

PRIVILEGED COMMUNICATION - MARITAL PRIVILEGE*

Evidence plays a crucial role in administration of justice whether it is a criminal case or a civil suit. To prove or disprove a fact, evidence is offered by the litigating parties in support of their allegations/demands which facilitates a judge to deliver the judgement based on the evidence tendered and the facts and circumstances of the case. Standard of proof required in the civil and criminal proceedings are entirely different. Civil cases are decided on the basis of preponderance of evidence while in a criminal case the entire burden lies on the prosecution and proof beyond reasonable doubt has to be given. There is neither any statutory provision nor any legal principle that findings recorded in one procedure may be treated as final or binding in the other as both the cases have to be decided on the basis of the evidence adduced therein.

Evidence” can be in many forms depending on the context in which it is used. It may refer to legally admissible testimony or testimony given by a witness in the court. A witness can testify based on any event he has seen or any communication he has heard or been a part of. However, there are some communications or matters where courts cannot force the individual to disclose the details of such communication/matter. These communications are known as privileged communications A privilege is a legal rule that protects communications within certain relationships from compelled disclosure in a court proceeding. As for instance when two individuals enter into a legally recognized relationship, all communication that takes place between them is protected. These communications are such that they may not be used as evidence in a court of law against the persons communicating due to the specific nature of their relationship.

Privileged communications under the Indian Evidence Act, 1872: Various communications that have been listed as privileged communications under the Evidence Act, communication during marriage or spousal/marital communication is one of them.

Communication during marriage: Section 122 of the Evidence Act, 1872 protects spousal communications (i.e., communication between a husband and a wife) from disclosure. It says:

“No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other” As for instance, the husband makes confession to his wife that he has committed a theft or murder of a person. The wife to whom the confession is made cannot be called as witness to the Court and compelled to give evidence against her husband.

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The section consists of two branches —

- (1) that a married person shall not be compelled to disclose any communication made to him during marriage by his spouse; and
- (2) that the married person shall not be (except in two special classes of proceedings) permitted to disclose such communication, unless the person who made it, or his representative in interest, consents to the same.

As per the section, there is a prohibition against the disclosure of any communication between spouses made during the subsistence of marriage unless the person who made it or his representative-in-interest consents to the same. It is irrelevant whether the communication is sensitive or strictly confidential in nature. The bar is not only against a spouse being compelled to disclose the same but also extends to cases where the spouse may be inclined or willing to disclose the same. In the latter case, the disclosure can be permitted if the other spouse who made the same, agrees to the disclosure

Principle underlying the privilege

Section 122 of the Indian Evidence Act recognises the age-old concept of marital confidence that all communications between spouses during the wedlock are sacrosanct. The prohibition is based on the ground that the admission of such testimony is likely to disturb the peace of the family and weaken the feeling of mutual confidence. Sir L.H. Jenkins, Chief Justice of the Calcutta High Court in *Nawab Howladar v. Emperor (1913) ILR 40 Cal. 891* remarked that “since decades, the courts have tried to protect the institution of marriage in matters where evidence or testimony could shatter the marital relationship between a husband and wife apart. This is one of the reasons why section 122 is still applied in cases involving offences of grave nature. The idea is to prevent a spouse to stand at the cross-road where they may be forced to speak against someone who they have vowed to spend their lives with”. The bar to disclosure of private communication in marriage is based on a high import which no court can waive at will through technicalities.

Genesis

The privilege of marital communication apparently seems to have emerged from Common Law jurisprudence defending the privacy of a married couple. The *Commission on Common Law Procedure* in its Second Report submitted in 1853, observed: “So much of the happiness of human life may fairly be said to depend on the inviolability of domestic confidence that the alarm and unhappiness occasioned to society by invading its sanctity and compelling the public disclosure of confidential communications between husband and wife would be a far greater evil than the disadvantage which may occasionally arise from the loss light which such revelations might throw on the questions in disputehence all communications between them should beheld privileged.”

When privilege can be invoked

While invoking the privilege under section 122, the important condition to be satisfied is that “*the communication must have been made during the continuance of the marriage.*” If the marriage was subsisting at the time when the communications were made, the bar prescribed by Section 122 will operate. The principle underlying the section has been explained in a landmark judgement of *Nagaraj v. State of Karnataka, 1996 Cr.L.J. 2901 (Kar.)*. The Court held that the principle underlying section 122 of the Indian Evidence Act would

make it clear that though section 120 of the Evidence Act enables a spouse to tender evidence in a case against the other spouse except in litigation between themselves either arising out of the marital relations or in a criminal prosecution and in all other cases bars the disclosure of any statements made by one spouse to another during subsistence of the marriage.

The privilege under section 122 of the Indian Evidence Act extends to all communications made to a spouse during subsistence of marriage by the other spouse. Such communications need not be confidential and applies to all communications. The privilege is not to the witness, but to the spouse who made the communication and therefore the witness cannot waive it at his or her nor can the Court permit disclosure even if he or she is willing to do.

