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VICTIMS AND VILLAINS: GENDER REPRESENTATIONS, SURVEILLANCE  
AND PUNISHMENT IN THE JUDICIAL DISCOURSE ON RAPE

por  
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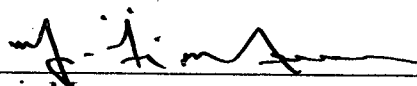
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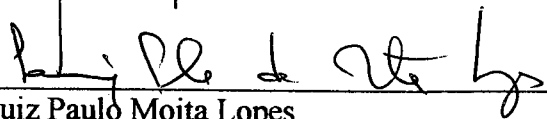
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I dedicate this thesis to Ayrton, for being there for me every step of the way.

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## ABSTRACT

VICTIMS AND VILLAINS: GENDER REPRESENTATIONS, SURVEILLANCE  
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2000

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The present work, based on the theories of critical discourse analysis, gender studies and feminist legal studies, carries out an investigation of the judicial discourse used in 50 British appeal decisions on rape cases. This work aims to investigate the discourse of these legal decisions to see how rape is defined, how rape offenders and rape complainants are described and categorised, and what impact the representations of the event 'rape' and its main participants have on the appeal decisions. In addition, this thesis also aims to investigate the role played by the discourse of appeal decisions on cases of rape on processes of education, surveillance, control and discipline of male and female social and sexual behaviour. As far as methodology is concerned, this study looks at the lexicó-grammatical choices made by the judicial writers to compose their legal decisions. The analyses indicate that, from the perspective of judicial discourse, serious rape is stranger rape, women of 'good' sexual character are 'true' victims, and rape is the result of criminal tendencies or mental problems (in the case of stranger rapists), or of desperation caused by the breakdown of the relationship (in the case of marital rapists). This rather flat picture depicts rape as an isolated crime motivated by an uncontrolled sexual drive or emotional despair, disconnected from social issues such as gender violence, domestic violence, gender asymmetry and the high level of social tolerance to the problem of violence against women, and ultimately influences the length of sentences given to sexually abusive men. The categorisation systems used by judicial discourse to evaluate rape express value judgements about how men and women behave, and are part of a pedagogical network that establishes, supervises, punishes and controls forms of behaviour and of identities.

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## RESUMO

## VÍTIMAS E VILÕES: REPRESENTAÇÕES DE GÊNERO, CONTROLE E PUNIÇÃO NO DISCURSO JUDICIAL SOBRE O ESTUPRO

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2000

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O presente trabalho, baseado nas teorias da análise crítica do discurso, de estudos de gênero e de estudos jurídicos feministas, investiga o discurso judicial utilizado em 50 decisões britânicas de apelação em casos de estupro. O objetivo deste trabalho é investigar como o discurso dessas decisões judiciais define o estupro, como a autora e o réu são descritos e categorizados, e que impacto as representações judiciais do evento 'estupro' e seus participantes causa sobre a decisão de apelação. Além disso, esta tese também investiga o papel desempenhado pelo discurso de decisões de apelação em casos de estupro em processos sociais de educação, supervisão, controle e punição do comportamento social e sexual de homens e mulheres. No que concerne à metodologia utilizada, o presente estudo investiga as escolhas léxico-gramaticais feitas por juizes ao produzir suas decisões. As análises realizadas neste estudo indicam que, do ponto de vista do discurso judicial, um estupro grave é aquele cometido por um estranho, mulheres de 'boa' reputação são vítimas 'genuínas' de estupro, o estupro é geralmente resultado de tendências criminosas ou problemas mentais (no caso de crimes cometidos por estranhos), ou do desespero causado pela dor da separação (no caso de crimes cometidos por maridos ou companheiros). Este quadro geral retrata o estupro como um crime isolado motivado por desejos sexuais descontrolados ou por desespero emocional, independente de questões sociais como a violência de gênero, a violência doméstica, a assimetria de gênero e o alto grau de tolerância social ao problema da violência contra a mulher, e acaba influenciando as sentenças de prisão dadas a homens condenados por estupro. Os sistemas de categorização utilizados pelo discurso judicial para avaliar o estupro expressam julgamentos de valor sobre como homens e mulheres se comportam, fazendo parte de uma rede pedagógica que estabelece, supervisiona, controla e pune formas de comportamento e formas de identidade.

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## Chapter 1

### Introduction

#### 1.1 Initial remarks

In his book 'Bleak House', Charles Dickens, a strong critic of the nineteenth century English justice system, describes the impression of a hearing held at the Court of Chancery on one of the book's characters. This is what the character says about her first experience in court (Dickens, 1993, p. 285):

To see everything going so smoothly, and to think of the roughness of the suitors' lives and deaths, to see all that full dress and ceremony; and to think of the waste, and want, and beggared misery it represented; to consider that, while the sickness of hope deferred was raging in so many hearts, this polite show went calmly on from day to day, and year to year, in such good order and composure; to behold the Lord Chancellor, and the whole array of practitioners under him, looking at one another and at the spectators, as if nobody had ever heard that all over England the name in which they were assembled was a bitter jest: was held in universal horror, contempt, and indignation: was known for something so flagrant and bad, that little short of a miracle could bring any good out of it to any one: this was so curious and self-contradictory to me, who had no experience of it, that it was at first incredible, and I could not comprehend it.

It would be unfair and untrue to say that the English justice system has not changed since the nineteenth century, and that efforts have not been made to adjust to new times. However, a great deal of the pomposity, the hierarchy, and the conservatism of the system has remained, and looking at the dealings of ordinary people with the legal system of today we can see that they are frequently marked by shattered hopes, frustration, prejudice, misrepresentation, awe and fear. How much of the sense of powerlessness and impotence that frequently overwhelms the lay person when in contact with the legal system is due to legal discourse? How much do we know of this discourse, its characteristics, its messages and workings, and the part it plays in processes of social surveillance, control and discipline?

This work delves into a specific type of legal discourse, the discourse of legal sentences on cases of rape, to investigate issues related to gender representation and power relations expressed and constructed through samples of this discourse. A basic premise here is that, even though the legal system materialises abstract ideals such as 'justice' and 'impartiality', it frequently produces injustice, domination and oppression. One area which is open to unfairness, stereotyping and even abuse is the legal treatment of rape victims. As Adler contends (1987, p. 151):

The treatment of rape victims by the law and the courts is grossly inadequate. It does little to help women to recover from the ordeal of rape and much to compound the initial trauma they experienced at the hands of the offender. This is partly due to legislative shortcomings and partly to attitudes of members of the legal profession who administer the law. Those attitudes mirror broad societal myths and stereotypes about the nature of the offence and must be challenged as a matter of great urgency.

Due to police and legislative shortcomings and the often biased attitudes of law enforcers and legal practitioners, many victims of sexual crimes prefer not to report the attack, and the cases which are reported to the police do not necessarily lead to the conviction of the attacker. The overall proportion of cases not proceeding to Court in England has increased from 7 to 33 percent. The number of rape convictions has dropped dramatically over recent years. Lees says that in 1980 37 percent of reported rapes resulted in a conviction, whereas by 1994 this number had decreased to 8.4 percent. According to Home Office statistics, the number of rape reports in England has more than doubled between 1985 and 1993, but the number of rape convictions has decreased from 24 percent in 1985 to 8.6 percent in 1994 (Lees, 1997).

The low reporting rate of rape<sup>1</sup> is directly linked to the way rape is discursively

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<sup>1</sup> Rape reporting has increased over the years in countries such as England and America, but it is unclear if the increase is due to a rise in criminality in general, to a change in the attitude toward rape offenders, or to a change in police recording practices. In spite of the increase in rape reports, both official and unofficial sources admit that the number of reported rapes is only a small proportion of the rapes which actually take place (Temkin, 1987; Adler, 1987; Edwards, 1996)

constructed: social discourses such as the legal one have pre-determined frames for what constitutes a 'genuine' rape and a 'real' victim; as many cases do not fit these patterns, many women probably fear to report an attack and be treated with disbelief, suspicion and disrespect. As the vast majority of women who are sexually assaulted do not report it to the police, those who report are only the tip of the iceberg, and this small percentage of sexual assaults which come to the judicial attention is still further decreased as the criminal justice system runs its course. This is in sharp contrast with public discourses such as the media, the police and the judicial discourse itself, which apparently criticise rape and other sexual offences severely, and claim that rape reporting is increasing over the years and that sexual offenders are being severely punished.

The negative results of the law often involve the discourse of the law. In the specific case of rape, one way of challenging the myths and stereotypes that underlie the judicial discourse on rape is by critically analysing and investigating the discourse of the law. The discourse of legal decisions, for instance, expresses the state of the law, affects the litigants and influences future cases and society at large (Coates, Bavelas and Gibson, 1994). As such, legal decisions are an important legal, cultural and language locus, and their legal and cultural relevance depends greatly on language, the basic tool and element of legal interactions. As Coates, Bavelas and Gibson argue (1994, p. 189):

The language used in legal judgements is not merely a reflection of individual thought; it is important in and of itself. Indeed, a particular judge's language may be drawn from counsel, witnesses, previous judgements or broader social discourse. It is this public discourse ... that has an impact and is acted upon. Language affects events and creates versions of reality.

This work aims to investigate the discourse of legal decisions on cases of rape to see how rape is defined, how rape offenders and rape complainants are described and categorised, and what impact these representations of the event 'rape' and its main

participants have on sentences on rape cases. In addition, this dissertation also aims to investigate the role played by the discourse of legal sentences on cases of rape on processes of education, surveillance, control and discipline of male and female social and sexual behaviour.

## 1.2 Methodology

### 1.2.1 Reported appellate decisions (RADs)

This work carries out a critical discourse analysis of a corpus of British reported appellate decisions on cases of rape of young and adult women, selected from specialised books where they are published (law reports). The corpus consists of 50 appellate decisions, some against conviction and some against sentence, reported on the Criminal Appeal Reports. All the decisions can be found in the appendix. They were randomly collected in 1996 and 1998 at the London University Library and the Hatfield Law School Library, and cover a period of time of about ten years, between 1986 and 1997. In this subsection I will describe and delimit these texts.

*A reported appellate decision on a rape trial (or reported decision)* is a type of text where gender relations and power relations overlap. Reported appellate decisions (or RADs for short) are the decisions reported from the higher courts and published in official law reports, which form the basic units of what lawyers call 'case law' (Radford, 1987). In order to situate these texts, I will point out exactly where they fit in a sequence of judicial procedures: a crime or felony is initially judged by a first instance court, presided by a single judge, and sometimes a jury (in the British legal system, these courts are the *Magistrates' Court* or the *Crown Court*). In this first level the

defendant (e.g. in a rape case) may be considered guilty or not guilty; if found guilty, he/she will be sentenced. In case the first instance verdict and sentence is unsatisfactory for the defendant, he/she may appeal to a higher court (in England, the *Divisional Court of Queen's Bench*, *Crown Court* or *Court of Appeal*). The Court of Appeal, which judges appeals on more serious cases (e.g. rapes), and where usually three judges sit, will produce a new decision entitled 'appellate decision', maintaining or altering, partially or entirely, the previous decision.

The defendant might appeal against conviction or against sentence. In the first case, the appeal court will either maintain the conviction and deny the appeal, or grant the appeal and quash the conviction, absolving the defendant. In the second case (appeal against sentence), the appeal court will either uphold the original sentence of imprisonment or reduce it. The sentence may also be appealed by the Attorney-General (see glossary), usually when it is considered too lenient, in which case the appeal court might increase the original sentence.

Appellate decisions exert influence over three distinct areas: the first, and more immediate, is over *the lives of the individual persons* directly involved with them (e.g. the appellant and the complainant), in the sense that an appellate decision settles a dispute and establishes directives (see p. 20) that the appellant must follow; second, appellate decisions also have a *didactic role* since the reported decisions are used at law schools for teaching the law; and thirdly, they function as *sources of law* when they are used as precedents in future cases. The importance, impact and relevance of reported appellate decisions were basic criteria for the selection of this genre for analysis.

Appeal courts are usually constituted of three judges. Each of them gives an opinion in an appeal case, and the majority verdict prevails (Maley, 1994), being later on published in the form of a law report. Due to the rule of precedent, cases must be properly reported

and the published reports must be readily accessible. Therefore, in the English legal system there is a vast collection of law reports, stretching back over the centuries (Darbyshire, 1996). According to Radford (1987, p. 137), “reported decisions are basically legal texts compiled as ritualised forms for both teaching the law and carrying it out”. Reported appellate decisions are written by judges and reported by qualified barristers; thereby they do not describe in detail what happened in the courtroom, but rather express the ways of seeing of both judges and barristers.

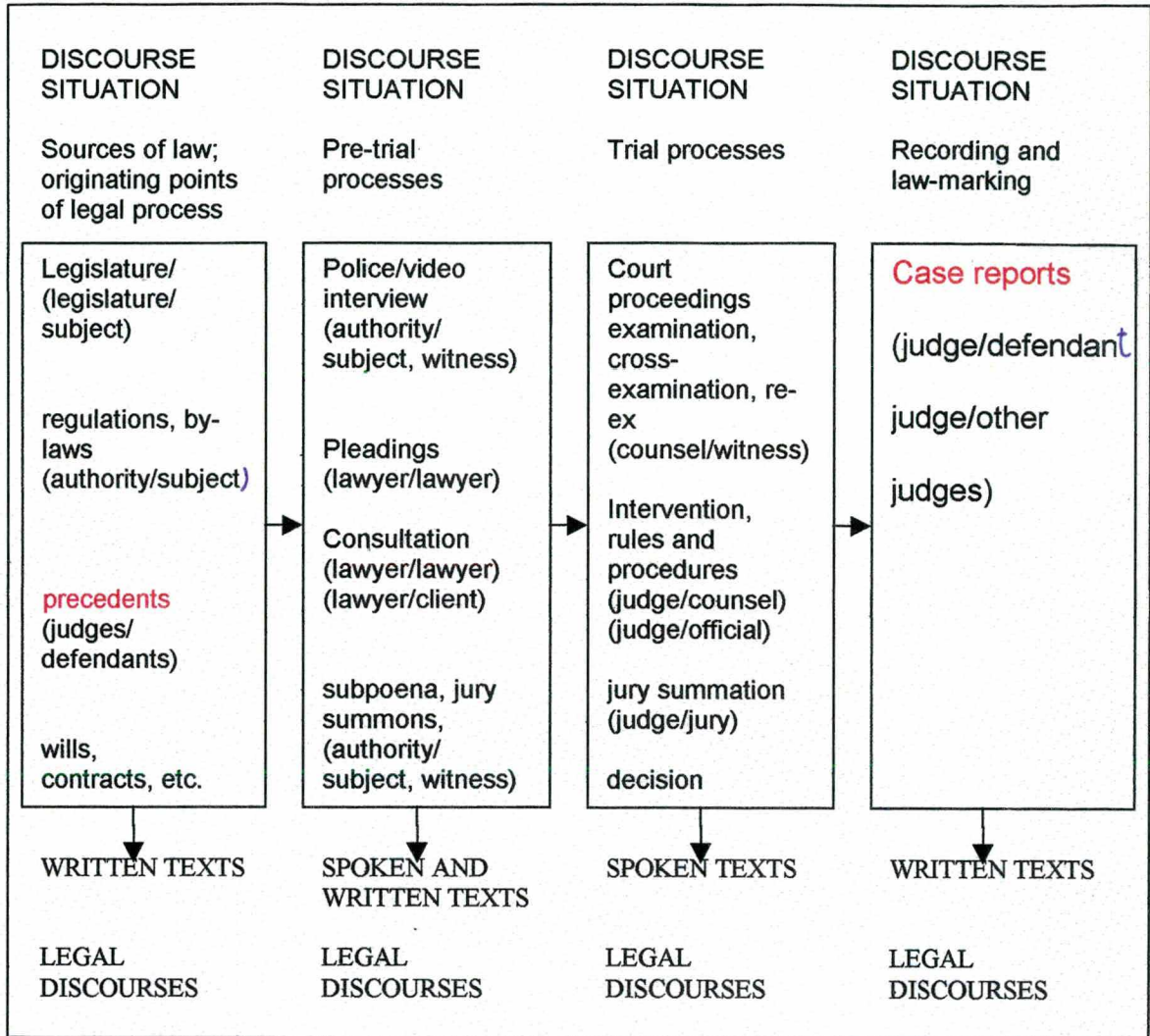
Only the judgements considered legally significant are later on published in law reports<sup>2</sup>. The decisions of higher appellate courts are particularly important as they are considered the essence of common-law (unwritten law used as precedent and principles that will guide future cases). In that sense, reported decisions can be seen as sources of law, exerting a great influence on the legal system and its practitioners, and having great social significance<sup>3</sup>. Reported decisions “are the ‘good policy’ cases which serve as teaching texts for trainees, solicitors, barristers or judges” (Radford, 1987, p. 137). In figure 1, reported decisions are located in two discourse situations: as precedents, they can be seen as *sources of law*, and belong to the first discourse situation on the left. When they are published in law reports, they become part of the fourth discourse situation, on the right, as examples of *recording and law-making*.

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<sup>2</sup> From the judicial point of view, significant appellate decisions are those which: involve the construction of a section of a statute; illustrate and further a particular point of law; cover practice points (how the court feels cases should be conducted); settle a dispute between two disagreeing lines of authority on a particular issue (e-mail personal communication with the editor of the Criminal Appeal Reports, 24/8/99).

<sup>3</sup> Due to the highly prestigious position occupied by high court judges (such as appellate judges), their decisions tend to be given much more importance (both by legal professionals and by the public at large) in the British legal system than lower court decisions. Adding to their importance, it is only high court decisions which become precedents, and are reported in law reports (Atiyah, 1995).

Figure 1.1



(from Maley, 1994)

RADs are not the event they describe and evaluate, but a representation of that event. A legal decision produced after a rape trial is several discursive stages away from the original event. After an attack takes place the victim reports it to the police, who passes it through an evaluative filter; if it is 'crimed' by the police (i.e. considered a criminal offence), the discursive representation constructed by the police is then sent to the criminal justice system for legal analysis (a second filter). During the trial proceedings, the defence and the prosecuting counsels will present different representations of the same event; these representations will be analysed by jurors and



judge, who will then produce a verdict and a sentence. If this first legal decision is questioned, it may go to a higher court, the Court of Appeal, which will put it through another filter, producing a new discursive representation of the original event. Each representation of a social practice is a recontextualisation (van Leeuwen, 1996). If each of these recontextualisations express strong and unequal gender and power relations between the participants of legal events (e.g. lawyers, judges, appellants, complainants, etc), this is the message that legal practitioners will receive and be socialised into, and this is the structure they will probably reproduce in their social practices and in their discourse.

### 1.2.2 Focus and purpose of the analysis

This work focuses on, and is guided by, the following working questions:

- a) How does the discourse of appellate decisions on cases of rape describe and represent women and men, and how do these texts construct and depict gender relations, gender roles and sexuality?
- b) What myths, stereotypes and ideological assumptions about men, women and sexuality do the representations of rape, rapist and rape victim express, draw upon and reinforce?
- c) What influence do the representations and categorisations of rape offenders and rape complainants by judicial discourse exert on the outcome of sentences on rape cases?
- d) How does the discourse of a rape trial and its subsequent legal decisions fit into a broader pedagogical process where gender behaviour (including sexual behaviour) and gender identities are supervised, controlled, disciplined and punished?

At the beginning of this chapter I argued that, in spite of representing notions such as justice for all, the legal system is also a creator and disseminator of injustices and discriminations. So much so that some theoreticians are sceptic about the ability of the law to remedy social and political problems<sup>4</sup>. Other theoreticians, however, insist upon the need for a justice system, and believe that we should strive to breach the gap between ourselves and the law. As Waldron argues, “for all its dusty paraphernalia, and for all its openness to abuse, mystery, and exploitation, the law is something we should strive to claim and construct and insist on as our own” (1990, p. 190).

One of the ways of opening spaces of resistance inside the legal system is by adopting a critique of the law. In a more discursive vein, we should demystify the notion that the incomprehensibility of legal language is a fact of nature, impervious to our efforts to understand it. It is not only possible to understand legal language, but equally to challenge, criticise and deconstruct legal discourse. A clear understanding of the discourse of law, its role, its links with power relations, of how language seems to be used more to obscure than to clarify legal procedures, is one way of claiming and constructing the law as our own. A possible apparatus to carry out an investigation of legal language and discourse is critical discourse analysis, with the help of social theories.

My purpose in this work is twofold: first, to investigate how the judicial discourse on rape, drawing from other social discourses (and at the same time feeding back into them), represents and categorises the event ‘rape’ and its two main participants, the attacker and the attacked. Second, I am also interested in analysing how these

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<sup>4</sup> The feminist jurist Carol Smart, for instance, argues that the law is seen by many people, including people in the women’s movement, as capable of providing individual solutions for fundamental problems such as gender inequalities, class or ethnical problems. In her opinion, resorting to the law can be a misleading solution because “the legal ‘remedy’ individualises the social issues – giving the individual the impression that the law can be used to resolve his, or less frequently her, personal problem” (1989, p. 104).

representations apportion blame and responsibility, influence the outcome of sentences, and ultimately serve as a pedagogical space where modes of gender behaviour are established, evaluated and penalised.

Fowler (1996b) believes that official, public languages, such as the language of the government or the law, should be priorities for critical linguistic analysis for two reasons: first, because their official origins give them a privileged role in shaping attitudes and meanings within a community; second, because they are usually consumed in a passive way, since there is no direct channel through which we can respond to official texts.

The investigation of the questions above was guided by and based on the following theoretical background:

### 1.2.3 Theoretical rationale

This work is primarily based on the theoretical and methodological apparatus offered by critical discourse analysis, a branch of discourse analysis which first appeared with the seminal book "Language and Control", published in 1979 by Fowler et al. According to Fowler, the authors' interest in that book was to "theorise language as a social practice ... an intervention in the social and economic order, and one which in this case works by the reproduction of (socially originating) ideology" (1996a, p. 3). Critical discourse analysis draws heavily from the systemic-functional view of grammar proposed by M.A.K. Halliday (1985), who claims that the functions of linguistic structures are based on social structures. The term "functional" here has two meanings: it implies that linguistic forms correspond to linguistic use; and it also indicates that, as language plays different functions, or does different things, so the forms of linguistics

express and respond to the functions of linguistics (Fowler, 1996). The term 'systemic' is also quite relevant here: it indicates that each time language is used, in whatever situation, the user is making constant linguistic choices. These choices are realised lexico-grammatically, but they are essentially choices of meaning (Richards et al, 1992).

According to Fairclough (1989, p. 5), the term *critical* indicates that this approach to language aims at revealing the hidden connections between language, power and ideology. Critical linguists analyse texts (written or spoken) looking for evidence of how social structures and social practices determine the choice of linguistic elements in a text, and the effects these choices have on social structures and social practices (bi-directional nature of discourse).

Apart from the framework of critical discourse analysis, this investigation draws heavily from the work of theoreticians and researchers in some other areas of applied linguistics and of the social sciences. One of them is the area of *legal discourse*, explored in chapters 2, 3 and 4 of this dissertation, with emphasis on the discourse of the criminal justice system (Goodrich, 1987; Gibbons, 1994; Maley, 1994; Stygall, 1994; Wood and Rennie, 1994; Coates, Bavelas and Gibson, 1994; Conley and O'Barr, 1998; Gaines, 1999). Other areas of research which have contributed greatly to this investigation are: *violence against women*, specially in the area of sexual violence, discussed and illustrated in chapters 2, 3 and 4 of this work (Hall, 1985; Scully, 1990; Clark, 1992; Campbell, 1993; Dutton, 1995; Bergen, 1996); *the legal treatment of sexual crimes*, discussed theoretically in chapter 2 and illustrated in chapters 3, 4 and 5 (Adler, 1987; Temkin, 1987; Radford, 1987; Edwards, 1981/1991/1996; Sampson, 1994; Lees, 1997), and *legal feminism*, a new area of legal studies that aims to deconstruct the male-centred legal institution and culture from a feminist, post-modern perspective, which influenced the dissertation as a whole, especially chapter 2.

(MacKinnon, 1983/1987; Smart, 1989; Rhode, 1989; Fineman and Thomadsen, 1991; Graycar and Morgan, 1992). Finally, the work of Michel Foucault (1991) concerning the genesis and structure of the modern criminal justice system has also been crucial to the interpretations and analyses carried out in chapter 5. The interdisciplinary theoretical framework adopted in this study helped to achieve a better understanding of the nature of legal decisions on cases of violence against women, using this understanding as a point of entry to analyse the social, cultural and ideological implications of such texts.

#### 1.2.4 Data analysis

The reported appellate decisions analysed in this dissertation all contained short descriptions of the assaults, and the judges' reasons and decisions. There were 80 different judges; of these, 74 were males, 1 was a female, and the remaining five were referred to with the title 'judge' plus a surname, which made it impossible to identify their gender. For analytical purposes, the cases were divided in accordance with the relationship between assailant and victim, as table 1.1 indicates:

**Table 1.1**Types of rape present in the corpus

Type of rape	Number of cases
<b>Stranger rapes<sup>a</sup></b>	
Rapes of virgins	6
Rapes of elderly women	4
Rapes of young or adult women	14
<b>Marital rapes</b>	
Former partners or in the process of separation	15
Present partners	3
<b>Acquaintance rapes</b>	4
<b>Prostitute rapes</b>	4
<b>Total</b>	50

<sup>a</sup> There were more appeals on cases of stranger rape than on cases of marital rape, acquaintance rape or prostitute rape. This is probably due to the length of the sentences; stranger rapists usually get longer sentences than known rapists (husbands, ex-partners, acquaintances) or men who rape prostitutes, and therefore attempt to reduce their sentences through an appeal to a higher court. On the other hand, rapists who have a previous relation with their victims are many times either acquitted or are awarded short sentences or non-custodial sentences (sentences which do not involve imprisonment), therefore they do not appeal.

As far as methodology is concerned, I will look at the lexico-grammatical choices (Halliday, 1985; Fowler, 1996a and b; Fairclough, 1995a and b; Coates, Beavin and Gibson, 1994) made in the appellate decisions, including under this category both *lexical items* (e.g. verbs, nouns, adverbs) and *grammatical structures* (reported speech v. direct speech) selected by the judicial writers to compose their legal decisions. I concentrate on these items because it is through them that the judges represent and

categorise the events under legal analysis and their participants, and at the same time express their ideological positions and attitudes towards sexuality, gender roles and gender relations.

### 1.3 Organisation of the thesis

Chapter 2 presents a review of the literature in the areas of critical discourse analysis, legal discourse, gender studies and feminist legal studies which have to do with *identity formation, the social and cultural view of the problem of sexual violence against women, and the legal treatment of victims of sexual violence*. I start by presenting some characteristics of legal discourse which point to its hierarchical character and to its role in creating and maintaining power relations within the legal system. Next, I present a brief overview of the structure of the British judiciary, who are the British judges (in terms of social class, schooling, gender, age), how they come to acquire their institutional identities, and the impact their background has on legal decisions. After that I discuss how rape, rapists and rape victims are viewed both by social discourses and by the judicial discourse on rape, and how the social and legal attitudes towards rape influence the way men and women see sexual violence and see themselves.

At the beginning of chapter 3 I present an overview of *vocabulary* from the perspective of critical discourse analysis. This section will serve chapters 3 and 4, since they use the same theoretical and methodological framework. In this section I discuss how the choice of lexical items frequently expresses myths and stereotypes that underlie the judicial discourse on rape, and help to organise and divide men, women and sexual behaviour into categories. These categories, structured around *prototypes* and

*interpretative repertoires*, establish relations of causality and responsibility and influence the outcome of legal decisions.

Chapter 3 discusses and illustrates how the event 'rape' is described and categorised by the discourse of appellate decisions; what constitutes a 'real', serious rape; what forms of rape are seen as less serious; and what consequences these categorisations have on the outcome of sentences for convicted rapists. Chapter 4 discusses and illustrates what I call the two main participants of a rape trial, the accused man (called the 'appellant') and the rape victim (called the 'complainant'). Similarly to chapter 3, in chapter 4 I also investigate how appellants and complainants are categorised, and how the categories used influence the final legal decision.

Chapter 3 and 4 should be read as a whole chapter divided into two parts merely for organisational purposes. Because of their similarity, there is a great amount of overlap in the examples presented in each chapter, since the same legal decision many times illustrates different facets of the representations of gender relations and gender roles and the views of sexuality and violence against women expressed by the judicial discourse on rape.

Chapter 5 presents an interpretation of the rape trial and of the sentences produced after it as spaces for a pedagogy of sexual behaviour. This chapter draws heavily from the theoretical views of Michel Foucault (1991), especially in what concerns the modern official power to supervise, control and punish behaviour, represented by the legal system. In this chapter I explore issues such as the functions of a sentence of imprisonment (from the viewpoint of the criminal justice system), the links between legal discourses and the discourses of other social sciences, the potential for control of the body offered by a rape trial, and the use of the judicial discourse on rape as an



attempt to reach or recompose social and sexual 'normality'. The last chapter, chapter 6, presents some final remarks about the entire work.

As a last remark, I'd like to point out that immediately after the 'References' section, at the end of the work, there is a concise glossary of some legal terms used both in the appellate decisions under analysis, as well as in some parts of the analysis proper. The aim of this section is to explain some frequently used legal terms so as to facilitate reading for those who are not familiar with legal discourse.

## Chapter 2

### Representations and identity

#### 2.1 Initial remarks

Following the ideas of Foucault, Norman Fairclough argues that "discourse is socially constitutive" (1992, p. 64). For Fairclough, as for other critical linguists, discourse not only reflects and represents society, it also signifies, constructs and constitutes society. One of the constructive effects of discourse can be seen in the creation and modification of social identities. Discourse helps to construct both social identities (or subject positions) and social relationships. This role of discourse corresponds to what Fairclough (ibid.) calls the 'identity' and the 'relational' functions of language. The identity function refers to the ways social identities are constructed in discourse; the relational function refers to the ways discourse establishes and organises relationships among its participants. Fairclough goes on to say that discourse not only constructs social identities, but also contributes to processes of cultural change, in which social identities are rearticulated, reconstructed and redefined. In this chapter, I present a review of the literature on three main areas: legal discourse, sexual violence against women, feminist legal studies (especially concerning the issue of sexual violence). From this theoretical and methodological framework I discuss how social and legal discourses construct rape, rape offenders and rape victims, and how these discursive constructions influence the way judges, men and women see crimes of sexual violence, sexuality, and their own identities.

Our diverse social experiences and our historical and cultural positions exert a great influence on the way we are, the way we think and behave. That is why many areas of

social studies are currently using the notion of the 'social construction of subjects'. Kress (1989b) argues that the term 'subject', borrowed from psychoanalysis, coupled with the metaphor of 'construction', represents a useful expression to discuss the social creation of linguistic subjects. Apart from looking at individuals from a social perspective, the notion of the 'constructed subject' brings into play the presence of power relations in society, and consequently in discourse (Kress, *ibid.*). The construction of subjectivity includes the formation of gender identities<sup>1</sup>. The process of acquisition of a gender identity is dependent on language, belief systems and social relations. Since belief systems and social relations operate basically through language, these three sources of subjectivity are closely interrelated. Language limits and constrains what can be said and what can be believed (Lees, 1997).

In order to contextualise the previous theoretical comments on the role of legal discourse in the construction of identities, I will start with a section on legal discourse, some of its characteristics, and its link with power. After that, I will discuss in more details the subject positions of judges, defendants (men) and complainants (women) in a rape trial. My aim in this third section is to consider how judges, defendants and complainants come to acquire their identities; to do so, I will also discuss some of the common-sensical notions that underlie the discourse of rape trials in general, and what effect these ideological assumptions have on the way men and women see themselves and gender relations. Finally, I will present some concluding remarks.

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<sup>1</sup> In the scope of this work, 'gender' is understood as the sum of psychological, social and cultural elements that form femininity and masculinity, distinct from the concept of 'sex', which refers either to biological and anatomical aspects of the human being, or to sexual relations. 'Gender' is a complex category, divided into three aspects: i) *gender labelling* (usually done at birth on the basis of anatomical features); ii) *gender identity*, which begins with the childhood perception (conscious or unconscious) of belonging to one sex, and which later on becomes more complex, involving a mixture (in different degrees) of masculine and feminine traits in every individual; iii) *gender roles*, which establish permitted and forbidden forms of behaviour for every person, in accordance with their biological sex (Dio Bleichmar, 1988).

## 2.2 Legal discourse: power and control through language

Critical linguists believe that social practices and discursive practices are mutually supportive, i.e., language is both the basis and the recipient of wider discursive, social and ideological processes. Due to this interdependence between discourse and society, social institutions rely profoundly upon the medium of language. In the words of Wodak (1996, p. 15):

Critical discourse analysis sees discourse – the use of language in speech and writing – as a form of ‘social practice’. Describing discourse as social practice implies a dialectical relationship between a particular discursive event and the situation, institution and social structure that frame it: the discursive event is shaped by them, but it also shapes them. ... [Discourse] is constitutive both in the sense that it helps sustain and reproduce the social status quo, and in the sense that it contributes to transforming it.

Discourse here is understood as a category that belongs to and derives from the social domain. In a broad social sense, ‘discourse’ (as an uncountable noun) is language use seen as social practice. In a more specific sense, ‘discourses’ (as a countable noun) are ways of signifying from a particular perspective (e.g. patriarchal x feminist discourse), modes of talking, ways of seeing/thinking (Fairclough, 1995a). Discourses are materialised in texts, which means that the linguistic features present in a text are determined by the characteristics of the discourse/s that text instantiates (Kress, 1985; Meurer, 1997).

Language plays a particularly important role in law, as most legal events (interviews between lawyers and clients, the creation of legal texts and written laws, hearings, trials, etc.) are basically linguistic. The interplay between law and language is probably as old as the appearance of the first organised human communities. Even before the creation of codified laws, language was already used to express the notion that each individual, as a

member of a community, had rights and obligations. Basic legal concepts, such as 'guilt' and 'murder', existed in language before being codified in laws. In this sense, therefore, we can say that language constructs law (Gibbons, 1994). As Maley (1994, p. 11) comments, "the greater part of [the different legal processes] are realised primarily through language. Language is medium, process and product in the various arenas where legal texts, spoken or written, are generated in the service of regulating behaviour."

Since language is instrumental to the control and regulation of human behaviour, we can also trace a parallel between language and power. Power, in the context of critical discourse analysis, is understood as "the ability of people and institutions to control the behaviour and material lives of others. It is obviously a transitive concept entailing an asymmetrical relationship: X is more powerful than/has power over Y" (Fowler, 1985, p. 61).

For Fowler, social control is exercised through two linguistic processes: *directive* and *constitutive practices*. Directive practices include manipulative speech acts such as commands, requests, proclamations, naming patterns, etc. Constitutive practices are involved in the social creation of reality, i.e., linguistic practices that construct institutions, roles and statuses to preserve the hierarchic structure of society, giving privileged opportunities to the ruling classes and keeping other less powerful social groups in a state of "voluntary or involuntary subservience" (Fowler, 1985, p. 64). Legal discourse involves both kinds of linguistic practices. In this work, however, I will be more interested in the *constitutive practices*, those that help to shape identities in legal discourse, and to distribute power unequally among its participants.

The most marked influence of language in the maintenance of power differentials can be seen in the imposition of ideology in official and public institutions. According to Althusser, the existing power structure is mainly maintained by "ideological state apparatuses", such

as the church, the law, education, coupled with “repressive state apparatuses”, which include the police and the armed forces (in Fowler 1985, p. 67). The function of ideological state apparatuses is to maintain and legitimise the existence and behaviour of the ruling classes, and they do that, as Fowler puts it, by bathing society in official discourse: “by constructing and reiterating certain selected signs, [ideological/official discourse] insists upon a set of concepts that make up a certain reality - one that is favourable to the groups for whom the ideology is constructed” (ibid., p. 68). The law and order apparatus, which encompasses both an ideological (law) and a repressive state apparatus (the police), is particularly powerful.

One of the basic premises of critical discourse analysis is that linguistic practices both reflect and construct ideological assumptions. The view of ideology in use here is that of meaning in the service of power. Ideologies usually figure in texts in the form of naturalised implicit assumptions that, together with the explicit contents of the text, help to construct its meaning (Fairclough, 1995b). They involve the representation of some event from a particular perspective or interest in such a way that the relation between proposition and fact is not transparent and obvious, but mediated through representational activity. Ideological representation is called ‘opaque’ because it comes to be seen as a mere reflection of ‘reality’, and not as a way of seeing events, facts or circumstances. Ideologies are also useful to construct and maintain unequal relations of power (Fairclough, 1995a; 1995b).

Legal discourse can be seen as a discourse of power, both in its own right, as an example of an official, public discourse<sup>2</sup>, and also in the allocation of rights to speak among

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<sup>2</sup> The view of ‘public discourse’ used in this work is twofold: from a broader perspective, it means ‘the discourse of public consequence’; from a more specific, situated perspective, it means “discourse which has gained legitimation through institutional offices and procedures of official transmission. What is at stake is

its participants<sup>3</sup>. In a legal interaction (e.g. a trial) subjects (judges) and clients (defendants/complainants) speak different languages. The specificity of the legal language, and the restrictions as to whom may speak it, rather than being just 'formal' and innocuous characteristics of legal language, serve as a means by which "the inner coherence of the group is maintained and its boundaries are clearly defined (outsiders do not use the characteristic forms)" (Fowler, 1985, p. 66).

In short, power relations, be they explicit or symbolic, are the backbone of most legal processes, especially those that take place in the courtroom. Concerning this specific legal arena, Maley says that "semiotically, the strongest meanings communicated by the physical setting of the [court]room and behaviour of those in it are those of hierarchical power" (1992, p. 32). Power is structural. It is a product of, and a process by which, members of an institution organise their activities. Institutional power is produced and reproduced through organisational symbolism: hierarchies, access to specific discourses and information, and the creation of ideological symbols (Wodak, 1996b). In general terms, those who have, as a result of their role, more access to the language of the law, and more right to speak and control the discourse and the topics in the courtroom, have consequently more power. Legal power, therefore, implies linguistic power, i.e., familiarity with, access to and control over discourse.

In the last two or three centuries law has almost reached the status of a positivist science: "precise, certain, predictable, repetitious and also more importantly, alien to any specific context" (Goodrich 1987, p. 175). The discourse of the law owes many of its

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institutional boundary maintenance and institutional public impression management" (Scollon, 1997, p. 44)

<sup>3</sup> Van Dijk (1996) presents an interesting analysis of the connection between access to discourse and power.

characteristics to Positivism<sup>4</sup>: an aura of universality, rationality, precision, and the notion that it expresses the crystallisation of ‘the truth’. Law is still shrouded in an aura of neutrality, objectivity and scientific method, as if the social events that are scrutinised by the judiciary could be purged beforehand of their social and cultural roots and rendered ‘value free’. As Edwards claims, “in the application of scientific method to law is the false premise that all subjectivity and partiality will be washed away. This is the promise of law’s baptism. Law’s language befitting the discourse of reason and science camouflages its discretion” (1996, p. 1)

Nowadays many legal scholars defend a social approach to legal discourse. In the view of Goodrich, for instance, traditional legal culture is controlled by “the positivistic view that law is an internally defined ‘system’ of notional meanings or of specifically legal values, that it is a technical language and is, by and large, unproblematically, univocal in its application” (1987, p. 1). However, this view leaves out the social aspects of law and legal discourse, the fact that law is a “specific, socio-linguistically defined, speech community and usage” (Goodrich, *ibid.*, p. 1), and that legal discourse belongs to a particular group or class and expresses relations of power over individuals and power over meaning.

Goodrich claims that law as discourse is characterised by two simultaneous processes: an appropriation and privileging of certain legal meanings or ideologies (*modes of inclusion*) and a rejection of alternative, competing or threatening meanings or ideologies

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<sup>4</sup> **Positivism**: the doctrine formulated by Comte which asserts that the only true knowledge is scientific knowledge, i.e. knowledge which describes and explains the coexistence and succession of observable phenomena, including both physical and social phenomena. Positivism has two dimensions: one is methodological (as above), and the other is social and political, in that positive knowledge of social phenomena was expected to permit a new scientifically grounded intervention in politics and social affairs [e.g. legal disputes] which would transform social life (in Jary, D. and Jary, J. (1991). *Collins Dictionary of Sociology*. Glasgow: HarperCollins Publishers. pp. 484-85).



(*modes of exclusion*)<sup>5</sup>. Legal method defines its own boundaries, and only the questions which fall inside these boundaries are considered legal 'issues'. The purpose of keeping legal method inside well-defined and well-defended boundaries is to maintain the aura of neutrality that encircles law and its decision makers; in addition, the notion that legal interpretation is based only on legal issues also exempts legal decision makers from accountability for unjust or biased decisions (Mossman, 1991). The interplay between modes of inclusion and modes of exclusion results in the apparent univocality of legal discourse.

Another important characteristic of legal discourse is its status as 'knowledge'. Knowledge and power are intimately linked; from the very dawn of civilisation knowledge has been in the hands of restricted communities of power. Legal knowledge, including the mastery of legal language, is no exception: in Western societies knowledge has always been produced and kept within the boundaries of institutions financed and controlled by religious and secular power (Goodrich, 1987).

Legal discourse, maybe more than other forms of knowledge, is deeply linked to the concept of 'truth'. Legal practitioners (especially judges), in the positivist tradition, are not just 'learned' individuals but individuals who represent and practice a rational, objective and neutral discipline: the law. Their word, both knowledgeable and 'holly', carries an enormous amount of power.

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<sup>5</sup> A good illustration for this point is a study of litigant accounts carried out by Conley and O'Barr (1998). After analysing more than a 100 trials, they concluded that litigant accounts present two forms: *rule-oriented accounts* and *relational accounts*. In rule-oriented accounts the claim for legal protection is based on specific formal rules, obligations and duties (such as the ones found in contracts or laws), and only evidence related to the rules in question is presented. In relational accounts the claim for legal relief is based on general rules of social conduct, i.e., the litigant presents him/herself as a good citizen, who fulfils his/her social obligations, being thus entitled to fair treatment (there is an emphasis on personal and social details). What Conley and O'Barr observed was that rule-oriented accounts, closer to the courts' more limited and rule-centred agenda, were favoured over relational accounts, related to a social agenda generally considered irrelevant by legal courts. Rule-centred versions of events, by fitting in with the courts' ideologies, tend to be included in legal discourse, while relational versions of events, which represent alternative, competing or threatening meanings or ideologies, tend to be left out.

However, modern Western society, far from being characterised by rational or logical social events, is going through a growing cultural, political and economic crisis (marked, among other things, by constant changes in social and cultural values, high unemployment, unequal access to wealth, education, etc.), which makes social relations particularly complex and diverse. How does the legal institution deal with this continuous process of social change? From the evidence of legal texts, we can detect an effort from the courts to keep up with certain social changes, such as changes in social values and lifestyles. However, the discourse of rape cases is still bound to and restricted by traditional definitions of what constitutes a 'woman', a 'man', a male-female relationship, family life, sexuality, parenthood, marriage, etc. We can detect in these texts the presence of conflicting ideologies living side by side, even though in general terms a gender-biased view of the world still sets the tone.

Philosophical Positivism has armed legal discourse with its rhetoric of universals, and with the self-protective doctrines of unity, coherence, logic, objectivity, and truth (Goodrich, 1987). The ideological advantages of Positivism are that it constructs a social order based on hierarchy (the sources of law) and authority (judicial practice). Therefore, as Goodrich points out, "the choice to pursue [the positivist] project is a *political* one" (ibid., p. 211). In theoretical terms, the positivist project defines legal knowledge and legal discourse as the study of ideal states of affairs, ignoring the historical and social construction of reality and human relations.

The next section of this chapter will deal with the fixed institutional and social roles which are assigned to the main participants of a rape trial: the judge, the defendant and the complainant.

### 2.3 Representations and identity formation in the discourse of legal decisions on rape cases

### 2.3.1 Judges

In order to act within an institutional domain, we are expected to be subjects formed by/within the ideologies, rules and boundaries of that institution. These constraints will influence not only our identity, but also the way we interact with ourselves, our peers and 'outsiders'. Scollon argues that "identity is inseparable from participation in a community of practice, and therefore the study of identity and the study of communities of practice are inseparable studies" (1997, p. 43). Institutional discourse is also ideological because, in acquiring the discursive norms of the institution, one also acquires the ideological norms (Fairclough, 1995a).

In the judicial context, legal education is perhaps the first step in the process of acquiring an institutional identity. And the identities of legal practitioners tend to present a great deal of homogeneity. If we consider the restrictions (social, financial, educational) and the highly competitive mode of entrance into law school, we can begin to visualise a certain uniformity among future professionals. And entry is just a preliminary stage in a long process. As Goodrich argues, "entry into law school is the start of an extremely lengthy process of socialisation into the techniques and language of an authoritarian hierarchy" (1987, p. 172).

To contextualise the process of identity formation of English judges (especially High Court ones), I will give a brief overview of how legal practitioners come to be High Court judges. In England, judges are selected from the ranks of barristers (see glossary) of between fifteen and twenty years of practice. The judges who preside over the Courts of Appeal, for instance, are appointed by the Lord Chancellor, who is a member of the cabinet. Since these judges are chosen by a member of the government, after consultation

with the Prime-Minister, we can ask ourselves to what extent an active political life and involvement with the government of the day can influence the appointment and the decisions of an English High Court judge. Referring to the selection of judges, J.A.G. Griffith contends that “ability by itself is not enough. Unorthodoxy in political opinion is a certain disqualification for appointment” (1977, p. 209).

It is also interesting to look at the social and academic background of English judges. Surveys covering the period from the 1880s to the 1970s show that most members of the senior English judiciary come from the upper and upper middle classes and have been educated in public schools and Oxbridge. Concerning their ages, English judges are usually appointed at about 52 or 53. Appeal judges, given the system of promotion, are considerably older: their average age is between 65 and 68 (Griffith, 1977, pp. 25-7).

The English judicial profession is also very homogeneous in terms of gender. In 1983 there were only three women High Court judges<sup>6</sup> out of a total of 77, and 10 women circuit judges<sup>7</sup> out of a total of 339. According to Polly Pattullo, the “typical profile of all those High Court judges appointed between 1980 and 1982 is of a 55-year-old white male, educated at one of the top public schools and Oxbridge and an experienced barrister and QC [see glossary]” (1983, p. 6). In short, senior English judges are middle-aged to elderly; probably three quarters of them have attended public schools and later Oxford or Cambridge (very few judges come from working-class backgrounds). In political terms, “it is probable (though judges do not parade their political views) that the overwhelming majority of judges are somewhat conservative” (Atiyah, 1995, p. 12).

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<sup>6</sup> Judges of the main civil court in England.

<sup>7</sup> England is divided into six circuits for judicial business. In each circuit sits a Crown Court judge or a County Court judge.

Considering the homogeneous social background, age and gender of English judges, it is not surprising to find that judicial decisions in political or moral cases tend to show a great deal of consistency. According to Atiyah, “[legal practitioners] do tend to be somewhat historically minded, at least in the sense that they often tend to perceive the world, the law, and the legal system in ways which other people would regard as old-fashioned or even obsolete” (1995, pp. 4-5)

One common question posed both by legal scholars as well as by scholars and researchers in other branches of the social sciences, is if judges are neutral or biased. Another way of posing this question is to ask if judges are political in their professional practices and decisions. According to Waldron (1990, p. 119), “whatever we think of the way judges make their decisions, *the effects* of their decisions are undoubtedly political”. In order to qualify his position, Waldron points out five different meanings of the word ‘political’: (i) part of the political system; (ii) “their decisions make a difference to the allocation of power, liberty and resources in society” (Waldron, *ibid*, p.119); (iii) involved directly in political interactions with others; trying to influence, persuade or pressure one another; (iv) biased towards one side or another in a partisan dispute<sup>8</sup>; (v) consciously motivated by ideological or moral beliefs.

According to Waldron, there is no doubt that judges are political in senses (i), (ii) and (iii), but it is controversial if they are political in senses (iv) and (v). My analysis, presented throughout this thesis, leads me to believe that they are indeed political in sense (iv), that is, their backgrounds and their institutional identity definitely influence their decisions.

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<sup>8</sup> As Waldron (1990, p. 121) points out, “the bias may or may not have been conscious, and it may or may not have been articulate”. In a more critical discourse analysis vein, judicial bias may be ideological. Judges cannot help being influenced by their background and “the conservative ethos of their office” (*ibid*, p. 121).

Being political is not synonymous of something negative – senses i, ii and iii are not. What is being questioned here is the myth that the law and legal decisions are impartial and neutral – that is, impartial in relation to the parties involved in a legal case. There is evidence that judges, usually men, many times express bias in favour of male parties, for example in legal decisions concerning sexual crimes.

However, it is important to remember that judges, as human beings, also vary in their opinions and decisions, being influenced both by personal and social prejudices and stereotypes. The premises that underlie their discourse, and the authoritarian and gender-biased ideologies from which such premises are drawn, are many times inarticulate and unknown to them on a conscious level. Fairclough draws an interesting distinction between personal values and beliefs, which exist on a conscious level, and ideological concepts, which are generally unconscious. He says that “[discourse] subjects ... are typically unaware of the ideological dimensions of the subject positions they occupy. This means of course that they are in no reasonable sense ‘committed’ to them, and it underlines the point that ideologies are not to be equated with views and beliefs” (1995a, p. 42). The discourse of the criminal justice system, for instance, as will be seen in chapters 3 and 4, looks very insensitive to women’s perspectives and points of view. However, this insensitivity is probably based more on unconscious assumptions about gender relations and gender roles than on an intentional wish to oppress.

Even though it may be argued, from a critical perspective, that the discourse of law expresses patterns of discrimination against minority groups (e.g. blacks, the poor, women, gays), there is a widespread notion that judicial decisions are neutral and rational, and that the judiciary decides disputes based on the law and on impartiality. It is important to highlight this feature of judicial discourse because neutrality here goes beyond impartiality: it also means that judges should produce judgements without touching into matters that are

not strictly related to the case before them (Griffith, 1977). According to the principle of neutrality, social issues related to particular cases should not interfere with or influence legal decisions<sup>9</sup> (rule-centred approach). Judges are constructed both by folk and official discourses as mere arbiters in conflicts between individuals or between individuals and the State, with no personal or political agendas. However, as Griffith argues, “neither impartiality nor independence necessarily involves neutrality. Judges are part of the machinery of authority within the State and as such cannot avoid the making of political decisions” (ibid, p. 190).

The prestige (both within the legal institution and in society at large) and the powerful position occupied by senior members of the judiciary obviously do not lead to an attitude of humility, of embracing alternative views or ideas. Many judges are encouraged to see themselves as infallible oracles, therefore not searching their minds for unconscious bias. Judges are also unlikely to challenge their views of justice or fairness, or to question if other social groups hold the same or different views. Even in questions of fact, they are likely to follow their intuitions or instincts about the case at hand, without considering the subjectivity or partiality of these intuitions (Atiyah, 1995).

In broad terms, judicial discourse represents the establishment and strives to keep things as they are. Having said that, I want to point out that to argue that the judicial discourse works to protect the existing social order does not mean that all judges are impervious to cultural, moral and social changes. Judges can present in their discourse traces of social/cultural changes. However, judicial attitudes will always change belatedly, if at all. In the opinion of Fineman and Thomadsen (1991), law can reflect and even facilitate

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<sup>9</sup> A sexual crime, for instance, involves many social, political and economic issues, issues which are rarely, if ever, raised or mentioned in the discourse of rape trials. The findings a London survey on rape carried out by the WAR (Women Against Rape) group in the early 1980s indicated that, in the London area, rape and other sexual crimes were related to current questions and debates about transport, housing policy, welfare, women's financial dependence, the police and the law on rape (Hall, 1985).

social change, but hardly ever initiate it. This is so because the implementation of legal rules reflects the views and beliefs of dominant, majority culture. As I said before, one of the functions of judicial discourse is to maintain the status quo, not to challenge it. Referring to the ideologies that shape the English judicial discourse, Griffith (1977, p. 214) says that:

Law and order, the established distribution of power both public and private, the conventional and agreed view amongst those who exercise political and economic power, the fears and prejudices of the middle and upper classes, these are the forces which the judges are expected to uphold and do uphold.

### 2.3.2 Women as complainants or rape victims

From the mid-70s on, there has been a great concern with the plight of the rape victim, and much has been researched and written around three main areas: the needs of the victim, the inadequacies of institutional responses to rape, and the modification of laws about rape (Adler 1987).

According to Adler, modern western society presents an ambiguous attitude towards rape complainants. On the one hand, rape is recognised as a serious crime and there is a growing awareness, since the mid-1970s, that rape complainants are roughly treated by the law and order institutions. On the other hand, society (including the legal establishment) still condones violence against women, and in spite of superficial changes in the language of legal decisions on rape trials (probably due to internal policies aiming at a more politically correct way to refer to women, blacks, the poor, homosexuals, etc), misconceptions, stereotypes and myths about sexuality and gender relations still sustain and shape the discourse of rape trials (see the representations of complainants and appellants in chapter 4). The ambiguous, contradictory and confusing messages sent from private and public discourses about rape have far-fetching negative consequences, such as the low rate of rape reporting. As an American writer commented (Woods, in Adler 1987, p. 168):



Until the time when the rape victim is no longer looked upon with suspicion and distrust, most rapists are likely to commit the crime with impunity. The bias against the rape victim ... can only be dispelled if people become aware of the quandary in which she has been placed by a society which tends to adopt a male perspective.

Some studies indicate that as little as 8 percent of rapes come to the attention of the police (Adler, 1987). Rape is still a very elusive (or underreported) crime, a crime connected with feelings of shame, guilt, fear and pain (fear of police and legal handling, of exposure, of losing one's social status and good name). Traditionally women learn to keep quiet about rape, to handle their shame and pain silently, and this social training is achieved greatly through the discourses that surround, describe and construct rape.

Studies in diverse areas of the social sciences (e.g. law, sociology, psychology, the social services) have argued and demonstrated that both the police and judicial handling of rape complainants express a great deal of sexism, discrimination and stereotypes involving women, men and the way they relate to each other. Far from being innocuous, this gender bias is in great part responsible for the low reporting rate of rape offences and the low conviction rate of rape trials (Hall, 1985; Edwards, 1996; Lees, 1997). In RADs, the gender bias is much more diluted than at the level of trial decisions, due to the nature and status of Appeal Courts: these courts represent one of the highest levels of the English legal system, and as such they have to be much more careful about their language<sup>10</sup>, and much more political in their dealings with members of 'minority' groups such as women<sup>11</sup>. Nevertheless, as I will argue and illustrate in the following chapters, the same misconceptions, myths and stereotypes that sustain social practices, police procedures, trial

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<sup>10</sup> The Judicial Studies Board has been offering training to British magistrates and circuit judges (lower court judges) in specific topics, such as 'human awareness', to teach them not to use offensive language and attitudes towards homosexuals or other minorities (Darbyshire 1996).

proceedings and trial sentences, are frequently reflected, incorporated and re-stated in appellate decisions.

One of the issues involved in a rape trial is that of violence against women. We have come to see the social phenomenon of violence as something quite common, almost as part of our everyday lives. This process of naturalisation and trivialisation of violence is to a great extent a discursive phenomenon; sexual crimes, for instance, are daily described, discussed and explored in the discourse of the media, of religion, of science, and of law. In Sampson's words, the public coverage of sexual crime has moved it "from the realm of the extraordinary into the everyday" (1994, p. 43). Sociologists believe that social problems are not just a simple reflection of objective conditions, but are also socially defined. This social definition establishes the nature of the problem, how it is to be approached and what is to be done about it (Bergen, 1996). Applying this to a discursive approach, we can say that the discursive construction of a problem such as violence against women, be it by the media, the law or the family, will exert a great influence on how gender violence is seen and how its perpetrators and victims are treated.

