution in a criminal case. However, there are several ways of rendering him competent and compellable where several people are charged in an indictment, viz. — (i) where a nolle prosequi is entered; (ii) where it is stated that no evidence will be offered against the accused and he is acquitted; (iii) where an order for separate trials is obtained; and (iv) where the accused pleads guilty but it is desirable that he should be sentenced before being called upon to give evidence for the prosecution. The above desiderata are now placed on statutory footing by section 53 (4) and (5) of the YJCEA 1999. * R v Grafton (1993) * The general principle is that a statement made in the absence of the accused person by a co-accused cannot be evidence against the accused person. * Application for separate trials- the trial judge has

discretion to order separate trials of defendants who are accused of committing an offence jointly. R v Moghal (1977) the risks of having one single trial and the different verdicts being returned, by different juries on similar facts. * In a trial with more than one defendant if one defendant pleads guilty he is no longer treated as a ' person charged'. * It is desirable that the guilty defendant be sentenced before testifying for the prosecution, this is to avoid the defendant colouring his testimony in the hope he would receive a lesser sentence. * If the judge is unclear then he will wait till the time of sentencing until the conclusion of the trial of the co-defendant. * R v Payne (1950) burglary, appealed to lesser his sentence to 15 months like his co -defendants. The defendants spouse /civil partner in criminal cases. * It is laid down in S53(3) of the YJCE Act 1999 to all witnesses however in extension to which the spouse (including the civil partner) is compelled to testify in criminal proceedings is dealt with in S80 of the Police and Criminal Evidence Act 1984. (PACE) * Competence of spouse . By virtue of section 80 (1) (a) of PACE (as amended) a spouse is competent to give evidence for the prosecution in criminal proceedings except where the husband and wife are " charged in the proceedings" (s. 80 (4)). The spouse is competent to give evidence on behalf of the accused or any person " charged in the proceedings" (s. 80 (1) (b) as amended). * The general rule is that anyone who is competent to give evidence is also compellable. However, an accused person and his spouse are exceptional in this regard. A spouse is compellable for her husband except where they are charged in the proceedings (s. 80 (2) as amended). By virtue of section 80 (3) a spouse is compellable for the prosecution or the co-accused if, and only if: * (a) the

offence charged involved an assault or injury or threat of injury to the wife or husband of the accused or a person under 16; * (b) a sexual offence is alleged to have been committed in respect of a person under 16; * (c) The offence charged consists of attempting or conspiring to commit or aiding, abetting, counselling, procuring or inciting the commission of the offence falling within paras. (a) and (b) above. * The above provisions apply to a spouse, and not to a cohabitee. The new section 80A of PACE which replaced the old section 80 (8) provides that failure of the wife or husband of any person charged in the proceedings to give evidence in the proceedings shall not be made the subject of any comment by the prosecution. It has been suggested that it would be pointless to state that the new provision was intended to modify section 35 of the Criminal Justice and Public Order Act 1994 (inferences from the accused's failure to give evidence at trial). * It must be noted, however, that in a civil trial section 14 (1) (a) of the Civil Evidence Act 1968 confers on a witness the right to refuse to answer any question or produce any document or thing if to do so would expose the husband or wife to proceedings for any criminal offence, recovery or penalty. * So basically a spouse or civil partner is compellable to give evidence on behalf of their partner. * However the spouse of the co-defendant is called by the defendant to testify he/she isn't compellable to testify on his behalf. * S80(3) of the 1984 Act, in a ' specific offence' the spouse of the defendant is compellable to testify for either the co-defendant or the prosecution in criminal proceedings S80(2A) (a) (b) * Acaster warning- this is when the spouse is not compellable but is competent to testify for the prosecution and is called by the prosecution to testify on its behalf. The judge may exercise

his discretion to warn the potential witness in the absence of the jury. (R v Acaster) * R v Pitt (1983) woman wasn't competent to give evidence against her husband and he was convicted, the conviction was quashed because her answers were inconsistent with her statement and was made a hostile witness. She didn't appreciate that she wasn't a compellable witness and could not have surrendered her right not to testify. * The case illustrates very powerfully why it is necessary for the trial judge to make certain that the wife understands her position before she takes the oath. When she takes the oath she is waiving her right to refuse evidence. * In the event of failing to note a competent but not compellable witness that she is not required to testify for the prosecution or the co-accused. The COA will take into consideration all of the factors below: * Whether the witness was reluctant or enthusiastic to testify against her husband. * Whether she was called to testify for the co-defendant or the prosecution. * The significance of her testimony. The prosecution is not allowed to comment on his or her silence S80A when the spouse or partner doesn't testify, this DOES NOT extend to the co-defendant and to the judge. Privileges enjoyed by certain classes of witnesses. * Any witness to legal proceedings, other than the accused in a criminal case, is entitled to refuse to answer questions put to them which might tend to lay the blame on them