(2018) 20 Ecc LJ 3–15 © Ecclesiastical Law Society
doi:10.1017/S0956618X17000862

Marriage, Polygamy and the Criminal Law of Conspiracy

Christopher Grout
Registrar, Qatar International Court and Dispute Resolution Centre

The fact that the criminal law in England and Wales continues to afford protection to spouses who conspire together to commit crime is considered by many to be an anachronism. That a person cannot be guilty of conspiracy if the only other person with whom he or she agrees is his or her spouse, is to be found in section 2 of the Criminal Law Act 1977. The origins of the rule are said to be based on biblical principles pertaining to marriage. The difficulty with that is that the concept of marriage has changed significantly over time, which raises the question of whether or not the existence of the exemption can today be justified. In R v Yilkyes Finok Bala and Others *[2016] EWCA Crim 560, the Court of Appeal was faced with the question of whether or not the legislative exemption applied to those who were party to a polygamous marriage. While acknowledging that there are arguments in support of the proposition that the exemption is outmoded, the Court of Appeal nevertheless interpreted the statutory provision in such a way so as to encompass parties to a polygamous marriage recognised under English law as valid. By virtue of the Civil Partnership Act 2004, the exemption was extended to cover civil partners. The expansion of the exemption is curious in the light of prevailing attitudes towards the applicability of the exemption at all in modern times. Furthermore, other statutory provisions (relating to analogous matters) have either been enacted or repealed to reflect present-day understandings of how the issue of marriage interacts with the criminal law. Yet, for reasons which are not altogether clear, the spousal exemption vis-à-vis the criminal offence of conspiracy remains in force.*

Keywords: marriage, polygamy, conspiracy, *R v Yilkyes Finok Bala and Others*

It is unusual for the Crown Court in England and Wales to concern itself with the legal and theological position regarding the institution of marriage, as it is understood under English law. Such an issue rarely has a place within the scope of a criminal trial. However, such a dilemma did arise, both before the trial judge and later in the Court of Appeal, in *R v Yilkyes Finok Bala and Others*.[1]

THE OFFENCE OF CONSPIRACY

The offence of conspiracy is created by section 1 of the Criminal Law Act 1977. The definition of conspiracy is, for the purposes of this article, immaterial. Of

1 [2016] EWCA Crim 560; [2017] QB 430.

relevance, however, is section 2(2), which provides under the heading 'Exemptions from liability for conspiracy':

> A person shall not by virtue of section 1 above be guilty of conspiracy to commit any offence or offences if the only other person or persons with whom he agrees are (both initially and at all times during the currency of the agreement) persons of any one or more of the following descriptions, that is to say—
> (a) his spouse...

Following the enactment of the Civil Partnership Act 2004, subsection (2)(a) above was amended to include reference to civil partners.[2]

THE ISSUES AT TRIAL

A detailed recitation of the facts, as faced by the trial judge and the jury, is unnecessary. The critical issue, which is the focus of this article, arose as a result of a decision taken by the trial judge at the end of the prosecution case. Having upheld a submission of no case to answer in relation to some of the defendants and having concluded that, on the evidence before the court, there were no other persons (who were not before the court) involved in the alleged conspiracy, the only two alleged conspirators remaining on the indictment were Dr Bala and Mrs Bala-Tonglele. It was submitted by the defence that, those two individuals being married, there could be no continued prosecution against them for conspiracy by virtue of section 2(2)(a) of the aforementioned legislation.

The nature of Dr Bala and Mrs Bala-Tonglele's marriage was not altogether straightforward. They had been married in Nigeria in 1997 but the marriage was polygamous as Dr Bala was, at the time, married to another woman. Having considered section 11(d) of the Matrimonial Causes Act 1973 and having accepted the submission that a polygamous marriage was a valid marriage under Nigerian law, the trial judge nevertheless concluded that Dr Bala's marriage to Mrs Bala-Tonglele was void under English law. The judge came to that conclusion on the basis that, at the time of that marriage, Dr Bala was domiciled in the UK. He was also married. As such, he did not, under English law at least, have the legal capacity to enter into a second marriage – whether in England or elsewhere. Accordingly, the judge concluded that neither defendant could avail themselves of the section 2(2)(a) exemption and thus permitted the prosecution against them to continue. Both were convicted by the jury and received sentences of imprisonment.