Added to the social and discursive trivialisation of gender violence, terms such as 'domestic violence' and 'marital rape' are recent additions to our language. As a result, many "women have historically lacked a social definition that allowed them to see the abuse [they suffered] as anything more than a personal problem" (Bergen 1996, p. 40)<sup>12</sup>. The normalisation and trivialisation of phenomena like rape and domestic violence leads countless women to see their violation as unimportant or their own fault, and to believe

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<sup>11</sup> In addition to that, appeals focus on issues of law and do not include all the details of the rape or of the trial. Therefore, their style is more formal and their contents less graphic than trial transcripts or trial sentences.

they should not 'fuss' over it. That is what Ruth Hall observed in her contact with sexually assaulted women at the Women Against Rape (WAR) centre in London. In her words (1985, p. 23):

Women's view of what has happened to us, and of who is to blame, is coloured by what others may think, and by how it would be seen in the courts or in law. If we were raped in a situation seen as 'risky', or if no 'force' was used, or if the rapist was a friend, or a boyfriend, it is hard to challenge the judgement that we have no right to complain.

Besides being traded in society, this body of myths, stereotypes and ideological assumptions about male and female sexuality and gender relations has also been incorporated into statutory law and common-law, as well as in the discourse of legal practitioners (lawyers, judges, etc). There is an interplay between legal discursive practices and broader social practices: cultural/ideological views of gender-sex relations shape legal practices and judicial texts, which in turn construct and reinforce commonly held views of sexual and social behaviour (Edwards, 1996).

One of the most damaging notions still traded in rape trials and legal decisions on rape trials is that rape is usually motivated by the assailant's sexual needs<sup>13</sup>. However, rape is not merely about sex, but mostly about power, frustration and anger (Adler, 1987;

<sup>12</sup> In her survey of survivors of marital rape, Bergen (1996) observed that older women (and several younger ones too) had difficulty in identifying their experiences as wife rape because they saw sex as their duty, something that was part of the expected behaviour of a 'good wife'.

<sup>13</sup> I'm not implying that the view of rape as sex, shared by many legal practitioners, eliminates the criminal nature of the offence. Rape seen, or interpreted, as sex is still considered a criminal offence liable to harsh punishment. My point here is that we can look at rape from different perspectives and with different focus of attention: we can concentrate on the sexual aspect of the offence, interpreting rape as a crime motivated by a need to satisfy sexual cravings, or we can focus on the links between rape and relations of power, interpreting it as motivated by a wish to subjugate, dominate and humiliate the victim. The two different focuses, or views, imply different objects of punishment: when we focus on the sexual aspect of the offence, the presence of physical violence becomes an important matter, and the offender is punished and possibly sent to prison to protect society from his 'uncontrollable' sexual drive. On the other hand, when we focus on the elements of power and domination expressed in a rape, the intrinsic violent nature of the act comes to the fore and physical violence is no longer a measure to determine the seriousness of the offence. According to this second interpretation, what should be punished and controlled

McLean, 1988; Rhode, 1989; Smart, 1985; Edwards, 1981,1996; Lees, 1997). As Adler notes (1987, p. 11), the problem with seeing rape as the outcome of frustrated sexual needs is that:

This belief provides the basis for a whole series of misconceptions about both victim and offender. So long as rape is seen as an act of sexuality rather than aggression and hostility, it will continue to be interpreted as predominantly pleasurable to both parties, rather than as harmful to the victim.

From a gender perspective, rape is grounded on aggression and a wish to dominate – usually the ‘weak’ and the vulnerable (such as children) (McLean, 1988)<sup>14</sup>. By saying that I am not denying that there is a sexual element in rape, rather I am arguing that its sexual connotation is different from the notion of sex most of us have. Most feminist researchers and theoreticians agree that rape is basically about violence and domination (see MacKinnon, 1983; Graycar and Morgan, 1992); the sexual abuse is a weapon used by the assailant to inflict an extra layer of insult, pain and humiliation on his victim. If we could pinpoint the genesis of sexual assault, it would probably be the existence of unequal positions of power between people (men and women, adults and children, blacks and whites, rich and poor, etc). As McLean contends, “it is apparently powerlessness (in political, social, sexual or physical terms) which makes certain people targets for abuse” (McLean 1988, p. 205)<sup>15</sup>.

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by a legal decision on a rape case is the wish to dominate and humiliate the other, a wish that can be satisfied through several means, of which forced sex is just one.

<sup>14</sup> The most recent attempts to theorise and explain sexual crime fall broadly into three schools: the *sociological*, which explains the occurrence of sexual crimes (especially rape) by the operation of relations of power and gender in society; the *biological*, which relies on Darwinian theories of evolution or the influence of hormones on behaviour; and the *psychological*, which links sex crimes to the psychological make-up of individuals (Sampson, 1994, pp. 6-7). Judicial discourse presents traces of both the biological and the psychological theories in its interpretation and representation of rape (see chapters 3 and 4).

<sup>15</sup> In South Africa, for example, there has been of late a tremendous increase in the number of rapes (more than a million victims each year). Carol Bower, director of a rape crisis centre in Cape Town, links the phenomena of apartheid and colonisation to the increase in gender violence. In her opinion, many South-

Discourse plays an important role in achieving control over sexuality. In his work “The History of Sexuality” (1979), Foucault argues that legal prohibitions, exclusions and limitations on sexuality are linked to particular discursive practices. According to him, it is by establishing prohibitions and regulations on sexuality within legal and medical discursive practices, among others, that control over female sexual behaviour is achieved (Edwards 1981, p. 13). The way women perceive the phenomenon of gender violence and sexual crimes, for instance, has a direct impact on their social behaviour. Studies carried out in England indicate that fear of crime acted as a ‘curfew’ for women, leading them to become ‘street-wise’, adopting strategies of avoiding men, keeping to well-lit streets, carrying something to defend themselves, etc. Fear of sexual attacks circumscribes women’s modes of living, behaviour and social activity (Edwards, 1991).

According to Smart (1989), the legal discourse on rape is characterised by a great emphasis on, and a concern with, sexuality, especially female sexuality. Law sees the body and its activities as an area of legal jurisdiction. From the time of the appearance of the first codified laws until today, the female body (particularly in its sexual and reproductive capacities) has been seen as an object of legal regulation, control and punishment (Smart, 1989). Several legal and social researchers have contended that the discourse of law constructs the female body as diseased, hysterical, or immoral. Susan Edwards (1981), for instance, argues that the discourse of rape trials is ripe with notions about female passivity, women as victims, and female culpability. Edwards says that women *are* their sex for legal discourse. In other words, for the legal culture sexuality is the main trait, the one that constructs, defines and shapes a woman’s identity. This is done by constructing a specific feature of the woman’s behaviour (e.g. her sexual history) as dominant, therefore giving it

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African men feel they can regain the political and social power they have lost through the use of physical

‘master status’ (Liebes-Plesner, 1984) (see case 6 in appendix). Other characteristics are either made to fit into this dominant one (‘auxiliary traits’) or, if conflicting, are downplayed. The discourse of rape trials constantly invokes images of motherhood, chastity, promiscuity, the ‘bad girl’, the virgin, the forgiving wife, etc., creating a portrait of women which is flat and uni-dimensional (see chapter 4, section ‘Complainant’). According to Liebes-Plesner’s (1984, p. 186), this narrow depiction of women is by no means uncommon:

Society does not perceive that the personality of a woman can combine different characteristics. Rather than being perceived as an integrated personality which incorporates both maternal love and passion, a woman is categorised one-dimensionally. She is either good or bad, motherly or sexual, Madonna or prostitute, innocent and pure or scheming and seductive. This split image is expressed in all forms of popular culture.

### 2.3.3 Men as defendants or rapists

I have argued that discourse is socially constitutive, constructing institutions, social relations and identities. In this section I will make some considerations on how discursive practices lead men to see sexual violence as trivial, normal, even acceptable. Referring to the link between the process of identity formation and language, Scollon contends that our individuality is constructed from the language of the world around us. He refers to what is inside us as *‘thought’*, and what is outside us as *‘behaviour’*. Following this line of thinking, the behaviour of individuals is shaped by the process of internalisation of public discourse in the form of thought (or ‘inner speech’), which is then externalised as individual behaviour (including speech behaviour). In Scollon’s words, “the behaviour of the

individual is derived directly from public discourse by way of this process of socialisation” (1997, pp. 45-6).

Even though not all men become involved with or accept violence, in modern Western patriarchal society the hegemonic or dominant model of masculinity is aggressive and misogynist (Newburn and Stanko, 1994). In spite of that, violence (including gender violence) is theorised by the discourses of law and morality as ‘wrong’. Sociologists have noticed that people who have performed acts defined socially or legally as ‘wrong’ can and do use discourse to present themselves as ‘normal’. In the context of rape, for instance, Diana Scully (1990) investigated the ‘vocabulary of motives’ of rapists, i.e., the linguistic devices convicted rapists use to interpret and explain their acts, and to make them look socially and culturally acceptable.

During her research, Scully observed that, discursively speaking, convicted rapists fell into two categories: admitters and deniers. ‘Admitters’ used excuses in an attempt to explain why their behaviour was rape but they were not rapists. The ‘denier’ type, in contrast, admitted that rape is usually impermissible, but argued that, in their particular cases, there were justifications that made their behaviour appropriate, if not right. As Scully observed, “like others in our society, these men set very narrow limits for the behaviour they would consider rape” (1990, p. 115). The convicted rapists studied by Scully constructed their justifications linguistically, and relied on well-known stereotypes about women to justify their actions. In the accounts of ‘deniers’, for instance, the victim and her behaviour were frequently described in such a way that the rapes were made situationally acceptable. Scully concluded that the mastery of a certain vocabulary seemed to be basic in the process of learning to accept, justify and carry out a rape.

This work shares the view that rape is, for the most part, learnt behaviour, acquired in the same way as any other kind of behaviour: socially in direct association with others as

well as indirectly through cultural contact. From this view, “learning includes not only behavioral techniques but also a host of values and beliefs, like rape myths, that are compatible with sexual aggression against women” (Scully, 1990, p. 59). As linguistic behaviour learnt from society, the use of discursive explanations and manipulations to make rape and other sex offences look normal is present not only in the discourse of rapists, but also in the discourse of the criminal justice system. Both rapists and legal practitioners (such as judges) build their explanations for rape based on knowledge acquired from society, a knowledge which expresses what our culture considers acceptable.

Scully offers a sociological explanation for the apparent insensitivity of many of the rapists she interviewed towards their victims. She argues that rapists have difficulty in putting themselves in their victims’ shoes and understanding their perspectives. This lack of empathy is intimately related to how power is distributed between the genders. Powerful people have few reasons to put themselves into the position of less powerful ones. For the less powerful person, on the other hand, it is vital to learn to understand and anticipate the behaviour of others. For men, for instance, role-taking with women, i.e. trying to see things from a woman’s perspective, is not essential, while for women role-taking with men “is a survival strategy” (Scully 1990, pp. 115-6)<sup>16</sup>.

Another researcher who links gender violence with power is the psychologist Donald Dutton. In his view, abusive men show an extreme need to control intimacy. Dutton argues that abusive men generate power by dominating or attacking women; they feel the need to

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<sup>16</sup> Research indicates that some women develop a ‘traumatic bonding’ with their aggressors (Dutton, 1995, p. 57). In Freudian theory there is the term *identification with the aggressor*, used to describe the paradoxical bonding sometimes formed between aggressor and victim. A person who is powerless in a life-and-death situation may come to identify with her attacker as a way of avoiding danger. According to Anna Freud, a potential victim believes that if she could see the world through her aggressor’s eyes, she might be able to save herself from destruction (in Dutton *ibid*, p. 56).



have an impact on others, especially their partners, and this impact is frequently achieved through violence (Dutton 1995, pp. 33-4).

#### 2.4 Final remarks

I have argued here that discourse is socially constitutive; this, however, does not mean that subjectivities are static: discourse helps to construct identities both in conventional and in creative ways (Fairclough, 1992). Fairclough points out that, due to the heterogeneity of texts, there is an ongoing negotiation between identity and difference; texts express processes of articulation, desarticulation and rearticulation which upset social identities. However, even though identities might be constantly reshaped in post-modern times as a result of changing social, political, cultural or economic influences, relations of power and domination still mark many texts, and official discourses particularly still resort to processes of naturalisation in order to present their views of the world as given and unproblematic.

The judicial discourse on rape lays bare patterns which are not restricted to the legal system, but which function symbiotically with the way sexual violence is treated in society at large. According to these patterns, the attacker is not always held entirely responsible for his actions, and the victim may be called upon to share some (if not all) of the blame.

As pointed out earlier, only a small proportion of rapes are reported, and an even smaller number of the reported cases ever come to trial<sup>17</sup>. The ones which do, however, play an important symbolic role. Criminal trials are symbolic in the sense that their main actors, e.g. the defendant and the victim, represent social roles; the trial itself embodies the notions of a 'good' society (and a 'just' and 'reliable' criminal justice system) and the

achievement of justice in individual cases (Bumiller, 1991). However, rape trials symbolise not only values such as ‘justice for all’ and a ‘reliable’ justice system, but also important social values concerning women, men and their relationships. The discourse of rape cases is an example of social values transformed into social action, and it has the power either to strengthen these values or subvert them (Conley and O’Barr, 1998). According to Liebes-Plesner, the stereotypes related to female social and sexual behaviour constructed during a rape trial (by defence lawyers, prosecutors and judges) “are perceived as fulfilling a social purpose parallel to that of myths and folktales, confirming the notion that trials are moral lessons rather than an efficient way of solving disputes” (1984, p. 173).

The discourse of a rape trial, rather than advancing female rights, can actually work to disempower women (one example is the trivialisation of domestic sexual abuse; see chapters 3 and 4). One of the most perverse effects of discourses on rape is that they can exert a great influence on the way women see themselves, their attackers and the violence they have been exposed to. Different women may define their violation in different ways, especially when their cases do not fit the accepted stereotypes or the legal norms. Their own difficulty in acknowledging that what they went through *was* rape, added to feelings of shame and guilty, and to a well-founded fear of the handling of the criminal justice system, leads countless women not to report sexual attacks.

In the following three chapters, I will discuss and illustrate how the judicial discourse of RADs on cases of rape represents the event ‘rape’ and its main actors: the assailant and the victim. I will also discuss how these linguistic representations influence the way event and actors are seen, the sentences given to sexually aggressive men, and ultimately the way women and men see themselves, their sexuality and the issue of gender violence.

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<sup>17</sup> For further comments on the amount of rapists who are eventually convicted by the British criminal



## Chapter 3

### The use of categorisations systems in the judicial discourse on rape - The event 'rape'

#### 3.1 Initial remarks

Much has been said, investigated and discussed about the tough handling of rape victims by the court system during a rape trial. Nowadays it is fairly well established that the victim suffers what is sometimes called a 'double rape': she is first raped by her assailant, and she is then 'raped' again by the Court system, in the sense that in both instances she loses all her privacy, and during the trial every detail of her past and present sexual and social life is scrutinised. My work explores yet another dimension of this 'double rape': the judicial discourse used to construct the legal responses to appeals on rape cases. My aim is to add to this well established line of inquiry (see Liebes-Plesner, 1984; Adler, 1987; Radford, 1987; Smart, 1989; Coates, Bavelas and Gibson, 1994; Edwards, 1981, 1996; Conley and O'Barr, 1997; Lees, 1997; etc.) by investigating how the linguistic and discursive structure of legal decisions contribute to the gender-biased treatment given to victims of rape.

In the following chapters I will investigate how the judicial discourse constructed by RADs on rape cases represents the drama of a rape trial. To do so, I will look at the vocabulary used in RADs to depict the sexual assaults, i.e. the event, and its main actors – the accused man and the victim. Certain images are very constant throughout the texts. These images, or *myths*, correspond to and express common-sensical beliefs about men, women and sexuality. As Wodak (1996, p.10) observes, myths are “secondary semiotic systems, which both insiders and outsiders are supposed to believe and which mystify

reality. A second reality is thus constructed and naturalised". A critical analysis of the judicial discourse on rape, such as the one proposed here, aims to deconstruct this discourse, i.e. to expose some of its unassailable truths as myths.

### 3.2 Vocabulary

The sexual mythology that surrounds rape starts with the victim specificity: until recently only women could be raped by penis penetration of the vagina, and the majority of rape trials today involve a female victim (McLean, 1988)<sup>1</sup>. Since until recently the law stated that only women could be raped, it leads to the conclusion that perhaps there is something in women that leads them to be raped. Feminist scholars also contend that the 'femaleness' of the victim leads to harsh official treatment because official institutions entertain preconceived and prejudiced notions about gender. According to McLean, being a woman and being a complainant of a sexual crime generally leads to inept official handling. In her words, "it is assumptions about female sexuality which predict the level of care and concern which [women] can expect when they become victims [of sexual crimes]" (1988, p. 196). Rape victims are frequently treated with mistrust and contempt, while a victim of a robbery or a burglary, for instance, usually has no fear of reporting the crime to the police and can generally expect the initiation of police and legal procedures.

The sexual mythology, the stereotypes and recurrent images about women and men found in the discourse of RADs (e.g. what constitutes a 'real' rape, who is a 'genuine' victim, the 'fiend' rapist, 'normal' sexual acts, perversions, etc) are part of a chain

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<sup>1</sup> The British Criminal Justice and Public Order Act 1994 has recognised male and female buggery as 'rape'. Male buggery is now treated as 'anal rape' (Edwards, 1996). However, while collecting the data for the present corpus in 1996 and 1998, I did not find any RAD dealing with a case of male buggery

whose links can be found in other discourses that construct and describe rape: the family discourse (which first teaches girls and boys what modes of behaviour are 'appropriate' and which are not), the media discourse (which trivialises and normalises violence, and which gives more coverage to 'stranger rape'); even scientific discourses (medical and psychiatric discourses have long been used to help investigate and control female sexuality, until recently defining women as sexual hysterics and men as slaves to their hormones) (Temkin, 1987).

My interest in analysing the vocabulary of RADs is not to investigate a specific professional lexicon or jargon, but to check how the lexical choices made by the producers of RADs indicate a system of classification, or categorisation, of the events involved in these texts, and their participants (especially the appellant and the complainant). This vocabulary, which is not specific to legal discourse, is nevertheless an indication of how the criminal justice system separates people and events into groups or classes, and which world-view(s) this system of categorisation expresses.

Words can only be interpreted and understood in context. It is important to remember that contexts are socially, culturally and politically constituted. So, to understand a word used in the context of a legal decision on a rape case, the reader has to take into account the judicial discourse on rape as a whole, with all its ideological overtones. The lexis of a discourse represents its conceptual repertoire. The important thing to remember is that there are different terms to refer to the same object, event or experience. The term we choose expresses our point-of-view. The vocabulary used by a writer is a strong indicator of, and an influence on, the scope and the structure of their experience and their world-view (Halliday, 1985). Fowler, for instance, calls for a

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prosecuted as rape. I found only one case of sexual assault by a woman on a man, but it was prosecuted as 'indecent assault on male' (See *Sharon Kristine B* (1994) Cr.App.R.(S.)).

dynamic view of vocabulary or lexis as "the encoding of ideas or experience" (1996b: 215).

Text producers rely not only on their lexical choices to express meaning, but also on shared common-sense assumptions about the world (world-views shared by writer and reader, which are more easily taken for granted among the members of the same institution) (Fowler, 1996b). When the reader shares the same ideological basis with the writer, such as is the case with members of the same institution or profession, they may not even notice the bias of the meaning.<sup>2</sup>

Due to the fact that it is not possible to say everything about something in a text (Winter, 1994), text producers have to rely on implicit propositions, which allow the text consumer to establish links between the clauses and sentences of the text. However, text writers can also structure their texts in order to predispose their readers to establish certain links and not others, creating predominant readings; these predominant readings rest on specific taken-for-granted propositions which are part of the implicit meaning of the text. Thus, a text addresses an 'ideal reader', who will bring to bear on the text the propositions which will lead to its 'preferred reading' (Fairclough, 1995b). The ideological function of a 'preferred reading' is to lead text consumers to accept as 'natural' the framework of common sense in which the text and the reader are positioned. As any other texts, legal decisions on rape cases also express and rely on a wealth of implicit common-sensical assumptions about gender roles, gender relations and sexuality.

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<sup>2</sup> I am arguing that writers and readers of RADs are members of the same institution because these texts, even though presenting decisions that affect the lives of ordinary people, are mainly read by students and teachers of law and by legal practitioners (defence or prosecution attorneys, judges, etc).

As many of these assumptions are part of implicit meanings present in RADs, they are difficult to bring to the level of awareness, and equally difficult to combat and deconstruct.

Fairclough differentiates two different types of discourse: *official discourses*, or discourses of public life and especially of policing; and *lifeworld discourses*, or discourses of everyday life and experiences (1995b, p. 164). The notion of lifeworld discourses is connected to the implicit, ideological assumptions that underlie a text: in order to fill in the textual gaps with the necessary implicit propositions, writer and reader have to share membership of the same lifeworld. In the rape trial structure, for instance, defendant (a man) and judge/s (usually men) belong to the male lifeworld; judge/s and lawyers are frequently members of more than one common world: the male lifeworld, the professional public world, the middle/upper-class lifeworld. Complainants (or rape victims), however, belong to the female lifeworld<sup>3</sup>.

Another discursive feature used to transform particular points of view into 'unquestionable' truths is the process of *naturalisation*, whereby ideological world-views are presented as 'natural', 'correct', 'impartial' renderings of reality. The most naturalised ideological propositions are those which are common-sensically believed by all members of a community, and seen as based on some generally accepted rationalisation (such as being part of 'human nature', or expressing 'what everyone knows') (Kress, 1985; Fairclough, 1995a). Due to the last 30 years of battle towards denaturalisation of sexist ideologies, some of the gender-biased assumptions that sustain the judicial discourse on rape are now taken as given only in increasingly narrow and challenged social circles. The assumption that women are provocative and 'ask to be

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<sup>3</sup> The notion of male and female lifeworlds used here, similar to the notion of male and female 'genders', can be seen as the end points of a continuum, rather than totally discrete categories.



raped' is an example of a rather contested ideological proposition, even though it is still found in some judicial texts.

On the other hand, the assumptions that people have unified and consistent selves (i.e. their behaviour patterns will not change in spite of changes in time, place and conditions), and that behavioural patterns are indicative of affective states (e.g. if a woman is forced to have sex but does not show physical and verbal resistance, she is in fact accepting and maybe even enjoying the experience) are highly naturalised in the sense that they are accepted by most people as common-sensically 'true'. The more naturalised a proposition, the more difficult it is to recognise its ideological underpinnings. "Opacity is the other side of the coin of naturalisation", argues Fairclough (1995a, p. 36).

### 3.2.1 Interpretative repertoires and prototypes

I suggested earlier that the judicial discourse on rape rests on a system of categorisation of men, women and sexuality. I will now make some comments on the use of categorisation processes to understand and organise reality, including sexual violence. In order to make sense of the large number of things and events we encounter in our daily lives, we organise them as examples of types or categories. The use of categorisation as a cognitive device allows us to simplify infinite variation, and ignore irrelevant features (Fowler, 1996b).

The vocabulary we use rests on sets of preconstructed categories, and the process of representation involves deciding how to 'place' people and events within these sets of categories (Fairclough, 1995b). According to Fowler, "the process of categorisation ... is part of a general strategy for simplifying and ordering the world" (1996b, p. 25).

It could be argued that the need to categorise is a natural cognitive strategy used by human beings. However, what critical discourse analysis wishes to challenge is the notion that the world has an intrinsic, natural structure, divided into equally natural categories, from which language passively draws its meanings (Fowler, 1996b). Language does not simply provide words for existing concepts; it crystallises and stabilises ideas. Words make ideas palpable through the signs they provide, which can then be spoken or written. Besides, words allow us to store ideas into systems, which enables us to express distinctions and relationships.

The point here is that the vocabulary used by a certain discourse and the categorisation system it expresses are not innocuous 'reflections' of reality, but help to construct ideas, values and relationships. In Fowler's words, "because the vocabulary system encodes a categorisation of the world as experienced by language-users (and their culture), vocabulary actively shapes the ideas handled by propositions" (1996b, p. 76).

By selecting a particular category to describe someone or something, we are establishing a link between the person or thing categorised and other members of the same group. To describe something by using categorisation devices is revealing not only of *what* is being described but also of *who* is describing: we try to make ourselves understood by fitting people and events into categories, and the categories we select to construct our descriptions, and thus clarify the world, indicate how we understand and interpret reality (Jalbert, 1983; Meurer, 1998).

Chapters 3 and 4 focus on how the discourse of RADs represents the event called 'rape', the man accused of the offence, and the woman victim of it. We could say that the system of categorisation used in RADs on rape to describe women, men and events is part of a language of gender power. The power over sexuality and gender relations

expressed in such a system of categorisation helps to shape social and sexual behaviour, making some particular forms of behaviour seem correct and inevitable and others appear to be harmful and disreputable.

Categories include both *prototypical* and *marginal* examples. Fowler argues that *categories* and *prototypes* allow us to concentrate on essentials, and to be able to identify rapidly what a thing or event is. A prototype is a word (or representation) that is perceived as a 'classic' example of its field, springing more immediately to mind when we think of its class. This phenomenon indicates that, for cultural and social reasons, we tend to perceive (or construct) certain words (or representations) as more central or more salient within a semantic field, while others shade away from these prototypical examples until the class merges in a fuzzy boundary, where we find its less typical examples.

The danger of prototypical definitions is that they may turn into *stereotypes*, "oversimplified, automatic interpretations – [which] inhibit understanding; thought becomes routine, uncritical, and discourse becomes prejudicial" (Fowler, 1996b, p. 26). Our discourse does not represent a rendering of the objective world, but rather our way of relating to, constructing and simplifying objective phenomena, making them manageable and economical for our thoughts and actions. However, our systems of categorising and classifying phenomena frequently seem so natural that they become 'common sense', and we believe they correspond to an objective 'reality' instead of a 'world-view', 'theory', 'hypothesis' or 'ideology'.

Another illuminating concept that can be used to understand systems of categorisation is that of '*interpretative repertoires*'. Interpretative repertoires are:

building blocks speakers use for constructing versions of actions, cognitive processes and other phenomena. Any particular repertoire is constituted out of a restricted range of terms used in a specific stylistic and grammatical fashion.

Commonly these terms are derived from one or more key metaphors and the presence of a repertoire will often be signalled by certain tropes or figures of speech. (Wetherell and Potter, 1988, in Coates, Bavelas and Gibson, 1994, p. 197)

In an analysis of legal decisions on cases of sexual assault tried in Western Canada between 1986 and 1992, Coates, Bavelas and Gibson (ibid) found that rape was often described as erotic/affectionate and as distinct from violence; the narrative structures and vocabulary used in these legal sentences depicted rape either as stranger rape or consensual sex, but hardly ever as a sexual assault carried out by a known assailant. They concluded that, in the interpretative repertoire of Canadian legal decisions on rape cases, either the offence fits into the stereotypical pattern of stranger rape, or it is described as a sexual act and not as a sexual assault.

This chapter will use the notions of 'prototypes' and 'interpretative repertoires' to investigate the process of categorisation of the event 'rape' in the vocabulary of reported appellate decisions on cases of rape. In the following subsections, I will discuss and illustrate with examples from the corpus how the judicial discourse of appellate decisions examined in the present study seek to define the event 'rape'. To do so, I will divide the examples into 2 groups (typical and non-typical rape), corresponding to the categorisation system used by appeal judges to classify, systematise and simplify the complex phenomenon of sexual violence against women. The subsections are:

### 3.3 Analysis: The legal view of rape

#### 3.3.1 The 'real'/typical rape

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The data used in this chapter consist of excerpts taken from 29 of the 50 RADs that compose the corpus (the excerpts are verbatim from the reported appellate decisions). In this chapter, as in the other analytical chapters which follow it, not all the cases in the corpus were analysed due to space constraints. The cases selected were the ones which better illustrate the categories discussed in the chapter, and are representative of the rest. The excerpts are individually numbered, each number representing one RAD. When the same number is repeated in two or more excerpts, this indicates that all of them come from the same RAD. The words or sentences highlighted in red within each excerpt are the ones I wish to focus on, since it is mainly through them that the categories or prototypes being discussed are constructed.

### 3.3 The legal view of rape

According to the English legal definition, rape consists of vaginal penetration by the penis, when the man knows the woman is not consenting to sex, or does not care whether she is consenting or not (Section 1 of Criminal Offences Act 1956)<sup>4</sup>.

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<sup>4</sup> Some countries have introduced what is called 'rape neutral laws'. This is the case in some Australian jurisdictions (e.g. Victoria, South Australia and New South Wales), where the legal definition of rape no longer requires penetration of the vagina by a penis, but simply forced sex. However, official statistics from the 1980s indicated that 92.5 percent of the complainants were women (Graycar and Morgan, 1992).

Women, however, see rape in a different light. From a woman's point of view rape is a life-threatening event where sex (of any kind) is used to control and humiliate her, during which her only concern is to survive (thus so many women offer no resistance to rape). The definitions of consent, consensual and forced sex traded in the legal discourse of rape all rest on male rather than on female experiences (e.g. if a woman shows no verbal and/or physical resistance, she is consenting; rape without physical violence is less serious; rape by a known man is less traumatic). At the restricted level of the specific case, one of the main functions of a rape trial is to define the meaning of the act to the parties (the defendant and the complainant), i.e. to establish if the sexual acts that took place were consensual or not, and thus if they constitute the crime of 'rape' or not. At the broader level of the legal system and of society, the trial and the legal decisions produced after it also help to define the meaning of the act, this time to a larger audience: legal practitioners (lawyers, judges, etc) and members of the public (witnesses, newspaper readers, etc).

The discourse of rape trials, along with other discourses, helps to establish what constitutes 'consensual' sex, 'normal' sexual acts, forced sex, abnormal sex. However, rape laws and legal practitioners alike do not take into consideration that men and women have different perspectives of sexuality, and therefore might have different definitions of rape. Women's experiences of heterosexual sex are not either *consensual sex* or *rape*; rather, they exist along a continuum that goes from choice, to pressure, to coercion, to force. Sex along this continuum can be classified into four types (Graycar and Morgan 1992, p. 331): *consensual sex* (both partners want it); *altruistic sex* (women agree to sex not to hurt the male feelings, or to avoid a scene or a row, or because they feel guilty about saying no); *compliant sex* (the consequences of not doing it are worse than the consequences of complying); and *rape* (the woman does not consent).

Until very recently the British criminal justice system did not even consider the existence of forms of forced sex within marriage. The legal and social silence around the issue of domestic sexual violence is so strong and pervasive that many women, for lack of an interpretative repertoire that describes any form of coercive sex as sexual assault, do not see their own experiences of forced sex as rape (see Hall, 1985; Edwards, 1989, 1996). From 1991 onwards marital rape has become a sexual crime in England, and some partners and ex-partners have been charged, tried and convicted of raping their wives. Nevertheless, the data in the present work indicate that domestic sexual violence is still surrounded by a mist of silence and taboo: domestic abuse is still seen as less serious, and abusive partners and ex-partners still get away with lighter forms of discipline and punishment.

Up to the 1980s, rape complainants were frequently criticised for going out alone, for having a 'promiscuous' sexual past, for hitchhiking, for dressing provocatively, even for living alone or sleeping scantily dressed (Adler, 1987). In the 1990s, these criticisms are not considered politically correct, and they are no longer overtly expressed in the discourse of appeal judges. Now a different, more subtle evaluative technique is applied: appeal judges do not criticise the provocative, imprudent women who gets raped, but they openly praise and describe as 'real' victims those women who can 'prove' that they didn't contribute to their rape: the very young, the virgins, the very old, women who were raped by strangers who broke into their homes, the victims of serial psychopathic rapists (for more on the judicial portrait of rape complainants, see chapter 4).

### 3.3.1 The 'real'/'typical' rape (standard rape episode)

From the legal point of view, rape is defined as a 'serious legal offence' when: it involves the penetration of the vagina by the penis; the victim is a very young or very old woman; intercourse is achieved through the use of physical force; the rapist is a stranger, preferably a stranger who broke into the victim's home. If brought to trial, this kind of rape is severely punished because it represents not just an attack against an individual woman, but a threat to some sensitive social values such as youth and old age, the home, virginity and the good name of women. As Rhode puts it, "one form of abuse – intercourse achieved through physical force against a chaste woman by a stranger – has been treated as the archetypal antisocial crime" (1989, p. 245).

Other forms of coercive sex that do not fit the above pattern are frequently not defined as rape. If before or during the rape the woman had even a slight modicum of control over the event (such as during a date), there will be serious doubts as to whether it was a 'real' rape. In short, the *standard rape episode* is one where the rapist is a stranger, the victim is totally powerless and passive, and intercourse is complete. In constructing their legal decisions, many judges still try to match the particular case they are analysing against this stereotypical standard episode; a mismatch makes conviction unlikely, or sentence length shorter (see table 3.1).



**Table 3.1**Average sentence length (in number of years)

	Stranger rape	Marital rape <sup>a</sup>	Marital rape during cohabitation	Prostitute rape	Acquaintance Rape
No. cases of life sentence	6				
No. cases of sentences below life	11	12	3	3	1
Average no. of years in prison	10.22	5.5	2	9.66	6

Note. Among the 50 appeals that compose the corpus, 36 were on sentence, and this table refers to this number only. Of the 36 sentences appealed, 6 were life sentences, so they were not considered to calculate the average number of years in prison. That average refers only to sentences below life imprisonment.

<sup>a</sup>The category 'marital rape' includes both couples who were still legally married but living apart or in the process of separation, and those who were already divorced and living apart (ex-partners).

As can be seen in table 3.1, the average sentence length for the stranger rapes found in the corpus was double the average sentence length for cases of marital rape, demonstrating that marital rape is still considered a less serious sexual crime. In addition, all the life sentences found in the corpus were awarded to stranger rapists.

In this subsection, I will present a number of examples of how a 'real' rape is seen from the judicial viewpoint. The excerpts selected represent examples of 'prototypical' rapes taken from the corpus. Inside each excerpt, I will highlight the particular lexicalisations typically chosen by appellate judges to evaluate the cases under analysis:

1. On October 26, 1993, he was released on parole. Four days later he committed *this terrible offence* ... He accepts that *this was a terrible case*. [Case 28 Albert Thomas 1994 – elderly widow raped by a burglar – 15 year sentence]
2. Over a period of three years the appellant committed offences against five mentally deficient women, some of whom were resident in a hospital where the appellant had been employed for many years as a nursing assistant ... *The offences were grave and despicable*, involving preying on mentally ill, vulnerable women, sexually abusing them and leaving them helpless and lost. [Case 29 – Michael Fox 1994 – stranger rape - life imprisonment]
3. ... *the appalling crime* he had committed on his victim [Case 31 – Joseph Kennan 1995 – rape of a young prostitute – 14 year sentence]
4. The applicant encountered a girl of 16 who was soliciting as a prostitute. She agreed to permit the intercourse for 30 pounds. She entered the applicant's car and he drove to a car park, where he attacked the girl, placing his fingers on her throat and striking her face. The applicant punched her several times so that she lost consciousness, and then had intercourse against her will without using a condom. The girl was later forced to masturbate the applicant and perform oral sex on him. The girl was released after being in the car for about four hours ... *a terrible incident* ... It must have been *unspeakably traumatic and terrifying for this young girl* ... In *a case as appalling as this ... the appalling four-hour endurance* that this unfortunate 16-year-old had to deal with ... *a very horrifying and terrifying four hours* in this girl's – this child's – life. [Case 34 - Asif Masood 1996 - rape of a young prostitute – 9 year sentence]
5. On three subsequent occasions he [the appellant] gained access to flats occupied by women, and raped them, using violence and threats to kill ... *these horrendous rapes ... the terrifying nature of the rapes* which were committed [Case 40 – Paul Brandy 1996 – stranger rape –life imprisonment]
6. The appellant was convicted of attempted rape, robbery and indecent assault. The appellant attacked *a young woman who was six months pregnant* as she walked home from a friend's flat. The appellant threatened her with a knife, made her remove her clothes and attempted to rape her and then indecently assaulted her ... This was undoubtedly *a very serious attack on a total stranger at night who was simply wending her way home* [Case 49 – Roy Low 1997 - standard 'stranger rape' episode – life imprisonment]

All the cases above fit into the 'standard rape episode': rape by a strange man, frequently aggravated by the use of threats or a weapon, and by the victim's age (I will explore the issue of aggravating features at more length below). The lexical choices construct the events as 'real' crimes: the offences are described as 'terrible', 'grave', 'despicable', 'appalling', 'unspeakably traumatic and terrifying', 'horrifying and terrifying', 'horrendous', 'very serious'. It is clear that the judges feel shocked and disgusted by the crimes and that their sympathies lie entirely with the victims. This severe judicial attitude is reflected in the long sentences awarded to these rapists.

However, not every rape is depicted with such abhorrence by the judges, and not every rapist receives the same severe punishment. Table 3.2 indicates what types of rape got longer sentences:

**Table 3.2**

Sentence length in relation to type of rape

Years in prison	Stranger rape		Marital rape <sup>a</sup>		Marital rape during cohabitation		Prostitute rape		Acquaintance rape	
	N° of cases	%	N° of cases	%	N° of cases	%	N° of cases	%	N° of cases	%
Life sentence	6	16.16								
16 to 13	4	11.11					1	2.7		
12 to 9	2	5.5					1	2.7		
8 to 6	5	13.88	6	16.16			1	2.7	1	2.7
5 to 3			5	13.88						
2 to 1			1	2.7	3	8.33				
Total	17	46.65	12	32.74	3	8.33	3	8.1	1	2.7

Note. The blanks indicate that there were no cases of that type in that category. Among the 50 appeals that compose the corpus, 36 were on sentence, and the percentages refer to that number only.

<sup>a</sup>See note 'a', table 3.1, p. 56.

The longest sentences (life imprisonment<sup>5</sup> to 9 years) were given either to stranger rapists (the vast majority), or to men who raped prostitutes (2 cases). Marital rapists and acquaintance rapists got sentences no longer than 8 years, many of these towards the lower end of the scale (below 3 years of imprisonment). I will elaborate on the different

treatment given to rapists in section 3.2, where ‘non-typical’ rapes will be discussed and illustrated.

In the 50 RADs investigated in this work, judges resorted to particular lexicalisations to describe the rapes (e.g. rape as an ‘appalling crime’, or as ‘sex’, ‘sexual intercourse’, etc). The choices made by the text producers reveal their ideological standpoints since, from the perspective of critical discourse analysis, for every particular lexicalisation there are other alternative lexicalisations, which derive from divergent ideological positions (Fairclough, 1995a).

### 3.3.1a ‘Ordeal’

A frequent lexical choice made by appellate judges to fit certain rapes into the ‘real rape’ slot is the use of the noun ‘ordeal’ to evaluate the event. When the event is interpreted as an ‘ordeal’, there is no doubt that it is indeed ‘rape’, and that the corresponding sentence will be severe<sup>6</sup>. Below are some examples of cases categorised as ‘ordeals’:

7. The girl did not consent to any sexual activity in the house. After *her ordeal*, she left and travelled to a friend’s house where she made a complaint. [Case 5 – Mohammed Iqbal Khan and others 1990 – young girl raped by a group of young boys - sentences of 5, 9, 7 and 7 years (respectively) upheld, reduced to 7 years, reduced to 5 years and upheld]
8. The case had to be slotted into its appropriate place in the overall spectrum of sentencing for the range of appalling cases that come before the Court ... Astonishingly, despite *the appalling ordeal* to which the appellant had subjected her, in her very full statement she felt able to say this: “Although this man seemed horrible by the things the did, I feel he wasn’t a bad man underneath” ... One’s first reaction to the case is inevitably one of *outrage and revulsion*. The thought of invading an old woman’s home and subjecting her to *this dreadful ordeal* is almost unthinkable. [Case 18 – Laurence McIntosh 1993 – rape of a 100-year-old widow by a stranger – 9 year sentence]

5 According to Lees (1997), the maximum penalties given to some stranger rapists (life sentences or sentences of 10 years or more) may give the impression that severe action is being taken to control rapists and other sexual offenders, even though in practice the maximum penalties are rarely used.

6 I do share with appellate judges the view of rape as an ordeal, an appalling and repulsive crime of violence against women. I do not question the choice of the noun ‘ordeal’ to define a particular rape, but the fact that some rapes are defined negatively as ‘appalling’ and ‘serious’ offences (as the examples in this section indicate), whereas others are described as less serious, and the offenders are treated with sympathy and condonation (see section 3.3.2).

9. ... she has clearly suffered emotionally and psychologically as anyone who has to go through *this dreadful ordeal* will have suffered [Case 25 Attorney-General's Reference No. 28 of 1993 – stranger rape – 8 year sentence]
10. It appears *the ordeal* of the victim was prolonged because the offender was unable to ejaculate. [Case 41 – Attorney-General's Reference No. 76 of 1995 – stranger rape – life sentence]

### 3.3.1b Aggravation

The 'real' or prototypical rape is often connected to the presence of aggravating features in the case. According to the *Peter Collin Dictionary of Law*, 'aggravation' is "something which makes a crime more serious" (1992, p. 8). In a rape trial, the features which aggravate the crime (and therefore result in a longer sentence to the offender) are: use of a weapon; attempt to frighten or wound the victim; subject the victim to sexual indignities; the victim's virginity; the victim's very young or very old age; burglary followed by rape; and the after effects of the rape on the victim.

The aggravating features mentioned in rape sentences shed more light on myths and stereotypes around male and female sexuality than on the circumstances of the rape itself. Aggravating factors express the values and ideologies of a community about gender and sexuality, which are crystallised and realised in laws, statutes, legal practices, in short, in legal discourse. In the genre 'legal decision', judges operate as protectors and upholders of sensitive social values such as: youth; old age; virginity or a woman's good name; the sanctity of the home; 'traditional' forms of sexuality (as opposed to 'bizarre', threatening forms of sex such as fellatio, buggery, fondling, touching, considered 'sexual indignities'). The following excerpts illustrate some of the aggravating factors found in the corpus, i.e. the victim's youth or old age, and burglary followed by rape:

11. The offender, aged 15 and of previous good character, was convicted of rape and indecent assault on *a 15-year-old girl* ... In view of *the aggravating features of the offence and the traumatic effect on the victim* and the fact that the offender did not plead guilty; nevertheless, despite his age and previous good character, the offence was so serious that only a custodial sentence was justified. [Case 2 - Attorney-General's Reference No. 3 of 1993 – young girl raped by a stranger – community service replaced by 2 year sentence]
12. A *14 year old girl* visited London for the first time from her home in Durham ... She lost her way back to King's Cross station and was accosted by the appellant who offered to assist her; but in fact he took her back to his flat, plied her with drink and then raped and bugged her. She had never taken alcohol before and was *a virgin* ... He was tried for very serious offences indeed ... What happens thereafter almost beggars description... She, after these terrible events had occurred, dressed herself – she had been stripped of her clothing by him – and staggered out into the street [Case 12 - Wared Mhaywi Kabariti 1990 – young girl raped by stranger – 12 year sentence]
13. It was, therefore, *a violent offence* and the appellant was properly convicted ... This is a truly shocking case ... this was an appalling crime committed against *a lady approaching 90 years of age who was in her home alone at night*. In our judgement, the sentence was right: if the appellant had been older the sentence might well have been longer. This appeal is dismissed. [Case 14 Kenneth Mark Robinson 1992 – old woman raped by a stranger in her home – 8 year sentence]
14. In the early hours of the morning *he entered a house* occupied by two sisters, one of who was six months pregnant. The offender threatened to kill both of them, and then raped the younger of the two sisters and indecently assaulted her by pushing his penis into her mouth and his fingers into her vagina ... For the Attorney-General it was submitted that *the offence was aggravated by the fact that the offender had broken into the victim's home at night, that the victim had no previous sexual experience of sexual intercourse, and that the offence had caused her long-lasting psychological damage*. [Case 23 – Attorney-General's Reference No. 16 1993 – stranger rape – 9 year sentence]

The rape that occurs in the victim's house, when she is attacked by an unknown assailant (a burglar or a sexual maniac, for instance) is seen as particularly shocking and abhorrent because it violates and threatens the private, domestic world, an almost sacred place in the social imagery where women are supposed to be guarded and protected against attacks by strangers<sup>7</sup>.

Due to the seriousness of the offence, this kind of rape is probably the most severely punished by the criminal justice system, especially when the victim is a very young or very old woman of 'good' reputation ('real' victims – see chapter 4). The two rapes illustrated below are depicted as 'true' examples of the prototypical 'serious sexual

<sup>7</sup> The home can also be a very dangerous place for women. According to Lees (1997), research indicates that there is a connection between marital rape and murder, and both are more likely to occur when the marriage is breaking down or after separation. Rape by a present or ex-partner can be potentially more dangerous than by a stranger; 45 percent of female homicides in England involve wife and lover killings (see also Campbell, 1992; Dutton, 1995).

offence’, as the lexicalisations chosen indicate (‘a grossly aggravating feature’, ‘an appalling attack’):

15. For the Attorney-General it was submitted that *the offence was aggravated by the fact that the offender had broken into the victim’s home at night, that the victim had no previous sexual experience of sexual intercourse, and that the offence had caused her long-lasting psychological damage ... Indeed, it is a grossly aggravating feature when young women cannot feel themselves safe within their own residences from having a break-in and being raped by an intruder* [Case 23 – Attorney-General’s Reference No. 16 of 1993 – Shane Lee Goddard – stranger rape – 9 year sentence]
16. *This was an appalling attack.* It is true it did not have some of the other sexual indignities which all too often accompany and aggravate an offence of rape, but *there were other serious aspects of it, not least the fact that this rape occurred in what should have been the security of the victim’s own home.* [Case 45 – Gary Howatt 1996 – stranger rape – 16 year sentence]

### 3.3.2 Non-typical rapes

Forced sex (especially with a known man) is often described within the sexual discourse of pain and pleasure, of masochism and sadism (Edwards, 1996), or of duty and obligation, and as such it can easily come to be seen as part of the ‘normal’ sexual life of couples. For instance, the fact that many women do not always enjoy sex but frequently accept to do it when they don’t really want to is still considered, in many circles, as part of the pack and parcel of a woman’s sexual life. The naturalisation of these supposedly non-violent forms of coercive sex helps to explain why law and order officials have difficulty in labelling episodes of forced sex between partners as rape<sup>8</sup>.

The assumption is that once a woman has consented to sexual intercourse with a man, this consent will extend for the whole duration of the relationship, and even after the relationship has come to an end (what is sometimes called ‘the permanent nature of

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<sup>8</sup> This difficulty is not restricted to the law and order apparatus. Marital rape is a relatively new concept, and it still receives little attention in comparison with other forms of rape (such as stranger rape or even date rape). Bergen (1996) argues that research on wife rape is still scarce if compared with the amount of research on other forms of violence against women and children. In her survey of American agencies which give help and support to rape victims, she found that wife rape was not widely seen as a serious social problem; in some rape crisis centres she found no available literature on wife rape, and members of staff were not trained to deal with this specific type of sexual abuse.

consent' – Adler, 1987). A rape allegation against a present or ex-partner, no matter how brutally the woman has been attacked, is viewed as extremely doubtful. In Adler's words (1987, p. 91), "where the victim agrees that there had been sexual involvement in the past, the defendant is almost always acquitted. [Rape is then presented] as an overreaction to a domestic dispute which occurred within the framework of an established sexual relationship". In a study of 50 rape cases tried at the Old Bailey<sup>9</sup> in 1984, Adler (ibid) observed that, with one exception, all the men who had a previous relationship with the complainant were acquitted of the rape charge.

Non-consensual sexual activity is far more common than we would expect, being part of the history of most cultures. Its victims are predominantly the weaker and the most vulnerable, while the perpetrators are generally those who represent society's dominant norm – heterosexual males (McLean, 1988). In England, for instance, the majority of sexual offences in the 1980s were committed by men against women and children (Adler 1987:15-6). Contrary to the popular (and legal) belief that sexual assaults are mostly committed by strangers, the offenders are usually intimates, relatives and men in positions of power. Recent Home Office figures indicate that around 45 percent of the rapes reported in Great Britain are committed by a known man. At the same time, the British police have been observing a constant decrease in the number of stranger rapes, which represent only 12 percent of the recorded incidents ("Violência sexual assusta britânicos", *Diário Catarinense*, Sunday 20 February).

Domestic coercive sex seems to be endemic in different countries. In Brasil, the report "Injustiça Criminal – A violência contra a mulher no Brasil", produced by the America's Watch – Projeto dos Direitos Humanos das Mulheres, found that approximately 70 percent of the reported attacks against women took place in the domestic environment, and that husbands and lovers were, in the majority of cases, the

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<sup>9</sup> The Old Bailey is the Central Criminal Court in London.



aggressors (Cardoso, 1996). Rhode (1989) claims that the most systematic American studies about marital rape indicate that between 10 and 15 percent of married women experienced coercive sex with their husbands, many times resulting in severe physical or psychological injuries. In England, a survey from the beginning of the 1990s estimated that one in seven married women had been raped by their present or previous husband, and in four out of five of these cases the offence had occurred more than once. Half of these rapes involved violence or threats of violence, and one rape out of five occurred when the victim was pregnant (Sampson 1994, p. 27). Bergen (1996) speculates that rape in marriage may be the most common form of sexual assault. In spite of that, the belief that the existence of a previous relationship between assailant and victim renders the rape less traumatic is firmly held by the criminal justice system (see Edwards, 1996; Lees, 1997; and illustrations found in this section). However, evidence from research studies and surveys with abused women indicate the opposite. It has been argued that rape by a familiar person may be more traumatic than by a stranger; marital rape victims report more long-term injuries than women raped by strangers (Adler, 1987; Rhode, 1989; Bergen, 1996). Clark claims that rape by a known man can be as devastating (or even more) than stranger rape because (1992, p. 224):

Violence from someone known will probably be endured over a longer period of time, access to the victim is usually unlimited, and the after-effects are harder to recover from because a trust has been violated and the victim is less likely to confide in others and, if she does, is less likely to be believed.

Rape by a known man is devastating for women because, besides the usual pain, guilt and shame linked to any sexual offence, it involves feelings of betrayal of trust, confusion and uncertainty. The difficulty in formulating coercive sex as rape also has the effect of keeping women silent (it is probably linked to the low reporting rate of

rape), and of letting many abusive men go undetected<sup>10</sup>. Much of this is due to the power of language, i.e. to the power to categorise and label events and experiences. In Wood and Rennie's words (1994, p.145), "there is power in the way an experience is named, and in who does the naming. ... It is usually men who name the woman's experience, and they name it from their perspective"<sup>11</sup>.

The difficulty in recognising domestic forced sex as rape is not restricted to the legal system. As 'genuine' rape is defined as stranger rape, it is very difficult for women to acknowledge that their experiences of forced sex with a known man (partner, ex-partner, friend, relative, date) are instances of rape. As Bergen found out while working with marital rape survivors, "the majority of women with whom I spoke said that they initially hesitated to apply this term [rape] to their experiences because they thought that rape happened only between strangers, not between two people who loved each other" (1996, p. 42). Women are led to believe that it is the lack of familiarity and the presence of physical force and coercion that defines an act as rape. Surveys reveal that many women have had experiences of non-consensual sex which neither them, nor their partners, nor the law, defined as 'rape' (Graycar and Morgan, 1992).

In this subsection, I will discuss how many rapes brought to the legal fore are named otherwise than 'real' rape. As I will illustrate, the judicial definition of 'real' rape found in RADs is still restricted to the prototypical 'stranger' rape, thus either leaving a great number of sexual assaults out of the punitive reach of the criminal justice system (and a

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<sup>10</sup> Referring to wife rape, Bergen (1996) claims that it is unclear how many victims of marital rape identify themselves as such and seek help at a rape crises centre or battered women's shelter. She believes that surveys involving women who volunteer to describe their experiences of marital sexual abuse might be unrepresentative of the actual number of women raped by their partners.

<sup>11</sup> If we consider the Brazilian reality, prior to the creation of the women's police stations in 1985 (Dornelles, 2000), women had to go to ordinary police stations to file rape complaints, usually to male police officers, and the male perspective would have a great influence on the complaint. Many other countries do not have special police stations for women. Only recently have the English police established special policies for treating rape complainants (use of female police officers, for instance – see Lees, 1997). And if the rape report reaches the trial level, as many lawyers and most judges (at least in the British judiciary) are men, the event is filtered through their perspectives.

great number of women unprotected), or treating the most common type of rape, i.e. rape by a known man, as a less serious sexual offence. The examples in this section have been divided into four categories of ‘non-typical’ rapes: *acquaintance rape*, *marital rape*, *marital rape during cohabitation*, and *ex-partner rape*.

### 3.3.2a Acquaintance/date rape

One of the types of rape that shades away from the core, prototypical ‘stranger’ rape is *acquaintance rape*, i.e. when assailant and victim had a previous relationship, not necessarily of a sexual nature. This type of rape is frequently treated by judges as a ‘personal problem’ rather than a criminal offence (Rhode, 1989). At the linguistic level, this trivialisation can be achieved through different devices: an emphasis on the previous relationship between the parties; the avoidance of the word rape when referring to the event; etc. In the excerpt below the appeal judges opted to introduce the complainant’s version of the events with the reporting verb ‘alleged’, which adds a tone of doubt to her story. Also worthy of notice here is the lack of negative adjectives, such as ‘revolting’, ‘appalling’, ‘terrible’, etc, to qualify the event:

17. During the evening of Friday, 30 November 1990 the complainant, a young woman aged 17, was drinking at various clubs in the company of her boyfriend and others ... During the early hours of the following morning she lost contact with them, but began talking with the respondent, a young man of 20, *whom she had known as a friend for several years*. She indicated she wanted to walk home and began to do so. The respondent accompanied her ... She *alleged* that he grabbed her, pulled her behind a hedge, forced her to the ground and lay full length on top of her. [Case 3 Attorney-General’s Reference No. 1 of 1992 - Acquaintance rape – appeal granted and sentence quashed]

Besides being the most frequent type of rape, rape by a known man is also the least reported, especially when the rapist is the complainant’s present or ex-husband or boyfriend, or a relative. The existing rape reports are usually made by unmarried,

separated or divorced women, or single mothers, a group of women whose sexuality is culturally and socially seen as in particular need of control and regulation (Lees, 1997).

In the last case illustrated in this section, a young girl was raped, while sleeping, by a friend. Throughout the appellate decision the judges, through innuendo, construct her behaviour as ‘inappropriate’:

18. *Eight years’ imprisonment for the rape of a girl aged 16 while she was asleep reduced to six years.*  
 - The offence arose in this way. At about 7.00 p.m. on Saturday, September 9, 1995 *the complainant*, who was then aged 16, *went to visit the appellant* whom she had known for about six years. He produced some wine and *she drank quite a lot of it. She became drunk.* [Case 50 – Michael Sellars 1997 - Acquaintance rape – 8 year sentence reduced to 6]

Notice that, in spite of her youth, the complainant is not referred to as ‘the young woman’ or ‘the young girl’ (common naming patterns in cases of rape of very young girls found in the corpus), but ‘*a girl aged 16*’. This implies that the judges do not see her as an ‘innocent’ child. Apart from that, the fact that she went to the appellant’s house and got drunk also helps to depict her as a rather experienced, imprudent woman.

18. The learned judge dealt with the present offence on the basis that the appellant had not deliberately got the complainant drunk, but had taken advantage of her drunken condition ... *There were a number of aggravating features ...* First of all, *the victim was young*, being only 16 at the time. She was subsequently very troubled when she discovered she was pregnant, believing, *mistakenly*, that it was the result of the rape. [Case 50 - Michael Sellars 1997 - Acquaintance rape – 8 year sentence reduced to 6]

In the excerpt above the use of the adverb ‘*mistakenly*’ implies, in a roundabout way, that the complainant was no longer a virgin and had had sex with other men apart from the appellant, since her pregnancy was not a result of the rape. The description of the complainant as an imprudent, loose woman has the effect of ‘demonising’ her (Gaines 1999) and rendering her susceptible to moral condemnation; it also serves as mitigation for the violence she suffered. In spite of the aggravating features present in the case (the complainant’s age and the fact that the appellant was in a position of trust towards her),

the appellant received a shorter sentence than other men who raped minors (compare, for instance, cases 12, 31 and 36 in appendix, where the number of years in prison were 12, 14 and 13, respectively). Besides, his sentence was reduced at appeal level.

