Commonwealth v. Vigiani

Supreme Judicial Court of Massachusetts

May 7, 2021, Argued; July 20, 2021, Decided

SJC-13087.

Reporter
2021 Mass. LEXIS 438 *

COMMONWEALTH *vs.* **ELI VIGIANI**.

Prior History: [*1] Suffolk. CIVIL ACTION commenced in the Supreme Judicial Court for the county of Suffolk on February 4, 2021.

The case was reported by *Georges*, J.

Counsel: *Ian MacLean*, Assistant District Attorney, for the Commonwealth.

Michelle Menken for the defendant.

Robert F. Hennessy & Merritt Schnipper, for youth advocacy division of the Committee for Public Counsel Services & another, amici curiae, submitted a brief.

Judges: Present: BUDD, C.J., GAZIANO, LOWY, CYPHER, KAFKER, WENDLANDT, & GEORGES, JJ.

Opinion by: LOWY

Opinion

LOWY, J. General Laws c. 233, § 20 (§ 20), limits who may give what sort of testimony in various civil and criminal proceedings. One set of limitations is found in § 20, Fourth, which applies to the testimony of a parent or minor child[1] against the other in criminal, delinquency, and youthful offender proceedings where the victim is not a family member and does not reside in the household. The central issue in this case is whether § 20, Fourth, disqualifies parents from being called to testify in their child's defense at an evidentiary hearing for a motion to suppress. We conclude that while § 20, Fourth, prevents the prosecution from calling the child's parents to testify for the Commonwealth **[*2]** in such proceedings, it allows the child to call his or her parents as witnesses for the defense and then the Commonwealth to cross-examine them.[2]

Background. Three days after the sixteen year old juvenile in this case was allegedly involved in a shooting incident, he and his mother arrived at Massachusetts Bay Transportation Authority (MBTA) transit police headquarters to be questioned. Both were informed of the juvenile's Miranda rights. In an affidavit filed with the juvenile's subsequent motion to suppress, the juvenile's mother alleges that the juvenile then invoked his right to counsel. At this point, the juvenile's mother claims that a detective spoke with her privately and encouraged her to convince the juvenile to speak with the police, promising that if he did, he would be permitted to leave and that the police would speak to the prosecutor on his behalf. The juvenile spoke with his mother for approximately fifteen minutes and then agreed to speak with police. During this conversation with

[1] General Laws c. 233, § 20, Fourth, specifically applies to minor children. However, to avoid repetition and because the juvenile in this case is a minor, we use "children" or "child" throughout when referring to the statutory terms. We refer to the juvenile here as "the juvenile."

[2] We acknowledge the amicus brief from the youth advocacy division of the Committee for Public Counsel Services and Massachusetts Association of Criminal Defense Lawyers.

police, the juvenile made incriminating statements. The juvenile was later indicted as a youthful offender, G. L. c. 119, § 54, on the charge of carrying a firearm without a license, G. L. c. 269, § 10 (*a*).

[*3] Before trial in the Juvenile Court, the juvenile moved to suppress his statements at MBTA police headquarters. To support his motion, the juvenile sought to call his mother to testify at the evidentiary hearing about her conversation with officers. In response, the Commonwealth moved to reserve and report the question whether § 20, Fourth, disqualified the juvenile's mother from testifying. Alternatively, the Commonwealth moved to prohibit the juvenile's mother from testifying based on § 20, Fourth. The judge denied both motions, and the Commonwealth filed a G. L. c. 211, § 3, petition in the county court. A single justice reserved and reported the case.

Discussion. 1. *Mootness*. Before turning to the statutory matter, we resolve a threshold issue. The Commonwealth argued in the Juvenile Court that § 20, Fourth, disqualified the juvenile's mother from testifying at the evidentiary hearing for his motion to suppress. By oral argument, the Commonwealth's position had changed, and it claimed that § 20, Fourth, does not apply to evidentiary hearings on motions to suppress at all. As a result, because the proceeding at issue was an evidentiary hearing on a motion to suppress, the Commonwealth has conceded that the mother **[*4]** could be called by the juvenile to testify. Due to the parties agreeing on this issue, the matter is moot. See *Metros* v. *Secretary of the Commonwealth*, 396 Mass. 156, 159, 484 N.E.2d 1015 (1985) ("It is the general rule that courts decide only actual controversies").