2 Civil Partnership Act 2004, Schedule 27, para 56.

https://doi.org/10.1017/S0956618X17000862 Published online by Cambridge University Press

THE APPEAL

A number of arguments were deployed before the Court of Appeal as to why the trial judge had erred in law by allowing the prosecution to continue. Critically, however, it was asserted that, as the defendants had been lawfully (albeit in the case of Dr Bala polygamously) married in Nigeria, they were 'spouses' for the purposes of section 2(2)(a) and so the exemption applied.

The Court of Appeal conducted a review of the relevant authorities, noting that, in the context of matrimonial proceedings, parties to polygamous marriages had not, under English law at the time, been entitled to any form of matrimonial relief: see *Hyde v Hyde*.[3] That position had changed by virtue of the Matrimonial Causes Act 1973, section 47(1), which provides:

> A court in England and Wales shall not be precluded from granting matrimonial relief or making a declaration concerning the validity of a marriage by reason only that either party to the marriage is, or has during the subsistence of the marriage been, married to more than one person.

Section 11 of the same Act provides, so far as is relevant, as follows:

> A marriage celebrated after 31st July 1971 shall be void on the following grounds only, that is to say—
>
> (a) ...
> (b) that at the time of the marriage either party was already lawfully married or a civil partner;
> (c) ...
> (d) in the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales.
>
> For the purposes of paragraph (d) of this subsection a marriage is not polygamous if at its inception neither party has any spouse additional to the other.

The Court of Appeal observed that the 'general rule of the English criminal law that husband and wife cannot be guilty of a conspiracy'[4] was acknowledged by the Privy Council in *Mawji v The Queen*.[5] That case, however, concerned the analogous provisions of the Penal Code of Tanganyika, where 'potentially polygamous' marriages were accepted by the Privy Council as being 'fully valid' and

3 (1860) LR 1 P & D 130.
4 Ibid at para 45.
5 [1957] AC 126.

https://doi.org/10.1017/S0956618X17000862 Published online by Cambridge University Press

that, as such, the exemption contained within the Penal Code applied. Their lordships, however, expressed no opinion on what the position under English law would be.

The Court of Appeal then considered the related issue of the competence of spouses in criminal trials, now the subject of express statutory provision[6] but previously governed by the common law. Having observed that a party to a bigamous marriage would be deemed a competent witness for the prosecution (against her 'spouse'), the Court of Appeal in *R v Junaid Khan*[7] stated:

> If that be the position with somebody who has gone through an invalid ceremony of marriage because it is bigamous, what is the position of a lady who has gone through a ceremony of marriage which under the religious observances of a faith, and under the law of some other countries, is entirely valid, but which, because it is a second polygamous marriage, is of no effect in the law of this country? In our judgment the position so far as her ability and competence to give evidence is concerned is no different from that of a woman who has not been through a ceremony of marriage at all, or one who has been through a ceremony of marriage which is void because it is bigamous. Exactly the same principles in our view apply, and therefore we hold that the learned judge was entirely correct in his reasoning in deciding that Hasina Patel was a competent witness for the prosecution, both in respect of her husband and in respect of this appellant.[8]

Finally, the Court of Appeal noted the legal position of unmarried partners, citing the comparatively recent case of *R v Suski*.[9] In that case an argument was deployed before the Court of Appeal to the effect that the section 2(2)(a) exemption pertaining to spouses (and now civil partners) must be extended to cover partners (not legally married or in a formal civil partnership), otherwise an accused would suffer an impermissible infringement of his or her rights under Article 8 of the European Convention on Human Rights (pertaining to respect for private and family life, home and correspondence) and Article 14 (discrimination). The Court of Appeal disagreed. It first observed that:

> In our judgment, it is clear that the applicant is not entitled to the benefit of section 2(2) as presently drawn simply because of its express terms: it employs the ordinary English words and refers to 'spouse' or 'civil

6 Police and Criminal Evidence Act 1984, s 80.
7 84 Cr App R 44.
8 Ibid at para 50.
9 [2016] EWCA Crim 24.

https://doi.org/10.1017/S0956618X17000862 Published online by Cambridge University Press

> partner'. Those are well understood words, referring to persons who are either married or have entered into a formal civil partnership.[10]

Then later:

> Parliament has extended the benefit of section 2 beyond spouses to civil partners, and insofar as the right to respect to private life is engaged in this context in the present case, it seems to us that the boundary drawn here would satisfy the requirements of Article 8(2) of the Convention in an area where principles of human rights law would, as we see it, afford to the state a significant margin of appreciation. It is recognised that the criminal law must be objective and certain and that 'bright line rules' are sometimes required for this purpose, whereas they may not be so in some of the other areas in which relationships between men, women and between same sex partners have had to be considered, such as the cases that we have already cited.[11]