### 3.3.2b Marital rape

Another ‘non-typical’ rape is marital rape, a kind of sexual assault which is even more endemic and difficult to detect than acquaintance rape (see Hall, 1985; Lees, 1997). Yet this is a less severely punished type of rape. In a review of Court of Appeal cases of marital rape heard between 1991 and 1995 (after the abolition of the marital rape exemption), Lees (1997) observed that marital rape was still not seen as ‘real’ rape. Sentences in such cases were at the lower end of the scale, and 50 percent of the sentences reaching appeal were further reduced. The findings in the present work were not different. Rape complaints of women against their present husbands are still very rare, even in the face of the abolition of the marital rape exemption. There were only three cases of marital rape during cohabitation in the 50 cases present in the corpus for this study (see table 4.2 in chapter 4). Of a total of 15 appeals on sentence in cases of marital rape, 8 sentences were reduced. In terms of sentence length, of the 50 RADs used in this corpus the average sentence length for stranger rape was 10.22 years, while for marital rape it was 5.5 years (see table 3.1).

The first example in this section comes from a case tried in 1987, when the English legal system did not contemplate the existence of marital rape as a crime. Curiously, other kinds of forced sexual acts within marriage (fellatio, buggery, etc) could be tried as ‘indecent assault’, as is the case here:

19. The appellant and his wife were married in January 1985. By September 1986 sexual intercourse between them had ceased, and the wife had served a divorce petition on the appellant. On September

14 the appellant forced his wife, at knifepoint, to undergo an act of fellatio, and then went on, still at knifepoint, to have intercourse with him. The act of fellatio formed the basis of a count of indecent assault to which the appellant pleaded guilty, after a ruling by the trial judge that it was capable of being an indecent assault. He appealed against conviction.

- **Held**, dismissing the appeal, that *although an act of fellatio was not unlawful, it was not, like the act of intercourse per vaginum, an act to which the parties gave consent by their marriage*. If the act was performed without actual consent, it was capable of being an indecent assault. [**Case 9 – Roy Kowalski 1987 – 4 year sentence reduced to 2**]

The event is not described as an ‘ordeal’ or as ‘appalling’, nor is the act of fellatio depicted as an ‘indignity’, as it frequently is in cases of stranger rape (see chapter 5). In 1991, the marital rape exemption, which had been part of the English law since the eighteenth century, was finally abolished. However, in spite of that not many cases of marital rape have reached the courts since 1991, and the ones that have involved couples who were usually no longer cohabiting. The case below, for instance, was categorised as rape only because cohabitation had ceased:

20. The parties were married in 1984 but separated in October 1989 because the wife complained that her husband, R was forcing her to have sexual intercourse. The wife left the matrimonial home with the child of the marriage and went to her parents’ home. Two days later R telephoned his wife to say that he was going to see about a divorce. The following morning R broke into the parents’ home and either *forced his wife to have sexual intercourse with him or attempted to do so*. The judge ruled that he could not believe that it was part of the common law of England that *where there had been withdrawal of either party from cohabitation*, accompanied by a clear indication that consent to sexual intercourse has been terminated, that that did not *amount to a revocation of the implicit consent by the wife*, and that there was ample evidence to enable the prosecution to prove a charge of rape or attempted rape against R. [**Case 13 – R (a husband) 1991 – marital rape – 3 years plus 18 months concurrent**]

Here we can see how the law evolved from the marital rape exemption first codified in the eighteenth century, to its abolition in the early 1990s. The point I want to make is that this case was seen as rape not because the judges agreed husbands had no longer the right to force their wives to have sex, but because *cohabitation had ceased*, therefore the implicit consent of the wife had disappeared. The question remaining is: would they have decided otherwise if the couple were still together at the time of the rape, or would they likewise have considered the husband a rapist and dismissed the appeal? Other

RADs involving couples in this corpus indicate that the state of the relationship at the time of the event has indeed a decisive effect on the appellate decision.

Another device used by judges to render a rape less serious is to interpret it according to the interpretative repertoire of a ‘romantic’ event which got a little rough (what I call ‘*love-gone-wrong*’ frame). The excerpt below is a good example of this strategy:

21. *Six years’ imprisonment for the rape of his wife by an estranged husband reduced to five years.*

- The offence took place in the early hours of the morning. The complainant had got up to adjust the central heating because she felt cold. She saw the appellant dressed in dark clothes and carrying a torch standing in a doorway. *He led her into the bedroom, turned the lights out, pushed her onto the bed* and, despite her making it abundantly clear that she was not consenting to what he was attempting to do, *had sexual intercourse to ejaculation with her*. He then tried to persuade her not to tell anybody, *kissed her, told her he still loved her* and left. He subsequently said that he had intended to kill himself by taking an overdose *after making love to his wife the last time* and he pulled out the telephone wire so that she could not be able to summon help when he did that. [Case 21 – Robert C 1993 - marital rape – 6 year sentence reduced to 5]

The event is interpreted within a tragi-romantic frame – the appellant is the passionate but confused husband, deeply hurt by the separation (for more on the appellant, see chapter 4). The use of affectionate and erotic terms puts the assault into a framework of consensual sexual acts, backgrounding the violence and unilaterally of the act. After analysing several legal decisions on cases of sexual assault tried in Western Canada between 1986 and 1992, Coates, Bavelas and Gibson (1994) concluded that by using the same vocabulary and narrative structures to talk about *consensual sexual acts* and *cases of sexual assault*, these two very different types of events might look indistinguishable. The legal decision in this case indicate that the judges relied on the ‘*love-gone-wrong*’ interpretative frame, so much so that the sentence was reduced:

- 21. **Held:** *the Court had recognised that a distinction might be drawn between cases of rape by a stranger and rape by a former husband or co-habitee.* The offence was carefully committed in the complainant’s own home; the appellant had entered by stealth and cut the telephone wires. *However, the sentence would be reduced to five years.* [Case 21 – Robert C 1993 - marital rape – 6 year sentence reduced to 5]

This is one of the many examples found in the corpus of the judicial belief that a woman raped by a former or present partner suffers a much less serious psychological trauma than a woman raped by a stranger. Notice also how the event is described; the offence is considered ‘serious’ due to the presence of aggravating features (the offender wormed his way into the complainant’s house and prevented her from seeking help). The use of the linking device ‘*however*’ makes the reduction in the sentence look at odds with the gravity of the offence, especially because the judges offer no explanation for the reduction.

In example 22, a wife accused her husband of bugging her several times without her consent. The event is depicted in such a way that it is doubtful if the complainant’s version of events should be entirely believed (the same case is taken up again in chapter 4, where I discuss the portrayal of some rape victims as liars):

22. The appellant met the complainant in a club and they were married a few weeks later. The complainant alleged that during their wedding night the appellant tied her up and bugged her against her will on five occasions.
- *She gave a highly coloured account of their relationship, an account that would be fully justified if the basic fact of continual forcible buggery had been established, but it had not.*
  - *There is no doubt that the offences were violent, and there is no doubt that there was a background of violence and unseemly behaviour from him to her during the time of the marriage and surrounding it ... This was not one of those cases towards the bottom of the scale where someone in love overlooks an earlier marriage. This was a man who told a lie to obtain advantages for himself. [Case 43 – Leslie David T. 1996 - Marital rape – 10 year sentence reduced to 7]*

Here the appeal judges claim to agree with the sentencing judge in considering the appellant’s behaviour ‘*unseemly*’ and ‘*violent*’, but his behaviour is not once called ‘rape’ or ‘sexual assault’. The complainant is depicted as a woman whose words cannot be entirely trusted (the phrase “*she gave a highly coloured account of their relationship, an account which was not fully justified*” implies that she was exaggerating), and the appellant is portrayed as a man with an improper behaviour, but not as a rapist. In that light, the reduction in the sentence is understandable. However, the view that the case



was less serious than the complainant had claimed is not made clear in the appellate decision, rather it is implied and expressed ‘between the lines’:

22. *So far as the major part of the indictment is concerned (the two counts of rape by buggery) in our judgement the sentence here was excessive. We therefore quash that sentence and substitute for it concurrent sentences of six years’ imprisonment, consecutive to 12 months, and thus the final sentence is seven years in the place of 10, to which extent this appeal is allowed. [Case 43 – Leslie David T. 1996 - Marital rape – 10 year sentence reduced to 7]*

The following excerpt is less gender-biased than the previous ones. It acknowledges the seriousness of marital rape, and the previous relation between the parties is not used as a mitigating factor for sentencing purposes. However, the sentence in this case (5 years) is lower than the average sentence for stranger rape aggravated by violence – a similar case of stranger rape aggravated by violence found in the corpus is Case 45 (Gary Howatt – 1996), in which the sentence was 16 years, three times the one in the present case:

23. *Five years’ upheld for the rape by a man of his wife in circumstances involving threats of violence.*
- The appellant’s wife told him she wished to separate from him. Some time later, the appellant grabbed her by the throat, pushed her face into a cushion, took off her clothing and made her put on a pair of stockings which he had bought. *The appellant then forced her to have intercourse against her will several times and forced his penis into her mouth twice.*
  - **Held:** ... the appellant’s conduct was gross and involved threats of violence ... *The ordeal* had lasted something of the order of one-and-a-half hours.
  - There can be no doubt at all that this was *the most dreadful ordeal* for this woman and, equally, there can be no doubt that *she has suffered very considerably* as a result of it. *This Court must never overlook what has happened so far as the victim of a sexual crime such as this is concerned.* [Case 47 – Michael H. 1997 - Marital rape – 5 year sentence]

The use of the word ‘ordeal’ is interesting because not every rape is described as such. This term conjures up an image of a ‘real victim’, a woman who resisted her attacker and really suffered (both physically and psychologically) as a result of the rape. Prior to 1991, married women who were raped by their partners found no protection under the British law. Since then some married victims have achieved the ‘real’ victim status, and their attacks are now sometimes defined as ‘ordeals’.

Since the event was an 'ordeal', the complainant had the status of 'genuine' victim, thus deserving the consideration of the courts. This approach to rape victims represents a positive change in judicial attitudes if compared with cases from the late 1980s (when marital rape was not even seen as a crime), and even with many recent appellate decisions.

### 3.3.2c Ex-partner rape

Some women suffer abuse after separation. Studies indicate that a third of women who leave their partners are attacked after the separation (Lees, 1997). An American survey of spousal abuse, for instance, revealed that "separated women report higher levels of violence committed against them than do married women still living with their mates" (Campbel, 1993, p. 121). Judicial treatment is always more lenient towards husbands who attack their wives than men who attack strange women. A documentary done by Channel 4 in 1995, involving 113 British cases of femicide (homicide of women), revealed that the domestic cases were more likely to end up with a manslaughter than a murder conviction (Lees, 1997). Sentence reduction is a trend for partner rape. In the corpus, more sentences for partner/ex-partner rape cases were reduced than for stranger rape cases (see table 3.3):

**Table 3.3**Impact of appeal on sentence length (only appeals on sentence)

	Upheld		Increased		Reduced	
	N° of Cases	%	N° of cases	%	N° of cases	%
Stranger rape	4	11.1	6	16.6	7	19.44
Marital rape <sup>a</sup>	7	19.44			8	22.2
Prostitute rape	2	5.5	1	2.7		
Acquaintance rape					1	2.7
Total	13	36.04	7	19.3	16	44.34

Note. The blanks indicate that there were there were no cases of that type in that category. Among the 50 appeals that compose the corpus, 36 were on sentence, and the percentages refer to that number only.

<sup>a</sup> See note 'a', table 3.1, p. 56.

The increase in the 7 sentences mentioned in table 3.3 were the result of appeals by the Attorney-General. The Attorney-General is “the principal law officer of the Crown, and the head of the Bar” (Rutherford and Bone 1993), and he may refer to the Court of Appeal a sentence he considers unduly lenient in relation to the gravity and seriousness of the case. In such cases, the court of appeal will review the first instance sentence and will frequently increase it. In the corpus, of the seven sentences appealed by the Attorney-General 6 were cases of stranger rape and one was the rape of a very young prostitute. There wasn't a single appeal by the Attorney-General to increase the

sentence in a case of marital rape. The implication is that, from the judicial point of view, a ‘serious’ rape case is a case of stranger rape, the gravity and seriousness of the offence being, to a great extent, determined by the lack of familiarity between rapist and victim. Another thing that can be observed from table 3.3 is a general trend towards sentence reduction; 44.34 percent of the sentences appealed were reduced, against 36.04 upheld and 19.3 increased.

The following examples illustrate the judicial treatment of cases of ex-partner rape:

24. *Ten years’ imprisonment for rape by a man of his former partner reduced to six years.*
- The appellant broke into the house at about midnight, prevented the victim from calling the police, and tied her hands behind her. The appellant then removed her underwear, put a pillow case over her head and raped her. He then put his penis into her mouth and raped her again. He later put his hands round her throat and squeezed until she became unconscious.
  - It is apparent from the recital of the facts of this case that this was *a very serious offence of rape ...* On the other hand, it is a striking and unusual feature of this case that *not only was the victim of this appalling offence one who had had a long-standing and intimate relationship with the appellant, but she has not suffered the degree of mental trauma which is sometimes associated with offences of this kind.* Furthermore, to put it no higher, she has gone a long way along the road towards forgiving the attacker. Those are clearly material matters when the question of what is the appropriate sentence is considered. [Case 16 – Derek John Hind 1993 – marital rape – 10 year sentence reduced to 6]

Here the judges admit that the offence was a serious one. This is not surprising since a husband’s immunity to rape prosecution was abolished in 1991 in precedent, and in 1994 in statute (Lees, 1997). However, the previous intimate relationship between the parties is presented as a mitigating factor since, from the judicial point of view, women sexually attacked by present or former partners are less traumatised than women attacked by strangers. Even though the original sentence was a high one (10 years), the reduction was also considerable, amounting to 40 percent of the original sentence (a 4 year reduction). Notice that again the judges refrain from using a cause-and-effect connector to indicate that the victim was not deeply traumatised due to her previous intimacy with the offender, but opt for the neutral pair ‘*not only – but*’, which merely indicates addition. One of the possible reasons for this rape to be considered ‘appalling’ is the fact that the victim forgave her assailant, which is considered as a mitigating

feature in the case, and which leads to a sympathetic judicial attitude towards the victim (see Chapter 4). As the complainant was seen positively by the court, the event was equally labelled ‘an appalling offence’. The following is a case of partner rape that also got a lower sentence:

25. Three years’ imprisonment upheld for the rape by a man of his partner at knife point on two occasions. Observations on the relevance of the willingness of the victim to forgive the offender.
- The appellant had lived with the complainant for about six years, but the relationship deteriorated, although they continued to live in the same house.
  - *“The rape of a former wife or mistress may have exceptional features which make it a less serious offence than otherwise it would be ... To our mind these cases show that in some instances the violation of the person and defilement that are inevitable features where a stranger rapes a woman are not always present to the same degree when the offender and the victim had previously had a long-standing sexual relationship.”*
  - *“The mere fact that the parties have over a period ... been living together and having regular sexual intercourse obviously does not license the man, once that cohabitation or sexual intercourse has ceased to have sexual intercourse with the girl willy-nilly. It is, however, a factor to which some weight can be given by the sentencing court ...” [Case 27 – James Henshal 1994 - Marital rape – 3 year sentence]*

The precedent quoted in the excerpt above (within quotation marks), used as a basis for the legal decision in case 27, indicates clearly that rape by a former partner is seen as less traumatic than by a stranger, a fallacy which is discredited by many researchers in the area (see Rhode 89, Adler 87, Edwards 96). Another point of interest in the precedent cited is the belief that a partner loses his sexual rights *once cohabitation has ceased*, not *during it*. However, the legal argument is that even after its termination, a relationship between accused and victim should be taken into account for the purposes of sentencing. The next excerpt comes from a case of ex-partner rape which, even though aggravated by violence, got a lower sentence than many other stranger rape cases aggravated by violence found in the corpus:

26. Six years’ imprisonment upheld for the rape with violence of the appellant’s former partner.
- The appellant lived with the complainant for five or six years ... The relationship broke down and the appellant ceased to live in the flat ... The appellant came to the flat one night and was admitted by the complainant. Following a conversation in which the complainant indicated that the relationship had no future, *the appellant threatened the complainant with a knife, prevented her from leaving the flat, punched her around the face, dragged her to the bedroom, removed her clothing by cutting it with broken glass and raped her.*

- ... *The sentencing judge recognised that this was a case where there had been a previous relationship and therefore the sense of violation is not as strong as where the rape takes place on a stranger.* However, *the relationship had been broken off* and the victim had declined to resume it. [Case 37 – Andrew Thorpe 1996 - Marital rape – 6 year sentence upheld]

In spite of the extremely violent nature of this case, because the rapist was the victim's ex-partner the event is seen as less traumatic than rape by a stranger. In this case, the end of the relationship is what renders this offence more serious in the eyes of the judges, and it leads to their decisions to maintain the original sentence. In those cases where the couple was still cohabiting the rape is always going to be seen as less serious, and the sentence will most probably be shorter (see the following sub-section).

The following is one more example:

27. *Two-and-a-half years' imprisonment for an indecent assault by a husband on his estranged wife reduced to two years.*
- The appellant had lived with the complainant for some years and later married her; they had two children. The relationship deteriorated and the appellant left the matrimonial home ... the appellant was seen by a psychiatrist who found him very depressed. On two occasions the appellant assaulted the complainant.
  - **Held:** *courts are now far more aware of the sort of cruelty that can be inflicted by a man on his wife. The Court had come to the conclusion that some reduction in the sentence was appropriate, and would substitute a sentence of two years for the original sentence.* [Case 38 – Wayne B 1996 - Marital rape – 2 ½ year sentence reduced to 2]

Here it is interesting to observe the contradiction in the appeal judges' basis for their decision. First, they indicate that the courts have evolved with the times and now recognise the existence of domestic violence and cruelty, which implies they consider this particular appellant guilty of assaulting his ex-wife. However, following this statement they reduce the original sentence, without explaining why (note the absence of a logical connector indicating contrast, such as 'however'). Apparently the legal writers did not wish to establish any contrast (or indicate a contradiction) between the first and the second sentences. It is as if the second statement (*The court had come to the conclusion that some reduction was appropriate ...*) followed the first (*courts are now aware of the sort of cruelty that can be inflicted by a man on his wife*) naturally,

with no incongruities. The impression is that the appeal judges were paying lip service to the notion that women should be protected from domestic violence. It is also interesting to consider why they abstain from giving reasons for reducing the original sentence. We can infer that, in spite of apparently condemning domestic violence, they did not find the case serious enough or the appellant guilty enough.

### 3.3.2d Marital rape during cohabitation

In most of the marital rapes found in the corpus (18 cases), the assault happened either at the breakdown of the relationship or after a divorce petition or a separation (15 cases). This leads us to believe that many cases of rape during marriage (which, according to surveys, are quite frequent - see Hall, 1985; Bergen 1996; Lees, 1997) are not reported to the police, or are reported but do not result in trial proceedings, or are tried but the defendants are either acquitted by the single judge (and therefore do not appeal), or get light sentences which do not justify an appeal.

Even in states and countries where the marital exemption for rape has been abolished criminal proceedings against spousal rape are still rare, and usually occur in circumstances of separation (Lees, 1997). Where the couple was separated or in the process of separation, it is easier to label the events as 'forcible sex'. The conclusion is that marital rape during cohabitation is the type of rape furthest from the core, prototypical 'stranger' rape. Accordingly, as the examples below will illustrate, the sentences awarded to these violent husbands are the shortest of all. The following excerpts were taken from the only three cases of marital rape during cohabitation found in the corpus. In these three cases, despite the sentences being much shorter than any others found in the corpus (1 ½ to 2 ½ years), two of them were further reduced.

28. Thirty months' imprisonment upheld for *the rape of a wife by her husband during the marriage*, following the wife's withdrawal from sexual relations after childbirth ... *The sentencer attributed the offence to the appellant's immaturity, and to feelings of rejection and jealousy over the attention his wife was paying to the child. This is an unhappy case.* [Case 20 – Robert Leonard T. 1993 – 2 ½ year sentence]

Here, the court is sympathetic towards the appellant. Again, the interpretative repertoire is 'love-gone-wrong', and the event is not called an 'appalling' or a 'revolting' case; the adjective chosen, '*unhappy*', is a further indication of the court's sympathy towards both the appellant and the complainant.

The same sympathetic interpretation of an offence of rape is exemplified in case 30 illustrated below:

29. Three years' imprisonment for *the rape of a wife by a husband, while the parties were still cohabiting and sharing a bed, reduced to 18 months.*
- The appellant married the complainant in December 1992, after living with her for two years. From early in 1994 the relationship deteriorated, and in May 1994 the complainant decided not to have further physical contact with the appellant, but did not communicate that to him
  - He had a good deal to drink ... He did not immediately seek to have any relations with her ... in the middle of the night he decided he wanted to have intercourse. *He asked her for 'a last cuddle'.* [Case 30 – Paul Richard M. 1994 – 3 year sentence reduced to 18 months]

In this case, the use of a familiar, endearing expression ('a last cuddle') depicts the scene as romantic lovemaking gone wrong. The appellant had drunk and drinking is frequently used as an excuse for questionable behaviour. Nevertheless, he '*asked*' her for a cuddle, not demanded or forced. The sympathetic interpretation is further developed in the next excerpt:

29. ... She asked him not to persist but he pulled her over her back and *had intercourse with her*. He did not use violence on her, beyond having intercourse against her will. On a number of occasions he said, "*You can't deny me my rights as a husband?*". The intercourse did not last long, either because the appellant ejaculated or because, when the complainant asked him, he got off her.
- **Held:** sentencing for rape committed by a man on his wife or person with whom he had previously lived had been considered in Berry (1988) 10 Cr.App.R.(S.) 13, where it had been recognised that *the previous settled relationship might make the offence less serious than it otherwise would have been ...* There was a distinction between the husband who was estranged from his wife and who returned to the house as an intruder either by forcing his way in or worming his way in through some device before *raping her*, and a husband who was *still cohabiting* in the same house and *with consent occupying the same bed as his wife. This class of case was not so grave as the former class of case.* [Case 30 – Paul Richard M. 1994 – 3 year sentence reduced to 18 months]



The appellant's words quoted above ("*You can't deny me my rights as a husband*") express the cultural and judicial myth that husbands have sexual rights over their wives. The event is described as '*sexual intercourse*', not rape. Notice that a distinction is drawn here between an estranged husband and a husband who is still cohabiting with his wife: in the instance of both of them attacking their partners sexually, the estranged husband commits '*rape*', while the present husband '*has sexual intercourse against her wishes*'. Marital rape during cohabitation, therefore, is interpreted as less serious than rape by a former partner, which in its turn is seen as less serious than stranger rape. Case 32 below is another illustration of how judges interpret marital rape during cohabitation:

30. Thirty months' imprisonment for the rape by a man of his partner, while they were still cohabiting but by the use of significant force, reduced to two years.
- The appellant had a relationship with the complainant who gave birth to their son. They subsequently lived together but the relationship deteriorated. One evening the complainant left their flat leaving the appellant in charge of the child. The appellant found her in a bar, handed the child over to her and went out. Later the appellant returned home, forced the complainant to go to the bedroom by pulling her hair, and *had intercourse with her* despite her attempts to prevent him from doing so.
  - *What happened thereafter is a matter about which there is some doubt*, but it is necessary to recite what she alleged happened.
  - In the event, *complaint was not made to the police*. An account was first given to social workers in support to an application to oust the appellant from their home and to support her alternative application to be re-housed. *It may be that there was an element of exaggeration in that account for that purpose*. It is to be noted that *when she made the complaint to others she did not allege that the full force of the offence of rape had taken place*. Her explanation subsequently was that she thought there had to be ejaculation for the full offence of rape to occur. *Whether or not that explanation was true or genuine we have no means of establishing, but we discount it as heavily as we can, and no doubt the learned judge did so*.
  - **Held:** in *M* the Court had indicated that *a distinction could be drawn between cases where an estranged husband forced his way into the wife's home as an intruder and raped her, and those where the husband was still living in the same house and occupying the same bed with consent*. *The circumstances of the present offence were more serious than those of M<sub>2</sub>, as the appellant used force to get the complainant to the bedroom. In the unusual circumstances of the case, the sentence would be reduced to two years ... This is an unusual case of rape and the details of it must be set out. [Case 32 – Kirk Paul Pearson 1995 – 2 ½ year sentence reduced to 2]*

Again, the adjective '*unusual*' does not express a negative evaluation of the events as do the adjectives '*appalling*', '*revolting*', '*serious*', etc, used to depict stranger rape. Here, there is an apparent contradiction in the appeal judges' reasoning: they admit that this case is more serious than the precedent they have to follow, but nevertheless they

decide to reduce the sentence. It is interesting to see how the judges mince their words when justifying this reduction. They use as a basis the '*unique features of the case*', but they do not say clearly which features are these. A possible conclusion is that the reduction in the sentence is linked to the way the complainant was constructed in this appellate decision: the existing relationship between the appellant and the complainant renders the rape 'less serious' in the judicial interpretation. On the night of the rape she had been drinking in a bar after leaving her son at home, which does not fit the prototypical behaviour of a 'good' mother and wife. The judges state that her version of the events may be exaggerated. Finally, she was reluctant to give evidence at the trial, which here is not interpreted as a sign of her forgiveness (a 'positive' feminine trait – see chapter 4), but as a sign of her having at least exaggerated the whole story.

### 3.4 Final remarks

A closer observation of social and legal practices indicates that there is a disparity between the way sexual violence is treated in theory and in praxis. At the level of legislation sexual abuse is defined as illegal and as liable to punishment; at the level of everyday life, most forms of coercive sex are unknown, unreported, unacknowledged and unpunished (Rhode 1989). At the trial level and at the level of legal decisions sexual abuse is dealt with in a similar contradictory way: while officially all cases of rape are strongly combated, in practice some cases are subjected to harsh punishment, while others are either presented as 'normal' and thus go unpunished, or are treated as less serious and consequently are subjected to lighter forms of discipline. The degree of punishment is directly linked to how the event is legally constructed.

The description of the event ties in with the sentence awarded. Severe forms of punishment (long prison sentences) are awarded to those cases framed as 'real rapes'. Events described as 'dates' or as 'less serious' sexual assaults are either qualified as 'consensual sex', or are considered 'minor' sexual crimes, being awarded lighter forms of punishment (e.g. short sentences or a reduction in the original sentence at the appeal level) when compared with the sentences awarded to stranger rape cases. Thus, the 6 life sentences found in the present corpus were all awarded to stranger rape cases; the longest sentence for a marital rape case was 8 years.

In the 50 cases investigated in this study, many of convictions and sentences were upheld (only two convictions were quashed; of the 36 appeals on sentence, 13 sentences were maintained, 16 were reduced and 7 were increased). Therefore, I could not say that the 50 rapists who appealed their original convictions or sentences escaped 'scott free'. This fact alone might lead us to conclude that the criminal justice system treats all rapists with the same degree of severity. However, the numbers above indicate a trend towards sentence reduction. In addition to that, a closer analysis of the data indicates that appellate decisions on rape cases present the event in very different lights, depending on how the assault has been labelled and categorised. This categorisation system reflects and recreates a body of sexual myths and ideological presuppositions about how men and women behave and relate to each other, and it is this ideological frame that will determine how blame, discipline and punishment is judicially apportioned, and who will be cast in the roles of 'victim' and 'villain'.

Even though the marital rape exemption was abolished in 1991 in England, this has not produced a dramatic change in sentencing policy. English judges still consider marital rape less serious than other kinds of rape (especially 'stranger' rape), and sentences awarded to men who rape their present or ex-partners are shorter than those

awarded to other convicted rapists. Appeal judges show a much higher degree of empathy and understanding of these violent husbands and partners than of stranger rapists. The notion that a certain degree of violence is somehow part of sexual relations, and the tendency to interpret rape as an expression of misplaced love and sexual desire rather than of gender violence and power explains in part this ‘charitable’ critique of abusive husbands. The categorisation of many rapes as ‘less serious’ or as ‘non-typical’ casts serious doubts on the criminal nature of the event: was it a ‘real’ rape? Did it really take place as the victim described it? To what extent was the victim responsible for it? Could it be that she not only contributed to the attack, but even fabricated it?

Some feminist scholars propose that rape be inserted into a broader context of crimes of violence against the person (Temkin, 1987). However, to expand the definition of rape to include all kinds of coercive sex (whether the woman fought vigorously back or just said ‘no’), and that of ‘rapist’ to include all kinds of men (dark strangers from the streets, maniacs and drug addicts, as well as husbands, boyfriends, neighbours, relatives, men of previously ‘good character’, nice college boys, etc) would make many people uncomfortable. As Wood and Rennie point out, “men want rape to stay in the realm of the reprehensible, a realm peopled by the deranged and the sick” (1994, p. 145). Within a certain set of gender and sexual assumptions – i.e. that men have a greater sexual appetite than women; that men are sexually active and women sexually passive; that male sexual drive, once aroused, is very difficult to control; that sexual violence provoked by the pain of rejection and separation is less grave – rape is made into something reprehensible yet understandable, and certain types of forced sex are seen as something excusable.

Chapter 4 follows the same theoretical and methodological structure of chapter 3, and continues exploring the representations of rape in the judicial discourse of RADs. In

it, I will discuss and illustrate how men accused of rape and women victims of rape are represented by the discourse of appellate decisions, and the implications of such representations.

## Chapter 4

### The use of categorisation systems in the judicial discourse on rape – The assailant and the victim

#### 4.1 Initial remarks

Until recently, the only characteristic which united rape complainants was that they were all women. Up to the present, the majority of rape complainants are women (Graycar and Morgan, 1992). It is fair to conclude, therefore, that the quality of the treatment they receive by law and order officials has something to do with this feature. Research in legal discourse indicates that gender differentiation is common in the legal process, i.e. in situations where male and female accounts of events are legally confronted, many times the male version or world-view is privileged (McLean, 1988; Smart, 1989; Edwards, 1996). But apart from treating people differently on the basis of their gender, the legal process can also be characterised by intra-gender differentiation, i.e. depending on how a woman is represented during the legal process (or, as in the present study, in a legal decision), she will be treated with more or less sympathy and respect, and will be more or less protected by the law. The judicial discourse of rape is pervaded by arguable notions both about women and men, especially in what concerns male and female sexuality and the way men and women relate to each other. And these notions, or myths, will determine to a great extent the legal treatment given to the parties in a rape trial. As MacLean (1988, p. 200) argues:

The law ... permits the incorporation as fact into the legal process of arguable, prejudicial and often degrading assumptions about the nature of males and females, and of role-stereotyping based on simplistic presumptions about gender

and its impact on behaviour ... Myths about female behaviour and sexuality inform the treatment of both the victim and the offender.

Chapter 3 dealt with the representation of the event 'rape' in appellate decisions. This chapter, following the same line, will complete the picture by discussing and illustrating how the main actors in the event 'rape', i.e. the accused man and the victim, are represented and categorised by the judicial discourse of RADs. To do so, the chapter will be divided into two broad sections: A) the Complainant; and B) the Appellant. These sections will be divided into smaller subsections, according to the different categorisations of assailants and victims found in the discourse of appellate decisions.

#### A. THE COMPLAINANT

In broad terms, the judicial ideology represents a complainant of rape in two ways: either as a 'genuine' victim of rape, or as a non-genuine (or non-prototypical) victim. The casting of the complainant in one of these two roles will depend on the presence or absence of a series of factors related to the woman herself, her attacker, and the way she reacted to the attack. In the following subsections I will present and exemplify, through excerpts taken from the corpus, the features which, according to the judicial view, help to identify a woman as a prototypical or a non-prototypical victim of rape. These features are directly linked to many of the myths about female behaviour traded in society. I will also discuss the lexical-grammatical choices made by the judges to portray some complainants as 'real' victims and others as not. The casting of the complainant as a 'genuine' victim or as a non-typical victim has serious consequences both for the appellant and for the complainant. For organisational purposes, the COMPLAINANT section is divided into:

## 4.2 Analysis: Genuine and non-genuine victims

### 4.2.1 Genuine victims

4.2.1.a The virgin ('the Madonna')

4.2.1.b The young girl

4.2.1.c The old respectable lady

4.2.1.d The woman who Resisted

4.2.1.e The forgiving wife

### 4.2.2 Non-genuine victims

4.2.2.a The former or present partner

4.2.2.b The temptress ('the whore')

4.2.2.c The liar

The data used in the section 'Complainant' consists of excerpts taken from 29 of the 50 RADs that compose the corpus (the excerpts are verbatim from the reported appellate decisions). The cases selected were the ones which better illustrate the categories discussed in the chapter, and are representative of the rest. The excerpts are individually numbered, each number representing one RAD. When the same number is repeated in two or more excerpts, this indicates that all of them come from the same RAD. All the 50 RADs can be found in the appendix. Even though the examples are divided into different subsections, many of them overlap, and conflicting features are sometimes found in the same appellate decision. The title of each subsection indicates the myth about women it represents.



## 4.2 Analysis: Genuine and non-genuine victims

### 4.2.1 Genuine victims

As I argued in chapter 3, the standard rape episode is one where the rapist is a stranger, the victim is totally powerless and blameless, and intercourse is complete. As one writer comments, “the clearer [the victim’s] sexual neutrality, the more violent her assault, the ‘truer’ a victim she is seen to be” (Toner, in McLean, 1988, p. 208). The ‘genuine’ victim, the one who is able to construct herself as free from blame, sexually unavailable and unknown to her attacker, will receive the full sympathy and protection of the courts. Virgins, very young girls, old ladies and women who resisted fiercely to the attack have a much higher chance of being represented as ‘true’ victims.

#### 4.2.1.a The virgin (the Madonna)

According to the British law, “a man commits rape if – (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it ...” (Section 1(1) of the Sexual Offences (Amendment) Act 1976). ‘Sexual intercourse’ here means penetration of the vagina by the penis (see note 1, chapter 3). Some authors argue that the emphasis on penile penetration to characterise rape is a trace of a patriarchal concern with female chastity (see Lees, 1997). The idea is that if the woman was penetrated her value as sexual property is damaged. According to this interpretation, the virginity of the victim is an aggravating factor in a rape trial because virgins stand to lose more by being raped than sexually experienced women.

My data also indicates that virginity is seen as an aggravating factor in a rape case. The reasons offered for the judicial protection of virginity, however, are in theory not just a concern with chastity. Nowadays appeal judges no longer frame their abhorrence of the rape of virgins in terms of loss of reputation, but rather in terms of the psychological trauma resulting from the fact that the rape was the victim's first sexual experience. In spite of having apparently moved from protecting the body of the victim to protecting her *soul*, we can nevertheless argue that the emphasis on and the privileging of virginity during a rape trial are evidences that the criminal justice system (and society at large) is still greatly concerned with female chastity and reputation. The victim's virginity is an almost incontestable proof of her 'good character', and as such contributes to her credibility as a witness. Therefore, when the victim is a virgin conviction is almost guaranteed, and the complainant will certainly get the sympathy of the Court.

That is what Adler found out in her analysis of rape cases tried at the Old Bailey in the mid-1980s. She concludes that (1987, p. 101):

There is a staggering difference in the conviction rates of those defendants whose victims were virgins, or of whose sexual past the jury knew nothing, and those accused of raping women known to have had prior sexual experience. This highlights the perceived importance of chastity in the 'genuine' victim of rape: virginity all but guarantees a conviction.

In Adler's study, only one man was acquitted of raping a virgin or a woman whose sexual past was not mentioned during the trial, which represented a conviction rate of 94 per cent. On the other hand, Adler's study showed a conviction rate of 48 per cent for men who raped women whose sexual reputation was discredited during the trial.

In the present work, in all of the 6 appeals on cases of rape of virgins found in the corpus, the offence was considered aggravated by the virginity of the victim. Of the six

sentences, three were increased by request of the Attorney-General (which indicates that the cases were considered serious), two were upheld (the appellants asked for a reduction in the sentence but their appeals were denied), and only in one case, where several boys had raped a young virgin, some of the sentences were slightly reduced and some upheld (the reductions were due to the youth of the appellants).

The following example comes from a case where a 15-year-old girl was raped by a 15-year-old boy. The trial sentence, community service and £500 compensation to the complainant, was considered too lenient and was therefore appealed by the Attorney-General, resulting in the replacement of the community service sentence by a 2 year prison sentence. In the excerpt below we can see that the complainant's youth and her virginity were crucial to the representation of the offence as 'serious' and the original sentence as not stern enough:

1. ... the grounds of the application were that the following aggravating features existed in the case – (1) *the complainant's age*; (2) *the fact that this was her first experience of sexual intercourse*; (3) *the oral sex*; and (4) *the traumatic effect the incident had on the complainant*
- In view of *the aggravating features of the offences* and the traumatic effect on the victim and the fact that the offender did not plead guilty; nevertheless, despite his age and previous good character, *the offence was so serious that only a custodial sentence was justified*. Thus the Court would quash the sentence passed and substitute an order that the offender be detained for a period of two years pursuant to section 53(2) of the Children and Young Persons Act 1933 [**Case 2 – Attorney-General's Reference No. 3 of 1993 – stranger rape – community service replaced by 2 year imprisonment**]

The following cases are other examples of the protection of virginity by criminal courts. As in the example above, the trial decisions were also appealed by the Attorney General, resulting in an increase in the original sentences:

2. Six years' imprisonment for rape and false imprisonment by a burglar increased to nine years.
- In the early hours of the morning he [the appellant] entered a house occupied by two sisters, one of whom was six months pregnant. The offender threatened to kill both of them, and then raped the younger of the two sisters and indecently assaulted her by pushing his penis into her mouth and his fingers into her vagina.
- The case arose out of *an appalling incident* which occurred on March 22, 1993. At the time *the victim was a virgin aged 17*.
- Secondly, it is submitted that this was *a young girl of 17 who had not had sexual intercourse before, and accordingly the experience was the more stressful and distressing to her on that account*. [**Case**

**23 – Attorney-General’s Reference No. 16 of 1993 (Shane Lee Goddard) Stranger rape – 6 year sentence increased to 9]**

3. Four years’ imprisonment for the rape of *a girl aged 16* increased to six years.
  - The offender, a man aged 39 at the time, approached a 16-year-old who had just left a public house.
  - The victim was 16 years old ... *She lived with her parents* and, at the time of the offence, *was a virgin*. [Case 19 – Attorney-General’s Reference (David Vernon Taylor) (1993) Stranger rape – 4-year sentence increased to 6]

In case 19 above, both the complainant’s youth and her moral character are features which lead to her portrayal as a ‘true’ rape victim. Her good character is established not only by her virginity but also by the fact that she was a ‘family girl’, still living with her parents. Again, as in other cases of rape of virgins, this appellate decision increased the original sentence.

Stranger rape of a young, virgin girl is considered as even more traumatic than ‘ordinary’ stranger rape: the evidence from the corpus indicates that both society and legal practitioners see such cases as inflicting severe moral and psychological wounds on the victim; therefore the rapist is generally awarded a long sentence at trial level:

4. *A 14 year old girl* visited London for the first time from her home in Durham ... She lost her way back to King’s Cross station and was accosted by the appellant who offered to assist her; but in fact he took her back to his flat, plied her with drink and then raped and buggered her. She had never taken alcohol before and *was a virgin*.
  - As to sentence, the judge had remarked that the fact *the victim* suffered *dreadful problems afterwards* did not affect the sentence passed upon the appellant: it should have done so, for *it was part of the whole relevant scene*. [Case 12 – Wared Mhaywi Kabariti 1990 – Stranger rape – 12 years sentence upheld – appeal denied]

In the excerpt above, the appeal judges depict the complainant as a ‘real’ victim and categorise the attack as an ordeal which left serious consequences. Notice how the psychological effects of the rape are not only acknowledged in this case but considered essential to the judicial decision which is to deny the appeal.

#### 4.2.1.b The young girl

A trial process, as well as the legal decision which is its aftermath, has as one of its functions the protection of sensitive socio-cultural issues and values. During a rape trial and the sentencing process, these issues are interpreted as the factors which will aggravate or mitigate a case of rape. One of these sensitive issues is *youth*; as in other public and private discourses, youth is presented by the discourse of the criminal justice system as something frail and valuable, which the law has to strive to protect. As far as victims of sexual assault are concerned, the younger they are the more they approach the 'real' victim prototype, and the more serious the offence. That is what the following examples indicate:

5. *A 14 year old girl* visited London for the first time from her home in Durham ... She lost her way back to King's Cross station and was accosted by the appellant who offered to assist her; but in fact he took her back to his flat, plied her with drink and then raped and buggered her. She had never taken alcohol before and was *a virgin*.
- She was *an impressionable young girl, small of stature and extremely good-looking*. [Case 12 – Wared Mhaywi Kabariti 1990 – Stranger rape – 12 year sentence upheld]

The physical description of the complainant presented above is unusual; except when referring to their injuries, the appeal judges usually do not describe the physical appearance of a complainant. In case 12, the judges probably mention her personality and her looks as a way of representing her as free from blame: her impressionable character helps to explain why she agreed to accompany a strange man, while the mention of her small stature helps to picture her as a helpless victim and adds to the shocking character of the attack. The process of casting her as a 'true' victim continues in the excerpt below:

5. ... She had *a conventional upbringing*. It is *a Christian home* ... *Without her parents knowing* ... she bought herself a return ticket to *London, to where she had never been in her life before*, and travelled that day to *the metropolis*.
- She was *bemused by the hustle and bustle of London*.

- *She was wandering around not knowing where on earth she was* and suddenly, as fate would have it, she was accosted by the appellant. [Case 12 – Wared Mhaywi Kabariti 1990 – stranger rape – 12 year sentence upheld]

Her upbringing and her home are defined as ‘conventional’ and ‘Christian’, thus above suspicion or blame. This device absolves not only the girl from blame, but also her family. London, on the other hand, is depicted as a centre of vice and danger (*the metropolis*), with which she was unable to cope. The following comments further emphasise her ‘good character’:

5. To all of that we have heard with the utmost care. We have no doubt at all, aided by Mr. Bate’s careful excursion through the sordid facts, that no jury faced with *this girl, considering her background and all else*, could possibly have avoided convicting this man. The case was overwhelming. [Case 12 – Wared Mhaywi Kabariti 1990 – stranger rape – 12 year sentence upheld]

In the following example, the rape victim is also pictured as a young and naive girl in the big town:

6. Fourteen years’ imprisonment, passed as a longer than normal sentence under the Criminal Justice Act 1991, s.2(2)(b), upheld for rape.
  - The appellant was convicted of rape and assault occasioning actual bodily harm. The appellant encountered *a 16-year-old girl who had been working as a prostitute*. The girl went with the appellant to a flat, *not for the purposes of prostitution*...
  - *The victim “S” was a 16-year-old girl who had come to London from Liverpool a few weeks before.* [Case 31 – Joseph Kennan 1995 – Prostitute rape – 14-year-sentence upheld]

In this case, even though young, the complainant was a prostitute. In spite of that, the judges see her as worthy of legal protection in view of her age. Notice, however, that they make a point of remarking that the complainant accompanied the appellant ‘*not for the purposes of prostitution*’, which probably made her rape look more credible from the legal point of view.

The complainants below fit into the ‘true’ victim slot not because of their ‘innocence’, but, among other things, because of their youth:

7. Nine years’ imprisonment for rape of *a victim aged 17* at knifepoint by a man who gained access to her flat increased to 13 years.
  - *The victim herself was gravely affected by the attack upon her.* Before that attack she had led an ordinary, happy life. After it *she lost contact with her friends; she has been unable to have any*

*physical contact with her boyfriend whom she sees only on an occasional basis; she cries a great deal; she has a feeling of being dirty; she tried to commit suicide within the first month after her attack and she describes her present life as a miserable, lonely existence. [Case 36 – Attorney-General’s Reference No. 10 of 1995 (Brian Denvir) Stranger rape – 9-year sentence increased to 13]*

8. A period of 10 years specified for the purposes of Criminal Justice Act 1994, s.34 in conjunction with a sentence of custody for life imposed for attempted rape reduced to seven years.
- The appellant was convicted of attempted rape, robbery and indecent assault. The appellant attacked *a young woman who was six months pregnant* as she walked home from a friend’s flat. The appellant threatened her with a knife, made her remove her clothes and attempted to rape her and then indecently assaulted her. [Case 49 – Roy Low 1997 – Stranger rape – life imprisonment – parole period reduced from 10 to 7 years]

When the rape complainant fits into the category of ‘genuine’ victim, it is more likely that judicial discourse will sympathise with her and make use of other discourses (e.g. medical and/or psychological) to compassionately depict the damage produced by the rape. In case 36 above, for instance, the complainant was quite young, had no previous sexual contact with the appellant, and was attacked after the assailant gained entry to her house. As such, she matches to a fit the ‘real’ victim prototype. In case 49, even though the victim was raped in the street, she was young *and* pregnant; the sentence of life imprisonment represents an attempt to protect not only her youth, but also the child she was expecting.

#### 4.2.1.c The old respectable lady

Regarding the victim’s age, the legal system strives to protect not only young but also elderly victims. The elderly are considered vulnerable, but at the same time they embody highly valued social characteristics such as experience, wisdom, reputation. Elderly women represent mothers and grandmothers, and therefore a sexual assault against one of them is seen as particularly shocking and disgusting. Men who attack elderly women are represented as ‘fiends’ and perverts, and are treated with the utmost strictness; usually their sentences are long ones, as the examples will attest. All the

cases illustrated below involved elderly women attacked at home by a stranger. These cases represent attacks on several of those sensitive socio-cultural values the criminal justice system is expected to protect: old age, a woman's good reputation, the sanctity and privacy of the domestic world. Therefore, they epitomise the 'serious rape offence' and are treated with a corresponding degree of severity.

The first excerpt comes from an appeal decision where the lexical choices indicate that both complainant and appellant fit into the prototypes of 'real' victim and 'real' rapist. The sentence was, accordingly, one of the longest found in the corpus:

9. Fifteen years' imprisonment upheld for the rape of *an elderly widow* by *a burglar*.
- The appellant broke into a house occupied by *a widow aged 78* who lived alone.
  - ... *the effect on the victim has been horrendous*.
  - *The fact remains that this lady's life has been completely ruined*. She cannot return to her home of 53 years. She is fearful of being alone. Her final years have been rendered completely desolate. [Case 28 – Albert Thomas 1994 – Stranger rape – 15-year sentence upheld]

The tone of sympathy to the victim and of horror towards the crime is obvious. The complainant is referred to in respectful, sympathetic terms: *an elderly widow*; *a widow aged 78*; *the victim*; *this lady*. In addition, the psychological effects of the event on her are strongly emphasised through the use of adjectives: she is *fearful*; her life has been rendered *completely desolate*. Correspondingly, her attacker is a 'true' criminal: *a drug addict* who *burgled* the victim's house and attacked her sexually. Therefore, the sentence of 15 years awarded him by the trial judge was upheld by the Appeal Court. The following excerpt was also taken from a case of an elderly woman attacked at home by a burglar:

10. The appellant broke into the home of *a woman aged 74* in the early hours of the morning. He pressed a knife at her throat, and threatened to kill her. The woman resisted and the appellant attacked her with some violence and raped her. The appellant told the victim that he had AIDS. The woman was subsequently admitted to hospital suffering from depression. Sentenced to 15 years' imprisonment. [Case 15 – Farag Mohammed Ali Guniem 1993 – 15 year sentence reduced to 13]



The excerpt above fits the prototypical ‘real’ rape: an elderly woman attacked at home, a stranger rapist, a long sentence. The last examples in this series also involve elderly ladies raped at home; however, as the assailants were quite young, the original sentences were comparatively shorter, or reduced (the impact of the offender’s age on the way he is represented and sentenced will be discussed in more details below):

11. The victim, *an elderly lady approaching 90 years of age*, was in her home at night and did in fact suffer actual physical injury as a direct result of the attempted rape.
  - *The complainant was a widow, aged 87*, described in the case as *a frail old lady fitted with a pacemaker*. Her husband died in 1979 and she lived alone in a ground floor flat in Hartlepool. [Case 14 – Kenneth Mark Robinson 1992 - 8 year sentence upheld]
12. Nine years’ detention in a young offender institution for rape of *a widow aged 100* by a boy aged 16 at the time of the offence reduced to seven years.
  - This court, in mercy, having regard to the youth of the appellant at the time of this offence, concludes that the right sentence here was one of seven years’ detention in a young offender institution. [Case 18 – Laurence McIntosh 1993 – Stranger rape – 9 year sentence reduced to 7]

#### 4.2.1.d The woman who resisted

The construction of consent (or resistance) to sex may facilitate or problematise the interpretation of an episode as rape (Wood and Rennie, 1994). From the moment a rape is reported at a police station to the eventuality of it reaching the trial level, the law and order apparatus is suspicious of cases where the lack of consent to sex consisted of mere verbal protests. Rape victims who are able to prove that they resisted in other ways besides saying ‘no’ or crying (such as offering physical resistance, and bearing marks of this resistance on their bodies<sup>1</sup>) are more likely to be believed. This is a lingering trace of the ‘death-before-dishonour’ philosophy (Rhode, 1989), according to which chaste women would rather risk being killed than give in to their aggressors. To this day, women who can prove physical resistance to rape are more likely to be depicted as

<sup>1</sup> Even though from the judicial standpoint a sexual assault is considered more ‘serious’ when the victim can prove her ‘good’ reputation and also her physical resistance to the attack, from the victim’s perspective physical wounds are not necessarily the most traumatic ones. As MacCannell and

women of 'good' reputation, and consequently to be believed and respected. That is what the following excerpts exemplify:

13. Fifteen years' imprisonment for rape of an elderly woman by an intruder in her home reduced to 13 years.
  - *She was a lady of some spirit*. She hit the appellant with an alarm clock and tried to seize the knife.
  - *Bleeding*, his victim made her way to a neighbour. [Case 15 – Farag Mohammed Ali Guniem 1993 – Stranger rape – 15 year sentence reduced to 13]
14. Six and a half years' imprisonment for rape by a man with a previous conviction for rape increased to eight years.
  - Several times he tried to gag the victim, whilst *she struggled to fight him off*.
  - *In an effort to persuade him to stop*, she said "this is rape, Sean".
  - *As she struggled, cried and screamed*, he forced her head into a pillow ...
  - *She begged and pleaded with him to stop*.
  - The victim continued to *resist and to scream*.
  - He tried to force the victim's legs apart with his knee, but *she locked her ankles in resistance*. *He ordered her to open her legs, but she refused*.
  - ... *she raked her fingernails across his neck*. [Case 25 – Attorney-General's Reference No. 28 of 1993 (Sean Cawthray) Stranger rape – 6 ½ year sentence increased to 8]

In excerpt 13 above the victim was an old lady, which by itself contributes to construct her as a 'genuine' victim. In addition to that she 'put up a fight', which in the judicial mind corresponds to proper female resistance in order to defend virtue (the complainant is positively described as '*a lady of spirit*'). Excerpt 14 is generous in comments about the victim's verbal *and* physical resistance. All the evidence of physical resistance (especially the bit about the complainant '*locking her ankles in resistance*') is essential for the construction of her 'good' character. Even though some appeal judges claim to understand lack of resistance to rape, this RAD illustrates that physical and verbal resistance is still seen as convincing signs of lack of consent and of the complainant's blamelessness. The use of the verb '*struggle*' is also worthy of notice in case 25. The term 'struggle' implies that the resistance was considered 'appropriate'. Resistance can be described along a continuum that goes from *continued physical struggle*, to *initial struggle only*, to *crying out for help*, to *saying 'no'*, to *crying*, and

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MacCannell argue, "independent of what happens to the body, the most violent acts are those resulting in long-term or permanent damage to the victim's subjective functioning" (1993, p. 205).

these different ways of describing resistance imply different evaluations. Mere verbal resistance (saying ‘no’) is many times not seen as convincing or sufficient (see case 6 in appendix, for instance). However, ‘struggle’ is a term more appropriate to other forms of physical combat than to a sexual assault (Coates, Bavelas and Gibson, 1994, p. 195):

This language of appropriate resistance seemed to us to be drawn from male-male combat between equals, where continued fighting is appropriate, rather than from asymmetrical situations (e.g. prisoners of war or victims of school-yard bullies) where physical resistance would lead to little chance of success and a high probability of further harm.

In cases defined as ‘real’ rape (e.g. stranger rape), the judicial discourse highlights not only the victim’s physical wounds but also her psychological injuries. This is the case in the excerpts below:

15. A sentence of life imprisonment substituted for a sentence of eight years’ imprisonment in the case of a man convicted of rape committed at knife point who had been convicted of four similar offences on a previous occasion.
  - As to the victim, she suffered *a bite on her left temple, a small cut in her vagina, swelling and redness over the lower back due to ground friction, and tenderness over her neck due to rough handling*. Apart from physical injuries, *she has been severely affected by the rape in a number of aspects of her life*. She has had persistent difficulty in sleeping and eating; she had great fear of travelling in public; and she found it impossible to continue her relationship with her long-standing boyfriend. She has been unable, and continued to be unable, to work for more than a few days. [Case 33 – Attorney-General’s Reference No. 22 of 1995 (Sylvester Semper) Stranger rape – 8 year sentence replaced by life imprisonment]
16. *The victim* on this occasion took urgent steps to call the police and *the offender* was in due course apprehended. *The victim* was examined by a doctor who found her to be *understandably upset* and also found that *her face, nose and neck were bruised and swollen and she had teeth marks on her arm*. [Case 44 – Attorney-General’s Reference No. 29 of 1996 (Carl Junior Fridye) Stranger rape and indecent assaults – 7 ½-year sentence upheld]

Even though physical evidence of rape is still interpreted as a faithful indication of the blamelessness of the victim, nowadays the ‘death-before-dishonour’ philosophy has been partially replaced in rape trials by the modern concept of ‘reasonable resistance’ (Rhode, 1989). Many judges today acknowledge that victims of sexual assault frequently do not resist either because of extreme fear, or to protect themselves from further harm. Below there are some examples of judges who showed this understanding:

17. She was a virgin but she appreciated that he was after sexual intercourse. *She did not want that to happen, but she was too scared to resist.* [Case 7 – William Bruce Fotheringham 1988 – Stranger rape – 6 year sentence]
18. He then grabbed her right arm and pulled her across the road into an alley-way ... *She was so terrified that she could not scream or shout.*  
 - *She was crying ... She was clearly shocked and upset.* She explained what had happened. *She was taken home to her parents. Her mother telephoned the police.* [Case 19 – Attorney-General’s Reference no. ....(David Vernon Taylor) 1993 – Stranger rape – 4-year sentence increased to 6]
19. Her account, *hardly surprisingly in the circumstances*, was that *she did not resist because she was frightened that he would hurt her.* [Case 42 – David Milne Razzaque 1996 – Ex-girlfriend rape and stranger rape – life imprisonment – parole period reduced from 17 to 10 years]<sup>2</sup>

#### 4.2.1.e The forgiving partner

As I pointed out in Chapter 3, sexual violence occurs more frequently within the boundaries of intimacy than between complete strangers<sup>3</sup>. The aggressors are more likely to be familiar men (e.g. husbands, boyfriends, ex-partners, relatives, neighbours), and most of the victims are women and children (see Adler, 1987; Edwards, 1996; Lees, 1997). In spite of their frequency, cases of intimate or domestic violence are difficult to detect, and as a consequence are more likely to remain unreported and unpunished. Most convicted rapists are strangers to their victims. In a survey carried out for the British Home Office in 1990, it was found that among imprisoned rapists, less than a half knew their victims, and in only 7 percent of cases there was a previous relation

<sup>2</sup> We should not be misled by the fact that, even though case 42 involved an ex-partner rape, the assailant was awarded a sentence of life imprisonment. This does not imply that other cases of marital rape found in the corpus were treated with equal hardness. Case 42 consisted of two counts of rapes (what is called in the legal jargon ‘a campaign of rape’), where one of them was the rape of the assailant’s ex-partner, and the other was a prototypical stranger rape, i.e. the attacker invaded a house and raped a woman who was unknown to him.