Mootness does not, however, necessarily prevent us from hearing a case. "We may choose to express our opinion on moot questions because of the public interest involved and the uncertainty and confusion that exist." *Metros, supra*. Whether § 20, Fourth, prevents a child from calling his or her parent to testify for the defense in applicable proceedings is a matter of importance and has been fully briefed. Thus, as we have in similar cases, see, e.g., *Matter of a Grand Jury Subpoena*, 447 Mass. 88, 89, 849 N.E.2d 797 (2006); *Matter of a Grand Jury Investigation*, 443 Mass. 20, 21, 819 N.E.2d 171 (2004), we exercise our discretion to decide the issue before us.

2. *Section 20, Fourth*. Because whether § 20, Fourth, prevents parents from testifying in their child's defense is a matter of statutory interpretation, we review de novo. *Commonwealth* v. *Ruiz*, 480 Mass. 683, 685, 108 N.E.3d 447 (2018).

a. *Legal backdrop*. "When construing a statute, we look first and foremost to the language of the statute as a whole," *Matter of a Grand Jury Subpoena*, 447 Mass. at 90, and strive to "give effect to each word." *Ropes & Gray LLP* v. *Jalbert*, 454 Mass. 407, 412, 910 N.E.2d 330 (2009). "A fundamental tenet of statutory interpretation is that statutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do **[*5]** so would achieve an illogical result." *Rahim* v. *District Attorney for the Suffolk Dist.*, 486 Mass. 544, 547, 159 N.E.3d 690 (2020), quoting *Sullivan* v. *Brookline*, 435 Mass. 353, 360, 758 N.E.2d 110 (2001). Because legislative intent controls our interpretation of statutes, "[w]e derive the words' usual and accepted meaning from sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions." *Commonwealth* v. *Montarvo*, 486 Mass. 535, 536, 159 N.E.3d 682 (2020), quoting *Commonwealth* v. *Garvey*, 477 Mass. 59, 61-62, 76 N.E.3d 987 (2017).

Generally, individuals have a duty to testify when subpoenaed because of "the fundamental principle that the public … has a right to every [person's] evidence" (quotation omitted). See *Matter of a Grand Jury Investigation*, 443 Mass. at 24, quoting *Three Juveniles* v. *Commonwealth*, 390 Mass. 357,

359, 455 N.E.2d 1203 (1983), cert. denied sub nom. *Keefe* v. *Massachusetts*, 465 U.S. 1068, 104 S. Ct. 1421, 79 L. Ed. 2d 746 (1984). Privileges and disqualifications are both exceptions to this rule, though they each operate differently. See generally M.S. Brodin & M. Avery, Handbook of Massachusetts Evidence § 5.1 (2016).

Drawing examples from the statute at issue to demonstrate the point, § 20, Second, creates a privilege known as the spousal privilege. See Mass. G. Evid. § 504(a) (2021). Under § 20, Second, a witness-spouse has a right not to be compelled to testify in a criminal proceeding against his or her spouse.[3] See *Commonwealth* v. *Garcia*, 476 Mass. 822, 826, 73 N.E.3d 296 (2017). This privilege belongs to the testifying spouse who may choose whether to testify or not. See *id.* By contrast, disqualifications are nonwaivable. See *id.* This is illustrated by § 20, First, otherwise known **[*6]** as the spousal communications disqualification.[4] See Mass. G. Evid. § 504(b). Specifically, § 20, First, disqualifies spouses "from testifying to private marital conversations, absent certain statutory exceptions … even when both spouses wish for the conversation to be considered in evidence." *Garcia*, *supra*.