And finally:

> Parliament reviewed the position in 2004 and removed the potential inequality in giving a protection to married couples only and extended it to civil partners. In doing so it decided against any further extension to informal partnerships of either duration, whatever the gender of the partners.
>
> We see no reason to extend any further than statute requires a rule of the common law that has become to be regarded as anomalous today. There are very good grounds why a court trying a charge of conspiracy should not have to inquire closely into the nature of personal relationships of alleged conspirators, infinitely variable as they are likely to be from case to case. Nor, in our judgment, should the criminal law turn upon such vagaries.[12]

Returning to the present case, having reviewed the authorities, the Court of Appeal concluded that the reference to 'spouse' in section 2(2)(a) of the 1977 Act is to be taken as a reference to a husband or wife (or civil partner) 'under a marriage, or civil partnership, recognised under English law'.[13] Insofar as polygamous marriages are concerned, the Court of Appeal observed that the 'implicit corollary' of the Matrimonial Causes Act 1973, section 11(d) is that:

10 Ibid at para 13.
11 Ibid at para 18.
12 Ibid at paras 22–23.
13 [2016] EWCA Crim 560 at para 55.

https://doi.org/10.1017/S0956618X17000862 Published online by Cambridge University Press

> where *neither* party is domiciled in the United Kingdom at the time of the relevant polygamous marriage, valid under the law of the place of celebration, then that marriage – assuming no other incapacity – *will* be recognised as valid in English law.[14]

The Court of Appeal therefore concluded, by analogy, that section 2(2)(a) of the 1977 Act does cover the position of a wife in a polygamous marriage which is valid under the law of the place of celebration and which is not regarded as void under English law. The Court observed that:

> In our view, the perceived social purpose underpinning s 2(2) in this regard is best achieved by such a conclusion and is not to be displaced by historic assumptions that there can only be one husband and one wife. It would be invidious to implement the underpinning policy by applying it to those party to one (lawful) marriage but not applying it to those party to other concurrent (lawful) marriages.[15]

This conclusion did not, however, assist Dr Bala, who, it had been determined, was domiciled in the United Kingdom at the time he entered into his second (polygamous) marriage. It will be remembered that such a marriage would be considered void under section 11(d) of the 1973 Act. Accordingly the appeal was dismissed.

ANALYSIS

The case of Dr Bala was certainly unusual. However, it raises broader questions relating to the interplay between the institution of marriage and the criminal law, which can be classified as follows:

i. What was the rationale behind the section 2(2)(a) exemption?
ii. Is the rationale, so far as it can be discerned, still applicable today?
iii. If so, is the scope of the exemption justified?
iv. If not, should the exemption be abolished?

What was the rationale behind the section 2(2)(a) exemption?

The answer to this question was concisely proffered by the Privy Council in *Mawji v The Queen*[16] when, in relation to the common law precursor to the 1977 Act and the Penal Code in Tanganyika, their lordships observed that:

14 Ibid at para 67, emphasis added.
15 Ibid at para 76.
16 [1957] AC 126.

https://doi.org/10.1017/S0956618X17000862 Published online by Cambridge University Press

> the rule is an example of the fiction that husband and wife are regarded for certain purposes, of which this is one, as in law one person. Some of the consequences of the fiction have been removed or modified by statute. This has not.[17]

Their lordships noted that the rule in question was explicitly stated in *Archbold's Criminal Pleading, Evidence and Practice* (33rd edition) in the following terms: 'A husband and wife cannot alone be found guilty of conspiracy, for they are considered in law as one person, and are presumed to have but one will.'[18] Counsel for the Appellant in *Mawji* identified the origins of the rule as emanating from the Old Testament, in particular Genesis 2:21 and 3:16 which respectively provide:

> So the LORD God caused the man to fall into a deep sleep; and while he was sleeping, he took one of the man's ribs and then closed up the place with flesh. Then the LORD God made a woman from the rib he had taken out of the man, and he brought her to the man.

> To the woman He said, 'I will make your pains in childbearing very severe; with painful labour you will give birth to children. Your desire will be for your husband, and he will rule over you.'