<sup>3</sup> In a survey carried out in the early 1980s by the London WAR group (Women Against Rape), 110 out of 214 women who had been raped by any men had been raped by their own husbands (Hall, 1985). In another survey also carried out by WAR in the mid-1980s involving 145 victims, an estimated 60 were raped by a husband, boyfriend, family member or man in authority. A further 50 victims were raped by a friend, acquaintance or workmate. Of these 110 cases of rape, only two cases of rape by a friend, acquaintance or workmate were reported (Temkin, 1987). According to the Women Protection Section of the 6<sup>th</sup> Police Station in Florianópolis, 90 percent of sexual crimes against children, teenagers and women are committed by men who are close to the victims. Of this total, 80 percent are family members and the majority live in the same house with the victim (“Estuprador Está Próximo da Vítima”, 16 August 1998, *Diário Catarinense*).

between the two. Less than a quarter of cases had taken place after a social contact between rapist and victim, and in over half the cases the victim had been attacked in the streets or the rapists had broken into her house (in Sampson, 1994, p. 36). Some researchers claim that many cases of domestic violence are never criminally prosecuted, and few reach the appeal level. Lees (1997), for instance, speculates that few marital rape cases reach the Court of Appeal as a result of short sentences awarded by Crown Court judges (first instance judgement).

There are many reasons why women fail to report being sexually assaulted by a known man, especially a partner or ex-partner. Among them are (Lees, 1997, pp. 127-8):

- fear for their lives;
- a strong tendency of women to minimise the threat to their lives in order to cope with the fear, which often prevents them from escaping when it is still possible<sup>4</sup>;
- mixed feelings about the aggressor;
- feelings of guilt, shame, etc<sup>5</sup>.

Mixed feelings of guilt, loyalty and fear lead many women to withdraw charges against partners, or to communicate with them in prison. The response of the criminal justice system to the emotional dilemma faced by these women is to interpret their attitude towards the event and the defendant as a feature which mitigates the seriousness of the case. Evidence that the complainant wishes to withdraw the charges against her

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<sup>4</sup> The difficulty many women have in breaking free from perverse relations, involving psychological and physical violence, presents parallels with the principles of brainwashing used on prisoners of war: both types of victim suffer isolation from outside help, humiliation and degradation, followed by acts of kindness coupled with threats to return to the degraded state if compliance is not obtained (Lees, 1997). This interpretation, however, is never broached in court, where the female forgiveness of a physically and/or sexually abusive partner is seen as indication of a 'noble' heart.

<sup>5</sup> Unfortunately, many women still blame themselves for the violence they have been victims of, especially when confronted with unsupportive members of the law and order apparatus (such as police officers, lawyers and judges). As MacCannell and MacCannell explain, "not every victim is able silently to endure, or to walk out on unsupportive authority when it sides with the assailant. Some must actively participate in transferring the blame to themselves ... For these victims, authority and the law do not

present or ex-husband leads many appeal judges to reduce his sentence. This trend is probably the result of a judicial wish to protect the privacy of the family; if the woman is prepared to 'forgive and forget' (seen as a 'positive' attitude), the judiciary is also willing to offer some measure of forgiveness. Marital rape, then, is seen more as the problem of an individual couple which should be dealt with in the privacy of the home, than as a socio-cultural phenomenon involving issues such as domestic violence and power asymmetry. From the judicial point of view, the more an abused wife is prepared to forgive her partner, the less the criminal justice system should interfere. In Edwards' words (1996, p. 360):

As with domestic violence, there is a concern that, where the victim is trying to put her life together and minimise the trauma, her courage, strength and tenacity and above all her forgiveness work in favour of mitigation of sentence. It is interesting that principles of punishment, retribution, deterrence and reparation also embrace a new principle in mitigation, that of victim survival and compassion.

In terms of discursive representation, women raped by men with whom they have (or had) a relationship constitute a borderline category: they are not usually portrayed as 'true' victims since, from the judicial standpoint, their trauma is lessened by the intimacy they shared with the assailants. However, they can be represented positively depending on how they reacted to the attack. Attitudes of compassion and forgiveness guarantee these complainants compliments from the appeal judges, at the same time that it guarantees a reduction in the appellant's sentence.

In an analysis of appeals in cases of marital rape heard between 1991 and 1994, Lees (1997) concluded that the main grounds for allowing the appeal was indication of the wife trying to contact the husband in prison. What appeal judges do not seem to take into consideration is that these contacts may be explained by the threat of retaliation. In

my data, for instance, among 18 cases of marital rape, there was only one reference to the well-founded fear many women have of their partners or ex-partners, and their consequent reluctance to press charges against them. Except for case 40 below, all the other cases of contact between victim and aggressor were interpreted as examples of a 'genuine' willingness to forgive:

20. Suffice it to say that so far as the first count of rape was concerned, the victim was a person with whom the appellant had had a sexual relationship. He gave her a severe beating. She was admitted to hospital. *He visited her and threatened to kill her if she told the police that he had caused the injuries. The victim told the police that she did not know who had assaulted her. She was assaulted again a few weeks after her discharge from hospital and he threatened to kill her.* [Case 40 – Paul Brandy (1996) Marital and stranger rape – life imprisonment – parole period reduced from 15 to 10 years]

This example corroborates the argument that married and even separated women are frequently at risk of being attacked or killed by their partners (Adler, 1987; Campbell, 1992; Lees, 1997). In such cases, fear for their lives, rather than a wish to forgive the assailant, can explain some victims' refusal to lodge a rape complaint or to pursue the legal proceedings to their end. As a last remark on case 40 above, the assailant got a life sentence because he had committed multiple rapes, only one of them being marital; the others were classical examples of stranger rape. As I pointed out in chapter 3, no case of marital rape found in the corpus was awarded a sentence of life imprisonment.

In the following examples, the forgiving attitude of the victim had a decisive effect on the way the appeal judges viewed the case:

21. Ten years' imprisonment for rape by a man of his former partner reduced to six years.
- Following the appellant's arrest, *the victim wrote to him and visited him in prison repeatedly.*
  - This was a serious case of rape, involving at least four ... aggravating features.
  - It was a striking and unusual feature of the case that *the victim had had a long-term relationship with the offender, and had not suffered the degree of mental trauma which is sometimes associated with such offences. The victim had gone a long way to forgiving the appellant. This was a very different category of case from many of the cases of rape which came before the courts.* Taking these matters into account, the sentence of 10 years was too long; a sentence of six years would be substituted. [Case 16 – Derek John Hind 1993 - Former partner rape – 10 year sentence reduced to 6]

As I suggested earlier, judicial discourse defines rape by a stranger as more serious than rape by a familiar man. Here we are talking about a psychological trauma, not merely a physical one (even though rape with physical violence is considered an aggravated offence). In view of that, we can conclude that what the modern criminal justice system wishes to punish through the rape trial is not just a hurt inflicted on the body but also a trauma inflicted on the *soul* of the victim<sup>6</sup>. Following this line of reasoning, we can see why rape by a known man is seen as less serious than rape by a stranger: according to judicial reasoning, the familiarity between assailant and victim should render the attack less traumatic (even though there is no evidence to support that; actually, women raped by their partners present higher degrees of physical and psychological trauma (Clark, 1992; Edwards, 1996). The comment below, still from the same case (case 16), is offered as another argument for the depiction of the offence as ‘not very serious’:

21. The injuries sustained by the complainant were not as severe as they might have been.

Curiously, this comment comes right after a detailed description of the rape, which sounds quite violent and traumatic (the appellant broke into the victim’s house, tied her hands and ankles, struck her on the head, put a pillow case over her head, raped her, forced her to have oral sex, tried to bugger her, raped her again, and finally squeezed her throat until she blacked out – see text in appendix). However, both the victim’s physical and psychological injuries are neutralised by her willingness to ‘forgive and forget’:

21. *The additional feature of this case, to which reference needs to be made, is the attitude of the complainant since these events. She wrote to him many times while he was awaiting his appearance at*

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<sup>6</sup> The notion that the *soul* is an important category for the criminal justice system, especially concerning penal punishment, was developed originally by Michel Foucault. This theme will be further developed in the following chapter.



the Crown Court, and then subsequently *she has repeatedly visited him in prison*. In a statement made on May 1, 1993, she refers to having been very hurt and confused but as *never having felt hatred or resentment towards the appellant*. She had *understandably* experienced considerable difficulty with her emotions and with building a new life. [Case 16 – Derek John Hind 1993 - Former partner rape – 10 year sentence reduced to 6]

The appeal judges refer to the victim in an understanding, compassionate way (*‘she refers to ... never having felt hatred or resentment towards the appellant’*; *‘she had understandably ... difficulty with her emotions’*). Because of her forgiving attitude, the complainant won judicial approval and the appellant had his sentence reduced.

The following example comes from another case where the complainant’s forgiveness resulted in a reduction in the trial sentence. In case 17 both the trial judge and the appeal judges were generous with praises to the forgiving attitude of the victim:

22. Six years’ imprisonment for the rape of a former partner reduced to five years.
- Rape was rape whether it was within a relationship, after the termination of relationship or between strangers ... *The fact that the victim had attempted to withdraw the charge and indicated that she had forgiven the appellant suggested that the psychological and mental suffering must be less than in other circumstances. The forgiveness of the victim provided some mitigation.* The sentence would be reduced to five years.
  - ... this appellant was denying that there had been any rape. The consequence of his denial was that the judge was able to see *the lady* herself and he made a comment after the trial about the way in which she had appeared. He said to her: “I do not wish to cause you any more *suffering*. I do not think I have seen anybody quite so *racked with conflicting emotions and loyalties* as you have been these last few days. *I am sure you have everybody’s sympathy.*” She had explained very early on that she no longer wished to pursue the complaint which she was making against the appellant. When she gave evidence before the magistrates, she indicated that *she still loved this man*. She indicated to the magistrates that *she had done all she could to withdraw the complaint*. However, it has to be appreciated that the offence was one not only committed against her, but against the whole peace of the country. It is not possible for *somebody who has suffered in this way* to withdraw the complaint.
  - Enough has been said to indicate *the turmoil that was in this woman’s mind*.
  - However, it seems to us that Mrs. E. is *one of those remarkable women who is prepared to forgive*, and has forgiven, that which was done to her by somebody whom she loved and probably still does love.
  - Accordingly, *some mitigation must be seen in that one factor*. It is not provided by anything which this appellant has done; it is provided by *the forgiveness of his victim*. [Case 17 – James Kevin Hutchinson 1993 - Marital rape – 6 year sentence reduced to 5]

The complainant is constructed as a ‘suffering’ woman, torn between her love and loyalty towards the appellant and the rape complaint she had made earlier on, which she attempts to withdraw. The picture of the woman who suffers and fights for her

relationship is part of the hegemonic ideal of femininity<sup>7</sup>, and it wins special praise in this case when it is coupled with a forgiving and loving attitude (“Mrs. E. is *one of those remarkable women who is prepared to forgive*”).

In the last example in this section, again the victim’s willingness to forgive her abusive partner is decisive in the case.

23. Three years’ imprisonment upheld for the rape by a man of his partner at knife point on two occasions. *Observations on the relevance of the willingness of the victim to forgive the offender.*
- **Held:** the complainant indicated to the sentencer in court that she did not wish the appellant to be sentenced to imprisonment ... *The sentencer, in reducing the sentence to three years in a case which would have merited about 10, gave full recognition of the attitude of the victim. The forgiveness of the victim and the desire of the victim not to pursue the matter is a factor which should be taken into account in mitigation, but it could not be the only consideration.* [Case 27 – James Henshall 1994 - Marital rape – 3 year sentence upheld]

Different from the cases illustrated above, this sentence was not reduced at the appeal level; this, however, is explained by the fact that the complainant’s forgiveness had already played a decisive role during the trial, resulting in a short sentence (3 years), which was upheld by the appeal judges. Nevertheless, this appellate decision is somewhat less gender-biased<sup>8</sup> than the previous ones; it acknowledges that the desire of the victim to forgive the accused is a mitigating factor, but should “not be the only consideration in the sentence”. As a consequence, the judges decided to uphold the sentence rather than to reduce it.

<sup>7</sup> From the hegemonic view of gender, one of the features which shapes feminine identity is suffering, something that gives women a special power. In the view of Marit Melhus (1990), for instance, suffering is inherent to being a woman. As a typically feminine ‘virtue’, suffering expresses the experiences of a woman’s life and helps to build her femininity.

<sup>8</sup> In the present work, I do not wish to assume the somewhat simplistic stance that the gender biases present in RADs are exclusively a result and an example of patriarchal male power over women. As Lees (1997) argues, we can interpret the discussion of power in the scope of gender as a field of force that traps both men and women, rather than something men exercise over women. However, even embracing the view that power relations submit and manipulate both genders, there is no denying that the discourse of the law in general, and the judicial discourse on rape in particular, are still markedly conservative male discourses, where women’s perspectives of sexuality and gender relations are only marginally represented.

#### 4.2.2 Non-Genuine Victims

During a rape trial, women who are not able to construct themselves as ‘genuine’ victims (women of good repute who were attacked by a total stranger) are harshly treated by criminal courts. Any hint of a previous relation with the accused or of a ‘notorious’ sexual past is usually interpreted as a forfeiture of the ‘victim’ status; the complainant will then be seen as a woman who ‘stepped out of line’ and brought the attack onto herself. Non-genuine victims, even when the defendant is found guilty, will not receive the sympathy of the court. The event will probably be minimised, and the sentence length will be shorter.

##### 4.2.2.a The former or present partner

Some judges seem to recognise that all cases of rape should be seen as equally serious, independent of the degree of intimacy that existed between the attacker and the victim, as the excerpt below indicates:

24. We take the view that the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, *irrespective of his relationship with his victim*. [Case 13 – R (a husband) 1991 – marital rape – appeal dismissed]

However, in spite of what the judges in case 13 stated, many other cases in the corpus suggest that a prior relationship between assailant and victim does play a crucial role in rape trials and appellate decisions, both in terms of the way defendant, complainant and event are represented, as well as in terms of sentence length. Of the 15 appeals on sentence in cases of marital rape present in the corpus, 8 of the sentences, more than half, were reduced; one of the reasons presented by the appellate judges for the reductions was the familiarity between assailant and victim. Where there was a

previous relation between assailant and victim, the fact is highlighted at the very beginning of the appellate decision (its opening lines). It could be argued that this is so because the prior relationship is an ‘issue’ in the case, that is, one of the legal points being disputed is whether this relationship has a bearing on the case. Nevertheless, the simple fact that the existence of a prior relation between aggressor and victim can be used as a line of defence and mitigation in a rape trial is highly questionable from the point of view of gender.

Consider the following examples:

25. Six years’ imprisonment for the rape of *his wife by an estranged husband* reduced to five years.
  - **Held:** *the Court had recognised that a distinction might be drawn between cases of rape by a stranger and rape by a former husband or co-habitee.* The offence was carefully committed in the complainant’s own home; the appellant had entered by stealth and cut the telephone wires. *However, the sentence would be reduced to five years.* [Case 21 – Robert C 1993 - Marital rape – 6 year sentence reduced to 5]
26. Three years’ imprisonment for the *rape of a wife by a husband, while the parties were still cohabiting and sharing a bed*, reduced to 18 months.
  - **Held:** sentencing for rape committed by a man on his wife or person with whom he had previously lived had been considered in Berry (1988) 10 Cr.App.R.(S.) 13, where it had been recognised that *the previous settled relationship might make the offence less serious than it otherwise would have been.* [Case 30 – Paul Richard M. 1994 - Marital rape during cohabitation – 3-year sentence reduced to 1 ½ years]

In the same way that the existence of a prior or present relationship between victim and assailant is crucial to the judicial interpretation of rape, the absence of any previous contact between the parties also plays a decisive role in judicial decisions. It is interesting to compare the opening lines of an appeal decision on a case of *marital rape* and another one on a case of *stranger rape*:

27. Thirty months’ imprisonment for *the rape by a man of his partner, while they were still cohabiting* but by the use of significant force, *reduced to two years.*
  - **Held:** in *M* the Court had indicated that *a distinction could be drawn between cases where an estranged husband forced his way into the wife’s home as an intruder and raped her, and those where the husband was still living in the same house and occupying the same bed with consent ...* In the unusual circumstances of the case, *the sentence would be reduced to two years.* [Case 32 – Kirk Paul Pearson 1995 - Marital rape during cohabitation – 2 ½-year sentence reduced to 2 years]
28. A period of 10 years specified for the purposes of Criminal Justice Act 1994, s.34 in conjunction with *a sentence of custody for life* imposed for attempted rape reduced to seven years.

- The appellant was convicted of attempted rape, robbery and indecent assault. The appellant attacked a young woman who was six months pregnant as she walked home from a friend's flat. The appellant threatened her with a knife, made her remove her clothes and attempted to rape her and then indecently assaulted her.
- This was undoubtedly *a very serious attack on a total stranger* at night who was simply wending her way home. [Case 49 – Roy Low 1997 - Stranger rape – life imprisonment – parole period reduced from 10 to 7 years]

In both excerpts above, the presence or the absence of a previous relationship between assailant and victim is immediately pointed out. However, the similarity goes no further: in case 49, a *stranger rape*, the absence of any previous contact between attacker and victim ('... *a very serious attack on a total stranger*') is one of the factors which led the accused to be sentenced to life imprisonment. In case 32, on the other hand, the fact that assailant and victim were married and living together ('*the rape by a man of his partner, while they were still cohabiting*') functions as a mitigating factor: the accused man got not only a much shorter sentence at trial level (2 ½ years imprisonment), but his sentence was further reduced at the appellate level (2 years).

Sometimes a single appellate decision illustrates the distinct way judges view rape by a stranger and rape by a known man:

29. A term of 17 years specified under the Criminal Justice Act 1991 in conjunction with a sentence of life imprisonment on a man convicted of a number of rapes reduced to 10 years.
- The appellant formed a relationship with a woman which deteriorated and the woman indicated that she wanted it to end. *The woman* agreed to see the appellant, and allowed him into her home. He subsequently refused to leave when asked, threatened her with a knife, forced her to take part in various sexual acts, and *had sexual intercourse with her three times*.
  - On another occasion the appellant attacked a young couple in their home, holding them captive for a day and *raping the young woman*. [Case 42 – David Milne Razzaque 1996 - Marital and stranger rape – life imprisonment – parole period reduced from 17 to 10 years]

In case 42 the accused man had been convicted of two counts of rape: one against his former partner and another against a strange woman. The way the two complainants are referred to, and the way the event is described, differs from the first count of rape to the second. In the first, the marital rape, the event is labelled '*sexual intercourse*' and the complainant is referred to as '*the woman*', not '*the victim*'. As a former partner rape, the

case is not considered as serious as the second one in the RAD. When referring to the second count, the judges label the attack '*rape*' and the victim '*the young woman*', which indicates more sympathy (as pointed out in section 2.2, the victim's youth is considered an aggravating feature in a rape case; the younger the victim, the more serious the rape). In count 2 of case 42 above the frame is 'stranger rape', therefore the complainant matches the 'real victim' prototype.

#### 4.2.2.b The temptress (the whore)

During a rape trial, the 'good' character of the complainant plays a very important role, especially if a conviction is to be achieved. Women who are able to construct themselves as 'chaste' and as free from blame will fit into the slot of 'genuine' victims, and will probably see their attackers convicted<sup>9</sup>.

However, legal discourse also changes with times, even if belatedly and partially. As a result of changing social mores, the appeal decisions investigated in this work indicate that the complainant's 'good reputation' is no longer openly referred to in legal decisions; the discussion of the complainant's sexual reputation is now done in indirect ways, by giving value to features such as virginity, youth, old age and no previous contact with the assailant. These features are indicators of 'good' character and blamelessness on the part of the victim: a virgin is 'obviously' a chaste woman; a very young girl probably has little or no sexual experience; an old lady is usually a woman of 'good' reputation; and a woman raped by a total stranger was supposedly not attacked due to her sexual history or her behaviour.

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<sup>9</sup> General view of rape victims: American surveys carried out in the late 70s and early 80s indicated that most people believed rape victims had provoked their attackers (by appearance or behaviour), and that most of them were either promiscuous women or women of bad reputation. Jury studies indicate that

On the other hand, women who have their reputations discredited during the trial will not be portrayed as 'true' victims, and conviction will become much more difficult. This is linked to the split view of female sexuality, according to which women are either Madonnas or whores. This view, rooted in Victorian morality that fiercely protected 'innocence' in young and adult women, still pervades the judicial discourse on rape (Adler, 1987). From Victorian times to today, the factors that determine social respectability for women have included virginity, marriage, housing, employment, past sexual experience, among others (Lees, 1997). The discursive manipulation of these factors allows the criminal justice system a great flexibility to disparage or praise female behaviour during a rape trial, without sounding downright sexist and discriminatory. Apart from indirectly depicting women as 'pure' or 'impure', blameless or guilty, by making comments about virginity, previous contact with the accused man, forms of resistance to rape, the place where the attack occurred, etc, judges can also resort to lexico-grammatical structures that, even though apparently 'neutral', convey ways of seeing and of evaluating female behaviour. These characterisations of women according to their reputation, covertly introduced into the judicial discourse, serve as an independent discourse of praise or of character vilification (Gaines, 1999).

In the first example in this subsection, judges categorise a young complainant by using the classical binary view of women - Madonnas or whores:

30. A 14 year old girl visited London for the first time from her home in Durham ... She lost her way back to King's Cross station and was accosted by the appellant who offered to assist her; but in fact he took her back to his flat, plied her with drink and then raped and buggered her. She had never taken alcohol before and was *a virgin*.
- The story he [the defendant] told the jury was very involved. If the jury were to accept what he said, far from being *a girl from a good home and was well brought up*, she as *a hussy who was only too anxious to nip into bed with him in this extraordinary circumstance*, namely that she was far from home not knowing where she was and where on earth she was going to go the following morning. We have looked very carefully at the evidence which he gave. It is just *as improbable a story as one*

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when the rape victim is criticised during the trial (for example, for dubious moral character), acquittal is almost guaranteed (Rhode, 1989).

*could read, even in fiction* [Case 12 – Wared Mhaywi Kabariti 1990 - stranger rape – appeal dismissed – 12 year’s imprisonment upheld]

In the dichotomous judicial view of female sexuality, women are defined in terms of a *structural opposition* (Fowler, 1991): they are either ‘*girls from good homes and well brought up*’ or ‘*hussies who are only too anxious to nip into bed*’. This particular complainant was able to fit into the first group, hence she was described with commiseration and understanding and her attacker got a long prison sentence.

The complainant in the next example, however, was not able to do that. The excerpts below come from one of the oldest cases found in the corpus (1988), and they discuss openly the so-called ‘promiscuous’ behaviour of the complainant. In case 6 the defendant appealed his trial sentence because he believed the single judge had wrongly refused him the right to cross-examine the complainant about her sexual past. The argument behind his appeal was that the ‘notorious sexual promiscuity’ of the victim led him to believe she was consenting to sex. It is fair to say that, among the more recent cases in the corpus (from the 1990s), there were no other appellate decisions which discussed the victim’s past sexual life so openly:

31. His counsel applied for leave to the trial judge to cross-examine the complainant about *her sexual relations with other men*, submitting that *there was evidence of promiscuity, i.e. that not only had she had sexual experience with men to whom she was not married but that she had done so casually and with little discrimination*, and that that went to the issue of consent.
- Counsel for the Crown resisted the application on the basis that, *even if these matters did show promiscuity on the part of the complainant, this was not relevant to the defence that she consented*, although it might have had some relevance if the defence had been a genuine belief in her consent. [Case 6 – Uriah Samuel Brown – 1988 – acquaintance rape – appeal dismissed]

In example 31, even the position of counsel for the Crown is judgmental of the complainant’s behaviour: the prosecuting counsel admits that she was in fact promiscuous, but argues that, as the defence was not ‘genuine belief in consent’, this was not relevant.



When the rape complainant is portrayed as a woman of ‘bad’ reputation, it becomes more difficult for her to convince legal practitioners and jurors that she did not consent to sexual intercourse with the defendant. In some cases like case 6 above, her alleged promiscuity is used as a line of defence, that is, the accused man can argue that, because the woman had sex with so many men, he believed she would be willing to have sex with him too. In many cases, genuine belief in consent can help to acquit a rapist and to discredit the complainant. To say that the man did not consider his actions as rape or that he genuinely believed the woman consented is to imply that much of the blame rests on her: she did not resist enough, she did not signal clearly enough her lack of consent, her promiscuous character misled the defendant. This line of defence was used in case 6. Even though the Appeal Court dismissed the appeal and upheld the conviction, it also highlighted and emphasised the complainant’s alleged ‘promiscuity’ throughout the appellate decision, as we can see in the extract below:

31. The police surgeon who examined the complainant on the day following the alleged offences said that *there were no marks of violence or injuries to any part of the complainant*. The doctor’s report also contained material, not given in evidence before the jury, from which the clear inference was that in her opinion *the complainant was suffering from some venereal disease. The appellant in cross-examination said that as a result of the intercourse that he had had with the complainant he had himself also contracted that disease.* [Case 6 – Uriah Samuel Brown (1988) acquaintance rape – appeal dismissed]

Even though the judges had previously described the complainant in the case above as not having consented to intercourse with the appellant, in this excerpt they indicate that there was no physical corroboration of her having been raped. The indication that she had a venereal disease gives further emphasis to her image as a promiscuous woman. The picture here is a contradictory one: the woman did not consent, but at the same time she was known as a ‘promiscuous’, ‘unclean’ woman, who presented no hard evidence of the attack. Below is a final excerpt from the same case, where the complainant’s resistance is thoroughly criticised by the appeal judges:

31. Further, the question whether it is unfair to exclude such cross-examination in a case on or near the borderline referred to may be affected by the consideration *whether there are other features relevant to consent which could tip the balance between fairness and unfairness*. In the present case *the complainant did not seek help from her boyfriend* when the appellant, on her evidence, was forcing her away from the club. *She did not shout out to her friends* who were there at the time and who saw what was happening. *She did not complain to the taxi-driver the following morning* when she was picked up at the appellant's home. *May these features have been due to her attitudes towards casual sexual relations, and in combination with that attitude sufficiently material to the question whether she consented or not so as to make it unfair to exclude the questions sought to be asked?* [Case 6 – **Uriah Samuel Brown 1988 - acquaintance rape – appeal dismissed**]

The complainant's reaction to the alleged rape is evaluated, and the appeal judges see her behaviour as 'atypical' of a 'real' rape victim. To prove her lack of consent, according to their view, she would have had to put up a fight, scream, call for help, and even complain of being raped to a complete stranger (the taxi-driver). Even though the judges use a question structure in the last sentence, it is simply a rhetorical question; they seem to believe that the complainant's attitudes to sexual relations were indeed casual and irresponsible, attesting her promiscuity and questioning the lack of consent in the case. Case 6 illustrates how the legal system serves as one of the public arenas where the behaviour of 'notorious' women is surveilled, judged, and controlled.

The next excerpt comes from a case where a defendant had been convicted of raping two different women, and subsequently appealed his sentence. The appellant lost the appeal on count 1 (the rape conviction stood), but the second rape conviction was quashed because the trial judge had not warned the jury that it was unsafe to convict a man solely on the words of the victim (which is evidence that many rape victims are suspected of having fabricated their stories). Below is the description of the victims' behaviour before the rapes:

32. The appellant was charged with two counts of rape involving two different women, *Miss P and Miss H*.
- *The complainant, Miss P, aged 31*, visited in the early hours of February 12, 1986, a club in Hockley, Birmingham. She had since 2.30 p.m. on the previous day spent most of the time drinking in the company of her girl friend and two men ... The other three went home at various times after midnight, leaving Miss P behind. The appellant was employed as a doorman or "bouncer" at the club. *She danced with him and he, eventually, so she said, offered to drive her home, an offer which she*

*accepted, only to find that she was being taken to his home and not hers. She accepted his invitation to go in for coffee. The time was now about 4.30 a.m.*

- *The complainant in the second count was Miss H, aged 22. She was an employee at the same club as the appellant. In the early hours of February 23 she accepted a lift home in the appellant's car. There had earlier been some horse-play in a jacuzzi upstairs in the club, in the course of which she had been soaked. As a result she was clad only in a blanket for the drive home. Once there, he accepted her invitation to a cup of coffee. [Case 8 – Maxie Angus Anderson Ensor 1989 - stranger rape – appeal on conviction partly granted and partly dismissed]*

The use of the titles *Miss P* and *Miss H* to refer to the complainants produces a distancing effect between them and the appeal judges. In many cases in the corpus, the complainants are referred to as ‘the victim’, ‘the young girl’, ‘the old lady’, which conveys a tone of sympathy. Apart from the naming pattern used to refer to the complainants, the detailed description of their behaviour prior to the rapes represents them in a negative light (they were out clubbing and drinking, they accepted a lift from a strange man in the small hours, they went to his home, one of them was scantily dressed). They are made to fit the stereotype of ‘provocative’ and ‘imprudent’ women, and illustrate the myth of *victim precipitation*, i.e. that sexual assaults are frequently precipitated by the victim’s ‘improper’ behaviour.

The excerpts above also illustrate the common view that women not only do not know their own desire, but contribute to the ‘uncontrollability’ of male desire, once it is aroused. By taking a lift with the defendant and by going to his house the two complainants arouse his desire, they did not avoid it. As they were seen as ‘having led the man on’, their rape did not fit into the category of ‘real rapes’.

In the last case in this section, a more recent one, the complainant’s behaviour is also presented as ‘inappropriate’: a couple was not yet separated when the wife started ‘seeing’ another man<sup>10</sup>. This behaviour is put forward as one of the reasons which led her husband to rape her:

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<sup>10</sup> The notion of male honour is intimately linked to female sexual behaviour, or to a woman’s ‘shame’. As Melhus argues, “the shameless woman has not only lost her own honour, she is also a threat to the honour of her husband and her relatives” (1990, p. 56). As a consequence, fathers, sons, brothers and

33. Three years' imprisonment for the rape of a wife by a husband, while the parties were still cohabiting and sharing a bed, reduced to 18 months.
- For about five months before the offence in June 1994 the marriage had been going "downhill" for various reasons. *The complainant had started seeing another man, although there was no suggestion that she was having a sexual relationship with him.*
  - On the evening of June 5, 1994, *the complainant told the appellant of her interest in another man and that she regarded their marriage as at an end. He took that badly and was crying* [Case 30 – Paul Richard M 1994 - Marital rape during cohabitation – 3 year sentence reduced to 1 ½ years]

#### 4.2.2.c The liar

According to many victimisation studies, and to numbers from the London Rape Crisis Centre, rape is one of the most underreported serious crimes<sup>11</sup>. Judges, however, frequently state that it is easy for a woman to lie and to bring a false case of rape to court. Legal practitioners present a wealth of possible motives for false allegations of rape, including spite, shame, guilt or greed. The view of rape complainants as potential liars draws from the general folklore of rape and notions of female sexuality and psychology. However, there is no evidence to indicate there are more false complaints of rape than of any other crime (Temkin, 1987).

As a consequence of the still firmly-held belief that women are prone to make false allegations of sexual abuse, the rape victim, differently from the victim of non-sexual crimes, is frequently treated by the law and order apparatus with suspicion. One evidence of this suspicion at the level of the rape trial is the *corroboration warning* given by judges to the jury before the jury produces its verdict. Through this legal

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husbands have a great concern with the protection of female virtue and shame. From this perspective, female sexuality can be seen as a danger to male honour.

<sup>11</sup> According to a recent Home Office study between 118 thousand and 295 thousand women are either raped or suffer some kind of sexual abuse annually in Great Britain. Only 6 thousand cases of rape and 17.500 cases of sexual abuse are recorded by the police; these numbers are considered just a fraction of the total number of cases of sexual violence against women ("Violência sexual assusta britânicos" (2000, February 20 - *Diário Catarinense*). According to Lees, only one in 10 women who go to a rape crisis centre lodge a complaint of rape at a police station. Of the rape complaints made at police stations, between 30 and 40 percent are 'no-crimes', i.e. the cases are not recorded as crimes (1997, pp. 55-6). For more on the low level of rape reporting, see also Hall, 1985; Temkin, 1987; Godenzi, 1994; Bergen, 1996.

procedure, judges warn the jury that it is not safe to convict a man of rape on the victim's evidence alone, without other corroborative evidence. In her classic 1980s study of 50 cases of rape tried at the Old Bailey, in London, Adler did not find a single conviction without some corroborative evidence. She concluded that "without injuries or admissions by the accused, and preferably both, a conviction in any rape case is extremely unlikely" (1987, p. 156).

The need for corroboration is based on the offensive misconception that "it is impossible to have sex with an unwilling woman" (McLean, 1988). The need for physical evidence of rape persists today *de facto* if not *de jure*. In a rape prosecution, force is often crucial to conviction. However, research studies and official numbers indicate that most rapes happen in the absence of physical force, since the act itself is violent enough to subjugate the woman (see Edwards 1996, p. 337)<sup>12</sup>.

Observe the following excerpts:

34. *The girl did not consent to any sexual activity in the house.*

- *Please do not confuse consent with submission.* By that I mean there may be cases, and the prosecution say this is one of them, where a girl allows a man to have sex with her without a struggle. That does no amount to consent at all. *If a girl decides that it is better to suffer being violated than run the risk of possible injury she is obviously not giving her consent to what is happening.* It is common sense to do that rather than struggle and probably risk more aggression and also the best weapon of the rapist is fear.
- The second ground of appeal advanced relates to the direction of the judge as to corroboration. He said: "... I must give you a warning about Miss Louise Varndell. This warning is not about her in particular but applies to all cases where a charge of rape is made. *Experience by the courts when complaints about sexual misconduct are made has shown that people who make these complaints sometimes tell lies. They tell lies for a variety of reason and occasionally for reasons that no one can discover* ... Before doing anything else ask yourselves whether what she has told you is on the face of it credible (...) If, having done that, and having borne in mind the warning I have already given you about this class of evidence but if you decide you can be sure she is telling the truth then you can and should both rely and act upon her evidence although there is no corroboration for it". ... Certainly it would have been preferable if the judge had used the words "it is dangerous to convict upon the uncorroborated evidence of Miss Varndell," but ... we are quite satisfied that there was no material

<sup>12</sup> For instance, national surveys carried out in the US in the 1980s indicated that over half of rapes did not involve physical force, and a third involved no weapons. Most assaults were carried out with the help of threats, and the victim's most common response was verbal protest (saying 'no') (Rhode, 1989). Yet, many legal practitioners still rely on and demand physical evidence as corroboration that the rape did really occur. According to the chief police officer Madge Branco, 7<sup>th</sup> police precinct, Florianópolis (personal communication), when the rape victim presents physical marks of the attack (also called 'the materiality of the crime') it is much easier to build a case and to convince the judge that rape really took place.

misdirection such as could conceivably have misled the jury. [Case 5 – Mohammed Iqbal Khan, Mahesh Dhokia, Jaswinder Singh Banga, Navaid Faiz 1990 - stranger rape – appeal partly dismissed and partly granted]

Judicial opinions are contradictory and ambiguous about the issue of resistance to rape: some judges seem to believe that only strong physical and verbal resistance characterise non-consensual sex (they therefore warn the jury that they should not rely on the words of the complainant alone, but should check if there is evidence (e.g. physical evidence) to support her claim). Others, expressing better tuning with times, acknowledge that many rape victims do not show much resistance in order to avoid further physical violence. However, sometimes the same appellate decision presents contradictory positions on the subject, which is the case in the appellate decision illustrated above. The following excerpt is another example of the ‘corroboration warning’:

35. *“It is not safe to proceed to conviction of a case of this sort on the uncorroborated testimony of the woman who makes the complaint. That is not an element advertent upon the female sex, it is simply that the ... courts, through years of experience, have come to the conclusion that unless the complaining woman’s evidence is supported by other evidence, independent of hers, it simply is not safe to convict even although you may be satisfied in your minds that she is telling the truth”* [Case 8 – Maxi Angus Anderson Ensor 1989 - Stranger rape – appeal partly dismissed and partly granted]

In example 35 the judge claims that the corroboration warning given to the jury is not *‘an element advertent upon the female sex’*. However, until very recently (1994) only women could be complainants in a rape trial. Therefore, if their sex was the only link between rape complainants, upon whom did this warning advert but upon women?

A rape trial represents the confrontation of two different versions of a set of events, the defendant’s version and the complainant’s version, from which jurors and judge/s will have to decide which represents ‘the truth’. However, the credibility of the defendant’s story and the credibility of the complainant’s story are judged according to very different criteria. To assert the defendant’s credibility as a witness, what is

considered relevant is his reputation based on the lack of previous convictions and his good character in general. To assert the woman's credibility, her previous sexual life and her sexual reputation are frequently the key factors. The complainant's reputation can be openly discussed, or it can be hinted at through comments about her sexual experience, her age, the way she reacted to the attack, etc. Apart from the use of the corroboration warning, which openly indicates that the victim's words should not be believed by themselves, at the micro level of linguistic structures the producers of legal decisions can also resort to certain lexico-grammatical choices to impart more or less credibility to the complainant.

For instance, I observed that in a number of reported appellate decisions the appeal judges used reporting verbs and expressions to introduce the complainant's version of the rape. Depending on which reporting device was chosen, a tone of doubt was added to the complainants' words, making them sound less credible and their stories less probable. This allowed the appeal judges to avoid expressing sympathy towards some specific complainants while at the same time not having to be overtly critical of their social and/or sexual behaviour. The use of certain reporting verbs, sometimes coupled with less than favourable descriptions of the complainant's behaviour (e.g. they were drinking, flirting, clubbing), probably raises questions in the minds of those who read RADs: Can the complainant be entirely believed? Could it be that she contributed to her rape (myth of *victim precipitation*)? Could it be that she was exaggerating, or even fabricating the whole story?

Consider the following example:

36. On March 25 the complainant left the flat, leaving her son with the appellant. *She met a girlfriend and they went for a drink in a local bar. About an hour later the appellant arrived and took exception to what he found. He had brought their son with him. He handed the child over to her and said that it was really her job to look after the child at home ...*
- *What happened thereafter is a matter about which there is some doubt, but it is necessary to recite what she *alleged* happened.*

- *She told* the police that some weeks earlier she had indicated that their relationship had come to an end...
- She refused whereupon, *according to her*, he seized her by her hair very roughly and pulled her across the living room through the hallway and into the bedroom.
- By this time she was crying and shouting for him to get off her and he persisted in his sexual demands to the extent, *according to her*, that he grabbed hold of her pubic hair and rolled her over on to the bed, dragging her with him.
- *She said* that intercourse lasted for about five minutes.
- In the event, *complaint was not made to the police*. An account was first given to social workers in support to an application to oust the appellant from their home and to support her alternative application to be re-housed. *It may be that there was an element of exaggeration in that account for that purpose*. It is to be noted that *when she made the complaint to others she did not allege that the full force of the offence of rape had taken place*. Her explanation subsequently was that she thought there had to be ejaculation for the full offence of rape to occur. *Whether or not that explanation was true or genuine we have no means of establishing, but we discount it as heavily as we can*, and no doubt the learned judge did so.
- In short, we have come to the conclusion that the circumstances here of the actual offence were more serious [than in a precedent cited]. On his own admission, the appellant used force to get her from the sofa and into the bedroom ... However, we have come to the conclusion that *in all the circumstances of the case, not least the unique features of the background to this case*, the sentence of two-and-a-half years is marginally excessive. [Case 32 – Kirk Paul Pearson 1995 - Marital rape during cohabitation – 2 ½-year sentence reduced to 2]

The complainant is described as having left her child at home to go to a bar, a behaviour considered ‘improper’ by her husband (*‘he handed her the child and said it was really her job to look after the child at home’*). Apart from this comment, the judges make it clear that they did not entirely believe the complainant’s version of events (*‘what happened ... is a matter about which there is some doubt’*). This tone of suspicion is further emphasised by the verb ‘*recite*’ (which implies a mere repetition of the complainant’s words, but no credit to them) and the reporting verb ‘*allege*’ (which indicates disbelief) to introduce the complainant’s version of the events.

In some RADs the judges do not use reporting verbs to introduce the complainant’s words, which leads us to think that the judges consider these versions of facts more credible than others. Compare, for instance, the sentence above “*She told the police that* some weeks earlier she had indicated that their relationship had come to an end”, and this alternative, not preceded by a reporting verb: “Some weeks earlier she had indicated that their relationship had come to an end”. Not surprisingly, the appeal judges reduced the sentence in case 32.



The following examples also illustrate the use of reporting verbs and expressions to discredit the complainant's words:

37. Sentences of nine years' imprisonment for rape by buggery by a man of a woman with whom he had gone through a ceremony of marriage reduced to six years, consecutive to a term of 12 months' imprisonment for making a false declaration.
- The appellant met the complainant in a club and they were married a few weeks later. The complainant *alleged* that during their wedding night the appellant tied her up and buggered her against her will on five occasions. The complainant *made allegations* that the appellant had also buggered her before the marriage, and that he continued to do so after the first night, but the appellant was not found guilty on counts alleging rape in the form of buggery without consent on those other occasions.
  - *She was to say that* she had married him because he was blackmailing her, that she could see no way out of her position and she felt that she was totally dominated by him.
  - They spent their wedding night at the Clarendon Hotel in Blackheath. The appellant had drunk a great deal, and *according to his now wife* he told her that as his wife he could do with her what he liked. *She said* that he kept her awake by giving her amphetamine sulphate and had said, that he wanted to hurt and humiliate her. *She said* he made her go on all fours, tied her wrists and her leg with his tie, and forcibly and against her will buggered her. *She said* that happened on some five occasions that night. Those incidents were reflected by Counts 2 and 3 upon which he was convicted, but *it was her case* (and this was reflected by Count 1) that he had also committed forcible buggery upon her from the time that they began to live in the same house until the marriage. Similarly, *it was her case* that after the marriage, and until her complaints were made, he continued forcibly to bugger her. *She gave a highly coloured account of their relationship, an account which would be fully justified if the basic fact of continual forcible buggery had been established, but it had not.* [Case 43 – Leslie David T 1996 - Marital rape – 9 year sentence reduced to 7]

The use of the reporting verbs and expressions '*alleged*', '*made allegations*', '*she was to say*' casts doubt on the complainant's version of events, even though this appeal is discussing the length of the sentence and not if buggery without consent really took place (the defendant was convicted for that, and here he was appealing the sentence, not the conviction). It seems that the judges had to accept that this was a case of rape, but they had mixed feeling about seeing the complainant as a 'real victim' and entirely believing her words. In the last part of the excerpt all the statements made by the complainant are introduced by a reporting expression or verb, which weakens their force: '*according to her*', '*she said*', '*it was her case*'. The last sentence in the excerpt depicts the complainant as a hysterical, over-emotional woman whose version of the facts was not at all proved. The picture created is that it is difficult to believe this woman was buggered against her will, got married as a result of blackmail, and was

again raped on her wedding night (even though the appellant was convicted of raping her). Again, the suspicion of the complainant's words might explain the reduction in the sentence.

As I argued above, the use of certain reporting devices can present the complainant's version of the events as doubtful. On the other hand, appeal judges also have the choice of *not* using reporting verbs to introduce the complainant's version of events. The excerpt below was taken from a RAD where the appeal judges sympathised with the victim. Accordingly, her version of the events is presented without the aid of reporting verbs or expressions, which renders it more truthful:

38. ... *She* [the complainant] *looked out of the window and saw* the offender whom *she did not recognise, as she had never seen him before*. She told him R. was not in, but at the offender's request *she opened the front door a little to speak to him*. She told him to go away. However, when she tried to close the door he jammed his foot in the gap, preventing her from doing so ... At this stage, W.C. [the complainant], *not surprisingly*, was becoming very frightened.
- *She thought he was going to rape her and perhaps kill her ... She was very frightened*. [Case 44 – Attorney-General's Reference No. 29 of 1996 (Carl Junior Fridye) Stranger rape and indecent assaults – 7 ½-year sentence upheld]

Apart from the lack of reporting verbs to introduce the complainant's story ('*she looked ...*', '*she opened ...*', '*she thought ...*', '*she was ...*'), other devices are used here to construct her as a credible witness and a 'true' victim: she had never seen the offender before, which attests this was a stranger rape; she opened the door '*at his request*', that is, she did not invite him in, and then she did it only '*a little*'; he forced his entry. The use of the adverbial phrase '*not surprisingly*' also indicates that the judges understood the victim's reaction and sympathised with it. Another grammatical choice available to judges to depict a rape complainant in a positive light is to resort to reporting verbs that add credibility to her words, as in the following excerpt:

39. ... this appellant was denying that there had been any rape. The consequence of his denial was that the judge was able to see *the lady* herself and he made a comment after the trial about the way in which she had appeared. He said to her: "I do not wish to cause you any more *suffering*. I do not

think I have seen anybody quite so *racked with conflicting emotions and loyalties* as you have been these last few days. *I am sure you have everybody's sympathy.*" She had *explained* very early on that she no longer wished to pursue the complaint which she was making against the appellant. When she gave evidence before the magistrates, she *indicated* that *she still loved this man*. She *indicated* to the magistrates that *she had done all she could to withdraw the complaint*. [Case 17 – James Kevin Hutchinson 1993 - Marital rape – 6 year sentence reduced to 5]

The reporting verbs used to introduce this complainant's assertions, '*explained*' and '*indicated*', do not question her statements but present them as truthful.

## B. THE APPELLANT

Similarly to complainants, appellants are also categorised by legal discourse into different types, and this differentiation has a direct impact on the way a man accused of rape is judged and sentenced. The judicial discourse on rape resorts to three naming patterns to represent (and label) the attacker in a rape case: negative naming; 'psy' naming; and sympathetic naming. These naming patterns indicate how attacker and event are seen, and also represent an attempt from the judicial writers to make sense of the phenomenon of sexual violence against women. The first naming pattern, negative naming, indicates that the event is considered serious and the attacker is seen as dangerous, criminal and alien to the group of 'normal' men who behave 'normally'. The choice of terms and explanations from the 'psy' discourses to refer to the appellant also pictures him as a dangerous man, but due to his psychological or emotional problems. The last naming option represents an attempt to treat the attacker with commiseration, and to explain and normalise his actions. In this section I will exemplify and discuss the ways rape defendants are represented in RADs, and point out which lexico-grammatical structures are used to construct their discursive representation. The section is divided into the following subsections:

### 4.3 Analysis: Stranger and known rapists

#### 4.3.1 The Stranger Rapist

##### 4.3.1.a The fiendish rapist

##### 4.3.1.b The deranged criminal

#### 4.3.2 The 'Disturbed' Husband

The data used in the section 'Appellant' consists of excerpts taken from 14 of the 50 RADs that compose the corpus (the excerpts are verbatim from the reported appellate decisions). The cases selected were those where the judicial description of the assailant (as a fiendish rapist, a deranged criminal or as a disturbed husband) had a direct impact on the outcome of the appeal (see table 4.1).

**Table 4.1**

#### Sentence length for stranger rapists v. marital rapists

Years in prison	The fiendish rapist		The deranged criminal		The disturbed husband	
	No. of cases	%	No. of cases	%	Number of cases	%
Life sentence	3	21.42	2	14.28		
14 to 12	2	14.28				
8 to 7			2	14.28		
5 to 3					2	14.28
3 to 1					3	21.42
Total	5	35.7	4	28.56	5	35.7

Note. Only the 14 cases used in the section 'Appellant' are included in the table.

Percentages refer to these 14 cases only.

As can be observed in table 4.1, stranger rapists depicted as ‘fiendish’ or ‘deranged criminals’ got the longest sentences (life sentences or sentences between 7 and 14 years of imprisonment). Marital rapists, especially those portrayed as ‘disturbed’ and under pressure at the time of the attack, got sentences towards the lower end of the scale (between 5 and 1 year of imprisonment). The following subsections will illustrate and explore in more details the information presented in table 4.1. The excerpts shown below are individually numbered, each number representing one RAD. Repeated numbers indicate that the excerpts come from one single RAD.

### 4.3 Analysis: Stranger and known rapists

#### 4.3.1 The stranger rapist

As with ‘genuine’ victims, the ‘real’ rapist is a stranger who rapes an unknown woman, preferably a woman who did not ‘contribute’ in any way to the attack. As we can see, the ‘real’ rapist prototype is directly linked to the ‘genuine’ victim prototype and to the ‘standard rape episode’. In the judicial ideology, individual cases are matched against this ‘triad’ (serious rape, genuine victim and dangerous rapist) to evaluate their seriousness and to distribute blame and punishment.

##### 4.3.1.a The fiendish rapist

As the RADs analysed in this work indicate, when judging cases seen as ‘serious’ the appellant is cast in the role of ‘real rapist’ either because: a) he is depicted as a ‘bad’ character (lack of morals, previous convictions, etc.), or b) he is almost deranged (a

drug addict, a victim of child abuse, a psychologically unstable person). In the latter case, even though he has practised a terrible deed (a ‘real’, serious rape offence), he deserves medical and psychological help. In the former, the lexical choices describe the appellant as a ‘bad character’ who deserves no sympathy. In the excerpts presented in this subsection, the appellants are characterised as ‘hard criminals’, and their actions as ‘appalling crimes’, through naming choices such as:

- *very serious offences indeed*
- *the sordid facts*
- *this terrible offence*
- *the appellant’s record of violent sexual crime was appalling*
- *the appellant was a clear danger to the public*
- *the offender*
- *he constituted a danger to female members of the public*
- *he was completely out of control*
- *the offender is, and has clearly demonstrated himself to be, a danger to women.*

The first excerpt in this section illustrates a case where the rapist was represented as a fiendish, immoral man:

40. A 14 year old girl visited London for the first time from her home in Durham ... She lost her way back to King’s Cross station and was accosted by *the appellant* who *offered to assist her; but in fact he took her back to his flat, plied her with drink and then raped and bugged her*. She had never taken alcohol before and was a virgin.
- *The appellant is now 23 years of age. He is Jordanian. He was tried for **very serious offences indeed**.*
  - *The appellant was found. His reaction to being found was to tell lies.*
  - *To all of that we have heard with the utmost care. We have no doubt at all, aided by Mr. Bate’s careful excursion through **the sordid facts**, that no jury faced with this girl, considering her background and all else, could possibly have avoided convicting this man. The case was overwhelming.*
  - *It would not have surprised us in the least if the learned judge had given him 14 or 15 years. She was lenient. [Case 12 – Wared Mhaywi Kabariti 1990 - stranger rape – 12 years’ imprisonment upheld]*

The appellant is portrayed in a very negative light. The lexical choices indicate his lack of morals: he *offered to assist a young lost girl but in fact took her into his flat, plied her with drink and then raped and buggered her* (in terms of verbal structure, he is cast into the role of agent while she is cast into the role of patient). In addition, he also *told lies*, which gives further strength to his negative portrait.

In the next excerpts, the appellants are characterised as a 'danger' to society and to women, and thus are sentenced to long prison sentences (14 years to life):

41. Fourteen years' imprisonment, passed as a longer than normal sentence under the Criminal Justice Act 1991, s.2(2)(b), upheld for rape.
  - *The appellant's record of violent sexual crime was appalling and the present offences involved a combination of sex and violence. The appellant was a clear danger to the public ...*
  - The appellant is aged 52 ... It is *the appellant's record of violent sexual crime* that must give any court great concern.
  - His record, therefore, shows in broad terms that in the space of 20 years the appellant had committed *two offences of rape, three offences of buggery and one offence of attempted buggery, with a clear pattern of violence associated with those sexual offences.* [Case 31 – Joseph Kennan 1995 - Rape of a young prostitute – 14-year-sentence upheld]
42. A sentence of life imprisonment substituted for a sentence of eight years' imprisonment in the case of a man convicted of rape committed at knife point who had been convicted of four similar offences on a previous occasion.
  - **Held:** The criteria for a discretionary life sentence had been laid down in *Hodgson (1967) 52 Cr.App.R. 115* ... They were that the offence was grave enough to warrant a very long sentence; that the offender was shown to be of an unstable character and likely to commit further offences, and that if the further offences were committed, the consequences to the public would be very grave. *There was no doubt that the first and the third of these criteria were satisfied; so far as the second was concerned, it was well established that there was no need for medical evidence to be led in order to establish that the offender was likely to commit further offences of the same kind ... Looking at the whole of the offender's history, the Court had come to the conclusion that he constituted a danger to female members of the public and would remain so for an indefinite period.* The Court would accordingly substitute a sentence of life imprisonment for the sentence of eight years' imprisonment imposed for the rape. [Case 33 – Attorney-General's Reference No. 25 of 1995 (Sylvester Semper) Stranger rape – 8 year sentence replaced by life imprisonment]
43. A period of 10 years specified for the purposes of Criminal Justice Act 1994, s.34 in conjunction with a sentence of custody for life imposed for attempted rape reduced to seven years.
  - The appellant was convicted of *attempted rape, robbery and indecent assault*. The appellant attacked a young woman who was six months pregnant as she walked home from a friend's flat. The appellant threatened her with a knife, made her remove her clothes and attempted to rape her and then indecently assaulted her:
  - **Held:** *the appellant had previous convictions for indecent assault* and there was evidence that *he was at a high risk of further offending.*
  - The appellant was at the time *living in a flat owned by the Thames Valley Housing Trust and unemployed.*
  - The probation officer who prepared that report felt that *he was completely out of control* and that *the risk of his re-offending was very substantial* [Case 49 – Roy Low 1997 - Stranger rape – life imprisonment – parole period reduced from 10 to 7 years]

The three appellants above were described as men with strong criminal tendencies and histories of previous convictions. Therefore, the sentences were long ones, ranging from 14 years' imprisonment to life imprisonment. In case 49, the assailant's criminal record is combined with his lifestyle (*'living in a housing state and unemployed'*) to further develop his characterisation as a man of bad character.

Another indicator of 'bad' character and dangerousness is the appellant's incapacity to control his sexual drive. The excerpt below is an example of this type of 'dangerous rapist':

44. A term of 17 years specified under the Criminal Justice Act 1991 in conjunction with a sentence of life imprisonment on a man convicted of a number of rapes reduced to 10 years.
- Upon his conviction the learned judge said this: "David Razzaque, you are a dangerous man ... *You are a danger to women in that you have a sexual appetite that you will stop at nothing to satisfy*". [Case 42 – David Milne Razzaque 1996 - Marital and stranger rape – life imprisonment – parole period reduced from 17 to 10 years]

#### 4.3.1.b The 'deranged' criminal

The examples presented above illustrate the process of categorising certain rapists as 'hardened criminals', men of bad character, no morals and uncontrollable sexuality. However, 'real' rapists may also be described by the discourse of appellate decisions as psychologically unstable men, driven to sexual aggression by drug addiction or emotional problems. This interpretation draws from the 'psychological theory' advanced to explain sexual assaults against women. According to this theory, sex abusers are seen as "inadequate, immature or mentally disordered, abusing through drunkenness" or through the use of other drugs (Sampson, 1994, p. 13). The view of



sexual abusers as socially, psychologically or sexually inadequate is not only shared by some judges but has also become popular<sup>13</sup>.

