**05/82**

## SUPREME COURT OF VICTORIA – COURT OF CRIMINAL APPEAL

# *R v McMINN*

### Starke ACJ, Crockett and McGarvie JJ

### 26 June 1981 — [1982] VicRp 5; [1982] VR 53; (1981) 57 FLR 206; (1981) 38 ALR 565

**CRIMINAL LAW – RAPE – PRESUMPTION OF CONSENT TO INTERCOURSE ARISING OUT OF THE MARRIAGE BETWEEN THE APPLICANT AND THE PROSECUTRIX – EFFECT OF A NON-MOLESTATION ORDER MADE PURSUANT TO SECTION 114 OF THE *FAMILY LAW ACT* 1975.**

McM. was convicted of the rape of his wife (prior to the enactment of the *Crimes (Sexual Offences) Act* 1980). It was alleged to have taken place without the consent of the Prosecutrix, being the Applicant's wife but after an order had been made pursuant to Section 114 of the *Family Law Act* 1975. The Applicant was convicted and appealed on the ground that the trial Judge did not direct the Jury that in the circumstances McM. could not be found guilty of rape in that there was a presumption of consent to intercourse out of the marriage between McM. and the Prosecutrix.

**HELD: If the law in Victoria is that which is expounded in Hale's *Pleas of the Crown* Vol. 1 page 629 "by their mutual matrimonial consent and contract the wife hath given up herself in this kind of her husband which she cannot retract", implied consent can be revoked whilst the marriage still exists. If an order has been made pursuant to Section 114 of the *Family Law Act* 1975 restraining the Applicant from assaulting or molesting his wife then the implied consent to intercourse during marriage can be revoked by the wife.**

***R v Steele* (1976) 65 Cr App R 22, followed.**

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