The implications are clear: first, woman is made from man and thus they are one person, and second, woman is subordinate to man, who will 'rule over' her. It is not difficult to see how a rule of law, based upon these precepts, has evolved such that there cannot be a conspiracy between a husband and wife as they are one person (and it could not sensibly be suggested that a person could conspire with himself or herself) and a wife is deemed subordinate to her husband and thus has no free will of her own.[19]

Their lordships, perhaps quite astutely, did not acknowledge that the subordination point had any influence on the establishment of the section 2(2)(a) exemption, although, as noted above, they very clearly found that the belief that a husband and wife had one will – presumably emanating from the belief that they were of one body – certainly did influence the exemption as well as its common law precursor.

17 Ibid, p 135.

18 Ibid, p 134. See also W Hawkins, *Pleas of the Crown*, eighth edition (London, 1824), vol 1, pp 448–449: 'it hath been holden, that no such prosecution is maintainable against a husband and his wife only, because they are esteemed but one person in law and presumed to have but one will'.

19 One could, of course, also use Genesis as the foundation for the acceptability of polygamous marriages and as support for the proposition that such marriages should be caught by the section 2(2)(a) exemption. In Genesis 4:19, Lamech (a descendant of Cain) takes two wives: Adah and Zillah.

https://doi.org/10.1017/S0956618X17000862 Published online by Cambridge University Press

Is the rationale, so far as it can be discerned, still applicable today?

As noted above, the Privy Council in *Mawji* described the belief that a husband and wife are, in law, one person as 'a fiction', although a fiction which continues to be protected by statute.

In *Kowbel v The Queen*[20] the Supreme Court of Canada considered the question of whether or not the common law rule that husband and wife could not conspire together had been implicitly repealed following the enactment of the Canadian Criminal Code. Fauteux J, dissenting, took a pragmatic approach to determining this issue: 'No one disputes that, in both the field of civil and criminal matters, husband and wife have each an independent legal identity.'[21] His lordship was critical of the way in which the rule had appeared to have formed part of the law of England and Wales – not, his lordship observed, by way of judicial precedent but instead through legal writers and commentators.[22] In any event, he concluded that the modern definition of marriage 'no longer embodies the legal notion of conjugal unity or subordination as it is said to have had in a far distant past'.[23] Fauteux J concluded by stating that 'I have, therefore, formed the view that the rule has perished with the disappearance of the reason which gave it life and support.'[24]

That, of course, was not the view of the majority who upheld the common law rule that husband and wife could not be the sole conspirators to a criminal offence. The Supreme Court noted that it had had sight of an English authority, dating back to the reign of Edward III (1327–1377), which had acknowledged the rule.[25] Noting that there were no judgments in Canada dealing with this particular issue, the Supreme Court observed that the position in England was 'well settled':

> These views have been expressed during over six centuries, and I would be slow to believe that the hesitations of a few modern writers could justify us to brush aside what has always been considered as the existing law ... It may very well be amended by legislative intervention, but as long as it is not, it must be applied.[26]

It must undoubtedly be correct that if the right is still protected by law, the courts must strive to uphold it. That does not, however, answer the question as to whether or not the rationale behind the rule is still worthy of protection.

20 [1954] SCR 498.
21 Ibid, p 510.
22 Ibid, pp 507–509.
23 Ibid, p 511.
24 Ibid.
25 Ibid, p 500.
26 Ibid, p 503.

https://doi.org/10.1017/S0956618X17000862 Published online by Cambridge University Press

The reality must surely be that the biblical foundation for the section 2(2)(a) exemption has been all but eroded. Curiously, this is so from two very different angles. First, an argument that husband and wife are one and/or that a wife is subordinate to her husband has no place in the modern world; certainly not in England and Wales in any event. But, conversely, the extension of the exemption to cover civil partners cannot, in any way, be said to be based upon biblical considerations. Parliament no doubt took the view that a protection which was afforded to spouses must likewise apply to civil partners: a failure to afford such protection to the latter would probably be deemed unjustifiably discriminatory. Doubtless a court would come to the conclusion, should the issue arise, that a spouse who is such by virtue of having entered into a same-sex marriage would also be covered by the exemption.[27] As noted above, the Court of Appeal in *Yilkyes Finok Bala and Others* has determined that the reference to 'spouse' contained within the exemption extends to a spouse under a polygamous marriage recognised as valid under the laws of England and Wales.

Is the scope of the exemption justified?