Apart from diminishing the assailants' responsibility for their actions, the view of sex offenders as emotional/psychological misfits also removes responsibility from society – if the causes of the sexual assaults against women are individual (criminal tendencies, psychological problems, use of drugs, etc), social norms, values and ideologies cannot be blamed. The view of 'dangerous' sex offenders as either 'monsters' or mentally disturbed men hides the fact that rape is committed by all kinds of men, both 'fiends' and psychologically unbalanced men in dark alleyways, as well as 'normal' men in 'normal' homes. As Edwards argues, "whilst we all prefer to believe that such men are if not physically identifiable then identifiable by personality traits, it is often the case that rapists are neither mentally ill nor psychopathic" (1996, p. 359).

The portrayal of some rape offenders as dangerous men due to their psychological/drug problems is constructed through the use of lexico-grammatical selections such as:

- *the offender was under the influence of drugs at the time of the commission of the offences*
- *the further evidence of mental instability contained in the psychiatric reports*
- *he came from a family who were generally of dull or very dull intellect. He was sexually abused as a child. He was an unwanted child.*
- *he had been drinking and smoking cannabis*
- *... something 'clicked' in his head*

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<sup>13</sup> In a survey carried out by the English magazine *Company*, half of the respondents shared the view that sex offenders were usually socially or sexually inadequate (in Sampson 1994, p. 13).

The lexical pair ‘offender/victim’, when used to refer to the appellant and the complainant, indicates that the court has no doubt that the case was indeed a criminal offence committed by a ‘real’ rapist:

46. *The offender* gained access to the flat occupied by *the victim* of the rape by a stratagem, and subsequently threatened her with a knife before raping her twice. On a later occasion *the offender* attacked two women who were walking in the street in the early hours, grabbing one of them by the buttock and grabbing the other by the breasts. A few minutes later *the offender* entered a battered woman’s refuge by climbing through a window and attacked a woman who was asleep in her bedroom with two of her children. He pulled her night shirt open, squeezed her throat, punched her face and bit her arm. [Case 44 – Attorney-General’s Reference No. 29 of 1996 (Carl Junior Fridye) Stranger rape and indecent assaults – 7 ½ -year sentence upheld]

However, the sentence in case 44, shorter than many others in the corpus for stranger rape, is explained by the presence of mitigating features in the case – the offender was a drug addict:

46. The Attorney-General acknowledges that there are some mitigating features: ... *the offender was under the influence of drugs* at the time of the commission of the offences [Case 44 – Attorney-General’s Reference No. 29 of 1996 (Carl Junior Fridye) Stranger rape and indecent assaults – 7 ½ -year sentence upheld]

In the example below, the appeal court upheld the appellant’s sentence of life imprisonment on the grounds that his mental instability made him a danger to women:

47. The appellant, *aged 34 with a bad criminal record* but with no convictions for sexual offences, repeatedly raped two women after threatening them with a knife, one at night in her home and the other five days later in an underground garage whence he had dragged her by the throat.
- On arrest he admitted the offences, adding that *he had been drinking and taking drugs* on both occasions. At his trial he pleaded guilty to the offences. *Medical and psychiatric reports showed mental instability* but no evidence that the appellant would benefit from psychiatric treatment. He was sentenced to concurrent terms of life imprisonment, the recorder remarking that his duty was not merely to punish and exert deterrence [sic], but rather more importantly to ensure the protection of women.
  - **Held**, ... in the light of *the further evidence of mental instability contained in the psychiatric reports*, the Court took the view that the sentence of life imprisonment by the recorder was correct. [Case 10 – Robert Dempster 1987 - Stranger rape – life imprisonment upheld]

In the following excerpt the appeal judges resort to the appellant’s intellectual failings and his history of sexual abuse and neglect to explain his behaviour:

48. Twelve years' imprisonment specified under the Criminal Justice Act 1991, s. 34 in conjunction with a sentence of life imprisonment imposed for repeated rapes of ill or mentally deficient women reduced to 10 years.
- Over a period of three years the appellant committed offences against five mentally deficient women, some of whom were resident in a hospital where the appellant had been employed for many years as a nursing assistant.
  - The appellant is 51 ... *The pre-sentence report indicated that he came from a family who were generally of dull or very dull intellect. He was sexually abused as a child. He was an unwanted child and eventually was made the subject of a care order on the grounds of neglect.* [Case 29 – Michael Fox 1994 - Stranger rape – life imprisonment – period for parole reduced from 12 to 10 years]

Stranger rapes are usually seen and described by judicial discourse as the epitome of the serious sex offence. However, certain factors can mitigate this classical appalling offence in the eyes of the criminal justice system, such as the presence of psychological problems, drug addiction or childhood traumas on the part of the offender. Another mitigating factor for sentencing purposes is the appellant's youth, which usually leads to some reduction in the sentence. This is the case in the appellate decision illustrated below, involving a 16-year-old boy who broke into a flat and raped an elderly woman:

49. Initially he had denied the offence, but later admitted going into the house to look for money, adding *that he had been drinking and smoking cannabis*. He said he had not realised that the victim was an old lady. When he went into the bedroom "*something clicked*" in his head. He then admitted raping the old lady, and said he ejaculated inside her. [Case 18 – Laurence McIntosh 1993 - stranger rape – 9 year sentence reduced to 7]

This almost paternal description of the assailant (he was very young, he had been drinking and doing drugs, he did not realise how old the victim was, he suddenly 'lost control' of himself) prepares the terrain for the final decision, which is to reduce the sentence.

49. One's first reaction to the case is inevitably one of *outrage and revulsion*. The thought of invading an old woman's home and subjecting her to *this dreadful ordeal* is almost *unthinkable*.
- This court, in mercy, *having regard to the youth of the appellant* at the time of this offence, concludes that the right sentence here was one of seven years' detention in a young offender institution. [Case 18 – Laurence McIntosh (1993) stranger rape – 9 year sentence reduced to 7]

Notice that in case 18, the judges were torn between two of the prototypes that guide legal decisions on cases of rape: the complainant was a 'genuine victim', a 100-year-old widow. The event, defined as a '*dreadful ordeal*', caused *outrage* and *revulsion*: this old lady was attacked by a burglar who entered her house at night, and exposed her to sexual indignities. However, these aggravating features are counterbalanced by some mitigating factors: the appellant's age (16), his unstable psychological profile, and his deep remorse, attested by the social workers and psychiatrists. In view of that, and as a token of mercy, the 9-year sentence previously established by the trial judge is reduced to 7 years. Obviously a 7 year sentence is no laughing matter, and might sound harsh enough; however, we have to analyse this sentence in the context of the other cases in the corpus, where similarly serious offences (stranger rape of elderly or very young women) were met with much longer sentences (e.g. 15 years to life imprisonment). The point I want to stress once again is that the harshness of the sentence will be determined, among other things, by the way event, assailant and victim are depicted and categorised, and these depictions and categorisations have to do with myths about gender behaviour and sexuality that sustain the legal discourse about rape.

The characterisation of some rapists as 'fiends' or as 'subnormal' implies that they are outside the group of 'normal' men. This dichotomy (normal v abnormal men) serves to safeguard society, in the sense that it states that 'real' rape is committed by morally or psychologically deficient men who attack unknown, innocent women, whereas normal men don't do that (and society is not to blame for the deranged or sociopathic behaviour of certain individuals).

#### 4.3.2 The 'disturbed' husband

As I argued in the previous section, when describing the behaviour of 'true' rapists appeal judges usually attribute their actions to criminal tendencies or psychological/psychiatric problems. They do not, however, follow the same pattern when judging men who raped former or present partners. In cases of marital rape, the judicial reasoning is that men who force their present or ex-partners to sex are led neither by an uncontrollable sexuality nor by criminal tendencies, but rather by a mixture of misplaced love, pain, stress and confusion. As such, they do not fit into the category of 'real' rapists.

The sympathetic portrayal of sexually abusive partners in RADs is achieved through a selection of naming patterns and descriptions that depict the assailant within a frame of pain and suffering, and which renders the event as something negative but less serious than other cases of rape. The naming of partners includes references to their status as husbands, their jobs and their 'good' characters, i.e. all in terms of 'normality'. The focus is not on the suffering they caused, but on their own suffering (see, for instance, example 50 on pp. 134-35). The description of these husbands as 'suffering men' has a twofold effect: it makes their actions seem less serious (they had strong reason to lose their minds), and it shifts the responsibility to their wives, who are pictured as the causers of their pain and distress. Clark observed the same process of reversal of responsibility in cases of marital rape in newspaper reports of male violence against women. She concludes that (1992, p. 220):

A husband is always and unarguably within society. It is a position ratified by society in the marriage institution. As such it is difficult for a husband to be seen as a fiend. Therefore, these violent men are normalised and humanised by 'suffering' naming. This keeps the ideology intact, although it does mean that the

women victims must take the blame. They bear the burden of reconciling anomaly to ideology.

In my data, some of the sympathetic and 'suffering' naming and grammatical selections used to describe aggressive husbands were:

- *he is a young man; he is sexually immature*
- *he had intended to kill himself*
- *a man of positive good character*
- *the appellant was emotionally ill*
- *he was of perfectly good character previously*
- *he had been a good husband*
- *he had been upset by the thought that there was another man in his wife's affection*
- *a man of exemplary character*
- *he was diagnosed as suffering from a reactive depression with associated anxiety symptoms, secondary to his wife leaving him*
- *he was on an emotional roller coaster*
- *the man had been gravely distressed both by the separation and the fact that his wife had a new man in her life*

The overall picture is that of a man driven to despair (even suicidal) by the breakdown of his marriage or by his wife's infidelity or disloyalty. After reading appellate decisions on cases of marital rape, the first impression is that we should pity the assailants and probably blame their partners for having driven them to such extremes of pain and violence. A closer analysis, though, indicates that this reversal of responsibility represents a double punishment for women who try to break away from their relationships. First, they are punished by their partners who rape and humiliate them; second, they are punished by the criminal justice system which, by sympathising

with the assailants and trivialising the offence, indirectly constructs the victims as the causers of their own attacks and as home rackers.

Among the 18 appeal on cases of marital rape found in the corpus, in some cases both appellant and complainant were depicted with sympathy and compassion. Consider the following case:

50. Thirty months' imprisonment upheld for the rape of a wife by her husband during the marriage, following the wife's withdrawal from sexual relations after childbirth.
- It was made perfectly clear to the appellant that his wife did not, *for good reason*, wish to have anything to do with him sexually at the time. [Case 20 – Robert Leonard T 1993 - Marital rape during cohabitation – 2 ½-year sentence upheld]

In excerpt 50 the judges indicate that they understand and approve the victim's behaviour; in their opinion, the fact that she had given birth recently and was not physically fully recovered was a 'good reason' for her refusal to have sex with the appellant. Therefore, the original trial sentence is upheld. On the other hand, the appellant is also described with understanding and sympathy. He is pictured as a confused and misguided man, but a man of 'good character'; the judges even offer reasons to explain and attenuate his behaviour:

50. *He went on no further on that occasion and, indeed, he apologised soon afterwards, which was his normal habit.*
- *He expressed complete agreement with all the allegations put to him. He expressed his concern and distress for what he had done and indicated how much he loved his wife. He then wrote a letter to his wife apologising for his conduct and saying how much he loved her. He pleaded guilty at the first opportunity. Indeed, he let it be known that he intended to plead guilty, because he was concerned that he should not put his wife through the ordeal of giving evidence.*
  - *It can be said that he is a young man; he is sexually immature; he has no previous conviction. He expressed immediate contrition and followed that by pleading guilty. He also did his best to obtain treatment.*
  - *The sentencer attributed the offence to the appellant's immaturity, and to feelings of rejection and jealousy over the attention his wife was paying to the child.* [Case 20 – Robert Leonard T 1993 - Marital rape during cohabitation – 2 ½-year sentence upheld].

Throughout the appellate decision the appellant is depicted in a positive light: he forced his wife to have sex but he *apologised* for his conduct and professed his love for

her<sup>14</sup>. The use of the of the adverb ‘*indeed*’ in the sentence “*Indeed, he let it be known that he intended to plead guilty, because he was concerned that he should not put his wife through the ordeal of giving evidence*” indicates the judicial appreciation of the appellant’s remorseful attitude. In addition to that, the appeal judges offer humane explanations for his aggressive behaviour: *he was young and sexually immature*. Cases of marital rape where the couple was still cohabiting are usually the ones where the judges make a greater effort to interpret the event as mercifully as possible (especially from the appellant’s point of view), and to protect and preserve as much as possible the marriage and the domestic environment. As a consequence, the sentences in such cases are the shortest ones found in the corpus (see table 3.2, chapter 3).

The following excerpt comes from case 21, an ex-partner rape. In this case, an estranged husband raped his wife and was condemned to 6 years imprisonment. However, at appeal level his sentence was reduced to 5 years, as the judges argued that there was a distinction between rape by a stranger and rape by a former husband (the second type being less serious). The event is presented within a tragi-romantic frame and the appellant as a confused man on the verge of suicide, which is further justification for the reduction in the sentence:

51. Six years’ imprisonment for the rape of his wife by an estranged husband reduced to five years.  
 - He then tried to persuade her not to tell anybody, *kissed her, told her he still loved her* and left. He subsequently said that *he had intended to kill himself by taking an overdose after making love to his wife the last time*, and he pulled out the telephone wire so that she could not be able to summon help when he did that. [Case 21 – Robert C. 1993 - Ex-partner rape – 6 year sentence reduced to 5]

Another reason for the reduction in the appellant’s sentence was his portrayal as a man of ‘good character’:

<sup>14</sup> A phase of contrition and remorse is often observed among men who abuse their partners. During this phase, they express remorse for the violence they committed, apologize, promise to reform, even consider therapy. They may also make suicide threats, which might be genuine (Dutton 1995, p. 49). However, the presence of this phase does not guarantee that incidents of abuse will not happen again.



51. Nevertheless, bearing in mind that he is *a man of positive good character*, this Court takes the view that the sentence was too great. [Case 21 – Robert C. 1993 - Ex-partner rape – 6 year sentence reduced to 5]

Positive descriptions of the offender's character take as a basis his previous behaviour, such as lack of previous convictions and professional standing. As a result, it seems that the act itself is not relevant to the offender's character; yet his 'good' character is relevant to sentencing (a mitigating feature).

The next example comes from another case of marital rape, where a man raped his partner at knife point on two occasions. Again, his desperation, caused by the breakdown of the relationship<sup>15</sup>, is presented as a mitigating factor:

52. Three years' imprisonment upheld for the rape by a man of his partner at knife point on two occasions. Observations on the relevance of the willingness of the victim to forgive the offender.
- He said, "I have got nothing to lose. I'm a dead man anyway."
  - He said, "*You fucked my life up and now I'm going to fuck you to see how you like it*".
  - *In the course of the afternoon, he became more and more emotional. On a number of occasions he put the knife to his own chest and invited the complainant to exert the final push, to do to him what he seemed to be unable to do to himself.*
  - She [the complainant] expressed the view that *the appellant was emotionally ill*, and that she did not want to go on with the case. [Case 27 – James Henshall 1994 - ex-partner rape – 3 year sentence upheld]

Though, as seen previously, rape with the use of a weapon is considered an aggravated, serious offence, in case 27 the husband who raped his wife twice at knife point was sentenced to 3 years' imprisonment. If we compare this sentence with others in the data, even with those where the appellant was a young man whom the Appeal Court claimed to treat 'mercifully', we can see that in case 27 the description of the appellant (a 'confused' and 'emotionally unstable' man), coupled with the description of the complainant's behaviour (the forgiving woman who acknowledged her ex-partner's

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<sup>15</sup> A Canadian study covering the mid-70s to the early 90s found out that 45 percent of femicides in the Ontario province occurred as a result of a man's rage over actual or impending separation from his partner (Dutton 1995; p. 15).

illness and did not want to see him go to prison) leads to a much shorter sentence (the young rapists in cases 14 and 18 got 8 and 7 years' imprisonment respectively). Note that in case 27 the assailant holds the victim responsible for his suffering ("*You fucked up my life and now I'm going to fuck you to see how you like it*")<sup>16</sup>; by quoting the assailant's words, the judges imply that the victim contributed to her attack.

Below is another excerpt taken from a case of marital rape which occurred at the breakdown of the relationship. Again, the husband is pictured as a pitiful man:

53. On the evening of June 5, 1994, *the complainant told the appellant of her interest in another man and that she regarded their marriage as at an end. He took that badly and was crying.*
- He had a good deal to drink.
  - He did not immediately seek to have any relations with her,
  - ... in the middle of the night he decided he wanted to have intercourse. *He asked her for 'a last cuddle'.*
  - She asked him not to persist but he pulled her over her back and *had intercourse with her.*
  - He did not use violence on her, beyond having intercourse against her will.
  - On a number of occasions he said, "*You can't deny me my rights as a husband*". The intercourse did not last long, either because the appellant ejaculated or because, *when the complainant asked him, he got off her.*
  - ... *the appellant suggested to the complainant that she should contact the police. He was remorseful about what he had done ... he immediately admitted the offence. In the course of his [police] interview he gave an account of the marriage and of the complainant seeing another man. He said he still loved her and that he had wanted her. He did not feel he had behaved as a criminal, although he accepted that rape by a husband on his wife was an offence.*
  - Thirdly, Mr. Cadwallader [the defence counsel] relied upon the personal circumstances of the appellant; *he was of perfectly good character* previously; *he had been a good husband* in the sense that he had supported his wife and had never shown her any violence ... *On the night in question he had had a great deal to drink; he had been upset by the thought that there was another man in his wife's affection.* [Case 30 – Paul Richard M. 1994 - Marital rape during cohabitation – 3-year sentence reduced to 1 ½ years]

The judges use several artifices to construct the picture of a suffering husband who lost control because of his pain: he got into bed not with the complainant, but with '*his wife*', which by itself makes his action less shocking. He '*asked for intercourse*', which depicts him as a polite, considerate man. Rather than raping her, he '*had intercourse against her wishes*'. The appellant is represented as a gentleman, a law-abiding citizen,

<sup>16</sup> In his work with abusive men, Dutton observed that cyclical abusers frequently blame their partners by playing what he calls "the bitch tape", a mental cassette stuck permanently on auto-reverse. Side one has

a man of 'good' character. The whole description indicates a fraternal critique of his behaviour: he is described as non-violent ("*He did not use violence on her, beyond having intercourse against her will*"); he had drunk; he '*asked for a last cuddle*' (which pictures the event as romantic lovemaking); he expressed remorse for his actions. Again, the overall picture is that of a loving but hurt man, unable to control his desire under the influence of pain and alcohol. His abusive behaviour is presented as distinct from the behaviour of a 'criminal'. According to this description, he was led to rape by 'thwarted love' and not by 'criminal tendencies' (as in the case of stranger rapists) and this, from the judicial point of view, functions as mitigation. His behaviour is interpreted as an expression of love, even if perverse love. The complainant, on the other hand, is judicially depicted as a woman who was having an affair.

The next case illustrated here is case 47, where a man convicted of raping his estranged wife and sentenced to 2 ½ years' imprisonment had his sentence reduced at appeal level. As in case 30, his 'good' character and his emotional problems are highlighted throughout the appellate decision:

54. The appellant had lived with the complainant for some years and later married her; they had two children. The relationship deteriorated and the appellant left the matrimonial home ... *the appellant was seen by a psychiatrist who found him very depressed*. On two occasions the appellant assaulted the complainant.
- The appellant was 38 years of age and *a man of exemplary character*. He had been in the army and had received glowing reports from the army when he left.
  - On August 31, *the psychiatrist found the appellant to have been very depressed and weepy when recounting the problems he was having with his wife*. He was described as "a very dependent kind of personality". *It appears he had depended heavily on his wife*. He found it difficult to ward off intruding, distressing thoughts and this had affected his sleep, his appetite and his social life. The report says that *he was diagnosed as suffering from a reactive depression with associated anxiety symptoms, secondary to his wife leaving him*.
  - As to the instant offence the [psychiatric] report was not definite in its terms. It was possible that he was still in a depressed state of mind when the incident occurred. *When depressed, anxious people can act in an irrational way due to their confused state of mind. Human experience, we suppose, leads one to accept readily that people who are depressed may act in an irrational way*. Certainly the way in which this man treated his wife, *the mother of his children*, was an irrational way, however it was caused.
  - We are told *he was on an emotional roller coaster* ....

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some version of : 'I feel bad. It's her fault'. Side two plays: 'She's a bitch. She's always putting me down'" (1995; p. 44):

- ... He was concerned because *in his confused state he found it difficult to accept that sometimes the wife would apparently be ready to grant the access to the children which he desired and on other occasions she would not.*
- *Of course he [the sentencing judge] had to give credit for **the exemplary army record** and for the fact that he had lived not just a life free of convictions but an exemplary life until the age of 37, when things had gone wrong. It was therefore a sad situation and of course any sentencing judge is going to try to see what caused this change in this man's behaviour ... **The man had been gravely distressed both by the separation and the fact that his wife had a new man in her life** but, he said, it was a grave offence and wholly unacceptable in any civilised society, and so it is. [Case 38 – Wayne B. 1996 - Marital rape – 2-1/2-year sentence reduced to 2]*

His character is described as 'exemplary' until two specific incidents changed it: the breakdown of his marriage and his wife's infidelity. The wife's behaviour is depicted as the source of the appellant's troubles. Her behaviour towards her ex-husband is characterised as irrational and vindictive (*'sometimes the wife would apparently be ready to grant the access to the children which he desired and on other occasions she would not'*), which is presented as further explanation of why the appellant became depressed, confused and eventually aggressive towards her. The judicial writers use psychiatric discourse to frame the appellant's behaviour in an understandable way. His behaviour is criticised and defined as '*unacceptable*', but it is also explained as the result of depression, anxiety and confusion (he is described as '*suffering from a reactive depression*' and '*anxiety*', and as being on an '*emotional roller coaster*', all due to '*his wife leaving him*' and having '*a new man in her life*'). The appeal judges express a great interest in retrieving the reasons for the appellant's behaviour, which leads to the construction of his wife as the one responsible for his depression, anxiety and aggression. The appellant's behaviour is criticised as '*unacceptable in any civilised society*' but the judges, as gatekeepers of this so-called '*civilised society*', treat violence against women with condonation and tolerance.

There is not a single comment on the danger many women are exposed to when they separate from their husbands or start seeing someone else. The complainant in case 38 above was assaulted twice and eventually raped by her ex-husband, and yet he is

described as a pitiful man, and his sentence is reduced. In many cases of stranger rape found in the corpus the assailants were described as ‘criminals’ and sent to prison for long periods of time in order to protect women from the risk of their reoffending. However, not one single abusive husband was described as dangerous (even though many of them attacked their wives viciously, sometimes more than once), and the possibility of their doing it again was not once raised by the appeal judges. However, evidence from research with survivors of wife rape indicate that the first incident is frequently not an isolated one but part of an ongoing problem (Bergen, 1996). The judicial view of domestic violence as episodic (thus not constituting a danger to other women or to society) represents a real danger to women, who run the risk of being attacked again by their partners or ex-partners after they are acquitted or released from their short prison sentences<sup>17</sup>.

#### 4.4 Final remarks

During the recent trial of O. J. Simpson for the charges of murdering his ex-wife Nicole Brown Simpson, and Ronald Goldman, some observers expected that such a public event would provide an opportunity to discuss the issue of domestic violence as a serious social problem (Gaines, 1999). However, such hopes were doomed to failure because the trial was conducted “in the Anglo-American adversarial tradition, in which the presentation of the ‘truth’ is a carefully strategized and exclusive process, motivated by a commitment to winning the case” (Gaines, *ibid*, p. 29). Unfortunately, trials for

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<sup>17</sup> According to Home Office figures from 1979, the largest category of murders in England was of spouses or co-habitants (24 per cent), and of these more than 80 per cent of the victims were women (Clark 1992, p. 224). Bergen (1996, p. 104) reports that in the States raped wives are at a greater risk of being killed by their partners. For similar data from Canada, see Dutton 1995, p. 19.

crimes against women are not used as a space where social issues can be publicly discussed and foregrounded.

Similar to murder trials, rape trials are also strategized processes motivated by two opposing commitments to winning the case (the defence and the prosecution), and this is reflected in the trial final decisions. Decisions on rape trials usually exclude the social implications of rape, and as such do not put forward the issue of violence against women in general. If that were the whole picture, it would be merely disappointing. However, more troubling than disappointing is that judicial discourse not only *does not* foreground the issue of violence against women<sup>18</sup>, but it relies on, strengthens and disseminates myths, stereotypes and prejudices that help to normalise and naturalise certain forms of gender violence, such as violence against ‘impure woman’ and domestic violence. A discourse that pictures women either as ‘saints’ or ‘sinners’, and which apportions blame and punishment depending on these characterisations, is still very much the norm in cases of gender violence, being used both by lawyers and judges. Gaines argues that during the O.J. Simpson trial, for instance, the victim, Nicole Brown-Simpson, was cast in marginalized, demeaned roles and was described as essentially and morally inferior, which provided justification for her abuse and death. In his words (1999, p. 29):

The fact that this discursive formation was part of a successful defense strategy perhaps illustrates the static nature of trial processes and their resistance to cultural awareness and social enlightenment. That such a discourse could be invoked in the ‘trial of the century’ and be left unmolested by public response can be seen as a commentary on the monolithic nature of the [Anglo-American] criminal defense system.

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<sup>18</sup> Only physical violence is an issue in rape trials, and the trial limits itself to the investigation and discussion of that particular instance of violence. Gender violence as a social-cultural phenomenon, and its links with myths and stereotypes traded in discourse, are not issues brought up in rape trials or in legal decisions on rape cases.

As I pointed out in the ‘Complainant’ and ‘Appellant’ sections, judicial discourse categorises rapists and rape victims primarily according to their ‘characters’. However, ‘good character’ is a feature that is constructed differently during the trial and the sentencing processes, having as a basis the person’s gender. For men, ‘good character’ requires no previous convictions, social and professional standing. For women, on the other hand, ‘good’ character means unfamiliarity with the offender, sexual neutrality or a willingness to ‘forgive and forget’. The justice system is one of the social arenas where female behaviour is judged and labelled as ‘appropriate’ or ‘inappropriate’; in appellate decisions, it is the judges who occupy the function of ‘evaluators’ of female behaviour. Women who do not fit the requirements above will be exposed to criticism, and can expect a lower level of legal protection.

Even in rape cases where the defendant is convicted, and later on his appeal is denied, a rape victim may still be condemned (openly or indirectly) by the judicial discourse. In spite of the increasing problematisation of the use in public discourses of binary pairs such as ‘*the chaste woman v the whore*’, we seem to have moved ahead only in some aspects: nowadays it is not enough to claim that the woman was promiscuous to guarantee an acquittal in a rape trial; even prostitutes are acknowledged as deserving police and legal protection against coercive sex. However, female sexual reputation is still discussed and focused on during the trial and in legal decisions; some women are described as teasers, manipulative or promiscuous (even if covertly), while others gain judicial approval by being depicted as virgins, innocent or forgiving.

Judicial discourse frequently reduces sexuality to chemistry and biology, or to romantic views of love and marriage; socio-cultural aspects of sexuality are either backgrounded or disregarded. Judicial discourse explains rape as either the result of criminal tendencies or psychological problems (in cases of stranger rape), or of

misplaced love, confusion and pain (in cases of marital rape). Issues such as power asymmetry between the genders, gender violence, gender discrimination and social tolerance to violence against women are hardly ever explored or mentioned in the discourse of appellate decisions analysed.

The sexual abuse of women, especially within the context of 'established' sexual and romantic relations, is often minimised in the discourse of RADs. This process of minimisation is achieved through the use of language which either questions the victim's version of facts or downgrades its relevance, through the differentiation of incidents into 'serious' and 'not so serious' and, in cases of marital rape, through the use of the victim's reluctance to press charges or her willingness to forgive her attacker and 'resolve' the incident as a suggestion that she also saw the rape as of limited significance and seriousness.

One reason for the judicial tolerance of domestic violence is the legal reluctance to interfere with the privacy of the family and the home. Judicial attitudes towards rape defendants, evidenced in the way rapist, event and victim are represented in legal decisions in rape cases, indicate that rapists are categorised into different types depending on the relationship they had with the victim. However, research indicates that this categorisation finds no base in actual rapists, many of whom are as likely to rape their wives as a stranger, or vice-versa. Independent of the relation between assailant and victim, the dynamics of the offence are the same (Lees, 1997). Since marital rape is considered less serious than other kinds of rape, we can conclude that the criminal justice system gives more priority to romantic notions about the sanctity of the home and the family than to protecting the victim.

Gender violence is linked to social and cultural ideologies, values and beliefs. Therefore it would be naive to propose long custodial sentences as a final solution to the



problem, without tackling the socio-cultural framework<sup>19</sup>. By pointing out the different forms of representation of abusive men and their victims found in appellate decisions, and the impact this differentiation has on sentence length, I want to bring to the fore the importance of categorisation systems within the judicial discourse on rape: they express value judgements about how men and women behave, and belong to a broader pedagogical structure (which includes other public and private discourses) whose function is to teach men and women which forms of behaviour and of identity are 'adequate' and sanctioned, and which are 'improper' and amenable to punishment.

The role of legal decisions on rape within a pedagogy of sexual behaviour for women and men is the topic of the following chapter.

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<sup>19</sup> Sampson (1994) says that the British criminal justice system has lately adopted a much tougher attitude to sex offences: new legislation has been created introducing tougher penalties to sex offenders, especially as a result of media pressure. In a very sensible reaction, however, this move towards tougher and longer sentences for sex offenders has been received with a grain of salt by members of anti-rape movements in Great Britain, who have been able to identify in it elements of social control and social surveillance. Another point to consider is that the introduction of tougher penalties for sex offences, in Great Britain (and elsewhere) may not be the result of a change of attitudes on the part of judges; it may be the result of a change in the nature of the offences themselves, and of public and media pressures.

## Chapter 5

### Legal decisions on rape trials as part of a pedagogy of behaviour

#### 5.1 Initial remarks

This chapter owes a lot to the work of Michel Foucault, in special to his book “Discipline and Punish”, which traces the evolution of criminal justice systems from Medieval *torture* to Enlightenment’s *punishment* to modern *discipline*. Foucault argues that until the late 18<sup>th</sup> century, punishment was frequently the public spectacle of torture: prisoners would be flogged, put on the pillory and even executed in open squares. From then on, however, the entire economy of punishment began to change: torture disappeared as a public spectacle, punishment became the most hidden part of the penal process, and the body ceased to be the only target of penal repression. The body began to be exposed to new techniques that aimed to render it ‘docile’, i.e. able to be subjected, used, transformed and improved. In Foucault’s words, “these methods, which made possible the meticulous control of the operations of the body, which assured the constant subjection of its forces and imposed upon them a relation of docility-utility, might be called ‘*disciplines*’” (1991, p.137).

Foucault argues that while the ancient forms of penalty (e.g. torture and death) addressed the body of the condemned, modern forms of penalty (e.g. incarceration) address their soul. It is over the souls (subjectivities) of men and women that the microphysics of judicial power is exercised. As he says (1991, p. 29):

It would be wrong to say that the soul is an illusion, or an ideological effect. On the contrary, it exists, it has a reality, it is produced permanently around, on, within the body by the functioning of a power that is exercised on those punished

– and, in a more general way, on those one supervises, trains and corrects ... This soul ... is born rather out of methods of punishment, supervision and constraint.

The reform of criminal law (from torture to punishment to discipline) introduced a new economy of the power to punish, which was then rendered more regular, effective, constant and detailed, and which began to operate at a lesser cost. The idea was “not to punish less, but to punish better; to punish with an attenuated severity perhaps, but in order to punish with more universality and necessity; to insert the power to punish more deeply into the social body”(Foucault 1991, p. 82). In short, a move from *coercion* to *consent*<sup>1</sup>. As punishment became hidden, it left the realm of everyday perception and entered that of abstract consciousness; Foucault points out that in the modern economy of criminal justice systems it is the certainty and the reach of punishment, rather than its spectacle, which must render punishment effective and discourage crime. To achieve this internalisation of the power to punish, discipline is vital; individuals must be docile, amenable to subjection, to the subtle grip of disciplinary power.

Disciplinary power, rather than being triumphant and overt, is modest and suspicious, but at the same time insidious and all encompassing. Comparing the power of written laws with disciplinary power, we can say that while the law attempts to reach a universality, to speak for the whole society, to be able to decide the ‘universal’ truth of events, discipline works at a micro-level, at the individual case, helping to practice, enact and inscribe the law on individuals. There are two images of discipline: at one extreme, *discipline-blockade*, exercised within enclosed institutions on the edges of society to arrest evil (e.g. the prison), and at the other extreme *discipline-mechanism*, a functional mechanism aimed to improve the exercise of power by making it lighter,

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<sup>1</sup> Fairclough (1989, pp. 3-4) points out that power is exercised through *coercion* of various sorts (including physical violence), or through the manufacture of *consent* or at least acquiescence to it. Power relations depend both on coercion and consent to varying extents. Ideology is the primary means of achieving consent, and the favoured vehicle of ideology is discourse (see also Figueiredo 1995, p.16).

faster, more effective, more discreet and all encompassing (Foucault 1991, p. 209). The legal system makes use both of *punishment* (it has the right to deprive 'guilty' people of wealth, liberty or life) and of *discipline* (it supervises, judges and controls people's actions and behaviour). In Foucault's words, "the legal apparatus was not to escape this scarcely secret invasion [of disciplinary powers]" (1991, p. 170).

Disciplinary power is realised through three basic instruments: 1) *hierarchical observation*; 2) *normalising judgement*; and 3) *examination* (Foucault, *ibid.*). Applying this to the judicial discourse on rape, we can say that all the three instruments of disciplinary power are present in RADs - judges have the hierarchical right to observe the social and sexual behaviour of women and men; they judge human behaviour, categorising some actions as 'abnormal' or 'criminal' (outside the social pact), and others as 'acceptable' or 'excusable' (within the social pact); and to arrive at these categories, judges rely on expert evaluations (made by doctors, psychiatrists, probation officers). According to Foucault, *examination* is the most important technique of discipline. Examination leads to the documentation of people, enabling on the one hand individual descriptions, and on the other hand the compiling of statistics and generalisations. As I will argue in this chapter, the judicial discourse of RADs on rape cases relies both on medical and psychiatric examinations to classify, instruct and discipline rape defendants and rape complainants.

## 5.2 The pedagogical function of legal decisions

A basic concept to the Foucauldian notion of disciplinary power is the idea of the *panopticon*. The panopticon, proposed originally as a way of controlling prisons, is the watching tower from where individuals can be seen by a central power but do not know

when they are being observed (e.g. the factory supervisor's office stands above the factory floor; the prison guard tower stands above the prison yard). The panopticon symbolises the constant, all encompassing gaze of power. According to Foucault, the panopticon generates a state of permanent visibility, which assures the automatic functioning of power and the internalisation of disciplinary mechanisms (1991, p. 201). An illustration of the internalisation of surveillance and power is how modern forms of subjectivity and identity are maintained through individual self-surveillance, self-correction and adaptation to social norms, rather than through the physical exercise of power (coercion)<sup>2</sup>.

In modern times, it is no longer necessary to discipline exclusively the body. Now that forms of surveillance and control have been individually internalised (mainly through discursive practices), the object of discipline and punishment is *the soul*, conceptualised in terms of the psyche, subjectivity, personality, consciousness and individuality (Smart, 1983). Discourse plays a crucial role in the discipline of subjectivities and consciousnesses. Women, for instance, are discursively trained to police and control their own behaviour and the behaviour of others, without the need for coercion or external surveillance (Lees, 1997). For the ones who have difficulty internalising the habits of self-surveillance and self-correction (the non-conformists, the

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<sup>2</sup> One of Foucault's basic claims was that, as power became pervasive and all-encompassing in modern societies, it also became diffuse, non-corporeal and non-violent. From this point of view power does not have to rely on violence, so violence becomes a phenomenon that takes place at the extreme margins of society, outside the social pact, and "it is thought to have been refined out of visibly proper behaviour and centralised and institutionalised exercises of power" (MacCannell and MacCannell 1993, p. 211). However, not everyone shares Foucault's view of power as 'non-violent'. MacCannell and MacCannell, for instance, observe that according to the Foucauldian view of power we should be witnessing a decline in violence and a redistribution of power at local level. Nevertheless, neither of these phenomena is happening. In their view, power is not neutral and freely available throughout the social body, but fiercely concentrated and protected by power holders and their agents, even through violence if necessary. One example is the power achieved through violence against women; cases of violence against women (e.g. rape, wife battery, sexual assault) are on the increase rather than on the decrease (see Temkin, 1987; Edwards, 1996; Lees, 1997). In MacCannell and MacCannell's words, "threats and the actual use of force and violence remain essential to the exercise of power" (1993, p. 205).

rule-breakers) there are several panoptic and disciplinary mechanisms to supervise, discipline and rehabilitate individuals. One of these mechanisms is the rape trial<sup>3</sup>.

According to Foucault, different discourses transformed areas such as sexuality and crime into objects of scientific knowledge and targets for institutional practices. Applying his view to rape trials, we can interpret the discursive practices of judges, for instance, as tools in a complex pedagogy of behaviour constructed and realised through legal discourse, a pedagogy which aims to supervise, discipline, educate and control the way men and women behave socially and sexually. From this viewpoint, no legal trial and legal sentence are the judgement and punishment of an isolated individual; the discourse of lawyers, prosecutors and judges also represents the social-cultural evaluation of human behaviour, the setting of examples, an attempt to recompose normality and restore the social pact<sup>4</sup>.

From the eighteenth and nineteenth centuries onwards new discreet but powerful disciplinary methods aimed at the control of individuals through training and normalisation. Disciplinary powers were exercised not merely on transgressions of the legal code, but on all forms of non-conformism, at school, at work, at home, in the bedroom. The apparatus of corrective penalty (which from the Foucauldian perspective includes both the legal right to apply fines and sentences and the micro disciplinary powers exerted by different institutions such as the prison, the school, the factory, the hospital, etc.) aims to restore not so much the *juridical subject* (the law breaker), but the

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<sup>3</sup> Lees contends that the role of trial processes in policing female behaviour (especially of the sexual kind) has not yet been fully appreciated. In her words, “through court procedures, women who do not behave in a stereotypical ‘feminine’ way, or women who speak out about male violence, render themselves open to such disciplinary techniques which are laid bare in the court drama” (1997, p. 87).

<sup>4</sup> The notion of a social pact is linked to contract theory, which “seeks to explain the origins and binding force of mutual obligations and rights in society” (Abercrombie et al. 1994, p. 383). As Hobbes argued in his book ‘Leviathan’ (1651), people enter into social contract with each other and surrender their absolute individual freedom to the state in order to guarantee social order and stability. Nowadays other social theories have replaced the classical theory of the social contract, such as the theory of consensus, according to which some degree of general consensus about social norms, added to physical coercion, provides the crucial basis of any society (Abercrombie et al, *ibid*).

*obedient subject*, the individual who can abide by laws, rules, orders, authority. The trial process punishes both a legal offence as well as departures from social rules and the non-observance of the social pact.

In trial proceedings and legal decisions we can see two forms of penalty at work: *the penalty of the law* - legal rules, the opposition of 'legal' and 'illegal' acts, etc - and *the penalty of the norm* - the trial represents a space for a broader form of pedagogy, which works by setting examples to be followed, by attempting to homogenise, normalise, bring 'offenders' back to the social pact (through rehabilitation) or exclude them from society (through condemnation) (Foucault, 1991)<sup>5</sup>.

The sentencing process, similar to trial proceedings, also has disciplinary powers: besides its obvious function of analysing, judging and punishing individual behaviour defined by law as 'criminal', it serves the pedagogical function of disciplining forms of behaviour which might have escaped the reach of legal punishment but not the reach of surveillance and control. From this perspective, a rape trial encompasses both the codified power to punish the defendant, and the disciplinary power to observe and control the defendant *and* the complainant.

In short, a rape trial involves punishment and discipline; its punitive and disciplinary aspects are addressed not only at the soul of *the defendant* but equally at the soul of *the victim*. Like the defendant, the complainant is also judged during the trial (even if by different standards) and, if found guilty of 'inappropriate' behaviour (e.g. promiscuity, unfaithfulness, 'bitchiness', drinking), her heart, her thoughts, her will and her inclinations must expiate her actions. Legal decisions such as RADs exercise a dual

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<sup>5</sup> Foucault differentiates between disciplinary punishment and legal punishment. In his view, disciplinary punishment is based on comparison, differentiation, hierarchy, homogeneity, and exclusion, all aiming at normalisation. Foucault refers to that as '*the penalty of the norm*'. In legal punishment, on the other hand, penalty is based on a corpus of laws and texts, not a set of observable phenomena; it differentiates not individuals, but categories of acts; it operates not based on hierarchies but on the binary division between the 'permitted' and the 'forbidden'; it does not homogenise people, but separate the condemned. This Foucault calls '*the penalty of the law*' (1991, p. 183).

level of power: they represent legal power (the power to judge and punish), but they also exert a micro power over the body and the sexuality of women, establishing appropriate and inappropriate forms of female social and sexual behaviour. Rape trials represent one of the disciplinary procedures through which conventional femininity is constituted and reconstituted, developed and resisted in society (Lees, 1997)<sup>6</sup>. As Foucault points out, a criminal trial does not pass judgement only on juridical objects such as ‘crimes’ and ‘offences’. In his words (1991, p. 17):

Judgement is also passed on the passions, instincts, anomalies, infirmities, maladjustments, effects of environment or heredity; acts of aggression are punished, so also, through them, is aggressivity; rape, but at the same time perversions; murders, but also drives and desires. ... It *is* these shadows lurking behind the case itself that are judged and punished.

But how exactly does the discourse of rape decisions operate as part of a pedagogy of behaviour, and how does this pedagogy extend to other people beyond the defendant? The Foucauldian view of the evolution of the criminal justice system can help us understand how the discourse of criminal justice reaches beyond the boundaries of the legal system. According to Foucault, among the reforms introduced throughout the eighteenth century to the system of criminal punishment was the technique of *punitive signs*, i.e. the example given by the punishment of criminals should be a symbolic obstacle to other potential law-breakers. Penal punishment became both a form of requalifying guilty individuals and helping them resume their place in society, and a way of discouraging other people from committing criminal offences (Foucault, 1991). To function as a semiotic sign, the penalty should have its most intense effects on those

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<sup>6</sup> A similar educational function was observed in the trials of Brazilian women prosecuted for having abortions or for murdering their newborn babies. After analysing the official records of cases tried between 1900 and 1950 in Florianópolis, Kupka concluded that “the justifications offered by the authorities clearly indicate a concern with ‘a positive evaluation of feminine behaviour’, aiming to educate and to shape conduct” (1999, p. 274).



who have not committed the crime. The ideal penalty should be light (or humane) on the body of the criminal, but heavy on the minds of the criminal, the victim and the public.

This way, the restorative and educational roles of legal punishment could extend to those who have broken not legal but moral or cultural rules. Take rape complainants, for instance. They have not been charged with a criminal offence, and therefore cannot be the object of direct penal punishment (e.g. loss of money or of freedom). However, during the rape trial the victim's body is exposed in a representational form, the events are re-enacted, details are discussed, an atmosphere of the circus (of a spectacle) is created. If we interpret the rape trial as a pedagogy of sexual behaviour, as I am doing in this chapter, we can argue that the discourse of rape trials has 'side effects' which reach far beyond the confines of the courtroom. Seen as a symbolic event, a rape trial establishes for the defendant and the complainant, and for men and women in general, the forms of behaviour which guarantee social and legal protection, and the ones which lead to exposure and punishment. Fear of symbolic punishment is enough to prevent many women from reporting a rape (Hall, 1985; Adler, 1987; Edwards, 1996). Their silence indicates that women have internalised the notion that they should learn to avoid male violence and to keep quiet about it (see Bumiller 1991)<sup>7</sup>.

The example, which in the old punitive regime was realised in the body of the condemned (the public spectacle of the execution), is now the lesson, the discourse, the decipherable sign, the representation of public morality conveyed during the trial and in the legal decision and punishment. The sign of the punishment is constructed in the

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<sup>7</sup> According to Foucault, the modern transformation of the art of punishing into a 'technology of representation' means that the sign of the penalty and its disadvantages must be more lively than of the crime and its pleasures (1991, p. 106). However, rather than decreasing due to the severity of the law, sex crimes and cases of domestic violence are on the rise (see Temkin, 1987; Edwards, 1996). This might lead some people to conclude that the symbolic message of legal punishment is not getting through. Others, like myself, may conclude the opposite: the pedagogical aims of rape trials and of other discourses on rape are being successfully achieved. The discourse of the law, in tandem with a host of other private and public discourses, is still based on myths about sexuality and discriminatory

minds of people not just by judicial discourse, but also by the language of everyday life. Similar patterns of social behaviour circulate in different discourses (e.g. family, media, religion, moral, education, law, sciences), leading to a strengthening and homogenisation (or naturalisation) of certain values, beliefs and ideologies. The new regime of crime and punishment depends on the interplay between different discourses, both private and public. As Foucault asserts, discourse became “the vehicle of the law, the constant principle of universal recoding” (1991, p. 112).

In the sections below I will argue and illustrate, with examples from the data, how the discourse of appellate decisions on rape cases is inserted in a broad pedagogical process (of which the whole trial is also part), a process which establishes ‘correct’ and ‘incorrect’ modes of sexual behaviour for women (and also for men, even though my main concern here is with the teaching of women). To do so, the analytical part of the chapter is divided into the following sub-sections:

### 5.3 Functions of a custodial sentence for rape

#### 5.3.1. Danger to society

#### 5.3.2 Example and warning

### 5.4 Interdiscursivity (the ‘discourses of man’ and legal discourse)

### 5.5 The control of the body (bio-power)

#### 5.5.1 Descriptions of female bodies and of rapes as pornography

#### 5.5.2 Physical evidence as corroboration

#### 5.5.3 Prostitute rape

### 5.6 Normal v. abnormal sexuality

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classification systems, which leads some men to see violence as acceptable, and many women either to accept violence as part of their lives or to be too frightened and ashamed to report it.

The data used in this chapter consist of excerpts taken from 28 of the 50 RAD that compose the corpus (the excerpts are verbatim from the reported appellate decisions). The excerpts selected illustrate the pedagogical role of legal decisions.

### 5.3 Functions of a custodial sentence for rape

From the point of view of the British criminal justice system, a sentence of imprisonment given to a rapist serves five basic functions: i) to punish the offender; ii) to serve as a warning/deterrence (example); iii) to protect women and society; iv) to reflect the gravity of the offence; v) to reflect public repugnance at the offence (against the breach of the social pact). These functions are made explicit in the words of the judges quoted below:

1. The imposition of a custodial sentence, it is submitted, is required to *mark the gravity of the offence, to emphasise public repugnance for such offences, to serve as a warning to others, to punish the offender and for the protection of women and girls.* [Case 2 – Attorney-General’s Reference No. 3 of 1993 – W – stranger rape – community service sentence increased to 2 years imprisonment]
2. An offence of this nature, it is submitted, should attract a more substantial sentence *to reflect both its gravity and the aggravating features; to act as a deterrent to the offender and others; and to reflect public repugnance* [Case 19 – Attorney-General’s Reference (David Vernon Taylor) 1993 – Stranger rape – 4 year sentence increased to 6]

To the functions stated and illustrated above, we can add one extra function of a custodial sentence – *rehabilitation*. According to Foucault, the reforms to the criminal justice system introduced from the late eighteenth century on included a new, more humane view of punishment. Imprisonment, for instance, apart from constituting a way of punishing someone who committed a criminal offence, became also a means of offering example, conversion (rehabilitation) and apprenticeship (1991). Legal penalties acquired an essentially corrective character; since the nineteenth century, rehabilitation has been seen as one of the functions of legal punishment.

Nowadays, modern penalties are traversed by disciplinary examinations. The legal punishment is a correction, a therapy, an attempt at normalisation; the judicial process is supposed to measure, assess, diagnose, cure and transform individuals. The transformation of individuals is achieved through the redemptive nature of the penalty, and the restoration of normality is partly achieved through the examples set out by legal punishment. The following excerpts illustrate legal decisions where judicial and medical discourses joined forces to advocate the reformatory function of imprisonment:

3. Nine years' detention in a young offender institution for rape of a widow aged 100 by a boy aged 16 at the time of the offence reduced to seven years.
  - A *social inquiry report* commented that there was no doubting the appellant's remorse for his victim's suffering and the deep shame which he was currently experiencing ... The doctor expressed concern about the "self damaging potential which his ruminations may cause", and recommended *professional counselling, together with guidance and support*. Although his potential for dangerousness needs to be examined, the psychiatrist thought he could not be regarded as a serious danger within the community. [Case 18 - Laurence McIntosh 1993 - Stranger rape - 9 year sentence reduced to 7]
4. Nine years upheld for the rape of a 16 year-old prostitute with false imprisonment and violence.
  - The psychiatrist says under a sub-paragraph headed "Insight": "[The applicant] tended to blame the index offence on the cannabis and alcohol he has used on the night [in question]. However, he did take responsibility for the offence and is seeking an explanation for what has taken place. He seemed genuinely confused that he has committed this offence [and] ... *specifically stated that he wanted to participate in a programme for sex offenders*". [Case 34 - Asif Masood 1996 - Prostitute rape - 9 years upheld]
5. The psychiatrist concluded his report by saying: "Mr. Low must be considered at high risk of further offending behaviour in the light of that which is stated above. As such he forms *a high priority candidate for treatment of sex offenders in prison. Mr. Low recognises the need to address his offending behaviour ...*" [Case 49 - Roy Low 1997 - Stranger rape - Life sentence - parole period reduced from 10 to 7 years]

The examples above illustrate how the disciplines (especially through the technique of examination) transformed the individual into a "calculable man", someone who can be analysed and controlled through a collection of files, records and individual information. The appellants were analysed and diagnosed as potential candidates for psychiatric or psychological treatment. The examples also illustrate the view of the prison as a place for 'reeducation' and 'reintegration'. The excerpts above also imply that the trial process has achieved one of its pedagogical functions to the extent that now

the appellants express remorse, accept responsibility and recognise their offending behaviour.

The next example differs from the ones above:

6. There was, in addition to the psychiatrist's report, a report which had been prepared as a pre-sentence report by a probation officer ... [The probation officer's] final recommendation is: "I do of course recognise that this is a serious offence and one that will have been deemed to have crossed the custody threshold. I am at a loss though to see how a term of imprisonment is going to change this man's behaviour". That may be so, but *the object of the sentencing exercise in circumstances such as this cannot be seen as being wholly reformatory*. Any man who behaves in this way to his wife, *his wife whom he knows to be weaker than himself*, deserves and will receive punishment and it is quite wrong that anybody should think the contrary.
- Certainly the way in which this man treated his wife, *the mother of his children*, was an irrational way, however it was caused. [Case 38 – Wayne B 1996 - Marital indecent assault – 2 ½ years reduced to 2]

Here, rather than advocating the reformatory function of a sentence of imprisonment, the judges defend another function of a custodial sentence: to punish an individual who broke both the law and the social norms. Notice that the defendant in case 38 is considered guilty not merely of an 'indecent assault upon a woman' (the index offence), but of attacking *his wife* (the institution of marriage), *a woman weaker than himself* (the myth of male chivalry), *the mother of his children* (motherhood). In view of such a breach of social norms he has to go to prison, and the judges, in an attempt both to prescribe and to restore normality, claim that '*it is quite wrong that anybody should think the contrary*'. The implication here is that rehabilitation, important as it is, cannot override the punitive aspect of a criminal sentence.

### 5.3.1 Social protection (protection of women/society)

Besides rehabilitating the offender, another important function of a sentence of imprisonment is to protect society from those who have breached both legal and social rules. According to Foucault, the criminal (especially the fiendish criminal; see chapter 4) has broken the social pact and has become the common enemy, a danger to society as

a whole, a monster. By breaking the pact and going ‘outside’ nature, he has become a social threat and has to be treated with the utmost severity, which means that he has to be excluded from the society of ‘normal’ people for their protection. This concern with the protection of society is expressed in the examples below:

7. ... *his* [the single judge’s] *duty was not merely to punish and exert deterrence, but rather more importantly to ensure the protection of women* ... [Case 10 – Robert Dempster 1987 - Stranger rape – life imprisonment upheld]
8. The appellant’s record of violent sexual crime was appalling and the present offences involved a combination of sex and violence. *The appellant was a clear danger to the public* ... [Case 31 – Joseph Kennan 1995 - Prostitute rape – 14 years upheld]
9. **Held:** for the Attorney-General it was submitted that the sentencer should have imposed a discretionary life sentence, having regard to the circumstances of the offences and *the danger that they indicated that the offender posed to female members of the community...* Looking at the whole of the offender’s history, the Court had come to the conclusion that *he constituted a danger to female members of the public* and would remain so for an indefinite period. The Court would accordingly substitute a sentence of life imprisonment for the sentence of eight years’ imprisonment imposed for the rape. [Case 33 – Attorney-General’s Reference No. 22 of 1995 (Sylvester Semper) Stranger rape – 8 years replaced by life imprisonment]
10. The judge expressly referred to section 2(2)(b) of the Criminal Justice Act 1991 on the basis that *a longer term was necessary to protect the public from serious harm from the offender.*
  - In Wilkinson (1983) ... Lord Lane C.J., giving the judgment of the Court said this: “... With a few exceptions ... *[the sentence of life imprisonment] is reserved ... for offenders ... who are in a mental state which makes them dangerous to the life or limb of members of the public*”. [Case 41 – Attorney-General’s Reference No. 76 of 1995 (Orlando Baker) Date rape – 9 years replaced by life imprisonment]
11. **Held:** ... the sentencer had no medical evidence about the appellant, but deduced from the number and gravity of the offences committed by the appellant that *he was a danger to the public at large.* [Case 42 – David Milne Razzaque 1996 - Stranger rape and marital rape – life imprisonment – parole period reduced from 17 to 10 years].

The examples above, with the exception of case 41, were taken from cases of stranger rape. In all the five cases the appellants were considered either ‘a danger to society’ or ‘a danger to women’, and got long prison sentences (one 14 year sentence and four life sentences). As we can see, the length of the sentence supposedly takes public interest into consideration. However, in all of the marital rape cases present in the corpus not one appellant was categorised as ‘a danger to society or to women’, and none got a sentence longer than 8 years (see table 3.2, chapter 3).

### 5.3.2 Example and warning

In this chapter, rape trial proceedings and legal decisions on rape are being interpreted as part of a pedagogy of gender behaviour. This pedagogy has a twofold aim: to deter or warn potential rapists from committing the offence of ‘rape’, and to instruct women (both rape complainants and women in general) about the dangers of going against social and sexual ‘normality’.

The disciplinary powers at work in rape trial proceedings represent a system of ‘*infra-penalties*’ (Foucault, 1991) – they define and repress areas of behaviour (e.g. the social and sexual behaviour of women) that had escaped the reach of written laws and statutes. For instance, women who have many sexual partners might be defined as ‘promiscuous’, ‘impure’ or ‘imprudent’ by legal and medical discourses. Consider case 6, for instance. In it, the defendant claimed that the victim’s ‘notorious’ sexual past led him to believe she was consenting to sex<sup>8</sup>. Below is the appeal’s judge’s opinion about the complainant’s ‘promiscuity’:

12. In our opinion, *this was a case near the borderline. Clearly the complainant was prepared to have intercourse with a number of different men*, but we do not think that the mere fact that *she was suffering from some venereal disease* is necessarily evidence of *substantial promiscuity* ... Nevertheless, although *we have not found it easy to reach a decision on this appeal*, in the end we do not think that the “evidence of *sexual promiscuity*” of the complainant was “so strong or so closely contemporaneous in time to the event in issue as to ... reach the border between mere credit and an issue in the case”. [Case 6 – Uria Samuel Brown 1988 – acquaintance rape – appeal dismissed – 7 years upheld]

In case 6, the judges dismissed the appeal and upheld the prison sentence because they did not find enough evidence of promiscuity in the complainant’s behaviour. The judicial conclusion, then, is that she “was prepared to have sexual intercourse with a

<sup>8</sup> In Adler’s study of 50 rape cases tried at the Old Bailey in the mid-1980s, applications from the defence to cross-examine a rape complainant about her past sexual history were denied by the judges only in 25 percent of cases. In addition to that, to ‘assassinate’ a woman’s character in court defence counsels do not have to rely exclusively on the judge’s authorisation to question her about her past sexual life; they

number of different men”; however, her promiscuity was not “substantial”, and as the appellant was not alleging he mistook her promiscuity for consent, it was not possible for the judges to allow the appeal. In spite of that, in many parts of the RAD the judges point out the complainant’s promiscuous lifestyle (“[the counsel for the appellant alleged that] *not only had she had sexual experience with men to whom she was not married but that she had done so casually and with little discrimination. It was, of course, in any event fundamental to such a submission that there was a factual basis for suggesting sexual promiscuity in this case*”), and at one point they question the way she reacted to the attack (“*in the present case the complainant did not seek help from her boyfriend when the appellant, on her evidence, was forcing her away from the club. She did not shout out to her friends who were there at the time and who saw what was happening. She did not complain to the taxi-driver the following morning when she was picked up at the appellant’s home*”). The fact that the appeal was denied occupies a secondary position in relation to the larger picture occupied by the judgmental, disciplinary description of the woman.