As the spousal privilege and spousal communication disqualification suggest, the Legislature may, within constitutional bounds, craft privileges and disqualifications that limit testimony to various degrees. See *Commonwealth* v. *Maillet*, 400 Mass. 572, 575-577, 511 N.E.2d 529 (1987) (tracing legislative evolution of spousal disqualification from "absolute prohibition against testimony where one spouse was a party" to current spousal privilege and spousal communication disqualification). In determining the ways in which testimony will be limited, the Legislature must balance multiple policy considerations. See *Matter of a Grand Jury Subpoena*, 430 Mass. 590, 597-599, 722 N.E.2d 450 (2000) (noting policy considerations in context of creating possible parent-child privilege); *Gallagher* v. *Goldstein*, 402 Mass. 457, 460-461, 524 N.E.2d 53 (1988) (same for spousal communication privilege). Once that balance is struck, we construe the resulting limitation narrowly due to the overarching duty to provide evidence. See *Matter of a Grand Jury Investigation*, 443 Mass. at 23-24. This discussion sets the stage for our interpretation of § 20, Fourth.

b. *Scope of disqualification.* To start, the text of § 20, Fourth, provides:

> "*A parent shall not testify against the parent's minor child and a minor child shall not testify against the child's parent* in a proceeding before **[*8]** an inquest, grand jury, trial of an indictment or complaint or any other criminal, delinquency or youthful offender proceeding in which the victim in the proceeding is not a family member and does not reside in the family household; provided, however, that for the purposes of this clause, 'parent' shall mean the biological or adoptive parent, stepparent, legal guardian or other person who has the right to act in loco parentis for the child; provided further, that in a case in which the victim is a family member and resides in the family household, the parent shall not testify as to any

---

[3] General Laws c. 233, § 20, Second, provides:

> "Except as otherwise provided in [G. L. c. 273, § 7,] and except in any proceeding relating to child abuse, including incest, neither husband nor wife shall be compelled to testify in the trial of an indictment, complaint or other criminal proceeding against the other."

[4] General Laws c. 233, § 20, First, provides:

> "Except in a proceeding arising out of or involving a contract made by a married woman with her husband, a proceeding under [G. L. c. 209D] and in a prosecution begun under [G. L. c. 273, §§ 1-10], any criminal proceeding in which one spouse is a defendant alleged to have committed a crime against the other spouse or to have violated a temporary or permanent vacate, restraining, or no-contact order or judgment issued pursuant to [G. L. c. 208, § 18, 34B, or 34C; G. L. c. 209, § 32; G. L. c. 209A, § 3, 3B, 3C, 4, or 5; or G. L. c. 209C, § 15 or 20], or a similar protection order issued by another jurisdiction, obtained by the other spouse, and except in a proceeding involving abuse of a person under the age of **[*7]** eighteen, including incest, neither husband nor wife shall testify as to private conversations with the other."

> communication with the minor child that was for the purpose of seeking advice regarding the child's legal rights" (emphasis added).

In proceedings where § 20, Fourth, applies, the Legislature clearly intended to disqualify the testimony of parents and their children in some manner. The Commonwealth and the juvenile agree on this point.[5]

The parties do dispute, however, the scope of this disqualification. The Commonwealth maintains that § 20, Fourth, is a total disqualification: when the proceeding is against the child, neither the Commonwealth nor, absent overriding constitutional considerations, the child may **[*9]** call the parent to testify. The juvenile, on the other hand, contends that the Legislature intended § 20, Fourth, to create a partial disqualification: the child may call the parent to testify for his or her defense, but the Commonwealth may not call the parent to testify against the child. The plain language of § 20, Fourth, its neighboring provisions, and its purpose all support the juvenile's interpretation.

i. *Plain language of § 20, Fourth*. We begin with the plain language. See *Rahim*, 486 Mass. at 547, quoting *Plymouth Retirement Bd.* v. *Contributory Retirement Appeal Bd.*, 483 Mass. 600, 604, 135 N.E.3d 702 (2019) ("When conducting statutory interpretation, this court strives 'to effectuate' the Legislature's intent by looking first to the statute's plain language"). In common parlance, "against" means "in opposition or hostility to." Webster's Third New International Dictionary 39 (1993). Like most words, "against" rarely stands alone and is often used as the antonym to the preposition "for," which means "one who takes the affirmative side." *Id.* at 886. See Webster's Dictionary of Synonyms 33 (1942) ("for" is antonym of "against").