In this author's view at least, it is clear from the above that the rationale behind the exemption is no longer applicable, leading to the perhaps inevitable conclusion that the exemption itself is no longer justified. However, had the contrary been the case (and some may well argue that there are good reasons for maintaining the exemption), it seems entirely appropriate that a protective right afforded to spouses (in the sense of husband and wife) should also be extended to cover civil partners and those who are in a same-sex marriage. For the reasons given by the Court of Appeal in *Yilkyes Finok Bala and Others* it is also perfectly proper to read the exemption in a way which covers polygamous marriages recognised under English law as valid.

If the exemption is to remain, the only potential criticism that could arise vis-à-vis its scope would relate to the position of unmarried partners, who, following the decision of the Court of Appeal in *Suski*, fall outside the ambit of section 2(2)(a). If one accepts that the biblical foundation of the exemption no longer exists, it is difficult to see why unmarried partners should be treated any differently from those who have gone through a marriage or civil partnership. A reality of modern life is that many people will find themselves party to a committed long-term relationship where they may also be long-term cohabitees. Yet they are treated differently from their married counterparts. Doubtless the point could be made that, for the purposes of the legislation, an unmarried partner is not, by definition, a 'spouse'. The law could, of course,

27 In this regard, see Schedule 7(2) (para 27) of the Marriage (Same Sex Couples) Act 2013, which amends section 11(c) of the Matrimonial Causes Act 1973 so that the fact that a couple does not comprise a man and a woman does not make a marriage void.

https://doi.org/10.1017/S0956618X17000862 Published online by Cambridge University Press

be changed (as it was to include civil partners). Furthermore, there is precedent, albeit in the context of a civil case, for 'reading down' a legislative provision referring to a spouse so as to encompass a partner.[28]

Accordingly, it would appear that *if* there is any justification at all for retaining the exemption, thought needs to be given to the issue of whether or not it should be extended to include unmarried partners.

Should the exemption be abolished?

If serious thought were given to the matter by the legislature, the far more likely conclusion would be that there remains no justification for retaining the exemption at all. If it is accepted that the original rationale behind the creation of the exemption no longer applies, are there any other compelling reasons which justify its survival?

The matter was considered by the Law Commission in its 1976 Report on Conspiracy and Criminal Law Reform.[29] The relevant section of the Report is entitled 'Agreement between husband and wife',[30] where the authors observed that 'there are arguments which favour both the abolition of this rule and its retention'.[31]

Insofar as arguments in favour of abolishing the rule were concerned, the Law Commission noted that in all other areas of the criminal law – notably those pertaining to offences against the person and against property – husband and wife were treated as two distinct legal persons. In addition, it observed that the Criminal Law Revision Committee had made recommendations that spouses should be competent to give evidence for the prosecution and compellable in certain circumstances. This recommendation was later to come into effect by virtue of the Police and Criminal Evidence Act 1984, section 80.

As to the retention of the rule, the Law Commission opined that it would be wrong to alter the position because to do so risked undermining the stability of marriage.[32] Drawing upon conclusions reached by the Law Reform Commission for Victoria,[33] the Law Commission noted the following: first, the risk that the stability of marriage (an essential tenet of which is the confidential nature of the relationship) would be undermined and the quality of the relationship would diminish; second, the making of an agreement between husband and

28 See *Ghaidan v Godin-Mendoza* [2004] UKHL 30, in which the House of Lords read paragraph 2(2) of Schedule 1 to the Rent Act 1977 in such a way as to afford rights to a same-sex partner as if he had been a spouse.
29 Law Commission No 76 (17 March 1976).
30 Ibid, p 20.
31 Ibid.
32 Ibid.
33 Law Reform Commissioner (Victoria), Report No 3, Criminal Liability of Married Persons (Melbourne, June 1975).

https://doi.org/10.1017/S0956618X17000862 Published online by Cambridge University Press

wife is, because of the nature of their relationship, much less reprehensible than the making of a like agreement between persons owing no duties to one another; and, third, the addition of the agreement of one spouse to a project (engineered by the other) is less likely to make the project a more formidable one than if it involved the agreement of someone else who could furnish additional resources.[34] For those reasons, the Law Commission recommended that the rule be retained.