However, judicial opinions can sometimes be less judgmental of so-called ‘promiscuous’ women. In an earlier similar case, the appellate judges showed a less gender-biased attitude when the appellant tried to discharacterise rape by claiming that the complainant’s ‘bizarre’ sexual behaviour and promiscuity had led him to believe that she was consenting to sex. Below is part of their decision:

13. The appellant was charged with rape of a woman who it was said would scream, bang her feet and head and kick during sexual intercourse ... *At the end of the complainant’s evidence—in-chief the appellant sought to cross-examine her about her past sexual experience and adduce evidence to show that during intercourse the complainant usually behaved in the above manner.* The trial judge refused leave and the appellant was convicted.
- The appellant sought to rely upon the following matters, inter alia, in so far as they had influenced his belief at the time that the complainant was consenting: (c) ... *the complainant’s bizarre sexual*



*behaviour during intercourse; (d) the complainant's reputation for sexual promiscuity based upon the appellant's own observations and her general reputation as it was known to him.*

- **Held:** ... when considering the effect of the appellant's belief that she was consenting to sexual intercourse, whether such evidence should be adduced was a question for the judge to decide in the context of the facts before him, and in the instant case the judge had been correct in excluding that type of evidence and there was nothing unsafe or unsatisfactory about the conviction.
- It must be remembered that there is a difference between believing that a woman is consenting to intercourse and believing that a woman will consent if advances are made to her. [**Case 10 – Kevin John Barton 1986 - Acquaintance rape – 6 years sentence – appeal against conviction dismissed**]

Even though case 10 is older than case 6, the appeal judges show a less male-bound view of 'consent' to sexual activities; they view consent as something instantial that has to be corroborated by a woman's actions and words, rather than something based on her previous 'reputation' and on the assessment of her willingness to sex based on her past sexual behaviour.

If on the one hand a 'notorious' reputation is often used in court as a way of discrediting the rape complainant and as a kind of excuse for rape, a woman who can present her reputation as unimpeachable will most probably see her assailant convicted of rape. That is the case of young virgins and elderly women, frequently depicted as 'genuine victims' (especially when they resist the attack physically), and of married women who forgive their abusive partners, frequently defined as noble or 'remarkable' (see chapter 4, section 'Complainant').

In case 12 below, we have an illustration of the binary view of women on the basis of their sexual behaviour: the complainant is described as a 'genuine victim' because she is, in the judges' own words, "*a girl from a good home and was well brought up*", rather than "*a hussy who was only too anxious to nip into bed with [the defendant] in this extraordinary circumstance*":

14. A 14 year old girl visited London for the first time from her home in Durham ... She lost her way back to King's Cross station and was accosted by the appellant who offered to assist her; but in fact he took her back to his flat, plied her with drink and then raped and buggered her. She had never taken alcohol before and was *a virgin*.
- The story he [the defendant] told the jury was very involved. If the jury were to accept what he said, far from being *a girl from a good home and was well brought up*, she was *a hussy who was only too anxious to nip into bed with him in this extraordinary circumstance*, namely that she was far from

home not knowing where she was and where on earth she was going to go the following morning. We have looked very carefully at the evidence which he gave. *It is just as improbable a story as one could read, even in fiction* [Case 12 – Wared Mhaywi Kabariti 1990 - stranger rape – appeal dismissed – 12 year’s imprisonment upheld]

The two excerpts below illustrate modes of feminine behaviour and lifestyle presented by appeal judges as ‘appropriate’ – an elderly widow who tries to resist the burglar who rapes her; a woman who forgives her sexually abusive former partner:

15. Fifteen years’ imprisonment upheld for the rape of *an elderly widow* by a *burglar*.
  - The appellant broke into a house occupied by *a widow aged 78* who lived alone.
  - *With considerable bravery, she hit him with a wooden banister which she kept hidden under her pillow.* [Case 28 – Albert Thomas 1994 - Stranger rape – 15-year sentence upheld]
16. Six years’ imprisonment for the rape of a former partner reduced to five years.
  - However, it seems to us that Mrs. E. is *one of those remarkable women who is prepared to forgive*, and has forgiven, that which was done to her by somebody whom she loved and probably still does love.
  - Accordingly, some mitigation must be seen in that one factor. It is not provided by anything which this appellant has done; it is provided by *the forgiveness of his victim.* [Case 17 – James Kevin Hutchinson 1993 - Marital rape – 6 year sentence reduced to 5]

Definitions and descriptions such as the ones above serve to point out ‘correct’ forms of behaviour and to repress ‘inadequate’ ones. To achieve its pedagogical ends, the criminal justice system relies both in forms of legal punishment (loss of money, freedom or life) as well as of discipline (social exposure, loss of social value/respect, discrimination, etc). The rape trial proceedings represents an arena where women can be personally disciplined through public exposure, loss of social repute, shame, and humiliation, or indirectly disciplined through the setting of examples of ‘proper’ and ‘improper’ modes of behaviour.

#### 5.4 Interdiscursivity: the ‘discourses of man’ and legal discourse

In his genealogical analysis of history, Foucault (1991) investigates the interplay between the structuring of the social domain and a multiplicity of discourses emanating

from the human sciences (Smart 1983, p. 66). One of the areas of the social domain which was structured and influenced by the discourses of the social sciences was the criminal justice system. The social sciences, or 'the sciences of man', as Foucault calls them, resulted from the disciplines as a whole new corpus of knowledge, techniques and 'scientific' discourses which became entangled in the mechanics of legal punishment. The sciences of man provided legal punishment with a hold on the condemned's *soul*: an assessment and a description not only of what criminals do, but also of who they are, will be, may be (Foucault 1991).

A trial is no longer concerned merely with establishing the truth of a crime and its proper punishment but, as Smart contends (1983, p. 72):

It constitutes a context within which there occurs an assessment of normality and the formulation of prescriptions for enforced normalisation. A series of subsidiary authorities have achieved a stake in the penal process; psychiatrists, psychologists, doctors, educationalists and social workers share in the judgement of normality, prescribe normalising treatment and contribute to the process of fragmentation of the legal power to punish.

The human sciences of psychiatry, psychology, gynaecology, pedagogy and criminology all have the same roots: the procedures of individualisation, of measurement, diagnosis and treatment of individual bodies, introduced by the disciplinary methods of the eighteenth and nineteenth centuries. Discipline and its tools (e.g. psychiatric and medical expertise) have penetrated the penal process, from investigation and judgement to punishment (Smart 1983, p. 72).

Knowledge of the individual (and the very creation of the concept of the '*individual*') was made possible by a host of human sciences, and it served as a basis for the creation of categorisation of criminals (in my data, for instance, rapists were described as 'fiends', 'deranged', or 'disturbed' husbands on the basis of evidence from psychiatrists, social workers and probation officers). From that perspective, the prison

(and also the trial proceedings which precede a term of imprisonment) became a sort of observatory, functioning as an 'apparatus of knowledge' (Foucault 1991, p. 126).

The sciences of man (psychiatry, psychology, pedagogy, criminology) are directly dependent on disciplinary analysis. As Foucault points out, "these sciences, which have so delighted our 'humanity' for over a century, have their technical matrix in the petty, malicious minutiae of the disciplines and their investigations" (1991, p. 227). Punishment and the prison belong to a technology of the body. It is within this technology of the body that the 'technology of the soul' (psy expertise) has appeared, as an extra tool for the technology of the body. Clinical medicine, psychiatry and psychology are branches of knowledge created by the growth in power that resulted from the disciplines (the spatial distribution of people, the control of gestures, postures and movements, observation, analysis, classification, documentation). These new forms of knowledge, on their hand, led to a multiplication of the effects of power.

The mingling of the trial process with sciences such as psychology and psychiatry has apparently purified and cleansed legal proceedings from its hard, cold and impersonal nature. In fact, what it has done is to transfer power from one site to another, or better, to integrate different sites of power, thus making them stronger. Fairclough (1995a) claims that when an expert system relies on another to construct its discourse, this reinforces its power structure. In Foucault's words, psychological or psychoanalytical tests, interviews, consultations and reports "merely refer individuals from one disciplinary authority to another, and they reproduce, in a concentrated or formalised form, the schema of power-knowledge proper to each discipline" (1991, p. 226). By resorting to scientific discourses, judicial discourse also increases its power by endowing itself with extra scientificity and rationality.

The use of psychiatric expertise means that the legal sentence no longer refers only to a codified crime (even if the sentence is formulated in those terms). Psychiatric expertise has extended the punitive reach of legal trials into the realms of “normality, attributions of causality, assessments of possible changes, anticipations as to the offender’s future” (Foucault 1991, p. 20). The use of psy-discourses by the judicial discourses of rape sentences is instrumental: it helps to emphasise the dangerous nature of ‘fiend’ rapists and ‘deranged’ rapists, or to excuse the behaviour of marital rapists.

The excerpts below illustrate the intimate link between psy-discourses and legal discourse:

17. A *social inquiry report* commented that there was no doubting the appellant’s remorse for his victim’s suffering and the deep shame which he was currently experiencing. It stated he had attempted suicide. Also before the Court was *a report from a consultant psychiatrist* who noted that the appellant was the youngest of six children in the family, an overprotected child showing early neurotic signs, devastated by his mother’s death when he was 12. Thereafter he showed general signs of delinquency, instability and a tendency to drug taking and alcohol abuse. He led an increasingly criminal lifestyle, chaotic, nomadic, much of it nocturnal, finding greater security in the criminal fraternity than within his family circle. *The offence itself appeared to the psychiatrist* to be “out of character”. His mental profile did not indicate the need either for violence or a habitually aberrant sexual lifestyle. *The rape occurred at a time of chaos, insecurity and humiliation with life when, it was said, his judgements, control and perceptions were very severely reduced by drug and alcohol intake.* His remorse and regret were genuine. *The doctor expressed concern about the “self damaging potential which his ruminations may cause”, and recommended professional counselling, together with guidance and support.* Although his potential for dangerousness needs to be examined, *the psychiatrist thought he could not be regarded as a serious danger within the community.* [Case 18 – Laurence McIntosh 1993 - Stranger rape – 9 year sentence reduced to 7]

In the example above, the use of psychiatric expertise helps legal discourse to establish a relation of causality between the defendant’s psychological profile and lifestyle (drug abuse, emotional problems) and his crime. Excerpt 17 is a classical example of the use of social work discourse and psychiatric discourse as a support for a more ‘humane’ legal decision. The social and psychiatric profiles give support to a paternal judicial view of the appellant, depicting him as a young man ‘to be pitied’ and helped, and thus reducing his sentence in two years.

In the following two examples, psy-experts assess possible changes in the defendants' behaviour while in prison, and make anticipations for their future:

18. *The probation officer goes on towards the end of the next paragraph*: “[The applicant’s] view is that by adhering to his Muslim faith and family values then he will be able to avoid further offending ... Whilst [the applicant] refers to the effect of his consuming a mix of alcohol and cannabis upon what he views as behaviour that was out of character, *he does show signs of accepting that it was ‘his’ behaviour and he presents as (sic) developing insight into the trauma provided to his victim and in consequence he wished to express his regret and extend his apologies to her*”. [Case 34 – Asif Masood 1996 - Prostitute rape – 9 years upheld]
19. The judge expressly referred to section 2(2)(b) of the Criminal Justice Act 1991 on the basis that *a longer term was necessary to protect the public from serious harm from the offender*.
  - In Wilkinson (1983) ... Lord Lane C.J., giving the judgement of the Court said this: “... With a few exceptions ... *[the sentence of life imprisonment] is reserved ... for offenders ... who are in a mental state which makes them dangerous to the life or limb of members of the public*”. [Case 41 – Attorney-General’s Reference No. 76 of 1995 (Orlando Baker) Date rape – 9 years replaced by life imprisonment]

In example 18, the appellant is described by the probation officer as contrite, someone who is seeking professional help (counselling) and who has shown remorse, probable indications of his upcoming changes. In example 19, the offender’s future behaviour (his likelihood to reoffend) is assessed based on expert opinion. As we saw in section 2.1.1, the length of sentence depends, to a great extent, on the appellant being perceived as a ‘danger to society’ or not. It is usually medical/psychiatric evidence which determines the dangerousness of a rapist (based on evidence of his mental state). In case 41 above, due to the appellant’s anticipated dangerousness, his sentence of 9 years imprisonment was increased to life imprisonment.

The psychiatrist, then, is an ‘*adviser in punishment*’ - he/she determines if the subject is dangerous or not, how the system should intervene to alter him, if it is better to force him into submission or to treat him. Consider the following examples:

20. On arrest he admitted the offences, adding that he had been drinking and taking drugs on both occasions. At his trial he pleaded guilty to the offences. *Medical and psychiatric reports showed mental instability but no evidence that the appellant would benefit from psychiatric treatment*. [Case 10 – Robert Dempster 1987 - Stranger rape – life imprisonment upheld]

21. Twelve years' imprisonment specified under the Criminal Justice Act 1991, s. 34 in conjunction with a sentence of life imprisonment imposed for repeated rapes of ill or mentally deficient women reduced to 10 years.
- The offences were grave and despicable, involving preying on mentally ill, vulnerable women, sexually abusing them and leaving them helpless and lost.
  - The appellant is 51 ... *The pre-sentence report indicated that he came from a family who were generally of dull or very dull intellect. He was sexually abused as a child. He was an unwanted child and eventually was made the subject of a care order on the grounds of neglect.*
  - Despite that background and his unusual personality it was clear, *according to the pre-sentence report*, that the appellant understood the wrongfulness of his behaviour. *There were a number of medical reports before the judge, who also heard evidence from a psychiatrist, Dr. Gordon [Case 29 – Michael Fox 1994 - Stranger rape – life imprisonment – parole period reduced from 12 to 10 years]*

In the two examples above, both defendants were characterised, with the help of doctors and psychiatrists, as mentally unstable and particularly dangerous. As such, they were forced into submission and separated from society: both got sentences of life imprisonment<sup>9</sup>.

Other rapists, on the other hand, are seen as amenable to treatment and rehabilitation:

22. After his arrest, *he contacted Relate [a marriage guidance organisation] in order to try to get some guidance. He has been seen by a psychologist who has described him as sexually immature and deeply distressed and ashamed of his conduct [Case 20 – Robert Leonard T. 1993 - Marital rape during cohabitation – 2 ½ year sentence upheld]*
23. *The psychiatrist says under a sub-paragraph headed “Insight”:* “[The applicant] tended to blame the index offence on the cannabis and alcohol he has used on the night [in question]. *However, he did take responsibility for the offence and is seeking an explanation for what has taken place. He seemed genuinely confused that he has committed this offence [and] ... specifically stated that he wanted to participate in a programme for sex offenders*”. [Case 34 – Asif Masood 1996 - Prostitute rape – 9 years upheld]

Some rapists, in spite of being considered likely to reoffend and therefore having been condemned to life imprisonment, are still seen as candidates for psychiatric treatment in prison:

24. There was before the sentencing court *a pre-sentence report which set out the development problems which the appellant had as a child and a young man, which resulted in him being transferred for part of his youth to a special school.* The probation officer who prepared that report felt that *he was completely out of control* and that the risk of his re-offending was very substantial.

<sup>9</sup> Not everyone agrees with the over-reliance of the criminal justice system on psy-discourses to determine the length of sentences for sex offenders. Sampson (1994), for instance, believes that the sentence length should be determined by the judiciary on the basis of what the offender has done, and not on an appraisal of the likelihood of the rapist reoffending, produced by a therapist.

- There was also before the court *a medical report* from Dr. Brown, *the visiting consultant forensic psychiatrist* to Her Majesty's Young Offender Institution at Feltham. *Dr. Browne indicated that the appellant was more or less illiterate and innumerate and his general knowledge was poor ... He was severely intellectually handicapped. His IQ was assessed as being in the subnormal range ...* and he had exacerbated his problems over the years through the *use of drugs*, mainly temazepam. Despite this *he is not considered to be mentally ill* in any clinical sense, and his mental state does not warrant a transfer to a psychiatric unit. *He was fit to receive any punishment which the court awarded.*
- The psychiatrist concluded his report by saying: "Mr. Low must be considered at high risk of further offending behaviour in the light of that which is stated above. As such he forms *a high priority candidate for treatment of sex offenders in prison. Mr. Low recognises the need to address his offending behaviour ...*" [Case 49 – Roy Low 1997 - Stranger rape – life imprisonment – parole period reduced from 10 to 7 years]

The diagnostic assessments present in penal judgement extend not just to the defendant, but also to the complainant (she too is evaluated by doctors and psychiatrists to establish the physical evidences of the rape, her 'trauma', her profile):

25. That was evidenced by *a psychiatric report* from Dr. Jasper dated January 19, 1993, which was before the learned judge. Dr. Jasper examined the victim on four occasions prior to the offender being sentenced (...) *She found that the victim was then suffering from a post-traumatic stress disorder which, she said, includes:*
  - *"symptoms of flashback (re-experiencing the event), intrusive thoughts and images relating to the traumatic event, nightmares, acute disturbance, depression, anxiety and irritability, all of which Sarah has experienced since the rape"* [Case 2 – Attorney-General's Reference No. 3 of 1993 – W – stranger rape – community service sentence increased to 2 years imprisonment]
26. Fifteen years' imprisonment for rape of an elderly woman by an intruder in her home reduced to 13 years.
  - The appellant broke into the home of a woman aged 74 in the early hours of the morning. He pressed a knife at her throat, and threatened to kill her. The woman resisted and the appellant attacked with some violence and raped her. The appellant told the victim that he had AIDS. *The woman was subsequently admitted to hospital suffering from depression.* Sentenced to 15 years' imprisonment.
  - On March 18, 1992, *she was admitted to hospital after taking an overdose of sleeping tablets and anti-depressants.* The medical report before the judge and before this Court indicated that *she was suffering at that time from depression*, although it is right to say that there were causes other than, and in addition to, this appalling experience which contributed to that depression. [Case 15 – Farag Mohammed Ali Guniem 1993 - Stranger rape – 15 years sentence reduced to 13]

In the two examples above, the judges borrowed from psychiatric and medical reports to describe the traumatic effects of the rape on the victims and to depict them as 'genuine' victims and their assailants as 'true' rapists. In the following excerpt, medical expertise is used not only to indicate the victim's psychological injuries, but also her physical ones. As both were present and attested by medical experts, she was categorised as a 'genuine' victim:



27. As to the victim, she suffered *a bite on her left temple, a small cut in her vagina, swelling and redness over the lower back due to ground friction, and tenderness over her neck due to rough handling*. Apart from physical injuries, *she has been severely affected by the rape in a number of aspects of her life*. She has had persistent difficulty in sleeping and eating; she had great fear of travelling in public; and she found it impossible to continue her relationship with her long-standing boyfriend. She has been unable, and continued to be unable, to work for more than a few days. [Case 33 – Attorney-General’s Reference No. 22 of 1995 (Sylvester Semper) Stranger rape – 8 years replaced by life imprisonment]

In the modern style of legal punishing, other ‘discourses of man’ share with the juridical discourse the responsibility of evaluating, categorising, educating and punishing both offender and victim. The legal power to educate, discipline and punish has been fragmented and divided among magistrates, ‘psy’ experts, educators, social workers, prison personnel, etc. As Lees points out, “power is not a possession, as radical feminists have argued, but is seen as embedded in the discourses of medicine, law, psychology and the social sciences” (1997, p. 12).

### 5.5 The control of the body (bio-power)

With the creation of the disciplines, especially the disciplinary mechanism of examination, the body became the object or target of new forms of power exercised with the help of scientific knowledge (e.g. medical knowledge).

The examination, and the process of documentation that accompanied it, allowed the constitution of the individual as an analysable, describable object. The disciplinary technique of examination was also vital for the surveillance, control and punishment of individuals. Foucault says that “the examination combines the techniques of an observing hierarchy and those of a normalising judgement. It is a normalising gaze, a surveillance that makes it possible to qualify, to classify and to punish” (1991, p. 184).

During the classical age (from the end of the 18<sup>th</sup> century) the body was manipulated, trained and shaped in order to make it more skilful, more obedient, more economically

productive, thus becoming a site and an object of knowledge and domination. The body was then made 'docile'. As Foucault explains, "a body is docile that may be subjected, used, transformed and improved" (1991, p. 136)<sup>10</sup>.

The new individual created by the processes of examination and documentation is, as already pointed out, a calculable man. According to Foucault, a mastery of the body and knowledge of its forces constitutes 'a political technology of the body'. That technology is diffuse and cannot be located in a particular institution or state apparatus. What the institutions and apparatuses do is to operate 'a micro-physics of power' (1991, p. 26), i.e. they observe, analyse and document the human body (thus functioning as a lab to enlarge the knowledge about the body), and supervise and discipline the uses we put our bodies to (thus fulfilling an educational function).

The judicial discourse on sexual crimes is one vehicle through which power over the body is exercised. Male and female bodies are diagnosed, treated and imprisoned during or as a result of a rape trial; women are depicted and judged as being constituted by their sex; female virginity and reputation, or unfaithfulness and promiscuity, all marked in the body, are protected or disciplined to safeguard women's social worth and social norms. In the discourse of rape trials, the body is a main target of legal and microforms of power (the penalty of the law and the penalty of the norm).

However, the control of the body is now strengthened by symbolic forms of punishment, apart from physical ones. In the new regime of criminal justice, punishment is no longer the mere degradation of the body but a series of subtle procedures, such as the right to observe, examine and judge the way people use their bodies. From this Foucauldian perspective, the criminal trial becomes part of a diagnostic process in which the law is a norm, and the judicial system is incorporated

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<sup>10</sup> The bodies of women were also trained to be 'docile' – economically productive in terms of motherhood, domestic work and sexual services, and politically obedient in terms of submission and

into a continuum of social apparatuses (including the medical and the administrative) whose aim is to restore normality (Lees, 1997). Normality is restored by scrutinising the behaviour of men and women who have broken the social pact (either the law or social norms), distributing blame and responsibility, teaching and rehabilitating, or excluding from the community (e.g. social discrimination or long prison sentences)<sup>11</sup>.

#### 5.5.1 Descriptions of female bodies and of rapes as pornography

One example of institutional examination and control of the body is the descriptions of female bodies found in rape trials and legal sentences on rape cases. Reported appellate decisions on cases of rape vary in the way they describe the event and the complainant: some are discreet and almost laconic, while others give detailed and graphic accounts of the rape.

If some appellate decisions are laconic about the details of the rape, the same cannot be said about the trial, where every single detail of the event and of the victim's body is scrutinised and debated. This leads some scholars to claim that rape trials and pornography share a common link: both publicly portray and evaluate the female body. As Lees points out, during a rape trial the main focus is on the complainant's body: "her body's secretions and underclothing are scrutinised, her photographed injuries distributed as exhibits, her body's level of sexual arousal debated.... She is objectified in similar fashion to her objectification in rape itself.... The analogy with porn is relevant here" (1997, p. 78). The victim's testimony during the trial has also been compared with

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deference to the male norm.

<sup>11</sup> The detailed, minute scrutiny and descriptions of the female body in a rape trial (its physiological functionings, its secretions, its reactions to rape (both physical and psychological), its marks) is interpreted by Lees (1997) as retaining something of the feudal notion of punishment as a spectacle of degradation of the body through torture. In the modern trial system, the female body is symbolically punished so that female minds and subjectivities can learn the lesson.

a pornographic vignette: the details of male penetration can give pleasure as other pornographic materials (MacKinnon, 1987)<sup>12</sup>.

In rape trials, as in pornographic texts, the events are constructed in fine details (where the woman was touched, who removed her knickers, if she had a period or not, etc). During most rape trials the complainant is forced to describe minutely which parts of her body were assaulted, and in which ways; these descriptions, which would embarrass women even in private circumstances, are particularly humiliating when given in public, in front of an audience. The paradox is that the very use of language to describe sexual parts and functions of a woman's body is sufficient to render her unrespectable in the courtroom, as will be evidenced in the excerpts below. Giving evidence in court can be interpreted as a way of 'shaming' the complainant, of exposing her to public scrutiny and contempt, of disciplining and punishing her (Lees, 1997). And the graphic details of female bodies are not restricted to courtroom discourse. The detailed (and probably distressing) descriptions of the rape given by rape complainants, plus evidence from medical examinations, also find their way into legal decisions<sup>13</sup>, as we can see in the examples below:

28. *He then began an act of intercourse with her. She objected, and took her hands away from his buttocks where she had had to place them. She took her hands away to wipe her mouth, and then she tried to put her hand between his body and hers. He said to her, angrily, that she must put her hands*

<sup>12</sup> An investigation of nineteenth century rape trials, carried out by Clark (in Lees, 1997), found out that back then women faced laughter from the court galleries while they were giving evidence, and that trials transcripts were sold as exciting literature. Things have not changed that much since the nineteenth century. Transcripts of rape trials and of trials for child abuse and incest are still circulated as pornography in prison among rapists, paedophiles, etc., a practice which seems to have existed for quite a while (Sampson, 1994; Lees, 1997). Lees (ibid) speculates that these transcripts might also be distributed by rapists upon their release. The intense interest and curiosity about the details of rape are interpreted by Lees as a trace of patriarchal concern with chastity. She claims that, from the patriarchal point of view, penetration is a basic issue because it leads to the implication that the victim's value as sexual property is damaged (1997, p. 79).

<sup>13</sup> The descriptions of the rape found in some RADs, though sounding sometimes graphic enough, are nothing if compared with the much more detailed and vivid descriptions complainants have to produce in court under cross-questioning. Courtroom depositions are closer to pornography than the descriptions found in legal decisions, and as such are more embarrassing to the victims. Judges themselves admit that giving evidence is a very traumatic experience for a rape complainant, so much so that an admission of guilt, which saves the woman the 'ordeal' of giving evidence in public and having her character and behaviour 'assassinated' by the defence, usually functions as a mitigating feature for a rape defendant.

- back on his buttocks. She did so, and he put his penis back in her mouth. While it was there he kept thrusting; because of the force of his thrusting she choked and began to, as she described it, “urge” – or, as one would suppose she meant, “retch”. He asked her why she was doing that. She replied that he had “pushed it too far back”. He continued with what he was doing, albeit not pushing as far back as he had before. Throughout the whole of this episode the knife was at the nape of her neck.
- He then stopped, withdrew his penis from her mouth and said, “Get on the bed”. She lay on the bed. He told her to get on her front and instructed her to kneel, and put her head down and her hands behind her back. She obeyed. With her kneeling in that position he put his penis into her vagina. She could feel the knife in the region of her neck the whole while. He continued the act of sexual intercourse. She did not co-operate and he said to her, “You can do better than that. If you help me you will live, if you don’t you will die; I am going to die tonight anyway”. So she did something to appease him.
  - Although he was to continue the intercourse for some little time, that is a sufficient description of the events for the purposes of this case. [Case 9 - Roy Kowalski 1987 – Marital rape – 4 year sentence reduced to 2]
29. Two days later he was back again. It was about midnight. The complainant had gone to bed. She heard the front door being broken open. The appellant ran into her bedroom. She started to call the police but the appellant took the telephone from her. He seized her from behind, put his hand over her mouth to stop her screaming – she could scarcely breathe – and he made her go upstairs into her bedroom. He took off the dressing gown that she was wearing, tied her hands behind her back with a belt, removed her knickers, struck her on the back of the head and put a pillow case over her head, apparently as a gag. He then turned her on her back and raped her. He took her downstairs and removed the pillowcase but left her hands tied. Then he told her to go upstairs again. This time he tied her ankles together and then tied them to her wrists behind her back and then untied her ankles. He made her sit up. He knelt in front of her and put his penis into her mouth. He put his fingers into her anus and then his penis into her anus. Because of the pain she said she would allow oral sex if he stopped. He did stop. Then he masturbated, holding her by the belt on her wrists. He raped her again. They then went downstairs. The appellant said that he would leave but demanded oral sex before he did. She said she could not go through that again and he might as well kill her. [Case 16 – Derek John Hind 1993 - Ex-partner rape – 10 year sentence reduced to 6]
30. On March 7, 1996 he went to see his doctor to discuss a referral to the marriage guidance organisation know as Relate. The complainant came home shortly after he did and saw him come into the house with a carrier bag. When she came into the house, he grabbed her by the throat and he pushed her down on the sofa. He pushed her face into a cushion, so that she was frightened that she was going to suffocate. He held her down with a tea towel across the back of her neck. She asked him not to kill her or to hurt her. He then said that he would not hurt her so long as she kept quiet and did not struggle. He said that he wanted to “fuck her” and that it was going to last a few hours as he “made the most of it”. He then took off most of his wife’s clothing. She removed her own necklace and she hid her broken glasses down the back of the sofa for fear that he would strangle or cut her. He then took stockings which he had purchased out of the carrier bag and made his wife put them on. He ripped the remainder of her clothes. He then penetrated her against her will. He forced her to go into the kitchen with him to fetch some wine from the refrigerator. He placed cushions on the floor, forced her to kneel on all fours and then penetrated her again. He forced her to perform oral sex, holding the back of her head and threatening to hurt her. He told her that he was thinking of tying her up. He hit her with a tea towel. He then took her upstairs, saying that he was going to ‘defile her little nest’. He then attempted to penetrate her whilst holding her against the bedroom door. He took her into the bedroom, forced her to put the stockings on with a suspender belt and forced his penis into her mouth. He then penetrated her again. [Case 47 – Michael H 1997 - Marital rape – 5 years upheld]

The three excerpts above present detailed descriptions of the rape. In example 28 the judges seem a little embarrassed by their long description (“*Although he was to continue the intercourse for some little time, that is a sufficient description of the events for the*

*purposes of this case*”), which does not happen in the other two examples. Example 30 is the one which most resembles pornography, evidenced in the mentions of *erotic lingerie* (stockings and suspender belt), an *erotic scene* (the cushions on the floor, the wine, the language used by the assailant), the threat of ‘bonding’ (*he told her he was thinking of tying her up*), and finally *the threats and the use of violence* (he tried to suffocate her, he hit her with a tea towel, he threatened to hurt her and to tie her up), which conjures up *a sado-masochist scenario* (this feature is present in the three excerpts).

The distressing experience of giving evidence in court, the frequent practice of character assassination carried out by defence lawyers and even by judges, and the fear of having the most intimate details of one’s life publicly discussed, laughed at or even enjoyed as erotic material, are indications of what expects women who file a complaint of rape, and probably leads many of them to keep quiet about male sexual violence.

#### 5.5.2 Physical evidence as corroboration

Another distressing aspect of reporting a rape, apart from the need to describe all its details to police officers, and later on to lawyers, public prosecutors and judges, is the medical examinations a rape victim has to undergo. When a woman reports a rape, she has to be prepared to undergo minute physical examinations in order to produce ‘hard’ evidence of the attack. A victim who can present physical or forensic evidence of the rape (bruises, cuts, bleeding, scratches, seminal fluid, etc) will be considered more reliable than a victim who is physically unscathed (see chapter 4). The physical examination is frequently embarrassing and distressing, especially when it takes place soon after the event.

When a woman reports being raped medical experts are allowed, under sanction from public powers, to carry out a further invasion of her privacy: the examinations she has to undergo constitute a first step in the process of exposure rape victims are subjected to during police and judicial proceedings. As Kupka argues, “[medical experts], with the authorisation of public power, [search] the most private space a woman possesses, her body, for more evidence of the crime. These experts [probe] the genitals and the female reproductive system, reading them like a text.” (1999, p. 283).

Consider the following examples:

31. *The young woman was medically examined. She had two love bites on her neck and an area of redness on her left breast. There were superficial injuries to her left shoulder blade, both elbows, left ankle and right calf, together with mud and grass stains on both heels. As to her private parts, there was a recent bruise just outside the hymen but inside the labia which, in the doctor’s opinion, could have been caused by finger pressure, “someone using fingers clumsily, like a drunken man, that was more likely than a penis to cause it”.* [Case 3 – Attorney-General’s Reference No. 1 of 1992 – Acquaintance rape – conviction dismissed – appeal granted]
32. *There was bruising on the back of her head and a superficial graze on the back of her right elbow. There was dried seminal fluid over her neck and chest.* [Case 22 – David James Shields 1993 - Stranger rape – 10 years upheld]
33. *Medical evidence at the trial indicated that the victim had bruises, abrasions and some loose hair. At one time it was thought that she had a possible fractured nose, but in the event that proved to be simply a swollen and bruised nose.* [Case 31 – Joseph Kennan 1995 - Prostitute rape – 14 years upheld]
34. *As to the victim, she suffered a bite on her left temple, a small cut in her vagina, swelling and redness over the lower back due to ground friction, and tenderness over her neck due to rough handling. Apart from physical injuries, she has been severely affected by the rape in a number of aspects of her life. She has had persistent difficulty in sleeping and eating; she had great fear of travelling in public; and she found it impossible to continue her relationship with her long-standing boyfriend. She has been unable, and continued to be unable, to work for more than a few days.* [Case 33 – Attorney-General’s Reference No. 22 of 1995 (Sylvester Semper) Stranger rape – 8 years replaced by life imprisonment]
35. *The victim on this occasion took urgent steps to call the police and the offender was in due course apprehended. The victim was examined by a doctor who found her to be understandably upset and also found that her face, nose and neck were bruised and swollen and she had teeth marks on her arm.* [Case 44 – Attorney-General’s Reference No. 29 of 1996 (Carl Junior Fridye) Stranger rape – 7 ½ years upheld]
36. *It took five weeks for the injury to her eye to clear up and her neck to heal. She had petechial haemorrhages around her neck and face and bruises on her body, legs, shoulder, buttocks and anal cleft.* [Case 46 – Edward James K. 1996 - Marital rape – 8 years upheld]

Physical evidence of ‘force’ is not necessarily a guarantee of conviction. In example 31, for instance, even though the complainant presented love bites, superficial injuries

and bruises, the event was interpreted as 'consensual sex', a bit rough but still consensual, so the appeal was granted and the appellant absolved. In examples 34 and 35, on the other hand, the physical evidence of violence, combined with evidence of psychological distress, corroborated the complainants' version of the events and worked to portray them as 'genuine victims'. A description of the wounds found on the complainant's body, such as the ones present in examples 31, 34 and 35, are usually found in cases where 'excessive' physical violence was used (usually stranger rape). In cases of marital rape, for instance, this description is rarely present (example 36 is an exception). In marital rape cases, as we can see in section 2.3.1 above, we find detailed descriptions of the event, but not descriptions of the wounds found in the complainant's body. One of the implications is that marital rape, even though constituting a sexual crime, is not considered violent, having more to do with 'thwarted', misplaced love than with gender violence.

The medical examinations the rape victim undergoes, and their descriptions in RADs, are part of 'bio-power' (Smart, 1983), the disciplinary power institutions such as the judicial and medical ones have to probe, examine and document the human body in order to make it more docile (in the context of sexuality, that means more obedient to the ideals of normality, masculinity and femininity).

### 5.5.3 Prostitute rape

Another illustration of the judicial interest in investigating and controlling the bodies of women can be found in appellate decisions dealing with the rape of prostitutes.

Due to the fact that discussions about female sexuality are usually framed within the context of heterosexual love, marriage and the family, prostitute women are frequently depicted as women who have gone outside this frame, and consequently are



characterised as unnatural, unclean, indecent, dangerous and deserving of pity (Smart, 1985)<sup>14</sup>.

While interviewing English magistrates about prostitutes and prostitution, Smart (ibid.) observed that many times they referred to prostitutes using expressions such as ‘*these people*’ and ‘*these women*’, thus grouping them under a special category of persons, distinct from other women. In my data a similar strategy was used: the judges also referred to prostitutes as a separate category of persons both through the use of isolating expressions (e.g. ‘*women such as the complainant*’) and by attributing to them certain special characteristics - they were depicted as psychologically *tougher* (rape was not so traumatic to them as to non-prostitute women) but physically *vulnerable* (to diseases); they were portrayed as women who should be *pitied* and *protected*, especially by the criminal justice system.

In the cases illustrated below, prostitute women were referred to as:

- *women such as the complainants*
- *vulnerable to infection*
- *women accustomed to the act of sexual intercourse*
- *particularly vulnerable women*

These are some examples:

37. ... *the fact that the complainant was a prostitute did not mean that she was not entitled to the protection of the law.*
- Mr. Gau [the defence counsel] emphasises that the victim in the present case was a prostitute who would have been prepared to have intercourse with the appellant if he had offered to pay. While recognising that that is not irrelevant, nonetheless, as the Crown Court judge said, *prostitutes are just as entitled to the protection of the law as any other woman. We have to bear in mind that this victim, while a prostitute, was aged only 16, and, indeed, had been a prostitute for a very short time.* [Case 31 – Joseph Kennan 1995 - Prostitute rape – 14 years upheld]

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<sup>14</sup> Smart says that this view of prostitute women is quite endemic, being “remarkably consistent across party political lines, across socio-economic class and across gender” (1985, p. 66).

In case 31 the appeal judges acknowledge the right of prostitute women to legal protection. In that particular case the complainant was a young woman (16), which increases the sympathetic judicial attitude.

The protective judicial attitude observed in case 31 above is also present in the excerpt below:

38. Nine years upheld for the rape of a 16 year-old prostitute with false imprisonment and violence.
- The applicant encountered *a girl of 16* who was soliciting as a prostitute. She agreed to permit the intercourse for 30 pounds. She entered the applicant's car and he drove to a car park, where he attacked the girl, placing his fingers on her throat and striking her face. The applicant punched her several times so that she lost consciousness, and then *had intercourse against her will without using a condom*. The girl was later forced to masturbate the applicant and perform oral sex on him. The girl was released after being in the car for about four hours.
  - **Held:** ... *it was for the courts to protect prostitutes.*
  - There is another side to that particular point. *It is only through the courts that prostitutes are going to get protection ... It is only if the courts are astute to recognise the need for prostitutes to be protected that they can indeed get the protection which they require and which only the courts can give. Therefore we take no account of the fact that she was a prostitute. The one aspect is counterbalanced by the other.* [Case 34 – Asif Masood 1996 - Prostitute rape – 9 years upheld]

In case 34 the judicial system is depicted in an almost paternal role towards prostitutes. It emphasises the notion that the legal system (in the present case, the criminal justice system) is able to distribute justice and protection to those who seek it. Notice in special the last sentences in this excerpt (“...we take no account of the fact that she was a prostitute. The one aspect is counterbalanced by the other”). The appeal judges indicate that the courts can overlook the ‘immoral’ nature of a prostitute’s trade in view of a greater good – protecting the prostitutes and keeping the community ‘healthy’.

Nowadays prostitutes fall into the category of women who are entitled to the protection of the criminal justice system. However, the legal and judicial protection granted to them does not seem to spring from the same sources as the protection granted to ‘pure’ women. Whereas the judicial protection of ‘innocent’ women aims to safeguard their good names, reputations, and psychological well-being, the protection of prostitutes aims, among other things, to safeguard the social body: prostitutes, by nature

of their trade, are exposed to diseases and infections (the myth of the ‘unclean’ woman who can pollute society), so they have to be protected against attackers who do not wear condoms (see case 34 above). This view is also illustrated in the following example:

39. Over a period of six years the offender raped five prostitutes. On each occasion the victim agreed to have intercourse with the offender provided that he wore a condom. In each case the offender removed the condom at the last minute, or refused to put a condom on, and forced the victim to have intercourse without a condom. On two occasions the victims were threatened.
- **Held:** ... *the Court accepted that intercourse was not as traumatic to the complainants as to most victims raped by strangers, but prostitutes were as much entitled to the protection of the law as anyone else.*
  - *Women such as the complainants were in particular need of the law’s protection as they were vulnerable to infection.*
  - He [the trial judge] began his sentencing remarks by summarising the nature of the offence and indicated that *to insist on having sexual intercourse in a manner which the other party was not prepared to accept was as much rape as if the offender had had sexual intercourse with any other woman against the woman’s consent.*
  - These were very young victims, ranging in age between 14 (the youngest) and 21 (the oldest). *They were vulnerable and they were in the usual difficulty for those pursuing their occupation of making complaints and procuring redress.*
  - The learned judge took the view that the trauma to these particular complainants was less than in some other cases. *We accept that the fact of sexual intercourse is not in itself as traumatic to complainants in this position as to most victims raped by strange men.* These were women who were accustomed to the act of sexual intercourse, and indeed invited it. *But prostitutes are as much entitled to the protection of the law as anyone else.*
  - They [prostitutes] are entitled to insist that they are not willing to permit sexual intercourse unless their sexual partner is protected. *It is undoubtedly rape for any defendant to insist upon sexual intercourse without protection when the woman does not consent,* and even more so if he imposes his sexual demands by force. *Those in the position of these victims are in particular need of the law’s protection because they are vulnerable to infection;* it is plainly not a fanciful risk with a man, on his own account, as *promiscuous* as the offender.
  - In addition, we draw attention to the fact that this was a series of offences committed against *particularly vulnerable women* [Case 48 – Attorney-General’s Reference No. 28 of 1996 (Grenville Charles Shaw) 1996 - Prostitute rapes – 4 years increased to 6]

This RAD presents some interesting innovations in terms of how rape is viewed by the British criminal justice system. First, forced unprotected sex (without a condom) equals rape. Second, the judges state that to force a prostitute woman to have sex in a way not previously agreed to is the same as forcing another woman to have sex against her will. Another novelty in this RAD is the fact that a man is, for the first and only time in this corpus, called ‘promiscuous’ (“...*it is plainly not a fanciful risk with a man, on his own account, as promiscuous as the offender*”).

This view represents a move in the criminal justice system towards a fairer treatment of prostitutes. After all, not so many years ago prostitute women who complained of

rape would receive hardly any support from the law and order apparatus<sup>15</sup>. On the other hand, by constructing prostitute women as a separate group with distinct features, the criminal justice system sets them apart from ‘normal’, non- prostitute women.

In addition to that, the description of prostitutes as a separate group in special need of legal protection has other implications. First, the view that they should (and *can only be*) protected by the law does not necessarily stem from a concern with the prostitutes themselves. It can equally result from a concern with the well-being of the community; by claiming to protect prostitutes from the risks of contracting venereal diseases the judges are also safeguarding the community (especially the male community) from the spread of these diseases. Second, the urge to ‘protect’ prostitutes and the notion that the criminal justice system is the only vehicle that can do this job can also be interpreted as a disciplinary mechanism to supervise and control the bodies and sexuality of prostitute women. Many magistrates and judges share the belief that it is necessary to coercively intervene into the lives of prostitutes (e.g. to salvage them, to help them, to guide them, to control them, to regulate them more efficiently, to educate them, and so on). As Smart points out, the judicial view is that “prostitutes are sexual objects which constitute a health hazard unless properly regulated” (1985, p. 64)<sup>16</sup>.

### 5.6 Normal v. abnormal sexuality

As has been argued previously, a legal sentence is not just a judgement of guilt and a form of establishing punishment for a criminal offence; it also represents an evaluation of normality and an attempt at a possible normalisation. Foucault claims that “today the

<sup>15</sup> In 1985, for example, an English judge stated that to talk about the rape of a prostitute was “a contradiction in terms” (Adler, 1987).

<sup>16</sup> In Smart’s research (1985), it was mostly male magistrates (71 per cent) who were concerned about the need to control the transmission of venereal diseases.

judge ... certainly does more than ‘judge’” (1991, p. 21). Normalisation, together with surveillance, is one of the great instruments of power. Being defined as ‘normal’ indicates membership of a homogeneous social group, at the same time that it implies a process of classification. Normalisation imposes homogeneity but it also “individualises by making it possible to measure gaps, to determine levels, to fix specialities and to render the differences useful by fitting them one to another” (Foucault 1991, p. 184).

One area that the judicial discourse on rape attempts to ‘normalise’ is that of sexual behaviour. An attempt at normalisation present in many RADs on rape trials is the classification of certain sexual acts as ‘ordinary’ or ‘normal’, while others are depicted as ‘sexual indignities’ or ‘sexual perversions’. According to this categorisation, the ‘traditional’ or ‘ordinary’ rape consists of penetration of the vagina by a penis in circumstances of force. This ‘ordinary’ rape can be aggravated by the presence of other sexual acts seen as more humiliating and undignifying than the ‘rape’ itself, such as fellatio, buggery and masturbation. Behind the distinction ‘*ordinary*’ rape *x* rape aggravated by other ‘*sexual indignities*’ is the notion that vaginal sex is ‘normal’ and enjoyable, so even when forced a ‘normal’ act of vaginal sex is less traumatic than ‘abnormal’, ‘unnatural’ acts such as oral or anal sex.

The excerpts below illustrate the judicial view of what constitutes an ‘ordinary’ rape:

40. The case for the Crown was what might be described, if one can describe rape as such, as *an ordinary rape; that is forcible penetration of the woman without consent*. [Case 1 – Regina v. Linekar 1995 - Prostitute rape – appeal granted and conviction quashed]
41. It is also right that *there was no extra perversion in the act of rape and no further indignity*. It is also right that the appellant had entered the victim’s home lawfully and with her consent. It is also correct that the physical injuries which she suffered were minor. [Case 37 – Andrew Thorpe 1996 - Marital rape – 6 years upheld]

In example 40 the judges select the adjective “ordinary” to describe the rape, even though they admit that this evaluation is controversial (“*if one can describe rape as*

*such*”). In example 41 the absence of ‘extra perversion’ and ‘further indignity’ must be read as ‘vaginal rape’. The description of the rape as ‘ordinary’ in case 37 is part of a judicial attempt to somehow downplay this particular event: the judges claim that the assailant entered the victim’s house ‘lawfully’ and with consent, and that her physical injuries were ‘minor’.

On the other hand, cases of rape involving sexual acts other than vaginal sex are frequently described as ‘perverted’ and ‘undignifying’. One form of sexual ‘indignity’ is oral sex:

42. The Attorney-General submits that there are a number of *aggravating features* in this case: first of all, the age of the victim; secondly, that this was her first experience of penetration of her private parts; thirdly, that the victim was submitted to *the further indignity of being forced to suck the offender’s penis*; fourthly, the traumatic effect which the incident has had upon her. [Case 2 – Attorney-General’s Reference No. 3 of 1993 – W – stranger rape – community service sentence increased to 2 years imprisonment]
43. It was submitted that *the offence was aggravated by* the age of the victim, the injuries and the infection she had received, the degree of force that was used, and *the fact that the offender put his penis into her mouth*.
  - On behalf of the Attorney-General, it is submitted that there was a number of aggravating features to this offence. First of all, the age of the victim. Secondly, the effect upon her of this experience; she had these serious injuries to her genital area; the act of rape had been her first experience of sexual intercourse ... Lastly, it is said that the attack included *an added indignity in that the offender forced his penis into the victim’s mouth* [Case 19 – Attorney-General’s Reference (David Vernon Taylor) 1993 – Stranger rape – 4 year sentence increased to 6]
44. *Indeed, some victims may find [oral sex] even more repulsive than the rape itself*. [Case 23 – Attorney-General’s Reference No. 16 of 1993 (Shane Lee Goddard) Stranger rape – 6 years increased to 9]

In the discourse of appellate judges rape itself is seldom described as an ‘indignity’, but oral sex is usually seen as particularly humiliating<sup>17</sup> (in the three cases illustrated above the presence of oral sex, added to other aggravating circumstances, led to an

<sup>17</sup> I am not questioning the notion that certain acts, added to the trauma of forced vaginal sex, can indeed inflict deep psychological scars on the victims. However, what I find questionable is the link, established by the judicial discourse of RADs, between ‘abnormal’ or ‘perverted’ sexual acts (fellatio, buggery, masturbation, etc) and trauma and humiliation, which seems to imply that ‘ordinary’ rape (i.e. vaginal penetration) is not as traumatic as rape aggravated by other sexual humiliations. In my reading, the interpretation of vaginal sex as less traumatic than other sexual practices results from a moralistic view of sexuality, in accordance to which vaginal sex is seen as always enjoyable. This view can be used to downplay the seriousness of cases of rape which do not involve masturbation, oral sex or buggery.

increase in the sentences at appeal level). If oral sex is described as ‘undignifying’ and perverted, oral sex coupled with masturbation is even more so:

45. She was subjected to *the degradation of having her assailant masturbate over her body. She was subjected to oral sex* and she was raped. In our view, *the degrading conduct to which she was subjected are matters of considerable weight* [Case 22 – David James Shields 1993 - Stranger rape – 10 years upheld]
46. *She was forced to masturbate the appellant and to perform oral sex upon him which, she said, she found extremely disgusting and distressing.* [Case 34 – Asif Masood 1996 - Prostitute rape – 9 years upheld]

As I argued above, it is common to see fellatio and masturbation described as ‘degrading’, ‘disgusting’ and ‘humiliating’ to the rape victim. However, there were some cases where oral sex was not described in the same way. Consider the following examples:

47. The offender met a young woman aged 21 at a nightclub. They spent some time together and she went back with him to his room in a hostel for ex-offenders at 2.30 a.m., where they engaged in consensual sexual intercourse. The following morning the woman woke up and said she was going home. The offender tried to persuade her to stay, locked the door and became aggressive. He threatened her with violence if she did not remove her dress, detained her for two hours during which time he raped her six or seven times and *made her perform oral sex on him ten times.*
  - Held: ... *For the offender it was argued that the previous convictions were the most aggravating feature of the case* ... There was false imprisonment, threats, repeated rapes and *forced oral sex.*
  - The judge expressly referred to section 2(2)(b) of the Criminal Justice Act 1991 on the basis that a longer term was necessary to protect the public from serious harm from the offender. [Case 41 – Attorney-General’s Reference No. 76 of 1995 (Orlando Baker) date rape – 9 years replaced by life imprisonment]
48. In May 1993 the victim of the offence met the appellant ... They formed a sexual relationship quite quickly in their acquaintance but that relationship deteriorated in July 1993 when he became violent and possessive ... She refused to have intercourse with him and that exacerbated matters.
  - *He forced her to indulge in oral sex.* [Case 42 – David Milne Razzaque 1996 - Stranger rape and marital rape – life imprisonment – parole period reduced from 17 to 10 years]

In example 47 forced oral sex is listed as an aggravating feature, but it is not pointed as the most important one. The appellant was condemned to life imprisonment more on account of his previous convictions than on account of features of the rape or of the victim – the case was seen as ‘serious’ and the rapist as really dangerous because of his criminal record. In excerpt 47 the forced oral sex was not described as ‘humiliating’ or

'painful'. One possible explanation is that certain acts are defined as more or less humiliating depending on the victim. In the example in question the complainant, rather than an 'innocent victim', was depicted as a woman who engaged in a 'one-night stand' with a strange man (she is referred to as '*the woman*', not '*the victim*').

In excerpt 48 oral sex is again not described as humiliating or painful; it is not even listed as an aggravating feature in the case. The way the judges refer to the incident of oral sex is curious; they phrase it as "*He forced her to indulge in oral sex*". The dictionary definition of '*indulge in*' is "to allow oneself (something that gives pleasure)" (Hawkins, "The New Oxford Paperback Dictionary", 1988, p. 413). The use of the verb 'indulge' produces a contradiction: how can someone be forced to do something which is pleasurable to her? The effect is also ambiguous. An ambiguous word is a word which may be taken to have one sense *or* another (or more than one other) (Fairclough 1995a, p.113). By choosing the verb 'indulge' to describe oral sex and combining it with the verb 'forced', the judicial writers might be indicating that either the incident occurred against the woman's will, *or* that she took pleasure in forced sex<sup>18</sup>. How, then, should one interpret the use of 'oral sex' in the examples above?

One possible help is the context. We could claim that in each of the cases illustrated above, the meaning of the expression 'oral sex' is disambiguated by the context of the appellate decisions, i.e. by combining 'oral sex' with adjectives such as 'disgusting', 'degrading', 'distressing' and 'repulsive', or with a verb such as 'indulge in', the judicial writers eliminate, in each case, all but one of the senses of the expression in question. Another possible interpretation of ambiguous words, according to Fairclough, is that rather than disambiguating words in specific texts, context may "impose hierarchical salience relations between senses" (1995a, p. 114), that is, even though



more than one meaning is possible, one of them is hierarchically more prominent than the other(s).

### 5.7 Final remarks

In this chapter, based on a Foucauldian view of the criminal justice system, I interpreted the judicial discourse on rape as part of a pedagogy of sexual behaviour. From this perspective, rape trials serve several educational aims: they discipline and punish the individual offender; they set 'proper' and 'improper' modes of behaviour to both the offender and other potential offenders; they serve as warnings to people in general. The warning function extends the discourse of rape trials and of legal decisions beyond the confines of the courtroom and even of the legal environment; the judicial discourse on rape serves as warning and example both to those directly involved with the trial (offender and victim) and to women and men in general.

The educational aim of judicial discourse is furthered by the help of several 'discourses of men', such as the discourses of psychiatry and psychology. Foucault claims that the legal power to punish has been fragmented and divided among several disciplines which, through the techniques of observation, judgement and examination, help to categorise people as 'normal' or 'abnormal', 'criminal' or 'innocent', amenable to rehabilitation or past recuperation. The discourses of medicine, psychiatry and psychology also help to add scientificity to legal discourse, somehow purging it of its harsh and cold punitive character. The idea is that the legal right to punish is not merely about retribution and revenge, but that it also encompasses a humane view of criminals.

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<sup>18</sup> I am not claiming that the judicial writers *consciously* chose an ambiguous word; this choice was probably unselfconscious. However, even if unconscious, lexical choices and adaptations serve macro discursive purposes (see Fairclough 1995a, p. 114).

The disciplinary techniques of observation, judgement and examination present in rape trials also serve to strengthen the hold over the body, and to increase its docility and its usefulness. The bodies and minds of rape victims are scrutinised to determine relations of causality and responsibility, to assess the seriousness of the rape, and to portray the complainant as a 'genuine' victim or as a 'non-typical' victim. In this process, the bodies of women are trapped in minute and embarrassing descriptions that resemble pornography, descriptions which also serve as warning to other women of the symbolic exposure a rape complainant goes through.

Finally, the judicial discourse on rape also serves the purpose of recomposing 'normality'. One of the functions of sentences on rape trials is to protect 'normal' society against the violent behaviour of rapists, as if their behaviour were disconnected from social ideologies and values. The way rape is defined and evaluated, and the circumstances that aggravate it, indicate what the criminal justice system considers 'normal', heterosexual sexuality, and what falls into the category of 'abnormal', bizarre and humiliating sexual acts.

## Chapter 6

### Legal discourse and gender asymmetry

#### 6.1 Initial remarks

In this work I argued that the judicial discourse on rape interprets cases of rape, as well as rapists and rape victims, according to certain interpretative repertoires and categories. The way event and participants are categorised by the discourse of rape decisions exerts an immediate influence on the outcome of the sentence, and ultimately on male and female social and sexual behaviour.

