

CRIMINAL LAW: Wife cannot testify against her husband  
without his consent.  
COSTS: Upon the dismissal of a rape charge, state  
must pay the costs.

September 19, 1941

✓ 176  
Honorable G. Logan Marr  
Prosecuting Attorney  
Morgan County  
Versailles, Missouri



Dear Sir:

We are in receipt of your request for an opinion,  
dated September 12, 1941, which is as follows:

"The defendant committed statutory  
rape and was apprehended. He was  
bound over to circuit court on the  
complaint and testimony of his  
victim, the young girl. She is  
pregnant. While the case has been  
pending in the circuit court, this  
defendant married the girl.

"What happens to the criminal prose-  
cution? She is his wife, can he keep  
her off the witness stand?

"If she is so reluctant to testify,  
and the case in the circuit court  
is dismissed, who will have to pay  
the costs? Will the complaining  
witness, the defendant, the county  
or the state have to pay the costs?"

Section 4081, R. S. Mo. 1939, reads as follows:

"No person shall be incompetent to  
testify as a witness in any criminal  
cause or prosecution by reason of

being the person on trial or examination, or by reason of being the husband or wife of the accused, but any such facts may be shown for the purpose of affecting the credibility of such witness: Provided, that no person on trial or examination, nor wife or husband of such person, shall be required to testify, but any such person may, at the option of the defendant, testify in his behalf, or on behalf of a co-defendant, and shall be liable to cross-examination, as to any matter referred to in his examination in chief, and may be contradicted and impeached as any other witness in the case: Provided, that in no case shall husband or wife, when testifying under the provisions of this section for a defendant, be permitted to disclose confidential communications had or made between them in the relation of such husband and wife."

A very similar statement of facts, as set out in your request, appears in the case of State v. Evans, 138 Mo. 116, 1. c. 121 and 125, where the court stated:

"And thereupon the court held and ruled that said witness, although the lawful wife of defendant, was a competent witness to prove the fact of carnal knowledge as charged in the indictment, and overruled said objections of defendant; to which action and ruling of the court the defendant then and there at the time excepted.

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"We agree with counsel that both the rule and its exceptions are founded in public policy, but the legislature of this State

has announced the public policy of this State. With this subject before it for its consideration, it has declined to relax or change the common law so as to render the wife a competent witness against her husband in a criminal prosecution of this kind. It permits her to testify for him at his option, but not against him. R. S. 1889, sec. 4218. And they may testify against each other in suits for divorce. R. S. 1889, sec. 8918.

"The careful expression of these two cases in which a wife may testify excludes all other exceptions save those already enumerated and which descended to us with the rule itself.

"The court clearly erred in admitting the wife as a witness over and against the defendant's objections and exceptions."

Section 4223, R. S. Mo. 1939, reads as follows:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

It has been held that a dismissal of a case is the same as acquittal, as set out in the above section. It was so held in State ex rel. Tudor v. The Platte County Court, 40 Mo. App. 503.

Section 4393, R. S. Mo. 1939, reads as follows:

"Every person who shall be convicted of rape, either by carnally and unlawfully knowing any female child under the age of sixteen years, or by forcibly ravishing any woman of the age of sixteen years or upward, shall suffer death, or be punished by imprisonment in the penitentiary for not less than two years, in the discretion of the jury."

Under the above section, the sole punishment is death or imprisonment in the penitentiary for a term not less than two years.

CONCLUSION

In view of the above authorities, it is the opinion of this department, under the facts as detailed in your request, that a wife cannot testify against her husband without his consent, and, upon a dismissal of the charge set out in your request, the state must pay the costs.

Respectfully submitted,

W. J. BURKE  
Assistant Attorney General

APPROVED:

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VANE C. THURLO  
(Acting) Attorney General

WJB:VC