The privilege does not end after the termination of marriage

It is also now well settled that if the marriage was subsisting at the time when the communications were made, the bar prescribed by section 122 will operate even after the wife has obtained decree for nullity of her marriage [*S.J.Choudhary v State, 1985 Cr. LJ. 622 (Del)*]. The prohibition is not confined to cases where the communication sought to be given out in evidence is of a strictly confidential character, but the prohibition is extended to all communications of whatever nature which pass between husband and wife. The privilege does not end after the termination of marriage. [*Emperor vs Ramchandra Shankarshet Uravane(1933) 35 BOMLR 174*]

The Supreme Court *M.C. Verghese v. T.J. Poonan, AIR 1970 SC 1876* has also held that section 122 will be applied to every communication made during the life of marriage and the same privilege will continue even after separation or divorce or dissolution of the marital relation, but only for the communication which was made during the existence of marriage. When the letters were written by Ponnann to his wife Rathi, they were husband and wife. The bar to the admissibility in evidence of the communications made during marriage attaches at the time when the communication was made and its admissibility will be adjudged in the light of the status at that date and not the status at the date when evidence is sought to be given in court

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When such communication can be disclosed

As per section 122 of the Evidence Act, the information can be disclosed if:

1. the person who made it or his representative-in-interest consents to its disclosure; or
 2. there is a suit between married persons; or
 3. the proceeding in which one married person is prosecuted for any crime committed against the other
1. The consent of the person is a must who made the communication or his/her representative. If the person consents to the disclosure of the communication made during the marriage, then it is admissible in evidence. The consent has to be positive, and not that it may be imported from mere waiver. As stated by Supreme Court in *M.C. Verghese v. T.J. Poonan, AIR 1970 SC 1876*, "section 122 commands that a wife or husband cannot be compelled to disclose and, even if she or he is willing to do so be

permitted to disclose any communication made to her or him by the spouse, except on express consent of the latter, or if he or she is no more, of the legal representative”.

2. In *Nawab Howladar v. Emperor (1913) ILR 40 Cal. 891*, the Court said that the widow of a deceased husband is not his 'representative in interest' for the purpose of giving such consent. In this case a widow appeared as witness and disclosed the communications made by her deceased husband. The Court held that the statement deposed by the wife of the deceased was a communication made to her during marriage by a person to whom she had been married. Not only, therefore, could she be compelled to disclose that communication, but she should not have been permitted to disclose it, for there was no one who did or could consent to the disclosure. The prohibition enacted by the section rests on no technicality that can be waived at will but is founded on a principle of high import which no court is entitled to relax.
3. If there is a suit between a husband and wife, in that event the matrimonial communication is not protected from disclosure.
4. Where a crime has been committed by the one of the spouses against other, as for instance assault, inflicting bodily injuries or any other crime and is prosecuted for the same, the communication between them ceases to be privileged.

Acts or conduct is not protected

Section 122 bars the disclosure of communication by one spouse to the other during marriage but not their acts or the conduct. A wife can testify as to the conduct of her husband of which she was the eyewitness but not the conversation. While differentiating conversations between spouses from acts and deeds the Supreme Court in *Ram Bharosey v. State of UP, AIR 1954 SC 704*, remarked that the statement of the wife “that the accused was seen in the early hours of the 27th May 1952 while it was still dark, coming down the roof of his house, that he went to the bhusha kothri and came out again and had a bath and put on the dhoti again. This is not inadmissible under section 122, as it has reference to acts and conduct of the appellant and not to any communication made by him to his wife”.

Similarly while reiterating the observations of the Supreme Court in above-mentioned case, the Allahabad High Court in *Shahnawaj Akhtar v. State of Uttar Pradesh, (1991)* noted that “the evidence that the wife produced in the court was regarding the act that the husband had done; the conduct of a husband in front of his wife cannot be put in the ambit of “conversation” under section 122 because the act was done “for the sake of doing, not for the sake of disclosure”.

The privilege does not operate against third person

Section 122 of the Evidence Act only prevents disclosure in giving evidence in court of the communication made by the husband to the wife. But *when* the communication is overheard by a third person or the information *falls* into the *hands of a third party, in that event the communication loses confidentiality and the privilege ceases to exist. Hence, they can be permitted to give evidence* about the marital communication.

The House of Lords in *Rumping v. Director of Public Prosecutions, (1962) 3 All ER 256* where Rumping the mate of a Dutch ship was tried for murder committed on board the ship. Part of the evidence for the prosecution admitted at the trial consisted of a letter that Rumping had written to his wife in Holland which amounted to a confession. Rumping had written

the letter on the day of the killing and had handed the letter in a closed envelope to a member of the crew requesting him to post it as soon as the ship arrived at the port outside England. After the appellant was arrested, the member of the crew handed the envelope to the captain of the ship who handed it over to the police. The member of the crew, the captain and the translator of the letter gave evidence at the trial, but the wife was not called as witness. It was held that the letter was admissible in evidence.

Lord Reid, Lord Morris of Borth-y-Gest, Lord Hodson and Lord Pearce were of the view that at common law there had never been a separate principle or rule that communications between a husband and wife during marriage were inadmissible in evidence on the ground of public policy. Accordingly except where the spouse to whom the communication is made is a witness and claims privilege from disclosure under the Criminal Evidence Act, 1898, (of which the terms are similar to S. 122 of the Indian Evidence Act though not identical), evidence as to communications between husband and wife during marriage is admissible in criminal proceedings.

To conclude, what the law in section 122 of the Evidence Act inhibits, is disclosure of marital confidence. What would otherwise have been cogent evidence under section 122 is barred to uphold sacredness of domestic union. The purpose being protection of marital confidences which is essential for the continued sustenance of marital relations that pave the way for welfare of the succeeding generation. The courts have strived to protect the privacy that a married couple holds, even if one of them commits an offence. This rationale is still being used by the courts to prevent hurting the peace present in a wedlock. As observed by Sir L.H. Jenkins in *Nawab Howladar v. Emperor*, it must be noted that a spouse readily agreeing to testify the other has already abandoned the idea of shielding their own marriage; therefore, the court taking the onus on themselves to neglect the greater good of public interest in a crime, to protect this sanctity, is alarming.