This dichotomy of "for" and "against" has a long and familiar pedigree. See Bartlett's Familiar Quotations 42 (J. Kaplan ed., 16th ed. 1992), quoting Romans 8:31 ("If God be for us, who can be **[*10]** against us?"). That usage persists in the common legal phrases "testify for" and "testify against." When a witness is called by a defendant, judges and lawyers ordinarily say that the witness will "testify for the defense" or "testify for the defendant." See, e.g., *Commonwealth* v. *McGee*, 467 Mass. 141, 146, 4 N.E.3d 256 (2014) (witness who agreed to be called by defense said to have "agreed to testify for the defendant"); *Commonwealth* v. *Girouard*, 436 Mass. 657, 668, 766 N.E.2d 873 (2002) (expert retained by defendant said "to testify for the defense" and to have "testified for the defendant"). Conversely, when a witness is called by the prosecution, that witness will "testify for the Commonwealth" or, synonymously, "testify against the defendant." See, e.g., *Commonwealth* v. *Morales*, 483 Mass. 676, 679, 136 N.E.3d 344 (2019) (prosecution's witness said "to testify for the Commonwealth"); *Commonwealth* v. *Smith*, 473 Mass. 798, 800, 46 N.E.3d 984 (2016) (witnesses who agreed to testify for Commonwealth said "to testify against the defendant"); *Commonwealth* v. *Garvin*, 456 Mass. 778, 795, 926 N.E.2d 169 (2010) (witness called by Commonwealth said "to testify against the defendant").

With these ordinary usages in mind, the mandate of § 20, Fourth, that a "parent shall not testify against the parent's minor child" most reasonably is interpreted to mean that a parent cannot be called by the Commonwealth to testify against the child.

---

[5] Although both parties agree that § 20, Fourth, is a disqualification, the judge and amici considered § 20, Fourth, to be a privilege. The surrounding provisions and legislative history show that § 20, Fourth, is a disqualification. As we have repeatedly noted, inclusion of the word "compelled" in § 20, Second, creates a privilege. See, e.g., *Commonwealth* v. *Garcia*, 476 Mass. 822, 826, 73 N.E.3d 296 & n.7 (2017); *Commonwealth* v. *Szerlong*, 457 Mass. 858, 859 n.3, 933 N.E.2d 633 (2010), cert. denied, 562 U.S. 1230, 131 S. Ct. 1494, 179 L. Ed. 2d 324 (2011). Unlike that provision, § 20, Fourth, does not use the word "compelled." Instead, the language of § 20, Fourth, resembles § 20, First, which also does not use the word "compelled" and is a disqualification. If the Legislature had wanted to create a privilege in § 20, Fourth, then it would have modelled the provision more closely after § 20, Second, not § 20, First. Furthermore, on two occasions the Legislature rejected amendments to § 20, Fourth, that would have inserted the phrase "be compelled" into it. See 2018 House Doc. 4426, § 20; 2017 Senate J., Uncorrected Proof (Oct. 26, 2017) at 40-41.

This does not mean, however, that the child is similarly prevented from calling **[*11]** his or her parents. Rather, the plain language of § 20, Fourth, leaves that possibility open. See *Gallagher*, 402 Mass. at 460-461, quoting *Rambert* v. *Commonwealth*, 389 Mass. 771, 773, 452 N.E.2d 222 (1983) ("The language of a statute is not to be enlarged or limited by construction unless its object and plain meaning require it"). Thus, § 20, Fourth, is sensibly construed to allow a child to call his or her parents to testify but prevents the Commonwealth from calling the parents.[6] The rest of the statute and the purpose of § 20, Fourth, further support this reading.

ii. *Neighboring provisions of § 20, Fourth*. "Even clear statutory language is not read in isolation." *Plymouth Retirement Bd.*, 483 Mass. at 605. As already noted *supra*, the Legislature created a disqualification in § 20, First, for spousal communications. That provision states, in relevant part: "neither husband nor wife shall testify as to private conversations with the other." G. L. c. 233, § 20, First. Because of the emphatic language of § 20, First ("neither husband nor wife shall testify"), the spousal communication disqualification prevents applicable testimony either for or against the defendant from being admitted over an objection. See *Gallagher*, 402 Mass. at 460 (§ 20, First, prohibits "testimony as to a marital conversation [even] when both parties to the conversation want disclosure").