I started by presenting *reported appellate decisions*, the object of analysis in this study, in more details, contextualising them within the structure of a rape trial and its subsequent sentences, and pointing out their legal and social relevance. Next I looked at legal discourse from the point of view of critical discourse analysis, exploring its links with conservatism, power and control. After that, I discussed how judges come to acquire their institutional identities, and how the construction of rape by legal discourse influences the subjectivities of rape offenders and rape victims. This formed the foundation for my critical reading of RADs on rape cases.

I then moved on to the analysis itself. I started by investigating how the lexicogrammatical choices made by judicial writers to depict the event rape, the defendant and the complainant expressed categorisation systems. My aim at that stage was to argue that the categories used by judges to make sense of rape, rape offenders and rape victims draw heavily from myths and stereotypes about gender relations, gender roles and sexuality, influence the distribution of blame and responsibility for the attacks, and

determine, to a great extent, the level of care rapists and rape victims receive, as well as the sentences awarded by the criminal justice system to abusive men.

Finally, I interpreted rape trials and decisions on rape trials as spaces where a pedagogy of social and sexual behaviour is established, where the body is constrained and controlled, and where 'normality' is structured and recomposed. My intention at this point was to investigate the discourse of rape trials and of sentences on rape trials as part of a broad social structure of surveillance, discipline, control and punishment.

In the following section, I will present a summary of the findings of my analyses, as well as some suggestions for further research in the area.

## 6.2 Summary of findings

Changes in discursal practices are a dimension of changes in social practices. Discursal practices are constrained by norms, social conventions, histories. The dialectical relationship between discursal practices and social practices can be marked by transformation or by ideological conventionality and repetitiveness (Fairclough 1995a), i.e. with virtually no changes or with slight modifications. Fairclough points out that in some discourses [such as official discourses] authoritarian elements coexist with democratic ones, patriarchal elements with feminist elements; however, the latter member of the pair always contains and limits the former (1995a:77). In spite of the apparent contradictions which might be present in a text (and in a discourse), there is usually a hegemonic reading which smoothes down (or backgrounds) the ambivalences.

This is the case with reported appellate decisions on cases of rape. The analysis of these texts indicates that both processes of social change and of social reproduction occur in the judicial discourse on rape: changes in cultural and social norms force some

transformations in the most challenged ideological assumptions that underlie the discourse of RADs, while those assumptions which are more naturalised and seen as basic norms of the legal institution are reproduced with little or no change.

The judicial discourse on rape analysed in this work presented moves that are part of wider tendencies of cultural change, such as: the use of politically correct language; the claim that prostitutes deserve legal protection against forced sex; the acknowledgement that many women do not resist a sexual assault to avoid further harm; the abolition of the marital exemption for rape; the acknowledgement of the psychological effects of rape on its victims.

On the other hand, the same discourse also presented many traces of myths and stereotypes about gender and sexuality, and frequently built a contradictory picture of the official legal attitude towards acts of sexual violence against women.

At the same time that it condemns acts of violence against women, the official rhetoric of appeal sentences on rape cases embraces, incorporates and reinforces through its discourse an ideology of gender bias and sexual discrimination, as well as a structure of surveillance, discipline and control of female sexuality. RADs in rape cases are critical of the stranger rape, but much less so of acquaintance rape or marital rape. The values they stand for are virginity, a woman's good name, the nuclear family, marriage, the sanctity of the home, rather than the sexual rights and liberties of the modern woman. As all kinds of women get raped, not only young virgins or old grandmothers, many of them find themselves unprotected by the law, and many assailants end up with mild forms of punishment, or no punishment at all. The conclusion is that the treatment given to both attacker and victim, and the sentences awarded in individual cases, will depend to a great extent on the discursive categorisation of event, assailant and victim. The way different abusive men were

described by the RADs analysed here, and the impact these descriptions and categorisations had on their sentence length, is a good indicator of the role played by the discourse of judges on the way rape victims and rapists are treated by the criminal justice system.

The categorisation of rapes into 'real' rapes and non-typical rapes, of appellants as 'dangerous' rapists or disturbed men, and of complainants as 'genuine' victims or non-genuine victims, constructs and reflects a body of myths and ideological presuppositions about sexuality and gender that determines the level of judicial care given to complainants, and the distribution of blame, discipline and punishment for sexual attacks.

Judicial discourse makes use of several prototypes to help categorise rape cases and their participants, such as the 'real rape', the 'true victim', the 'typical rapist'. The prototypical cases are seen as serious and as deserving severe punishment. Events and participants that shade away from these central, core examples (e.g. marital rape, date rape, rape of sexually experienced women) are seen with disbelief and suspicion, and frequently end up in acquittals or short sentences.

The vocabulary we use rests on sets of pre-constructed categories, and the process of representation involves deciding how to 'place' people and events within these sets of categories (Fairclough 1995b). In the RADs analysed in this study, rape complainants and rape defendants were categorised as 'victims' or 'villains' mainly according to their 'characters'. And 'character' is a category that is constructed differently for men and women. For a man, 'good' character involves lack of previous convictions, social and professional status. For a woman, on the other hand, it implies a 'good' sexual reputation, no familiarity with the offender or, in the case of women raped by their partners, a willingness to forgive the aggressor.

By constructing 'character' according to different standards, the judicial discourse on rape establishes 'proper' and 'improper' modes of behaviour for women, indicating what types of women will be cast in the role of 'genuine' victims (e.g. virgins, old ladies, women who resisted the attack physically) and will receive legal protection and sympathy, and what types of complainants will be exposed to judicial trivialisation, criticism and discrimination (e.g. women raped by former or present partners, promiscuous women).

The final picture constructed by the categorisation systems used by judicial discourse is that serious rape is stranger rape, that women of 'good' sexual character are 'true' victims, and that rape is the result of criminal tendencies or mental problems (in the case of stranger rapists), or of desperation caused by the breakdown of the relationship (in the case of marital rapists). This rather flat picture depicts rape as an isolated crime motivated by an uncontrolled sexual drive or emotional despair, disconnected from social issues such as gender violence, domestic violence, gender asymmetry and the high level of social tolerance to the problem of violence against women.

Rather than offering a space where women can find protection against sexual violence, the rape trial and the sentences that follow it frequently naturalise or minimise male violence against women through its system of categorisation of victims (Madonnas v. whores), events (sex v. ordeal) and defendants ('disturbed men' v. fiends). This categorisation system expresses value judgements about how men and women behave, and is part of a pedagogical network that establishes, supervises, punishes and controls forms of behaviour and of identities.

And the educational nature of the judicial discourse on rape is not limited to the courtroom, or to the persons directly involved with the trial. The symbolism of the trial and its decisions serves as warning and example to other potential offenders, both those

who break legal rules (e.g. men who sexually assault someone) and those who break social rules (e.g. women who behave in ways considered 'improper' for their gender, their social position, etc.).

Besides representing a space where the soul of men and women can be educated, controlled and disciplined, the rape trial also offers the possibility of increasing the control and use of physical bodies. The minute disciplinary techniques of observation, examination and judgement at work before, during and even after the trial, aided by sciences such as medicine and psychiatry (theoretically aimed to establish causality and responsibility and to assess the seriousness of the case), increase the control over the bodies of complainants and defendants, and serve as a warning to women in general of the legal and medical right to scrutinise the female body, and the degree of exposure and embarrassment rape complainants are subjected to. Given the symbolic nature of the rape trial<sup>1</sup>, it is not surprising that many women prefer to keep quiet about being raped rather than set the judicial machinery in motion.

Finally, by defining what constitutes an 'ordinary' rape and what is seen as 'revolting', 'undignified' or perverted sexual acts, the judicial discourse on rape strives also to establish what is considered 'normal' and 'abnormal' in terms of sexuality.

#### 6.2.1 Is it possible to change ?

Lees (1997) contends that at present the balance in rape trials is still in favour of the defendant. His sexual history is not questioned, even if he has attacked the complainant's character, and he has his own representative during the trial, whose task

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<sup>1</sup> The rape trial resembles the old spectacle of medieval torture in the reenactment of the rape, the detailed scrutiny of the victim's body and behaviour, her exposure to censure and criticism, and her need to present a 'virtuous' character as the only way to be seen as a 'genuine' victim.



is to destroy the victim's character and credibility. The complainant, on the other hand, finds her social and sexual life put under a microscope, and has no special representative during the trial to defend her interests and put forward her version of the facts. The final judgement mimics this imbalance of forces; even though the judges are supposed to take no part, their discourse relies heavily on an ideology of gender discrimination, misogyny and sexual myths (as discussed in chapter 3 and 4) which further tips the scale in favour of the defendant.

A critique of the language of the criminal justice system can help legal practitioners (lawyers, prosecutors, judges) to become more aware of the sexual/gender bias present in this discourse type, but it can also have a farther range of influence. According to Temkin (1987), the problem with rape within the legal system starts early on, at law school, where teachers of law are rarely willing to consider and discuss with their classes questions such as the experience of the victims, or the myths about rape that still find expression in legal discourse. Thus, a critique of the discursive and linguistic practices of the criminal justice system could also prove very productive for teachers and students of law.

The influence of judicial discourse is not circumscribed to the courtroom: judges also act in the capacity of teachers, lecturers, consultants, book writers. A critique of their language and discourse, therefore, and any change in their discursal practices, can have an influence that reaches far beyond the limits of the courtroom. The discourse of the criminal justice system reaches lay people who are directly or indirectly involved in a criminal trial, such as the defendant and the complainant, witnesses, jurors, members of the public, etc. Thus, a critique of the legal discourse on rape can potentially lead to attitudinal change.

An older strategy to combat the gender bias present in the law has been the efforts towards changes in legislation. In the case of rape, the effectiveness of legislation to protect women from the gender bias present in rape trials (such as the introduction of legal reform and guidelines to avoid sex-gender discrimination) depends on several other discourses which are apparently external to the legal process, but which in fact exert a great deal of influence on legal practice. Men and women, rapist and victim, judge, appellant and complainant, all draw from the same social and cultural sources to construct their versions of reality and their identities. The same discourses that teach women what patterns of behaviour are acceptable and appropriate and will win them social and legal esteem, also naturalise abusive behaviour such as male violence.

Because of the interdependence between different social discourses in the creation and dissemination of values, myths and ideologies about gender and sexuality, tougher sentences to rapists are not by themselves a solution to the problem of gender bias in the legal treatment of rape. As Temkin points out, "the problem of rape will not be solved by measures taken within the criminal justice system alone" (1987, p. 206). Legal reform (including the reform of legal language) is not enough to solve the problem of sexual/gender bias in rape trials for two reasons: first because there is an interplay between legal discourse and other discourses which describe and construct rape with similar degrees of bias and sexism; second because all the discourses on rape share the same ideological basis: preconceived naturalised assumptions about sexuality (as discussed in chapters 3 and 4), gender roles and gender relations that are still being traded in culture and in society.

Law reform may be just a part of the fight against gender bias in the law. According to Cameron, "our linguistic habits often reflect and perpetuate ideas about things which are no longer embodied in the law, but which continue to have covert significance in the

culture" (1990, p. 16). The conservative ideas and notions concerning women's social (and sexual) behaviour may not be embodied anymore in our present laws, but they are still present in our social framework, of which the legal system is part.

A good example of the discrepancy between legal reform and social change is section 2 of the British Sexual Offences (Amendment) Act 1976, or the 'rape shield law' enacted by some American states, both of which prevent defence lawyers from questioning rape victims about their previous sexual lives. Despite representing a theoretical shift in the way gender relations are seen by the legal system, these legislations do not correspond either to a change in everyday gender relations between men and women, nor to a decrease in the number of rape cases. Conley and O'Barr (1998) use the work of Gregory Matoesian (1993) to make sense of this apparent contradiction. According to Matoesian, power is both cause and effect of gender relations. In the scope of the legal system, for instance, we could say that men dominate its practices and its discourse because they have power (power as cause of dominance); on the other hand, we could also say that men dominate the legal system, therefore they must have power (power as effect of dominance). Matoesian argues that changing the structure of the legal system addresses just one side of the power coin (legal male power as effect of legal male dominance), but leaves the other one untouched (male power in general as cause of legal male dominance).

### 6.3 Suggestions for further research

This work is by no means exhaustive; it represents one way of looking at the way rape offenders and rape victims are linguistically depicted by the discourse of legal decisions. There are many other linguistic and discursive aspects of the discourse of

legal decisions on cases of rape worthy of investigation, and a lot remains to be done. A critique of the biases present in rape trials also has to go beyond an analysis of legal discourse. Wodak is a critical discourse analyst who advocates a broader context of investigation, from the smallest level of the discourse unit itself and the micro-analysis of the text, to larger contextual levels such as the institution in which the discursive event takes place and society at large. According to her, “because of the specific problem under investigation, we should include other information which relates to our problem, such as other discourses of the same speakers, other events in the same institution, etc. The integration of all these context levels would then lead to an analysis of discourse as social practice” (Wodak 1996:21). In this section I offer some suggestions for further research in other areas of the legal discourse on cases of violence against women, as well as on areas which are intimately related to this discourse type. Some of them are:

- An investigation of the discourse of rape victims and rape offenders, two participants of the rape trial whose voices find little space in legal decisions, for example through narratives and interviews.
  
- An investigation of other discourses produced by the judges who analyse cases of rape, such as through personal interviews. This investigation could indicate if judges are consistent in their positions, if their personal discourse also expresses gender biases, if they are aware of them, if the same ideologies inform both their personal discourses and their official decisions, etc.

- An analysis of narratives and interviews produced by rape survivors who preferred not to report their attacks. Such an investigation could shed light into how these women discursively construct their experiences of forced sex, if they define them as 'rape' or not, if they see themselves as 'victims' or 'villains', etc.
  
- An analysis of the macro-structure of legal decisions, using the situation-evaluation framework developed by Winter (1994). Winter argues that, as it is not possible to say everything about anything, when producing a text we are restricted to saying only what is strictly relevant. In view of that, he believes that linguists should investigate how the discipline of the clause is used for saying less than everything (1994:67). From the perspective of critical discourse analysis, it would be interesting to analyse which lexico-grammatical choices the producers of legal decisions on cases of rape make in order to convey not only a surface, explicit message about the case at hand, but also to trigger in the text consumer hidden ideological messages or common-sensical assumptions about men, women and sexuality which sustain legal interpretation.
  
- An investigation of how legal decisions on cases of rape are used as teaching materials for law students, and to what point law students and law professors are aware of the role played by these texts in the construction, dissemination and maintenance of myths, stereotypes and ideological assumptions about sexual violence among legal practitioners and in society at large.

This research is not looking for a 'guilty' party, the one who is responsible for the bias that entraps both men and women in the judicial discourse on rape. One of the basic

aims of this work is to call for a critical analysis of the linguistic and discursive practices of legal practitioners, which both reflect and constitute the broader social practices in which legal professionals live and operate. This can potentially lead to an understanding of discourse as part of social action, and eventually to discursive and social changes. Concerning the potential for change of critical discourse analysis, Wodak believes that “agents within the institutional structure (both insiders and outsiders) who merely act in a more critically reflective way would make a significant difference.... Critical linguistics, within [institutional domains], may thus have an emancipatory impact on all parties involved” (1996, p. 172).

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## Glossary

**Acquittal:** act of setting an accused person free because he/she has been found not guilty of a crime.

**Appeal:** an application to a person, body, court, or tribunal superior to one which has decided an issue, to reconsider that decision and, if thought fit, to alter it. The result of the appeal may be to affirm, modify, or reverse the decision of the court below (Walker, 1980). An appeal is *allowed* (or *admitted*) or *denied* (or *dismissed*). If an appeal against conviction is allowed, the conviction is *quashed*. An appeal against sentence results in the trial sentence being *upheld* (maintained), *increased* or *reduced*.

**Appellant:** defendant who asks a higher court (court of appeal) to change a decision of a lower court.

**Appellate decision:** the decision produced by a court of appeal.

**Assailant:** aggressor, attacker.

**Attorney-General:** one of the Law Officers, a member of Parliament, who prosecutes for the Crown in certain cases, advises government departments on legal problems and decides if major criminal offences should be tried (Collin, 1992).

**Barrister:** lawyer (especially in England) who can plead or argue a case in one of the higher courts (Collin, 1992).

**CJS:** short for criminal justice system.

**Common-law (or case law):** law created by the courts in the process of deciding the cases before them. The decision of a higher court either lays down the legal principles relevant to the case under consideration (which will have to be followed by lower courts in deciding similar future cases), or follows the existing principles in that branch of the law, and may, in its turn, develop those principles a step further (that is why an



appellate decision makes use of several previous ones to compound its judgement) (Atiyah, 1995).

**Complainant:** person who makes a complaint or who starts proceedings against someone (in a rape trial, the rape victim).

**Concurrent sentence:** where the defendant is convicted of several offences at the same trial, the court has, in general, power to direct that the sentences shall be served concurrently (i.e. together or at the same time). Sentences run consecutively if they follow one upon the other (Rutherford and Bone, 1993).

**Consecutive sentence:** see concurrent sentence.

**Consent:** agreeing that something should happen. In the scope of a rape trial, consent is a major issue because the very definition of rape depends on it, i.e. rape is legally defined as sexual intercourse with a woman without her consent. A frequent line of defence is that the woman consented, and her past moral and sexual character (i.e. her 'promiscuity') may be used as an indication that she probably consented to sex, or that the defendant was led into believing that she would consent.

**Conviction:** finding that a person accused of a crime is guilty (Collin, 1992).

**Corroboration:** evidence which confirms and supports other evidence (Collin, 1992).

**Count:** separate charges against an accused person read out in court in the indictment (Collin, 1992).

**Court of appeal:** civil or criminal court to which a person may go to ask for a sentence to be changed and of which the decisions are binding on the High Court and lower courts (Collin, 1992).

**Cr.App.R.:** short for 'Criminal Appeal Reports', a law report where accounts of criminal proceedings at appeal level (against conviction) are published. This acronym,

together with the year and the volume number, is used in the law reports, as well as by judges and other legal practitioners when referring to previous cases.

**Cr.App.R.(S.):** short for 'Criminal Appeal Reports (Sentencing)', a law report where accounts of criminal proceedings at appeal level (against sentence) are published. This acronym, together with the year and the volume number, is used in the law reports, as well as by judges and other legal practitioners when referring to previous cases.

**Custodial sentence:** in relation to an offender 21 years or over, a sentence of imprisonment and under that age, detention in a young offender institution, etc (Rutherford and Bone, 1993).

**Defendant:** person who is accused of a crime in a criminal case.

**Estranged husband/wife:** man or woman who is no longer living with his/her partner, but who is not yet legally separated or divorced.

**Issue:** the principal (or main) fact on which a conviction is founded.

**Judicial discourse on rape:** from the scope of this investigation, judicial discourse is the discourse produced by judges on legal decisions.

**Law reports:** a published account of a legal proceeding, giving a statement of the facts, and the reasons the court gave for its judgment (Rutherford and Bone, 1993).

**Lord Chancellor:** member of the British government and cabinet who presides over the debates in the House of Lords and is responsible for the administration of justice and the appointment of judges (Collin, 1992).

**Marital rape exemption:** protection given to husbands in England, who until 1991 could not be accused of raping their wives because the English law understood that, by marriage, a woman gave an implicit consent to sex with her husband. Therefore, sexually abusive husbands could at best be prosecuted for other sexual crimes (e.g.

indecent assault) but not for rape. The English marital rape exemption was overturned in a case judged in 1991, and it was abolished in statute in 1994.

**Precedent:** a judgement or decisions of a court of law cited as an authority for deciding a similar set of facts; a case which serves as an authority for the legal principle embodied in its decision. The common law has developed by broadening down from principle to principle (Rutherford and Bone, 1993).

**QC:** Queen's Counsel. Senior British barrister appointed by the Lord Chancellor (Collin, 1992).

**RAD:** short form of reported appellate decision (see chapter 1).

**Rape:** unlawful sexual intercourse with a woman who at the time of the intercourse does not consent, knowing that she does not consent or being reckless as to whether she consents (Sexual Offences (Amendment) Act 1976, s.1(1)) (see note 1, chap. 3).

**Sentence:** legal punishment given by a court to a convicted person (Collin, 1992).

**Sex offence:** "those activities involving sex which are deemed to be outside the law" (Sampson, 1994, p. 1), e.g. rape, indecent assault, unlawful sexual intercourse, incest, etc.

**Solicitor:** (in England and Wales) lawyer who has passed the examinations of the Law Society and has a valid certificate to practice and who gives advice to members of the public and acts for them in legal matters, and who may have right of audience in certain courts (Collin, 1992).

**Trial:** criminal or civil case heard before a judge.

**Trial sentence:** sentence produced by the first instance judge, the one who first heard the case. This sentence may be appealed to a court of appeal (civil or criminal).

**Verdict:** decision of a jury or magistrate.

## **APPENDIX**

CASE 1 REGINA V. LINEKAR

1994 Oct. 21

Swinton Thomas L.J., Morland and Steel JJ.

Crime—Sexual Offences—Rape—Consent—Agreement to sexual intercourse in return for payment—Subsequent failure to pay—Whether consent vitiated by fraudulent promise to pay.

The defendant approached the complainant, who was working as a prostitute. She agreed to have sexual intercourse with the defendant for the sum of £25. After sexual intercourse had taken place the defendant made off without paying. The complainant knocked on the door of a neighbouring house and complained that she had been raped. The police were called. The defendant was arrested and charged with rape. At the trial the complainant gave evidence that sexual intercourse had taken place as a result of a violent assault and that she would not have consented to sexual intercourse unless she had been paid in advance and the defendant had worn a condom. The judge directed the jury that if the complainant had consented to sexual intercourse believing she would be paid but the defendant had never intended to pay the agreed sum then that fraud vitiated the complainant's consent. The jury convicted the defendant of rape and, in reply to a question by the judge, stated that they had reached their verdict on the basis that the defendant never intended to pay and consent was vitiated by the fraud.

On appeal by the defendant—

Held, allowing the appeal, that it was an essential ingredient of rape that the woman did not consent to the act of sexual intercourse with the particular man who penetrated her; that the only types of fraud which could negative consent were frauds as to the nature of the act itself or as to the identity of the agent; that, therefore, the reality of the complainant's consent to sexual intercourse with the defendant was not destroyed by its having been induced by the defendant's false pretence that he would pay her; and that, accordingly, the conviction of rape would be quashed (post pp. 241A, 244G, 246C–D).

Reg. v. Dee (1884) 14 L.R. Ir. 468 and Reg. v. Clarence (1889) 22 Q.B.D. 23 considered.

The following cases are referred to in the judgment:

Papadimitropoulos v. The Queen (1956) 98 C.L.R. 249

Reg. v. Barrow (1868) L.R. 1 C.C.R. 156

Reg. v. Clarence (1889) 22 Q.B.D. 23

Reg. v. Dee (1884) 14 L.R. Ir. 468

Reg. v. Flattery (1877) 2 Q.B.D. 410

Reg. v. Olugboja [1982] Q.B. 320; [1981] 3 W.L.R. 585; [1981] 3 All E.R. 443, C.A.

Rex v. Jackson (1822) Russ. and Ry. 487

Rex v. Williams [1923] 1 K.B. 340, C.C.A.

The following additional cases were cited in argument:

Reg. v. Case (1850) 4 Cox C.C. 220

Reg. v. Morgan [1976] A.C. 182; [1975] 2 W.L.R. 913; [1975] 1 All E.R. 8;

[1975] 2 All E.R. 347, C.A. and H.L.(E.)

Reg. v. Saunders (1838) 8 Car. & P. 265

Reg. v. Young (1878) 38 L.T. 540

I appreciate that article 7 is addressed to administrative authorities. Nevertheless its terms are such that, in application to this case, it amounts to a mandate to the administrative authorities of California and of England to co-operate to secure the prompt return of this boy. The obligation under article 7 is not, expressly or by implication, limited to the central authorities of the jurisdiction from which the child has been removed and of the jurisdiction where the child then is.

I note article 8, namely that anybody

“claiming that a child has been removed ... in breach of custody rights may apply either to the central authority of the child's habitual residence or to the central authority of any other contracting state for assistance in securing the return of the child.”

The words “any other” are, in my view, of significance and clearly cover this jurisdiction, notwithstanding that the boy is not now here.

Article 11 provides: “The judicial or administrative authorities of contracting states shall act expeditiously in proceedings for the return of children.” The terminology is noticeably wide. I consider myself to be under a duty, as the judicial authority of a contracting state, to act expeditiously, as Mr. Setright bids me do this afternoon, in proceedings for the return of this child.

I interpret the language both of the articles of the Convention and of the text of the Act as being deliberately wide in its instruction to this court to co-operate with all other contracting states in making orders which will secure the return of wrongfully taken children; and in this case its duty can be discharged only by making the orders for the boy's initial restoration into his mother's care in England if, as there are substantial grounds for expecting, he does land here with his father during the next few days.

Orders accordingly.  
Costs reserved.  
Legal aid taxation.

Solicitors: Bindman & Partners.

M. B. D.

The Incorporated Council of Law Reporting for England & Wales

APPEAL against conviction.

The appellant, Gareth Linekar, on 10 September 1993 in the Central Criminal Court before Judge Coombe and a jury, was convicted by a majority of 11 to 1 of a single count of rape. On 8 October 1993 he was sentenced by way of a combination order to two years' probation and 100 hours' community service. He appealed against conviction on the grounds that the judge had wrongly directed the jury that they could convict the appellant of rape if, *inter alia*, they were satisfied that he had never intended to pay the complainant for sexual intercourse and that her consent was therefore vitiated by fraud.

The facts of the case are stated in the judgment.

*Jonathan Markson* (assigned by the Registrar of Criminal Appeals) for the appellant.

*Timothy Spencer* for the Crown.

MORLAND J. delivered the judgment of the court. On 10 September 1993 in the Central Criminal Court before Judge Coombe, the appellant was convicted by a majority of 11 to 1 on a single count of rape. On 8 October he was sentenced by way of a combination order to two years' probation and 100 hours' community service. The sentence imposed indicates the unusual facts of the case. The appellant appeals against his conviction by leave of the single judge.

The complainant was a woman of 30 who worked occasionally as a prostitute to supplement her social security benefit. On 21 March 1993 she was working as such outside the Odeon Cinema in Streatham. Some time after midnight she was approached by the appellant who was then aged 17. There was negotiation between the two of them and the sum of £25 was agreed for sexual services. The appellant and the complainant went off to find a suitable place where they could have sexual intercourse. This proved difficult but eventually, after a long period of time, sexual intercourse took place between them on the balcony of a block of flats. After sexual intercourse had taken place the appellant, in breach of the agreement he had made with the complainant, made off without paying.

Immediately the complainant knocked on the door of a neighbouring house. She was distressed, nearly naked and complained that she had been raped. The police were called. The appellant was arrested and, when interviewed, told a number of lies.

The Crown case, based on the evidence of the complainant, was that the act of sexual intercourse took place as a result of a forced violent assault upon her and did not take place with her consent. She said in evidence that she would not have agreed to sexual intercourse until she had been paid in advance and unless the man wore a condom. The case for the Crown was what might be described, if one can describe rape as such, an ordinary rape; that is forcible penetration of the woman without her consent.

The appellant did not give evidence on his own behalf, but cross-examination of the complainant was on the lines that the act of sexual intercourse had been done with the complainant's consent, and that what had happened was that afterwards the appellant had broken his promise to pay her the £25. It seemed clear that the appellant did not in fact have £25 and, as the jury were to find by a verdict, which was in the nature of a special verdict, at the time of sexual intercourse, he did not have any intention of paying even if he had the money to pay.

Before summing up to the jury, discussion took place between counsel and the judge on the basis that a possible conclusion by the jury was that the jury might not have been sure about the evidence of the complainant and there was a halfway house, so to speak, that sexual intercourse had taken place with the consent of the complainant, but that consent had been obtained as a result of, and induced by, the fraud of the appellant; that fraud being a false pretence by him that he had a present intention of paying the £25 that he had promised when the bargain was made.

When the jury returned, they were specifically asked on what basis they found the appellant guilty. The answer that was given by the foreman of the jury was that the basis was that the appellant never intended to pay and consent was vitiated by fraud.

In his summing up, the judge said:

"There is a possible scenario, if I can put it that way, in between those two extremes, and again it is a matter of fact for you to judge, but I want to tell you what the legal position would be. The woman, as I have reminded you just now—and I will go through her evidence in slightly more detail a little later—said, 'I would never go ahead and have sexual intercourse with a man without payment first' . . ."

The judge went on to say:

"It is a real possibility that she decided to go ahead and have sexual intercourse, trusting the man would honour his obligation, and supposing contrary to my second scenario, which would lead to a complete acquittal, you were satisfied so you were sure that the defendant never intended to pay before he penetrated her at all. He tricked her you follow, not forced her because that is scenario number one, but tricked her, well then I am going to tell you that it would be the case or may be the case, that you would take the view that there was no consent at all. That would be consent vitiated by fraud, you follow. She tells you she would never consent to have intercourse and indeed nobody suggested they had intercourse because they were romantically attached or physically affected by each other emotionally, it was a commercial deal, a squalid type no doubt. If the position were that he quite deliberately never intended to pay at the outset, well then the fraud on her is that she was tricked into believing he genuinely intended to pay when she submitted sexually, and therefore it is a matter for you which you would no doubt take the view that the fraud vitiated the consent because her consent was given on the basis he was going to pay up, you follow. . . . If that is the view, then it would be rape because the Crown would have proved lack of consent, you follow, and you may think I say it would be rape that may be putting it too highly, you have got to go on whether he appreciated that his fraud meant that she was not consenting. You have got to be satisfied so you are sure that he knew of it or was reckless about it at the very least, but if you were of that mind then it would still be rape."

The second scenario that was open to the jury to conclude was that having had sexual intercourse the appellant changed his mind, decided not to pay her the agreed £25 and made off. In that case, as the judge made clear to the jury, the appellant would be not guilty. In the summing up the judge said:

"It would help me, if you take the view he is guilty at all, if you would indicate that he is guilty because he forced himself upon the

woman or that he is guilty because he did have intercourse without her consent, her consent being vitiated by fraud.”

The reason the judge asked the jury to come with, in effect, a special verdict, was so that he could sentence the appellant in accordance with the finding of the jury, and it was for that reason that the sentence of the combination order was imposed by the judge.

This court is indebted to both counsel for their research. Mr. Spencer for the Crown realistically said to us that he anticipated that he would have difficulty in upholding the conviction.

Before the judge there was argument, and cases were cited before him, but the judge realised that the matter was of considerable legal difficulty and anticipated that the result of his direction might well, and understandably, reach this court.

The problem is highlighted, for example, in the Fifteenth Report of the Criminal Law Revision Committee on Sexual Offences, dated 30 December 1983 (Cmd. 9213). It is worth quoting paragraph 2.25 of the Report, at p. 496:

“We are, however, concerned about the precision of the distinction that can be drawn between fraud which is sufficient to vitiate consent and other types of fraud. This concern has been increased by a recent decision of the Court of Appeal that the issue of consent is a question of fact for the jury and that consent should be given its ordinary meaning.”

That case is *Reg. v. Olugboja* [1982] Q.B. 320, where the court indicates that in certain cases it was of the view that the decisions could be explained by a vitiation of consent by fraud. The Committee went on to say:

“At one extreme, fraud as to the nature of the act is clearly accepted as rape; while, at the other, a man who promises a woman a fur coat in return for sexual intercourse, with no intention of fulfilling his promise, would not generally be regarded as committing rape. It is, however, in our opinion inherently unsatisfactory to leave what constitutes an offence to be determined on the facts of each case. We recommend, therefore, that it should be expressly stated in the legislation which cases of consent obtained by fraud amount to rape. Somewhere a line must be drawn. We would include within rape those cases that before 1976 clearly were rape, namely fraud as to the nature of the act and impersonation of a husband. We see no reason to distinguish between consent obtained by impersonating a husband and consent contained by impersonating another man, so that latter case should also constitute rape. All other cases of fraud should be dealt with under section 3 of the 1956 Act and should not amount to rape.”

The reference to section 3 of the Act of 1956 is the procurement of sexual intercourse by false pretences.

The value of the paragraph which we have quoted from the Fifteenth Report of the Criminal Law Revision Committee is that it was a Committee of which Lawton L.J. was the chairman and among its members were Waller L.J., Lloyd J., McCullough J. and the future Hazan J. We venture to suggest that the recommendation in that paragraph does represent the law as it now is, and has been probably for over a century.

An essential ingredient of the offence of rape is the proof that the woman did not consent to the actual act of sexual intercourse with the particular man who penetrated her. If the Crown prove that she did not consent to sexual intercourse, rape is proved. That ingredient is proved in the so called “medical cases.” The victim did not agree in those cases to sexual intercourse. In *Reg. v. Flattery* (1877) 2 Q.B.D. 410, she agreed to a surgical procedure which she hoped would cure her fits. In *Reg. v. Williams* [1923] 1 K.B. 340, she agreed to a physical manipulation which would provide her with extra air supply to improve her singing.

In our judgment, it is the non-consent to sexual intercourse rather than the fraud of the doctor or choir master that makes the offences rape. Similarly, that ingredient is not proved in the husband impersonation cases because the victim did not consent to sexual intercourse with the particular man who penetrated her. We venture to suggest that at common law it is immaterial whether the penetrator is impersonating a husband, a cohabitee or a lover, as is supported by the Criminal Law Revision Committee in the paragraph that we have quoted.

In the 19th century, English judges got themselves into somewhat of a tangle in impersonation cases. In *Rex v. Jackson* (1822) Russ. and Ry. 487, a court of 12 judges decided by eight to four that carnal knowledge of a woman whilst she was under the belief that the man is her husband was not rape. In *Reg. v. Barrow* (1868) L.R. 1 C.C.R. 156, a court of five judges took the same view contrary to the opinion of the trial judge, Kelly C.B. In that case Bovill C.J., giving a judgment with which Channell B., Byles J., Blackburn J. and Lush J. concurred, said, at p. 158:

“It does not appear that the woman, upon whom the offence was alleged to have been committed, was asleep or unconscious at the time when the act of connection commenced. It must be taken, therefore, that the act was done with the consent of the prosecutrix, though that consent was obtained by fraud. It falls therefore within the class of cases which decide that, where consent is obtained by fraud, the act done does not amount to rape.”

In so far as that case is still good law, it supports the argument of the appellant. In *Reg. v. Flattery*, 2 Q.B.D. 410, a court of five judges expressed dissatisfaction with the decision in *Reg. v. Barrow*, L.R. 1 C.C.R. 156. It needed the good sense of the judges in Ireland to resolve the problem in *Reg. v. Dee* (1884) 14 L.R.Ir. 468. The Court of the Crown Cases Reserved of Ireland consisted of six judges including May C.J. and Palles C.B., May C.J. having been the trial judge. The facts of that case are set out shortly in the judgment of May C.J., at pp. 475-476:

“There is not, I think, any doubt or dispute as to the facts and circumstances of the case. Upon the report of the judge, who was myself, and the findings of the jury, it is, I think, established that Judith Gorman, wife of one J. Gorman, who was absent (having gone out to fish), lay down upon a bed in her sleeping-room in the evening, when it was dark; that the prisoner came into the room, impersonating her husband, lay down upon her and had connexion with her; that she did not at first resist, believing the man to be her husband, but that, on discovering that he was not her husband, which was after the commencement but before the termination of the proceeding, her consent or acquiescence terminated, and she ran

A the woman was deceived, as she said to the prisoner in his presence and hearing, when he came into the room, 'You are soon home tonight,' to which he made no reply. At the time my own opinion, founded upon well-known cases in England, was that the prisoner was not guilty of rape, but at the request of the counsel for the Crown I left certain questions to the jury, and, upon their findings, directed them to find a verdict of guilty, reserving the case for consideration of the court, which is now called upon to decide the question which arises."

B The Chief Justice then went on to consider the various English authorities and then said, at pp. 478-479:

C "Now, rape being defined to be sexual connexion with a woman without her consent, or without, and therefore against, her will, it is essential to consider what is meant and intended by consent. Does it mean an intelligent, positive concurrence of the will of the woman, or is the negative absence of dissent sufficient? In these surgical cases it is held that the submission to an act believed to be a surgical operation does not constitute consent to a sexual connexion, being of a wholly different character. This is no consensus quoad hoc. In the case of personation there is no consensus quoad hanc personam."

D In our judgment, applying those dicta to the facts of the present case, here there was consent by the prostitute to sexual intercourse, consensus quoad hoc. There was consent by the prostitute to sexual intercourse with this particular appellant consensus quoad hanc personam. The so-called "medical cases," such as *Reg. v. Flattery*, 2 Q.B.D. 410 and *Rex v. Williams* [1923] 1 K.B. 340 are examples of no consensus quoad hoc. The husband impersonation cases are examples of no consensus quoad hanc personam.

E Palles C.B., in his very learned judgment in *Reg. v. Dee*, 14 L.R.Ir. 468, 488, said:

F "I think it follows that . . . an act done under the bona fide belief that it is another act different in its essence is not in law the act of the party. That is the present case—a case which it is hardly necessary to point out is not that of consent in fact sought to be avoided for fraud, but one in which that which took place never amounted to consent. The person by whom the act was to be performed was part of its essence. The consent of the intellect, the only consent known to the law, was the act of the husband only, and of this the prisoner was aware."

G In our judgment, the ratio of *Reg. v. Dee* is the absence of consent and not the existence of fraud which makes it rape.

H *Reg. v. Dee* was followed in 1885 by the Criminal Law Amendment Act 1885 (48 & 49 Vict. c. 69) which is entitled: "An Act to make further provision for the protection of women and girls, the suppression of brothels and other purposes." Under section 3 of that Act it was enacted:

"Any person who— . . . (2) By false pretences or false representations procures any woman or girl, not being a common prostitute or of known immoral character, to have unlawful carnal connexion, either within or without the Queen's dominions; . . . shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding

A two years, with or without hard labour. Provided that no person shall be convicted of an offence under this section upon the evidence of one witness only, unless such witness be corroborated in some material particular by evidence implicating the accused."

B It should be noted that under that section, in contradistinction to rape where life imprisonment was the sentence, the maximum sentence was one of two years and also, unlike rape, corroboration was required as a matter of law.

C It was in section 4 of the same statute that it was enacted in a form that is declaratory of the common law:

D "Whereas doubts have been entertained whether a man who induces a married woman to permit him to have connexion with her by personating her husband is or is not guilty of rape, it is hereby enacted and declared that every such offender shall be deemed to be guilty of rape."

E Under section 9 of that Act it was enacted that: "If upon the trial of any indictment for rape, . . . the jury shall be satisfied that the defendant is guilty of an offence under section 3"—that is procurement of sexual intercourse by false representations—"but are not satisfied that the defendant is guilty of the felony. . . . the jury may acquit" of rape and find the defendant guilty of the misdemeanour of procuring sexual intercourse by false pretences. Although the wording of the sections is slightly different, they foreshadow similar sections in the Sexual Offences Act 1956, and the offence of procuring sexual intercourse by false representation remains, in the proper case and subject to the appropriate direction for the requirement as a matter of law for corroboration, an alternative verdict that a jury can return.

F In 1888 was decided *Reg. v. Clarence* (1889) 22 Q.B.D. 23. This was the well known case of the husband who knew that he was suffering from gonorrhoea and his wife did not, and he quite deliberately had sexual intercourse with her with the result that the disease was communicated to her. He was convicted of an indictment charging him with inflicting grievous bodily harm under section 20, and of an assault occasioning actual bodily harm under section 47 of the Offences Against the Person Act 1861. The court of 13 judges, by a majority of nine to four, decided that Clarence was not guilty under either section.

G The importance of *Reg. v. Clarence*, in our judgment, is that it exposes the fallacy of the submission that there can be rape by fraud or false pretences. Wills J. said, at p. 27:

H "That consent obtained by fraud is no consent at all is not true as a general proposition either in fact or in law. If a man meets a woman in the street and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud, but it would be childish to say that she did not consent. In respect of a contract, fraud does not destroy the consent. It only makes it revocable."

Stephen J. said, at p. 43:

"It seems to me that the proposition that fraud vitiates consent in criminal matters is not true if taken to apply the fullest sense of the word, and without qualification. . . . Many seductions would be rapes, and so might acts of prostitution procured by fraud, as for instance by promises not intended to be fulfilled."



Stephen J. continued, at pp. 43-44:

"These illustrations appear to shew clearly that the maxim that fraud vitiates consent is too general to be applied to these matters as if it were absolutely true. . . . The only cases in which fraud indisputably vitiates consent in these matters are cases of fraud as to the nature of the act done. As to fraud as to the identity of the person by whom it is done, the law is not quite clear. In *Reg. v. Flattery*, in which consent was obtained by representing the act as a surgical operation, the prisoner was held to be guilty of rape. In the case where consent was obtained by the personation of a husband, there was before the passing of the Criminal Law Amendment Act of 1885 a conflict of authority. The last decision in England, *Reg. v. Barrow*, decided that the act was not rape, and *Reg. v. Dee*, decided in Ireland in 1884, decided it was. The Criminal Law Amendment Act of 1885 'declared and enacted' that thenceforth it should be deemed to be rape, thus favouring the view taken in *Reg. v. Dee*. . . . they justify the observation that the only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to in fact into a rape are frauds as to the nature of the act itself, or as to the identity of the person who does the act. There is abundant authority to shew that such frauds as these vitiate consent both in the case of rape and in the case of indecent assault. I should myself prefer to say that consent in such cases does not exist at all, because the act consented to is not the act done."

With that sentence, this court respectfully agrees. Stephen J. went on to say, at p. 44:

"Consent to a surgical operation or examination is not a consent to sexual connection or indecent behaviour. Consent to connection with a husband is not consent to adultery. I do not think that the maxim that fraud vitiates consent can be carried further than this in criminal matters. It is commonly applied to cases of contract, because in all cases of contract the evidence of a consent not procured by force or fraud is essential, but even in these cases care in the application of the maxim is required, because in some instances suppression of the truth operates as fraud, whereas in others at least a suggestion of falsehood is required. The act of intercourse between a man and woman cannot in any case be regarded as the performance of a contract."

Then, at the bottom of p. 44: "The woman's consent here was as full and conscious as consent could be. It was not obtained by any fraud as to the nature of the act or as to the identity of the agent." Those two last sentences, in our judgment, apply clearly to the facts of this case.

Moving to more recent times, there is the highly persuasive authority of *Papadimitriopoulos v. The Queen* (1956) 98 C.L.R. 249, a decision of the High Court of Australia. The court was presided over by Sir Owen Dixon C.J., and consisted of McTiernan, Webb, Kitto and Taylor J.J. The headnote reads:

"Rape is carnal knowledge of a woman without her consent. Carnal knowledge is the physical act of penetration. It is the consent to such physical act of penetration which is in question upon an indictment for rape. Such a consent demands a penetration as to what

of what he is doing. Once the consent is comprehending and actual, the inducing causes cannot destroy its reality and leave the man guilty of rape. Where a woman consented to sexual intercourse under the belief, fraudulently induced by the man, that she was married to him. *Held*, that the man was not guilty of rape."

The facts of that case were that the complainant believed that she had gone through a marriage with the appellant. In the judgment of the court said, at pp. 260-261:

"It must be noted that in considering whether an apparent consent is unreal it is the mistake or misapprehension that makes it so. It is not the fraud producing the mistake which is material so much as the mistake itself. But if the mistake or misapprehension is not produced by the fraud of the man, there is logically room for the possibility that he was unaware of the woman's mistake so that a question of his mens rea may arise. So in *Reg. v. Lambert* (1919) V.L.R. 205, Cussen J. says:—'It is plain that, though in these cases the question of consent or non-consent is primarily referable to the mind of the woman, if she has really a mind, yet the mind of the man is also affected by the facts which indicate want of consent or possible want of capacity to consent'. For that reason it is easy to understand why the stress has been on the fraud. But that stress tends to distract the attention from the essential inquiry, namely, whether the consent is no consent because it is not directed to the nature and character of the act. The identity of the man and the character of the physical act that is done or proposed seem now clearly to be regarded as forming part of the nature and character of the act to which the woman's consent is directed. That accords with the principles governing mistake vitiating apparent manifestations of will in other chapters of the law."

"In the present case the decision of the majority of the Full Court extends this conception beyond the identity of the physical act and the immediate conditions affecting its nature to an antecedent inducing cause—the existence of a valid marriage. In the history of bigamy that has never been done. The most heartless bigamist has not been considered guilty of rape. Mock marriages are no new thing. Before the Hardwicke Marriage Act it was a fraud easily devised and readily carried out. But there is no reported instance of an indictment for rape based on the fraudulent character of the ceremony. No indictment of rape was founded on such a fraud. Rape, as a capital felony, was defined with exactness, and although there has been some extension over the centuries in the ambit of the crime, it is quite wrong to bring within its operation forms of evil conduct because they wear some analogy to aspects of the crime and deserve punishment. The judgment of the majority of the Full Court of the Supreme Court goes upon the moral differences between marital intercourse and sexual relations without marriage. The difference is indeed so radical that it is apt to draw the mind away from the real question which is carnal knowledge without consent. It may well be true that the woman in the present case never intended to consent to the latter relationship. But, as was said before, the key to such a case as the present lies in remembering that it is the penetration of the woman's body without her consent to such

B 1994 June 29, 30;  
July 1, 4, 5, 12

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kind must be punished under other heads of the criminal law or not at all: they are not rape. To say that in the present case the facts which the jury must be taken to have found amount to wicked and heartless conduct on the part of the applicant is not enough to establish that he committed rape. To say that in having intercourse with him she supposed that she was concerned in a perfectly moral act is not to say that the intercourse was without her consent. To return to the central point; rape is carnal knowledge of a woman without her consent; carnal knowledge is the physical fact of penetration; it is the consent to that which is in question; such a consent demands a perception as to what is about to take place, as to the identity of the man and the character of what he is doing. But once the consent is comprehending and actual the inducing causes cannot destroy its reality and leave the man guilty of rape."

C

Respectfully applying those dicta to the facts of the present case, the prostitute here consented to sexual intercourse with the appellant. The reality of that consent is not destroyed by being induced by the appellant's false pretence that his intention was to pay the agreed price of £25 for her services. Therefore, he was not guilty of rape.

If anything, the appellant was guilty of an offence under section 3 of the Act of 1956 which was not an alternative that was put to this jury. In our judgment, the appeal must be allowed, and the conviction and sentence quashed.

E Appeal allowed.

Conviction quashed.

Solicitors: Crown Prosecution Service, Youth Division.

[Reported by MRS. CLARE BARSBY, Barrister]

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Financial Services—Restricted information—Disclosure—Securities and Investments Board allegedly disclosing restricted information—Whether disclosure actionable at suit of persons from whom it was obtained or to whom it related—Whether disclosure made in bad faith—Financial Services Act 1986 (c. 60), ss. 179, 187(3)

The second plaintiff made a loan of £5m. from pension funds of which it was the trustee to the first plaintiff in respect of which the beneficiaries of the pension funds brought an action against the plaintiffs and others. The Securities and Investment Board ("the S.I.B.") initiated an investigation into the management of the funds and the loan in the course of which it obtained information from the auditors of the funds and disclosed to them certain information as permitted by section 180(1)(g) of the Financial Services Act 1986.<sup>1</sup> The plaintiffs alleged that the S.I.B. had also wrongfully disclosed information within section 179 of the Act of 1986 as to the reliability of the auditors' reports to the beneficiaries of the pension funds, but for which disclosure the plaintiffs would have reached a settlement of the beneficiaries' action upon terms which would not have required either of them to make any payment to the funds. The plaintiffs brought an action against the S.I.B. under section 187(3) of the Act of 1986 in respect of two alleged contraventions of section 179 which they claimed had been committed in bad faith.

On the S.I.B.'s summons to determine whether disclosure of restricted information was actionable at the suit of persons from whom it was obtained or to whom it related without the consent of those persons to disclosure and to strike out the action:—

Held, striking out the action, that section 179 of the Financial Services Act 1986, properly construed, did not confer on those whose consent was required for the disclosure of restricted information a personal cause of action for disclosure without their consent; that the disclosure of non-restricted information by the S.I.B. to assist the beneficiaries in deciding on the appropriate course in their litigation against the plaintiffs accorded with its express role under the Act of 1986, namely the protection of the interests of investors and customers of financial services and there was no evidence that the S.I.B. had acted in bad faith within section 187(3) of the Act of 1986; that the disclosures complained of concerned opinions about, and possible inferences from, information which on the facts did not constitute restricted information, and in any event the information had already entered the public domain so that repetition of it could not amount to

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<sup>1</sup> Financial Services Act 1986, s. 179: "(1) Subject to section 180 below, information which is restricted information for the purposes of this section . . . shall not be disclosed by . . . [the primary recipient] . . . without the consent of the person from whom the primary recipient obtained the information and if different, the person to whom it relates." S. 187(3): "No designated agency or transferee body . . . shall be liable in damages for anything done or omitted in the discharge or purported discharge of the functions exercisable by the agency by virtue of a delegation order or, as the case may be, the functions exercisable by the body by virtue of a transfer order unless the act or omission is shown to have been in bad faith."

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received any express promise, undertaking or offer of immunity. It is at this point that I must return to the affidavit of Mrs. Hyde of the Crown Prosecution Service. After her conference with police officers, she knew:

"that the police wanted to use the applicant as a prosecution witness and had stated to him that he would not be prosecuted for offences associated with the murder of Ronald Eades."

In my judgment, we are entitled to treat that evidence as true and should do so. We should disregard the evidence of the police officers to the contrary.

It is then necessary to see how far the disputed evidence on behalf of the applicant supports Mrs. Hyde's statement. Perhaps the high point is in the affidavit of the applicant's father. He says that in the early evening of March 18, P. C. O'Brien told him:

"that George would be released later on after he had made a voluntary statement concerning the matter, and that he was not going to be charged with anything because he was going to be their main prosecution witness."

The applicant himself says in this statement that on that day he was told, "We're definitely going to have you on our side." It is those passages which I think we are entitled to treat as truthful in the light of Mrs. Hyde's affidavit. In my judgment, although not, as he has since admitted, a stranger to crime, it was clearly an abuse of process for him to be prosecuted subsequently. The impression created was not dispelled for over five weeks, during which period he gave repeated assistance to the police. This case, I think, be regarded as quite exceptional. The justices were bound to treat it as one of abuse of process.

I would quash the committal of the applicant for the section 4(1) offence.

BUCKLEY J.: I agree.

CASE 2

Application granted.

Solicitors: Bernstein Garcia for the applicant. Crown Prosecution Service, Croydon.

ATTORNEY-GENERAL'S REFERENCE (No. 3 of 1993) (W)

COURT OF APPEAL (The Lord Chief Justice (Lord Taylor), Mr. Justice Henry and Mr. Justice Blofeld): March 11, 1993

Court of Appeal—Jurisdiction—Sentence—Sexual Offence—Rape—Young Offender—Whether Court Has Jurisdiction to Review Reference by Attorney-General—Magistrate Courts' Act 1980 (c.43), s.24, as amended—Criminal Justice Act 1988 (c.33), ss.35(1)(a), 36.

Sentence—Sexual Offences—Rape—Young Offender—Review of Non-Custodial Sentence.

By section 24 of the Magistrates' Courts Act 1980, as amended:

"Where a person under the age of 18 years appears or is brought before a

magistrates' court on an information charging him with an indictable offence other than homicide, he shall be tried summarily, unless—he has attained the age of 14 years and the offence is such as is mentioned in subsection (2) of section 53 of the Children and Young Persons Act 1933 (under which young persons convicted on indictment of certain grave crimes may be sentenced to be detained for long periods) and the court considers that if he is found guilty of the offence it ought to be possible to sentence him in pursuance of that subsection . . ."

By section 35(3) of the Criminal Justice Act 1988, "This Part of this Act applies to any case in which sentence is passed on a person—(a) for an offence triable only on indictment . . ."

By section 36: "(1) If it appears to the Attorney-General—(a) that the sentencing of a person in a proceeding in the Crown Court has been unduly lenient; and (b) that the case is one to which this Part of this Act applies, he may, with leave of the Court of Appeal, refer the case to them to review the sentencing of that person . . ."

The offender, aged 15 and of previous good character, was convicted of rape and indecent assault on a 15-year-old girl. He was made the subject of a supervision order for three years on condition that he attend a specified activities programme. His parents were ordered to pay £500 compensation to the complainant victim. The Attorney-General applied under section 36 of the Criminal Justice Act 1988 for a review of the sentence, on the ground that it was unduly lenient, in view, *inter alia*, of the aggravating features of the case. A preliminary point was taken on behalf of the offender that the Court of Appeal had no jurisdiction to entertain the application on the ground that since under section 24 of the Magistrates' Courts Act 1980 a person under 18 may be tried summarily in some circumstances for an indictable offence, any such offence cannot be an offence which is triable "only on indictment."

Held: (1) the statutory offence of rape provided in Schedule 1 to the Sexual Offences Act 1956 only for penalty for conviction on indictment, and since rape did not figure in Schedule 1 to the Magistrates' Courts Act 1980, that latter Act did not apply to the instant case. Therefore, the Court of Appeal did have jurisdiction under section 35(3)(a) of the Criminal Justice Act 1988 and the Attorney-General was entitled to apply under section 36 of that Act to refer the sentence to the Court and leave would be granted.

(2) In view of the aggravating features of the offences and the traumatic effect on the victim and the fact that the offender did not plead guilty; nevertheless, despite his age and previous good character, the offences were so serious that only a custodial sentence was justified. Thus the Court would quash the sentence passed and substitute an order that the offender be detained for a period of two years pursuant to section 53(2) of the Children and Young Persons Act 1933.

*Billam* (1986) 82 Cr.App.R. 347, [1986] 1 All E.R. 985 and dictum of Lawton, L.J. in *Bradburn* (1985) 7 Cr.App.R. (S.) 180, 183 and *Attorney-General's Reference* (No. 4 of 1989) [1990] 1 W.L.R. 41 applied.

[For s.24 of the Magistrates' Courts Act 1980, see *Archbold* (1993) para. 1-69, for ss.35, 36 of the Criminal Justice Act 1988, see *ibid.* paras. 7-293, 294. For s.53 of the Children and Young Persons Act 1933, see *ibid.* para. 5-332.]

Reference.

This was an application by the Attorney-General under section 36 of the Criminal Justice Act 1988 for leave to refer a sentence which he regarded as unduly lenient. On February 5, 1993, in the Crown Court at Newport (Gwent) (Judge Prosser), the offender, Richard Kenneth W, aged 15, was made the subject of a supervision order for three years, with a condition that he attended a specified activities programme

concurrent after his conviction of rape (count 1) and indecent assault (count 2) on a 15-year-old girl. His parents were ordered to pay £500 compensation to the complainant victim.

The facts appear in the judgment.

The grounds of the application were that the following aggravating features existed in the case—(1) the complainant's age; (2) the fact that this was her first experience of sexual intercourse; (3) the oral sex; and (4) the traumatic effect the incident had on the complainant.

The following additional cases were cited in argument: *Bristow* (1990) 12 Cr. App. R. (S.) 632, *Hallett* (1990) 12 Cr. App. R. (S.) 552, *Roberts and Roberts* (1982) 74 Cr. App. R. 242, [1982] 1 All E. R. 609 and *Trainor and Mottram* (1988) 9 Cr. App. R. (S.) 440.

*John Nutting* for the Attorney-General.

*Patrick Harrington* (assigned by the Registrar of Criminal Appeals) for the offender.

**THE LORD CHIEF JUSTICE:** This is an application by Her Majesty's Attorney-General pursuant to section 36 of the Criminal Justice Act 1988. He applies to refer to this court a sentence he regards as being unduly lenient.

A preliminary point has been taken by Mr. Harrington on behalf of the offender to the effect that this court does not have jurisdiction to entertain this application. It is therefore necessary briefly to look at the statutory provisions which create the power in this court to review sentences on a reference by the Attorney-General.