With respect to the authors of the Report, those conclusions appear tenuous at best. First, it is necessary to balance the interests of spouses with the interests of society as a whole. Being able to prosecute those who conspire to commit criminal offences is undoubtedly in the public interest, whoever they may be. The idea that those party to a marriage are free to conspire to commit crime simply because the state does not wish to trespass into the realms of the confidences associated with marriage is highly questionable. That the conduct of conspiring parties who are husband and wife is, prima facie, less reprehensible than if the parties were of some other description is equally dubious. The Law Commission seems to assume that the only category of persons who may owe duties to one another is that of spouses. One could, by analogy, suggest a whole host of other categories of people who should be afforded protection based upon this premise. Familial relationships such as mother and daughter, father and son, and brother and sister could all be argued for inclusion within the statutory exception. So too could the employer and employee, who undoubtedly owe duties of sorts to each other. It would be absurd, of course, to suggest that all these people should be incapable, in law, from conspiring together and yet the Law Commission appeared to unhesitatingly accept that the nature of the relationship between husband and wife somehow made any agreement (which would otherwise be treated as a criminal conspiracy) automatically less reprehensible. Finally, the suggestion that any conspiracy would be less formidable because it involved spouses is fanciful, even by 1970s standards but more so now. A husband and wife may have quite distinct assets to bring to a criminal conspiracy in terms of both knowledge and skill and access to resources. One could go as far as to suggest that, because of the intimate knowledge each has of the other, they may even make a more formidable team.

The section 2(2)(a) exemption also appears anomalous in light of other developments within the criminal law relating to spouses. As has been noted above, section 80 of the Police and Criminal Evidence Act 1980 makes a spouse a competent witness for the prosecution in criminal proceedings against the other (unless, of course, they are jointly charged). Furthermore, section 80 has made a spouse compellable in certain defined circumstances.

34 Law Commission No 76, p 21.

https://doi.org/10.1017/S0956618X17000862 Published online by Cambridge University Press

The long-standing defence of marital coercion has, in recent years, attracted significant public attention, ultimately leading to its abolishment. In 2009, a case described by the then Lord Chief Justice of England and Wales, Lord Judge, as 'notorious' involved the husband and wife Anne and John Darwin.[35] Together, they connived to collect the insurance and pension money payable to Anne Darwin upon her husband's death, while the latter was still alive. John Darwin faked his own death in a staged canoeing accident while at sea. At the inquest, a year later, the coroner was to conclude that John Darwin must have encountered difficulties at sea and drowned. Unbeknown to all but his wife, John Darwin had, in fact, returned to the area in which he lived, albeit in disguise and using a false identity. In the meantime, his wife was successfully claiming on the various insurance and pension policies. Five years later, John Darwin was to hand himself in to a police station on the pretence of believing he was a missing person, suffering from amnesia. Both partners were charged with various substantive counts pertaining to fraudulent activity. They could not, of course, be charged with conspiracy. John Darwin pleaded guilty but his wife pleaded not guilty, citing marital coercion. She was convicted and both went to prison.

In 2012, proceedings were brought against the then Secretary of State for Energy and Climate Change, Chris Huhne MP, and his former wife, Vicky Price, for offences of perverting the course of justice. The sorry tale – which ended with both being convicted and imprisoned – related to Price accepting responsibility for a driving offence when, in fact, it was her husband who was culpable. Her husband having pleaded guilty, the defence of Price was one of marital coercion. This latter example led many to criticise the existence of the defence (which could only be raised by women who said that they had committed the offence in the presence and under the coercion of their husbands), with Lord Pannick QC quoted as saying that the defence was 'an absurd law that should have been abolished a long time ago'.[36]

In 2014, the defence was abolished by virtue of the Anti-social Behaviour, Crime and Policing Act 2014, section 177.

CONCLUSION

There can be little doubt that the current position insofar as the relationship between spouses and criminal conspiracy is concerned is an unhappy one. On the one hand, most seem to agree that the spousal exemption created by

35 *R v Darwin and Darwin* [2009] EWCA Crim 860.

36 J Rozenberg, 'Defence of marital coercion used by Vicky Pryce to be abolished', *The Guardian*, 17 January 2014, available at <https://www.theguardian.com/law/2014/jan/17/defence-marital-coercion-vicky-pryce-abolished>, accessed 31 August 2016.

section 2(2)(a) is an anomalous one in the light of present-day attitudes and related statutory amendments. On the other, Parliament has extended the exemption to include civil partners and the Court of Appeal has interpreted the exemption in such a way as to encompass parties to a polygamous marriage recognised as valid under English law. The justification for retaining the exemption (let alone extending its scope) appears highly questionable. The time has perhaps come for Parliament to acknowledge that the law should no longer protect those party to a marriage who conspire to commit crime. There are countervailing public interest reasons why those who conspire to commit crime – whoever they may be – should be prosecuted. This author suggests that the exemption should be abolished.

https://doi.org/10.1017/S0956618X17000862 Published online by Cambridge University Press