"[A]wareness of a possible construction **[*12]** is indicative of … legislative intent." *Montarvo*, 486 Mass. at 539 n.5. Had the Legislature intended to create a similarly all-encompassing disqualification in § 20, Fourth, it could have emulated the language of the spousal communication disqualification. In particular, the Legislature could have used similarly broad language as that found in § 20, First, rather than modifying the phrase "shall not testify" with the word "against" as it did in § 20, Fourth. For example, the Legislature might have written: "neither parent nor child shall testify in a proceeding before an inquest, grand jury, trial of an indictment or complaint or any other criminal, delinquency or youthful offender proceeding against the other."

Such unqualified language would have made clear that parents were disqualified from testifying, regardless of whether the child or Commonwealth called them. That the Legislature chose different words speaks to a different intent. See *Simmons* v. *Clerk-Magistrate of the Boston Div. of the Hous. Court Dep't*, 448 Mass. 57, 65, 858 N.E.2d 727 (2006) ("where the Legislature has employed specific language in one portion of a statute, but not in another, the language will not be implied where it is absent"). Consequently, § 20, Fourth, is most naturally read as preventing parents from being called to testify by the Commonwealth — that **[*13]** is, parents cannot "testify against" their child — but allowing the child to call his or her parents to "testify for" the defense.

iii. *Purpose of § 20, Fourth*. Along with these textual indications, the purpose of § 20, Fourth, is salient. See *Montarvo*, 486 Mass. at 536, quoting *Garvey*, 477 Mass. at 61 (statutory language "considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished").

Section 20, Fourth, is aimed at the well-recognized goal of protecting the parent-child relationship.[7]

[6] Because § 20, Fourth, is a disqualification, not a privilege, the parent would not be able to refuse to testify once called by the child unless a privilege applies, such as the privilege under the Fifth Amendment to the United States Constitution against self-incrimination.

[7] Legislative history confirms that protecting the parent-child relationship is the purpose the Legislature had in mind when it last amended § 20, Fourth, in 2018. See St. 2018, c. 69, § 111; Miller, Mass. Legislature Reveals Final Criminal Justice Package, Boston Globe, Mar. 23, 2018 (quoting House Majority Leader as stating, in reference to amended § 20, Fourth, "You start pitting family members against each other, no matter how dysfunctional the family, I think you've ruined that family forever"); Brownsberger, Criminal Justice Reform at a Glance (May 6, 2018), https://willbrownsberger.com/criminal-justice-package-at-a-glance/ [https://perma.cc/3BRK-TQYJ] (noting that amended § 20, Fourth, will "[p]rotect the parent-child relationship by disqualifying parents

See *Matter of a Grand Jury Subpoena*, 430 Mass. at 599 (collecting statutes that "indicate a Legislative acknowledgment that families serve a special role in society and deserve unique protections"). With this end in mind, forcing a parent in possession of evidence favorable to his or her child to keep silent as the child is subjected to criminal prosecution would be an absurd result. See *Three Juveniles*, 390 Mass. at 366 (O'Connor, J., dissenting) ("The State should not make unrealistic demands on its citizens"). A more logical way to achieve the Legislature's goal would be to prevent the Commonwealth from calling parents to testify against their child but allow parents to testify for their child's defense — exactly what the text of § 20, Fourth, does.

Finally, the Commonwealth **[*14]** notes that by being called to testify in their child's defense, parents may be subject to uncomfortable questions on cross-examination. This is true. Such is the nature of our adversarial process. Undoubtedly, the decision to call a parent to testify will at times be a difficult one to make because of what may come out during the rigors of cross-examination. Yet families must make countless trying choices over the course of a lifetime. In enacting § 20, Fourth, the Legislature recognized the ability of families — presumably with the aid of counsel — to make one more.

Conclusion. The order of the Juvenile Court denying the Commonwealth's motion to prohibit the defendant's mother from testifying is affirmed.

So ordered.

---

and children from being called to testify against each other in court").