Section 36 of the Criminal Justice Act 1988, so far as relevant, provides:

"(1) If it appears to the Attorney-General—(a) that the sentencing of a person in a proceeding in the Crown Court has been unduly lenient; and (b) that the case is one to which this Part of this Act applies, he may, with the leave of the Court of Appeal, refer the case to them for them to review the sentencing of that person . . ."

Section 35 of the Act defines the scope of section 36 applications, and provides as follows:

"(1) A case to which this Part of this Act applies may be referred to the Court of Appeal under section 36 . . ."

"(3) This Part of this Act applies to any case in which sentence is passed on a person—(a) for an offence triable only on indictment . . ."

The submission which is made to us turns upon that phrase "triable only on indictment." It is submitted that different statutory provisions apply to indictable offences alleged to have been committed by persons under the age of 18 from those applicable to adults. Mr. Harrington has referred us in particular to section 24 of the Magistrates' Courts Act 1980 as amended. That provides:

"(1) Where a person under the age of 18 years appears or is brought before a magistrates' court on an information charging him with an indictable offence other than homicide, he shall be tried summarily unless—(a) he has attained the age of 14 and the offence is such as is mentioned in subsection (2) of section 53 of the Children and Young Persons Act 1933 (under which young persons convicted on indictment of certain grave crimes may be sentenced to be detained for long periods) and the court considers that if he is found guilty of the offence it ought to be possible to sentence him in pursuance of that subsection. . . ."

The submission which is made is this, that since under section 24 of the 1980 Act a

person under 18 may be tried summarily in some circumstances for an indictable offence, therefore any such offence cannot be an offence which is triable "only on indictment."

If that submission were right, the ludicrous situation would exist that the only sentences which the Attorney-General could refer under section 36 would be sentences for homicide. All other indictable offences would escape the net created by the phrase "triable only on indictment," because under section 24 of the 1980 Act persons under 18 could, in some circumstances, be tried summarily for them.

The basic fallacy in that submission is to approach this issue by consideration of the offender rather than the offence. Fundamental to our criminal justice system is the classification of offences which, under section 14 of the Criminal Law Act 1977, was defined as being within three categories. That provision was repealed by the Magistrates' Courts Act 1980, but the division into three categories was re-enacted. The three categories are, first, offences triable only summarily; secondly, offences triable either way; and thirdly, offences triable only on indictment.

So far as that third category is concerned, the position is, in our view, accurately summarised in *Blackstone's Criminal Practice* (1992) at p. 975, as follows dealing with statutory offences:

"The enactment creating the offence will prescribe the maximum penalty. If the statute provides for a maximum penalty imposable on summary conviction and does not provide for a penalty on conviction on indictment, then the offence is summary. If the statute provides for one penalty on summary conviction and a different (greater) penalty on conviction on indictment, then the offence is triable either way. If the statute provides only for a penalty on conviction on indictment, then the offence is triable only on indictment, unless the offence is listed in the Magistrates' Courts Act 1980, Schedule 1."

Rape is a statutory offence under section 1 of the Sexual Offences Act 1956. The penalty for rape is prescribed in the First Schedule to that Act. It provides only for a penalty for conviction on indictment. Rape does not figure in Schedule 1 of the Magistrates' Courts Act 1980.

In those circumstances rape is an offence triable only on indictment, in our judgment. We are grateful to Mr. Harrington for taking what was an ingenious point and arguing it well. But, in our judgment, it is not well-founded. Accordingly, we are satisfied that we do have jurisdiction here, and that the Attorney-General is entitled to refer this sentence to the court.

We grant leave in this particular case.

The offender's name is Richard Kenneth Walbyoff. On January 12, 1993, he was convicted on one count of rape and one count of indecent assault, after a trial at Cardiff Crown Court. The case was then adjourned for the preparation of a pre-sentence report, as is required under the Criminal Justice Act 1991.

On January 22, the matter came before the trial judge again and full mitigation was advanced on behalf of the offender. That included the oral evidence, as well as the written evidence in the pre-sentence report, of the probation officer. The effect of the pre-sentence report and the oral evidence was to recommend strongly to the learned judge that in this case a community sentence would be appropriate.

The learned judge was clearly troubled by the case. He adjourned it further and on February 5 the matter came before him again. He then sentenced the offender at Newport Crown Court in this way: on each count he made a three-year supervision order with a condition that the offender attend a special activity programme—that programme had been explained and advocated by the probation officer; the parents

of the offender were ordered to pay £500 compensation to the victim under the provisions of section 55 of the Children and Young Persons Act 1933.

The circumstances which gave rise to the prosecution were these. A girl called Sarah Jane Evans, who was 15 years and one month at the time of the offence, was at the same school as this offender. The offender was born on October 1, 1977, and the offence was committed on his 15th birthday.

On that day the victim left school in Cwmbran at 3.45 in the afternoon. She was on her way home with her brother and a friend. The offender called out to her from an embankment near some woods. She went up to him to see what he wanted. He told her to come with him. She refused. He then put his arm round her neck in a headlock and pulled her towards some trees. She struggled but to no avail.

In the woods the offender began to kiss the victim, undid her blouse and fondled her breasts. She did not say anything by way of objection at that stage. The offender then began to pull down her knickers. She told him that she was menstruating and told him to stop. He refused. Holding her by the shoulder he managed to put his penis inside her vagina, although not fully, and he hurt her in doing so. He withdrew without ejaculating.

At that stage the victim said she wanted to go home. But the offender pushed her head down and forced her to have oral sex with him; not for long, but he did require her to put his penis in her mouth. Again he did not ejaculate.

He then allowed the victim to leave the woods. She did not tell her parents as she was scared, but she did tell a friend, and next day told her tutor, and eventually the headmaster of the school.

The offender was interviewed by the police. He admitted the sexual activities, except for the insertion of his penis into the girl's vagina, claiming that she had consented to everything that had taken place between them and he maintained that suggestion by his counsel through cross-examination of the girl at the trial, and in his own evidence on oath.

The girl was examined by a doctor, who found that the vaginal introitus was red and tender and there was a tear of the hymen consistent with some penetration but not full sexual intercourse.

The Attorney-General submits that there are a number of aggravating features in this case: first of all, the age of the victim; secondly, that this was her first experience of any penetration of her private parts; thirdly, that the victim was submitted to the further indignity of being forced to suck the offender's penis; fourthly, the traumatic effect which the incident has had upon her.

That was evidenced by a psychiatric report from Dr. Jasper dated January 19, 1993, which was before the learned judge. Dr. Jasper examined the victim on four occasions prior to the offender being sentenced. The first occasion was in December, three months after the rape. She found that the victim was then suffering from a post-traumatic stress disorder which, she said, includes:

"symptoms of flashback (re-experiencing the event), intrusive thoughts and images relating to the traumatic event, nightmares, acute disturbance, depression, anxiety and irritability, all of which Sarah has experienced since the rape."

The report stated that the symptoms were persisting, and at one stage in December it was thought the victim would need to be admitted to a psychiatric unit. That was avoided, but the report concludes: "We would anticipate her receiving treatment for many months to come."

That was all before sentence, and it has to be said that national publicity since can hardly have helped the girl.

The mitigating features which were relied upon are, principally the age of the offender and his previous good character.

The Attorney-General submits that this sentence was unduly lenient, because rape, particularly when accompanied by aggravating features such as were present in this case, should, save in wholly exceptional cases, attract a custodial sentence, even in the case of a juvenile of the offender's age. The imposition of a custodial sentence, it is submitted, is required to mark the gravity of the offence, to emphasise public repugnance for such offences, to serve as a warning to others, to punish the offender and for the protection of women and girls. Undoubtedly, it is submitted, that puts the offence into the category which is defined by section 1(2)(a) of the Criminal Justice Act 1991 as being so serious that only a custodial sentence can be justified. Here, it is submitted on behalf of the Attorney-General, there were no exceptional circumstances present which could have justified the sentence imposed by the learned judge.

We were referred to a number of authorities, but it is sufficient to refer only to two. The leading case in regard to the level of sentencing for rape is *Billam* (1986) 82 Cr. App. R. 347, [1986] 1 All E.R. 985. In that case the Lord Chief Justice, Lord Lane, gave guidance as to the proper level of sentencing for this kind of offence. He said this at p. 350 and p. 987:

"For rape committed by an adult [one must appreciate he was talking of adults] without any aggravating or mitigating features, a figure of five years should be taken as the starting point in a contested case."

The learned Lord Chief Justice then went on to define some features—not an exhaustive list, but some—which would aggravate the offence and therefore require a sentence to be longer. He identified eight, and of those it is quite clear that three applied here (at p. 350 and p. 988b respectively):

"(6) the victim is subjected to further sexual indignities or perversions; (7) the victim is either very old or very young; (8) the effect upon the victim, whether physical or mental, is of special seriousness."

The learned Lord Chief Justice then said:

"Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point."

Later in his judgment the Lord Chief Justice turned to sentencing in respect of juveniles, and he said this at p. 351 and p. 988g:

"In the case of a juvenile, the Court will in most cases exercise its power to order detention under the Children and Young Persons Act 1933, section 53(2). In view of the procedural limitations to which the power is subject, it is important that a Magistrates' Court dealing with a juvenile charged with rape should never accept jurisdiction to deal with the case itself, but should invariably commit the case to the Crown Court for trial to ensure that the power is available."

We refer also to *Bradbouri* (1985) 7 Cr. App. R. (S.) 180. The relevance of that case is that in the course of it Lawton L.J., giving the judgment of the Court, indicated the criteria by which the Court should approach the question whether an offence was so serious that a non-custodial sentence cannot be justified. He said it comes to this (at p. 183):

"... the kind of offence which when committed by a young person would make

right-thinking members of the public, knowing all the facts, feel that justice had not been done by the passing of any sentence other than a custodial one."

That dictum was adopted by this Court in relation to the Criminal Justice Act 1991 in *Baverstock* (1993) 96 Cr. App. R. 435, [1993] 1 W.L.R. 202.

We understand the reluctance of the trial judge, after strong recommendations for a community sentence from the probation service, to impose a custodial sentence on a 15-year-old boy of previous good character. His approach did not, in our judgment, deserve the vilification to which he has been subjected. No court wishes to order custody in such circumstances, unless, in the words of the 1991 Act, the offence, or as here two offences, "are so serious that only a custodial sentence can be justified." But in our judgment that was clearly the situation here. This was a serious case with aggravating features. Furthermore, the offender did not plead guilty. On the contrary, he put the girl through the further ordeal of giving evidence and being cross-examined to suggest that she had consented. The offender thus forfeited the mitigation which a plea of guilty would have earned.

We have listened with the greatest care to the submissions made by Mr. Harrington which, if we may say so, were most ably presented. But we have come to the conclusion that a non-custodial sentence was simply not tenable in the present case.

Accordingly we have to consider whether the sentence was not merely lenient, but unduly lenient. Applying the criteria laid down in *Attorney-General's Reference No. 4 of 1989* (1990) 90 Cr. App. R. 366, 371, [1990] 1 W.L.R. 41, 46, "we have to ask. Was this a sentence outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate"? In our judgment it was. Only a custodial sentence could be justified in this case.

We bear in mind the element of double jeopardy in all Attorney-General's references: the offender is sentenced, he then hears that the sentence is to be reviewed, he has the added suspense and anxiety of waiting and attending on the hearing. Secondly, we also recognise the added stress and worry which the public attention to this case must have imposed on the offender and his family, as well as on the victim and hers. Principally, however, we have regard to the offender's youth, and the period we shall specify is much shorter than would be the case for an adult. In the result, we quash the sentence passed and substitute an order that the offender be detained for a period of two years pursuant to section 53(2) of the Children and Young Persons Act 1933.

*Order accordingly.*

*Solicitors: Crown Prosecution Service, Headquarters.*

**R. v. CENTRAL CRIMINAL COURT, ex parte THE TELEGRAPH PLC**

**SAME, ex parte BRITISH BROADCASTING CORPORATION**

**SAME, ex parte NEWSPAPER PUBLISHING PLC**

**SAME, ex parte SLATER**

**SAME, ex parte C**

**SAME, ex parte H**

**SAME, ex parte M**

**SAME, ex parte P**

**COURT OF APPEAL** (The Lord Chief Justice (Lord Taylor), Mr. Justice Auld and Mr. Justice Curtis): January 26, March 12, 1993

*Contempt of Court—Court Proceedings—Restrictions on Reporting—Severing of Indictment Resulting in Three Subsequent Trials—Substantial Risk of Prejudice to Administration of Justice—Trial Judge at Start of Trial of 11 Defendants Jointly Charged in Criminal Proceedings Postponing Publication of Certain Parts of Those Proceedings Involving Five Defendants—National Newspaper and Others Seeking Leave to Appeal Against Judge's Order—Whether Postponement Justified—Whether Order Should be Varied—Contempt of Court Act 1981 (c.49), s.4(2)—Criminal Justice Act 1988 (c.33), s.159(5)(b).*

By section 4(2) of the Contempt of Court Act 1981:

"... the court may, where it appears necessary for avoiding a substantial risk of prejudice to the administration of justice in ... any ... proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose."

By section 159 of the Criminal Justice Act 1988:

"(1) A person aggrieved may appeal to the Court of Appeal, if that Court grants leave, against—(a) an order under section 4 ... of the Contempt of Court Act 1981 made in relation to a trial on indictment ... and (c) any order restricting the publication of any report of ... any part of a trial ... (5) On the hearing of an appeal under this section the Court of Appeal shall have power ... (b) to confirm, reverse or vary the order complained of ..."

Eleven defendants were charged on indictment on counts of various offences concerning a Class A controlled drug known as "Ecstasy" of a total value of over £7 million. The prosecution case against all of them depended almost entirely on the evidence and credibility of an alleged accomplice, one V, who had earlier pleaded guilty to a charge of conspiracy unlawfully to produce the drugs involved in the case and awaited sentence for that offence. V had a substantial criminal record involving drug offences and was said to be a colourful character whose evidence would attract much interest. The judge ordered separate trials of certain counts in the indictment because he considered that a single trial would be too onerous for a jury. As a result,

# Attorney General's Reference (No 1 of 1992)

## CASE 3

COURT OF APPEAL, CRIMINAL DIVISION  
LORD TAYLOR OF GOSFORTH CJ, HUTCHISON AND HOLLAND JJ  
12 OCTOBER 1992

*Criminal law – Attempt – Acts preparatory to offence – Acts constituting offence – Rape – Attempted rape – Whether necessary for prosecution to prove actual physical attempt at penetration – Criminal Attempts Act 1981, s 1(1).*

- 1 In order to raise a prima facie case of attempted rape under s 1(1)<sup>a</sup> of the Criminal Attempts Act 1981 it is not necessary for the prosecution to prove that the defendant had with the requisite intent necessarily gone as far as to attempt physical penetration of the victim's vagina. If there is evidence from which the intent can be inferred and there are proved acts which a jury could properly regard as being more than merely preparatory to the commission of rape and as showing that the defendant had embarked on committing the offence that is sufficient to raise a prima facie case of attempted rape (see p 194 c to e, post).  
*R v Gullefer* [1990] 3 All ER 882 applied.

### Notes

- For the actus reus of attempt, see 11(1) *Halsbury's Laws* (4th edn) para 72, and for cases on the subject, see 14(1) *Digest* (2nd reissue) 194–201, 163–168.  
For rape and the penalty for attempted rape, see 11(1) *Halsbury's Laws* (4th edn reissue) para 514, and for cases on the subject, see 14(2) *Digest* (2nd reissue) 182–193, 7008–7107.  
For the Criminal Attempts Act 1981, s 1, see 12 *Halsbury's Statutes* (4th edn) 15 (1989 reissue) 776.

### Cases referred to in judgment

- DPP v Stonehouse* [1977] 2 All ER 909, [1978] AC 55, [1977] 3 WLR 143, HL.  
*R v Campbell (Tony)* (1990) 93 Cr App R 350, CA.  
*R v Eagleton* (1855) Dears CC 515, [1843–60] All ER Rep 363, 169 ER 826, CCR.  
*R v Gullefer* [1990] 3 All ER 882, [1990] 1 WLR 1063, CA.  
*R v Jones (Kenneth)* [1990] 3 All ER 886, [1990] 1 WLR 1057, CA.

### Cases also cited or referred to in skeleton arguments

- Bank of England v Vagliano Bros* [1891] AC 107, [1891–4] All ER Rep 93, HL.  
*R v Boyle* (1986) 84 Cr App R 270, CA.  
*R v Hill* (1781) 1 East PC 439.  
*R v Ilyas* (1983) 78 Cr App R 17, CA.  
*R v Lloyd* (1836) 7 C & P 318, 173 ER 141, NP.  
*R v Ransford* (1874) 31 LT 48, CCR.  
*R v Robinson* [1915] 2 KB 342.  
*R v Rowley* [1991] Crim LR 785.  
*R v Widdowson* (1986) 82 Cr App R 314, CA.  
*R v Wright* (1866) 4 F & F 967, 176 ER 869, NP.

### Reference

The Attorney General referred to the Court of Appeal, Criminal Division, pursuant to s 36 of the Criminal Justice Act 1972, the following point of law for

<sup>a</sup> Section 1(1) is set out at p 192 f, g, post.

the consideration of the court: whether, on a charge of attempted rape, it is incumbent on the prosecution, as a matter of law, to prove that the defendant physically attempted to penetrate the woman's vagina with his penis. The facts are set out in the opinion of the court.

*Victor Temple* (instructed by the Crown Prosecution Service) for the Attorney General.  
*Gordon Lakin* (assigned by the Registrar of Criminal Appeals) for the respondent.

**LORD TAYLOR OF GOSFORTH CJ** delivered the following opinion of the court. This case comes before the court on a reference by Her Majesty's Attorney General under s 36 of the Criminal Justice Act 1972.

The respondent was charged with attempted rape and was acquitted by direction of the trial judge. In consequence of the learned judge's ruling, the Attorney General has referred a point of law for the opinion of this court. The point of law is stated thus:

'Whether, on a charge of attempted rape, it is incumbent upon the prosecution, as a matter of law, to prove that the defendant physically attempted to penetrate the woman's vagina with his penis.'

The effect of the evidence for the prosecution is not entirely clear, but the following facts were, it seems, proved.

During the evening of Friday, 30 November 1990 the complainant, a young woman aged 17, was drinking at various clubs in the company of her boyfriend and others. During the early hours of the following morning she lost contact with them, but began talking to the respondent, a young man of 20, whom she had known as a friend for several years. She indicated she wanted to walk home and began to do so. The respondent accompanied her.

On the way they stopped by a gap in a hedge where there were steps leading to a shed. It is not clear how long they were there, the respondent contending that it was about an hour. However, at some stage the respondent asked the complainant to wait while he relieved himself. When he re-emerged she alleged that he grabbed her, pulled her behind the hedge, forced her to the ground and lay full length on top of her. He put his hand over her mouth and threatened to kill her if she did not stop screaming. At that stage the young woman became extremely frightened and lost consciousness.

Although her account was challenged, there was independent evidence to the following effect. An occupier of a nearby house heard a muffled moaning sound. She looked out of her window and saw the respondent on top of the complainant, the complainant's knickers being around her ankles. The respondent then got up and pulled the complainant roughly up the stone steps away from the road. She was clearly distressed, crying and trying to scream.

The police were called. They arrived within minutes. Two officers heard 55 muffled screams and crying. The complainant was on her back, her skirt pulled up to waist level and her breasts exposed. She was barefoot and without her knickers, which were subsequently found in the undergrowth nearby. At the time the police arrived at the scene the respondent was kneeling near to the girl, although it is contended on his behalf that there was some 6 feet between them. 60 The respondent immediately stood up when the police arrived. His trousers were round his ankles and he pulled them up. At that stage one of the officers observed that his penis was flaccid. He was questioned as follows:

Q. What have you been doing? A. What do you think?

Q. This girl appears very upset and distressed. Did she agree to you having sex with her? A. I don't know. I didn't ask her.

The young woman was medically examined. She had two love bites on her neck and an area of redness on her left breast. There were superficial injuries to her left shoulder blade, both elbows, left ankle and right calf, together with mud and grass stains on both heels. As to her private parts, there was a recent bruise just outside the hymen but inside the labia which, in the doctor's opinion, could have been caused by finger pressure, 'someone using fingers clumsily, like a drunken man, that was more likely than a penis to cause it'.

The respondent was also examined. He had superficial cuts and bruises to both knees and recent bruising on the shaft of the penis, consistent either with attempted intercourse or vigorous masturbation.

The bruising of the complainant's private parts corresponded to the bruising of the respondent's penis.

On interview the respondent admitted touching the complainant's breasts and putting his hand up her skirt. He claimed that she did not protest or make any noise. He accepted that she was in no fit state owing to drink to give consent. He said he never asked. He denied having an erection, but he admitted that his trousers were down. He was asked:

Q. Surely, there is only one reason to have your trousers down isn't there, what's that? A. To have intercourse but I didn't have intercourse though.

Q. Why didn't you have intercourse with her? A. I don't know, I just didn't.

It was then put to him that to have intercourse would be the natural conclusion, and his answer was, 'But I couldn't, cause I was drunk, so I couldn't, could I?' He was unable to recall how the complainant's knickers were removed, but denied that he was responsible.

On that evidence at the close of the prosecution case Mr Lakin on behalf of the respondent submitted that the evidence did not disclose any act which went beyond mere preparation.

It is convenient at this point to set out the relevant provisions of the Criminal Attempts Act 1981. Section 1(1) provides as follows:

'If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.'

Section 4(3) provides:

'Where, in proceedings against a person for an offence under section 1 above, there is evidence sufficient in law to support a finding that he did an act falling within subsection (1) of that section, the question whether or not his act fell within that subsection is a question of fact.'

In his ruling the learned judge referred to those Provisions of the Act. He also referred to the decisions of this court in *R v Gullefer* [1990] 3 All ER 882, [1990] 1 WLR 1063 and *R v Kenneth Jones* [1990] 3 All ER 886, [1990] 1 WLR 1057, in which it was held that the words of the Act should be given their ordinary and natural meaning. The learned judge then reviewed the facts which have already been outlined, and concluded that there was evidence from which the jury could conclude that the respondent had done acts more than merely preparatory to the commission of the offence of rape. He said:

'That is evidence, in my judgment, from which the jury being properly directed can come to the conclusion that the defendant intended to have sexual intercourse with his victim at the very least whether she consented or not. Secondly, having regard also to the additional facts that the girl had been heard to scream and/or moan in the moments before she was dragged inside

the fence, she was as a matter of fact not consenting to what was happening to her at that time. Thirdly, there is evidence, in my judgment, that the defendant had done acts more than merely preparatory to the commission of the offence.'

The learned judge then referred to a passage from the judgment of Lord Lane CJ in *R v Gullefer*, including this sentence ([1990] 3 All ER 882 at 884, [1990] 1 WLR 1063 at 1065):

'Was the appellant still in the stage of preparation to commit the substantive offence, or was there a basis of fact which would entitle the jury to say that he had embarked on the [offence] itself?'

Finally the learned judge said:

'... I am satisfied that, whether or not the defendant's penis was ever erect or even semi-erect, he had embarked upon the preparation of, he had embarked upon the commission of the offence itself but had not gone beyond the stage of attempt.'

The case then proceeded. The respondent gave evidence and Mr Lakin for the defence was nearing the end of his final speech when the learned judge intervened and caused the jury to retire. The judge then indicated that he had changed his mind and concluded that his earlier ruling was incorrect. The jury were then brought back to court and the learned judge directed them as follows:

'The position is that I have ruled as a matter of law that what the prosecution can prove cannot in law amount to an attempted rape because, it seems to me, it is essential that, for that offence to be proved, there must be some evidence of attempt, actual physical attempt at penetration. Of that there is no evidence.'

Mr Temple, on behalf of the Attorney General, submits to us that the learned judge was correct in his first ruling and that the test he stated to the jury in directing them to acquit was wrong. That test, it is submitted, sought to resurrect one of two rival tests developed in the common law before the 1981 Act.

In *R v Kenneth Jones*, and again in *R v Campbell* (1990) 93 Cr App R 350, this court made it clear that the words of the Act were to be applied in their plain and natural meaning, as the learned judge reminded himself in his first ruling. The words are not to be interpreted so as to reintroduce either of the earlier common law tests. Indeed one of the objects of the Act was to resolve the uncertainty those tests created.

One of those tests was the so-called 'last act' test, stated in *R v Eagleton* (1855) Dears CC 515, [1843-60] All ER Rep 363, ie has the defendant, with intent to commit the full offence, done the last act in his power towards committing that offence, or, as Lord Diplock put it in *DPP v Stonehouse* [1977] 2 All ER 909 at 917, [1978] AC 55 at 68, has he 'crossed the Rubicon and burnt his boats'? The other test, derived from *Stephen's Digest of the Criminal Law* (9th edn, 1950) art 29 was: did the act done with the intent to commit the full offence form part of a series of acts which would constitute its actual commission if not interrupted?

In *R v Gullefer* [1990] 3 All ER 882 at 885, [1990] 1 WLR 1063 at 1066 Lord Lane CJ, after referring to those two approaches, said:

'It seems to us that the words of the 1981 Act seek to steer a midway course. They do not provide, as they might have done, that the *R v Eagleton* test is to be followed, or that, as Lord Diplock suggested, the defendant must have reached a point from which it was impossible for him to retreat before the actus reus of an attempt is proved. On the other hand the words give



perhaps as clear a guidance as is possible in the circumstances on the point of time at which Stephen's "series of acts" begins. It begins when the merely preparatory acts come to an end and the defendant embarks on the crime properly. When that is will depend of course on the facts in any particular case.

Mr Temple submits that here the test applied by the learned judge amounted to resurrecting the *Eagleton* test. It would be equivalent in the case of a charge of attempted murder by the use of a gun to saying that, unless the trigger of the gun was actually pulled, there was insufficient evidence to go to the jury on that charge.

In our judgment the learned judge was correct in the ruling which he gave at first and fell into error in reconsidering it at the end of the case.

It is not, in our judgment, necessary, in order to raise a prima facie case of attempted rape, to prove that the defendant with the requisite intent had necessarily gone as far as to attempt physical penetration of the vagina. It is sufficient if there is evidence from which the intent can be inferred and there are proved acts which a jury could properly regard as more than merely preparatory to the commission of the offence. For example, and merely as an example, in the present case the evidence of the young woman's distress, of the state of her clothing, and the position in which she was seen, together with the respondent's acts of dragging her up the steps, lowering his trousers and interfering with her private parts, and his answers to the police, left it open to a jury to conclude that the respondent had the necessary intent and had done acts which were more than merely preparatory. In short that he had embarked on committing the offence itself.

For the reasons which we have endeavoured to give, we would answer the question posed in the reference No.

*Opinion accordingly.*

N P Metcalfe Esq Barrister.

## a Barclays Mercantile Business Finance Ltd and another v Sibec Developments Ltd and others

CHANCERY DIVISION (COMPANIES COURT)

b MILLETT J

8, 9 JULY 1992

*Company – Administration order – Discharge of order – Release of administrators – Postponement of release – Outstanding claim against administrators – Applicants leasing goods to company on hire purchase – Administration order made against company – Administrators refusing to permit applicants to repossess goods – Applicants applying to court for leave to commence proceedings against company and/or administrators for wrongful interference with goods – Administration order discharged and winding-up order made – Applicants applying for administrators' release to be postponed until applicants' claim for conversion tried – Whether applicants having valid claim against administrators – Whether administrators' release should be postponed – Insolvency Act 1986, s 11(3).*

The applicants leased or supplied goods on hire purchase to a company which became subject to an administration order. The hire-purchase agreements were terminated because of arrears of payment and the applicants requested repossession of the goods, but the administrators refused to consent to repossession by the applicants. The applicants applied to the court, pursuant to s 11(3)(c) and (d) of the Insolvency Act 1986, for leave to repossess and to commence proceedings against the company and/or the administrators for delivery up of the goods, damages for wrongful interference and payment of hire or lease charges in respect of the goods as an expense of the administration. The administrators subsequently consented to the goods being repossessed and the alternative claims were adjourned. Before those claims were heard the administration order was discharged on the administrators' petition and a compulsory winding-up order was made. The winding-up order provided for the release of the administrators after a specified period. The applicants applied for the administrators' release to be postponed until their claims for damages and payment of hire or lease charges had been tried.

**Held** – The applicants could not succeed in an action for conversion against the administrators unless they established an immediate right to possession, a lawful demand for redelivery and an unreasonable refusal to deliver. The applicants' immediate right to possession of the goods was not affected by s 11(3) of the 1986 Act, since s 11(3) merely imposed a moratorium on the enforcement of a creditor's legal rights and did not alter or destroy those rights. Furthermore, irrespective of whether the making of a demand necessary to constitute a cause of action in conversion against the company was prohibited by s 11(3)(c), the administrators remained until their release liable at the discretion of the court to pay not only for the use of the goods of another but also compensation for having wrongfully refused consent to the owner to retake the goods and therefore remained exposed to the applicants' claim for wrongful retention of goods, whether or not they had

Crown Prosecution Service for the Crown as appellant in Parmenter's case. E. Edwards Son & Noice, Billericay, for the respondent Parmenter.

## REGINA (RESPONDENT) v. R (APPELLANT)

HOUSE OF LORDS (Lord Keith of Kinkel, Lord Brandon of Oakbrook, Lord Griffiths, Lord Ackner and Lord Lowry): July 1, October 23, 1991

*Sexual Offences—Rape—Husband and Wife—Whether Husband Criminally Liable for Raping Wife—Sexual Offences (Amendment) Act 1976 (c. 82), s.1(1)(a).*

By section 1(1) of the Sexual Offences (Amendment) Act 1976:

"For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it. . . ."

A husband can be criminally liable for raping his wife.

A husband was charged with, *inter alia*, raping his wife, and at his trial the judge overruled a defence submission that a husband could not be guilty of rape upon his lawful wife; whereupon, the husband changed his plea to one of attempted rape. On appeal against the judge's ruling, the Court of Appeal dismissed the appeal on the ground that the common law fiction that a husband could not be guilty of rape upon his wife was, *inter alia*, an anachronism. On appeal therefrom by the husband to the House of Lords:

Held, dismissing the appeal, that the judge's ruling was correct. Further, section 1(1) of the Sexual Offences (Amendment) Act 1976 presented no obstacle to the House of Lords declaring that in modern times the supposed marital exemption in rape formed no part of the law of England.

Dicta of the Lord Justice General (Lord Emslie) in *S v. H.M. Advocate* (1989) S.L.T. 469, 473 approved and applied. Ruling of Simon Brown J. in *C. (Rape: Marital Exemption)* [1991] 1 All E.R. 755, 758 approved. Dictum of Donovan J. in *Chapman* (1958) 42 Cr.App.R. 257, 261, [1959] 1 Q.B. 100, 105 considered. Decision of the Court of Appeal, Criminal Division *sub nom. R (a Husband)* (1991) 93 Cr.App.R. 1 affirmed.

[For rape and husband and wife, see *Archbold* (1992 ed.), para. 20-24. For s.1 of the Sexual Offences (Amendment) Act 1976, see, *ibid.* para. 20-4.]

Appeal from Court of Appeal (Criminal Division).

This was an appeal by the appellant, R, from a decision of the Court of Appeal (Criminal Division) (Lord Lane C.J., Stephen Brown P., Watkins, Neill and Russell L.J.J.) (1991) 93 Cr.App.R. 1, dismissing his appeal against a ruling of Owen J. in the Crown Court at Leicester on July 30, 1990, who ruled that a husband could be guilty of rape upon his wife.

The facts appear in the judgment of Lord Keith of Kinkel.

The Court of Appeal certified under section 33(2) of the Criminal Appeal Act 1968 that a point of law of general public importance was involved in its decision, *viz.*, "Is a husband criminally liable for raping his wife?"

Leave to appeal to the House of Lords was granted.

The appeal was argued on July 1, 1991, when the following additional cases were

cited: *Reid* (1972) 56 Cr.App.R. 703 and *Straw v. D.P.P.* (1961) 45 Cr.App.R. 113, [1962] A.C. 220.

*Graham Buchanan* for the appellant husband.  
*John Mithro, Q.C.* and *Peter Joyce, Q.C.* for the Crown.

Their Lordships took time for consideration.  
October 23. The following opinions were delivered.

**LORD KEITH OF KINKEL:** My Lords, In this appeal to the House with leave of the Court of Appeal (Criminal Division) that Court has certified the following point of law of general public importance as being involved in its decision, namely: "Is a husband criminally liable for raping his wife?" The appeal arises out of the appellant's conviction at Leicester Crown Court on July 30, 1990, upon his pleas of guilty, of attempted rape and of assault occasioning actual bodily harm. The alleged victim in respect of each offence was the appellant's wife. The circumstances of the case were these. The appellant married his wife in August 1984 and they had one son born in 1985. On November 11, 1987, the couple separated for about two weeks but resumed cohabitation at the end of that period. On October 21, 1989 the wife left the matrimonial home with the son and went to live with her parents. She had previously consulted solicitors about matrimonial problems, and she left at the matrimonial home a letter for the appellant informing him that she intended to petition for divorce. On October 23, 1989, the appellant spoke to his wife on the telephone indicating that it was his intention also to see about a divorce. No divorce proceedings had, however, been instituted before the events which gave rise to the charges against the appellant. About 9 p.m. on November 12, 1989 the appellant forced his way into the house of his wife's parents, who were out at the time, and attempted to have sexual intercourse with her against her will. In the course of doing so he assaulted her by squeezing her neck with both hands. The appellant was arrested and interviewed by police officers. He admitted responsibility for what had happened. On May 13, 1990, a decree nisi of divorce was made absolute.

The appellant was charged on an indictment containing two counts, the first being rape and the second being assault occasioning actual bodily harm. When he appeared before Owen J. at Leicester Crown Court on July 30, 1990, it was submitted to the judge on his behalf that a husband could not in law be guilty as a principal of the offence of raping his own wife. Owen J. rejected that proposition as being capable of exonerating the appellant in the circumstances of the case. His ground for doing so was that, assuming an implicit general consent to sexual intercourse by a wife on marriage to her husband, that consent was capable of being withdrawn by agreement of the parties or by the wife unilaterally removing herself from cohabitation and clearly indicating that consent to sexual intercourse had been terminated. On the facts appearing from the depositions either the first or the second of these sets of circumstances prevailed. Following the judge's ruling the appellant pleaded guilty to attempted rape and to the assault charged. He was sentenced to three years' imprisonment on the former count and to eighteen months' imprisonment on the latter. The appellant appealed to the Court of Appeal (Criminal Division) on the ground that Owen J.:

"made a wrong decision in law in ruling that a man may rape his wife when the consent to intercourse which his wife gives in entering the contract of marriage has been revoked neither by order of a court nor by agreement between the parties."

On March 14, 1990, that Court (Lord Lane C.J., Sir Stephen Brown P., Watkins, Neill and Russell L.J.J.) (1990) 93 Cr.App.R. 1, delivered a reserved judgment dis-

missing the appeal but certifying the question of general public importance set out above and granting leave to appeal to your Lordships' House, which the appellant now does.

Sir Matthew Hale, in his *History of the Pleas of the Crown* (1736) vol. 1, Chap. 58, p. 629, wrote:

"But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract."

There is no similar statement in the works of any earlier English commentator. In 1803 East, in his *Treatise of the Pleas of the Crown*, Vol. 1 Chap. X, p. 446, wrote:

"... a husband cannot by law be guilty of ravishing his wife, on account of the matrimonial consent which she cannot retract."

In the first (1822) edition of *Archbold, A Summary of the Law Relative to Pleading and Evidence in Criminal Cases*, at p. 259 it was stated, after a reference to *Hale*, "A husband also cannot be guilty of a rape upon his wife."

For over 150 years after the publication of Hale's work there appears to have been no reported case in which judicial consideration was given to his proposition. The first such case was *Clarence* [1888] 22 Q.B.D. 23, to which I shall refer later. It may be taken that the proposition was generally regarded as an accurate statement of the common law of England. The common law is, however, capable of evolving in the light of changing social, economic and cultural developments. Hale's proposition reflected the state of affairs in these respects at the time it was enunciated. Since then the status of women, and particularly of married women, has changed out of all recognition in various ways which are very familiar and upon which it is unnecessary to go into detail. Apart from property matters and the availability of matrimonial remedies, one of the most important changes is that marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband. Hale's proposition involves that by marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happens to be feeling at the time. In modern times any reasonable person must regard that conception as quite unacceptable.

In *S. v. H.M. Advocate* (1989) S.L.T. 469 the High Court of Justiciary in Scotland recently considered the supposed marital exemption in rape in that country. In two earlier cases, *H.M. Advocate v. Duffy* (1983) S.L.T. 7 and *H.M. Advocate v. Paxton* (1984) J.C. 105, (1985) S.L.T. 96 it had been held by single judges that the exemption did not apply where the parties to the marriage were not cohabiting. The High Court held that the exemption, if it had ever been part of the law of Scotland, was no longer so. The principal authority for the exemption was to be found in Baron Hume's *Commentaries on the Law of Scotland Respecting Crime*, first published in 1797. The same statement appeared in each edition up to the fourth, by Bell, in 1844. At p. 306 of vol. 1 of that edition, dealing with art and part guilt of abduction and rape, it was said:

"This is true without exception even of the husband of the woman; who although he cannot himself commit a rape on his own wife, who has surrendered her person to him in that sort, may however be accessory to that crime ... committed on her by another."

It seems likely that this pronouncement consciously followed *Hale*.

The Lord Justice-General, Lord Emslie, who delivered the judgment of the Court, expressed doubt whether *Hume*, who

"We say no more on this matter which was not the subject of debate before us, because we are satisfied that the Solicitor-General was well founded in his contention that whether or not the reason for the husband's immunity given by Hume was a good one in the 18th and early 19th Centuries, it has since disappeared altogether. Whatever Hume meant to encompass in the concept of a wife's 'surrender of her person' to her husband 'in that sort' the concept is to be understood against the background of the status of women and the position of a married woman at the time when he wrote. Then, no doubt, a married woman could be said to have subjected herself to her husband's dominion in all things. She was required to obey him in all things. Leaving out of account the absence of rights of property, a wife's freedoms were virtually non-existent, and she had in particular no right whatever to interfere in her husband's control over the lives and upbringing of any children of the marriage."

By the second half of the 20th century, however, the status of women, and the status of a married woman, in our law have changed quite dramatically. A husband and wife are now for all practical purposes equal partners in marriage and both husband and wife are tutors and curators of their children. A wife is not obliged to obey her husband in all things nor to suffer excessive sexual demands on the part of her husband. She may rely on such demands as evidence of unreasonable behaviour for the purposes of divorce. A live system of law will always have regard to changing circumstances to test the justification for any exception to the application of a general rule. Nowadays it cannot seriously be maintained that by marriage a wife submits herself irrevocably to sexual intercourse in all circumstances. It cannot be affirmed nowadays, whatever the position may have been in earlier centuries, that it is an incident of modern marriage that a wife consents to intercourse in all circumstances, including sexual intercourse obtained only by force. There is no doubt that a wife does not consent to assault upon her person and there is no plausible justification for saying today that she nevertheless is to be taken to consent to intercourse by assault. The modern cases of *H.M. Advocate v. Duffy* (*supra*) and *H.M. Advocate v. Paxton* (*supra*) show that any supposed implied consent to intercourse is not irrevocable, and that separation may demonstrate that such consent has been withdrawn, and that in these circumstances a relevant charge of rape may lie against a husband. This development of the law since Hume's time immediately prompts the question: is revocation of a wife's implied consent to intercourse, which is revocable, only capable of being established by the act of separation? In our opinion the answer to that question must be no. Revocation of a consent which is revocable must depend on the circumstances. Where there is no separation this may be harder to prove but the critical question in any case must simply be whether or not consent has been withheld. The fiction of implied consent has no useful purpose to serve today in the law of rape in Scotland. The reason given by Hume for the husband's immunity from prosecution upon a charge of rape of his wife, if it ever was a good reason, no longer applies today. There is now, accordingly, no justification for the supposed immunity of a husband. Logically the only question is whether or not, as a matter of fact the wife consented to the acts complained of, and we affirm the decision of the trial judge that charge 2(b) is a relevant charge against the appellant to go to trial."

I consider the substance of that reasoning to be no less valid in England than in Scotland. On grounds of principle there is now no justification for the marital

*Clarence* [1888] 22 Q.B.D. 23 a husband who knew that he suffered from a venereal disease communicated it to his wife through sexual intercourse. He was convicted on charges of unlawfully inflicting grievous bodily harm contrary to section 20 of the Offences Against the Person Act 1861 and of assault occasioning actual bodily harm contrary to section 47 of the same Act. The convictions were quashed by a court of 13 judges of Crown Cases Reserved, with four dissents. Consideration was given to Hale's proposition, and it appears to have been accepted as sound by a majority of the judges. However, Wills J. at p. 33 said that he was not prepared to assent to the proposition that rape between married persons was impossible. Field J. (in whose judgment Charles J. concurred) said, at p. 57, that he should hesitate before he adopted Hale's proposition, and that he thought there might be many cases in which a wife might lawfully refuse intercourse and in which, if the husband imposed it by violence, he might be held guilty of a crime. In *Clarke* (1949) 33 Cr.App.R. 216, [1949] 2 All E.R. 448 a husband was charged with rape upon his wife in circumstances where justices had made an order providing that the wife should no longer be bound to cohabit with the husband. Byrne J. refused to quash the charge. He accepted Hale's proposition as generally sound, but said, at p. 218 and p. 449 respectively:

"The position, therefore, was that the wife, by process of law, namely, by marriage, had given consent to the husband to exercise the marital right during such time as the ordinary relations created by the marriage contract subsisted between them, but by a further process of law, namely, the justices' order, her consent to marital intercourse was revoked. Thus, in my opinion, the husband was not entitled to have intercourse with her without her consent."

In *Miller* (1954) 38 Cr.App.R. 1, [1954] 2 Q.B. 282 the husband was charged with rape of his wife after she had left him and filed a petition for divorce. He was also charged with assault upon her occasioning actual bodily harm. Lynskey J. quashed the charge of rape but refused to quash that of assault. He proceeded on the basis that Hale's proposition was correct, and also that *Clarke* had been rightly decided, but took the view, at p. 8 and p. 290, that there was no evidence which entitled him to say that the wife's implied consent to marital intercourse had been revoked by an act of the parties or by an act of the court. As regards the count of assault, having referred to *Jackson* [1891] 1 Q.B. 671, where it was held that a husband had no right to confine his wife in order to enforce a decree for restitution of conjugal rights, he said, at pp. 9, 10, and at pp. 291-292 respectively:

"It seems to me, on the reasoning of that case, that although the husband has a right to marital intercourse, and the wife cannot refuse her consent, and although if he does have intercourse against her actual will, it is not rape, nevertheless he is not entitled to use force or violence in the exercise of that right, and if he does so he may make himself liable to the criminal law, not for the offence of rape, but for whatever other offence the facts of the particular case warrant. If he should wound her he might be charged with wounding or causing actual bodily harm, or he may be liable to be convicted of common assault. The result is that in the present case I am satisfied that the second count is a valid one and must be left to the jury for their decision."

So the case had the strange result that although the use of force to achieve sexual intercourse was criminal the actual achievement of it was not. Logically, it might be thought that if a wife be held to have by marriage given her implied consent to sexual intercourse she is not entitled to refuse her husband's advances, and that if she resists then he is entitled to use reasonable force to overcome that resistance. This indicates the absurdity of the fiction of implied consent. In the law of Scotland, the

regarded as an aggravated assault, of which the achievement of sexual intercourse is the worst aggravating feature. It is unrealistic to sort out the sexual intercourse from the other acts involved in the assault and to allow the wife to complain of the minor acts but not of the major and most unpleasant one.

The next case is *O'Brien* [1974] 3 All E.R. 663, where Park J. held that a decree nisi effectively terminated a marriage and revoked the wife's implied consent to marital intercourse, so that subsequent intercourse by the husband without her consent constituted rape. There was a similar holding by the Criminal Division of the Court of Appeal in *Steele* (1976) 65 Cr.App.R. 22 as regards a situation where the spouses were living apart and the husband had given an undertaking to the court not to molest his wife. A decision to the like effect was given by the same Court in *Roberts* [1986] Crim.L.R. 188, where the spouses had entered into a formal separation agreement. In *Sturges* [1990] Crim.L.R. 198, however, it was ruled by Judge Fawcus that a husband could not be convicted of rape upon his wife in circumstances where there was in force a family protection order in her favour and he had had sexual intercourse with her against her will. The order was made under section 16 of the Domestic Proceedings and Magistrates Courts Act 1978 in the terms that "the respondent shall not use or threaten to use violence against the person of the applicant." Judge Fawcus took the view that it was not to be inferred that by obtaining an order in these terms the wife had withdrawn her consent to sexual intercourse.

There should be mentioned next a trio of cases which were concerned with the question whether acts done by a husband preliminary to sexual intercourse with an estranged wife against her will could properly be charged as indecent assaults. The cases are *Caswell* [1984] Crim.L.R. 111, *Kowalski* (1988) 86 Cr.App.R. 339, and *H.* (unreported), October 5, 1990, Auld J. The effect of these decisions appears to be that in general acts which would ordinarily be indecent but which are preliminary to an act of normal sexual intercourse are deemed to be covered by the wife's implied consent to the latter, but that certain acts, such as fellatio, are not to be so deemed. Those cases illustrate the contortions to which judges have found it necessary to resort in face of the fiction of implied consent to sexual intercourse.

The foregoing represent all the decisions in the field prior to the ruling by Owen J. in the present case. In all of them lip service, at least, was paid to Hale's proposition. Since then there have been three further decisions by single judges. The first of them is *C. (Rape: Marital Exemption)* [1991] 1 All E.R. 755. There were nine counts in an indictment against a husband and a co-accused charging various offences of a sexual nature against an estranged wife. One of these was of rape as a principal. Simon Brown J. followed the decision in *S. v. H.M. Advocate* (1989) S.L.T. 469 and held that the whole concept of a marital exemption in rape was misconceived. He said, at p. 758:

"Were it not for the deeply unsatisfactory consequences of reaching any other conclusion on the point, I would shrink, if sadly, from adopting this radical view of the true position in law. But adopt it I do. Logically, I regard it as the only defensible stance, certainly now as the law has developed and arrived in the late twentieth century. In my judgment, the position in law today is, as already declared in Scotland, that there is no marital exemption to the law of rape. That is the ruling I give. Count seven accordingly remains and will be left to the jury without any specific direction founded on the concept of marital exemption."

A different view was taken in the other two cases, by reason principally of the terms in which rape is defined in section 1(1) of the Sexual Offences (Amendment)

"For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if—(a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and (b) at the time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it . . ."

In *J. (Rape: Marital Exemption)* [1991] 1 All E.R. 759 a husband was charged with having raped his wife, from whom he was living apart at the time. Rougier J. ruled that the charge was bad, holding that the effect of section 1(1)(a) of the Act of 1976 was that the marital exemption embodied in Hale's proposition was preserved, subject to those exceptions established by cases decided before the Act was passed. He took the view that the word "unlawful" in the subsection meant "illicit," i.e. outside marriage, that being the meaning which in *Chapman* (1958) 42 Cr.App.R. 257, [1959] 1 Q.B. 100 it had been held to bear in section 19 of the Sexual Offences Act 1956. Then in *S.* (unreported), January 15, 1991, Swinton-Thomas J. followed Rougier J. in holding that section 1(1) of the Act of 1976 preserved the marital exemption subject to the established common law exceptions. Differing, however, from Rougier J., he took the view that it remained open to judges to define further exceptions. In the case before him the wife had obtained a family protection order in similar terms to that in *Sharples* [1990] Crim.L.R. 198. Differing from Judge Fawcus in that case, Swinton-Thomas J. held that the existence of the family protection order created an exception to the marital exemption. It is noteworthy that both Rougier J. and Swinton-Thomas J. expressed themselves as being regretful that section 1(1) of the Act of 1976 precluded them from taking the same line as Simon Brown J. in *C. (Rape: Marital Exemption)* [1991] 1 All E.R. 755.

The position then is that that part of *Hale's* proposition which asserts that a wife cannot retract the consent to sexual intercourse which she gives on marriage has been departed from in a series of decided cases. On grounds of principle there is no good reason why the whole proposition should not be held inapplicable in modern times. The only question is whether section 1(1) of the Act of 1976 presents an insuperable obstacle to that sensible course. The argument is that "unlawful" in the subsection means outside the bond of marriage. That is not the most natural meaning of the word, which normally describes something which is contrary to some law or enactment or is done without lawful justification or excuse. Certainly in modern times sexual intercourse outside marriage would not ordinarily be described as unlawful. If the subsection proceeds on the basis that a woman on marriage gives a general consent to sexual intercourse, there can never be any question of intercourse with her by her husband being without her consent. There would thus be no point in enacting that only intercourse without consent outside marriage is to constitute rape.

*Chapman* (1958) 42 Cr.App.R. 257, [1959] 1 Q.B. 100 is founded on dicta in support of the favoured construction. That was a case under section 19 of the Sexual Offences Act 1956, which provides:

"(1) It is an offence, subject to the exception mentioned in this section, for a person to take an unmarried girl under the age of eighteen out of the possession of her parent or guardian against his will, if she is so taken with the intention that she shall have unlawful sexual intercourse with men or with a particular man. (2) A person is not guilty of an offence under this section

intercourse contrary to some positive enactment or intercourse in a brothel or something of that kind. Donovan J., giving the judgment of the Court of Criminal Appeal, rejected both interpretations and continued, at p. 261 and p. 105 respectively:

"If the two interpretations suggested for the appellant are rejected, as we think they must be, then the word 'unlawful' in section 19 is either surplusage or means 'illicit.' We do not think it is surplusage, because otherwise a man who took such a girl out of her parents' possession against their will with the honest and bona fide intention of marrying her might have no defence, even if he carried out that intention. In our view, the word simply means 'illicit,' i.e. outside the bond of marriage. In other words, we take the same view as the trial judge. We think this interpretation accords with the common sense of the matter, and with what we think was the obvious intention of Parliament. It is also reinforced by the alternatives specifically mentioned in sections 17 and 18 of the Act, that is, 'with the intent that she shall marry, or have unlawful intercourse . . .'

In that case there was a context to the word "unlawful" which by cogent reasoning led the Court to the conclusion that it meant outside the bond of marriage. However, even though it is appropriate to read the Act of 1976 along that of 1956, so that the provisions of the latter Act form part of the context of the former, there is another important context to section 1(1) of the Act of 1976, namely the existence of the exceptions to the marital exemption contained in the decided cases. Sexual intercourse in any of the cases covered by the exceptions still takes place within the bond of marriage. So if "unlawful" in the subsection means "outside the bond of marriage" it follows that sexual intercourse in a case which falls within the exceptions is not covered by the definition of rape, notwithstanding that it is not consented to by the wife. That involves that the exceptions have been impliedly abolished. If the intention of Parliament was to abolish the exceptions it would have been expected to do so expressly, and it is in fact inconceivable that Parliament should have had such an intention. In order that the exceptions might be preserved, it would be necessary to construe "unlawful" as meaning "outside marriage or within marriage in a situation covered by one of the exceptions to the marital exemption." Some slight support for that construction is perhaps to be gathered from the presence of the words "who at the time of the intercourse does not consent to it," considering that a woman in a case covered by one of the exceptions is treated as having withdrawn the general consent to intercourse given on marriage but may nevertheless have given her consent to it on the particular occasion. However, the gloss which the suggested construction would place on the word "unlawful" would give it a meaning unique to this particular subsection, and if the mind of the draftsman had been directed to the existence of the exceptions he would surely have dealt with them specifically and not in such an oblique fashion. In *Chapman*, Donovan J. accepted at p. 260 and p. 102 that the word "unlawful" in relation to carnal knowledge had in many early statutes not been used with any degree of precision, and he referred to a number of enactments making it a felony unlawfully and carnally to know any woman-child under the age of 10. He said, at p. 103 "one would think that all intercourse with a child under 10 would be unlawful; and on that footing the word would be mere surplusage." The fact is that it is clearly unlawful to have sexual intercourse with any woman without her consent, and in my opinion there are

*agle v. Westminster City Council* [1990] 2 A.C. 716 in relation to paragraph 3A of Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982.

I am therefore of the opinion that section 1(1) of the Act of 1976 presents no obstacle to this House declaring that in modern times the supposed marital exception in rape forms no part of the law of England. The Court of Appeal (Criminal Division) took a similar view. Towards the end of the judgment of that Court Lord Lane C.J. said, at p. 8 and p. 1074 respectively:

"The remaining and no less difficult question is whether, despite that view, this is an area where the court should step aside to leave the matter to the Parliamentary process. This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it."

I respectfully agree. My Lords, for these reasons I would dismiss this appeal, and answer the certified question in the affirmative.

**LORD BRANDON OF OAKBROOK:** My Lords, For the reasons given in the speech of my noble and learned friend, Lord Keith of Kinkel, I would answer the certified question in the affirmative and dismiss the appeal.

**LORD GRIFFITHS:** My Lords, For the reasons given by my noble and learned friend, Lord Keith of Kinkel, I would dismiss this appeal and answer the certified question in the affirmative.

**LORD ACKNER:** My Lords, For the reasons given in the speech of my noble and learned friend, Lord Keith of Kinkel, I too, would answer the certified question in the affirmative and dismiss the appeal.

**LORD LOWRY:** My Lords, For the reasons given by my noble and learned friend, Lord Keith of Kinkel, I would dismiss this appeal and answer the certified question in the affirmative.

*Appeal dismissed.*

*Solicitors:* Kingsford Stacey, agents for Hawley & Rogers, Leicester. Crown Prosecution Service, Headquarters.

**STEPHEN OLAREWAJU OMOJUDI**

**COURT OF APPEAL** (Lord Justice Glidewell, Mr. Justice Hodgson and Mr. Justice Buckley): October 4, 1991

*Sentence—Deportation Order—Guidelines on Recommendation for Deportation to be Strictly Applied—Immigration Act 1971 (c. 77), s.6(2).*

By section 3(6) of the Immigration Act 1971:

"... a person who is not a patriot shall ... be liable to deportation from the United Kingdom if, after he has attained the age of 17, he is convicted of an offence for which he is punishable with imprisonment and on his conviction is recommended for deportation by a court empowered by this Act to do so."

By section 6(2):

"A court shall not recommend a person for deportation unless he has been liable to deportation if he is a British citizen. . . ."

The Court quashed a recommendation for deportation where no seven day notice as required by section 6(2) of the Immigration Act 1971 was served upon the appellant prior to his appearance at court on a charge of conspiracy to defraud.

The Court reiterated that the clear and strict provisions of the Immigration Act 1971 had to be complied with. Further, the guidance set out in *Nazari* (1980) 71 Cr.App.R. 87 should be followed.

[For s.6 of the Immigration Act 1971, see *Archbold*, 1992 ed., paras. 5-688, 689.]

Appeal against recommendation for deportation.

On March 7, 1989, in the Crown Court at the Inner London Sessions House (Judge Rucker) the appellant was convicted of conspiracy to defraud and was sentenced to four years' imprisonment. He was also recommended for deportation. He also pleaded guilty after re-arraignment on a separate indictment to three counts of theft and two counts of attempted theft for which he was sentenced to concurrent terms of 12 months' imprisonment. The facts appear in the judgment.

He appealed against the recommendation of deportation.

*Owen Davies* (not below) (assigned by the Registrar of Criminal Appeals) for the appellant.

**BUCKLEY J.:** On March 7, 1989, at the Inner London Crown Court the appellant was convicted of conspiracy to defraud and was sentenced to four years' imprisonment and a recommendation for deportation was made. He appeals against the recommendation for deportation by leave of the single judge.

In the circumstances it is probably necessary to say no more about the offence than that it was a significant conspiracy to defraud London clearing banks of something over £60,000.

What we are told by Mr. Davies (who has appeared before us today and who has prepared a very helpful skeleton argument) and is confirmed by the transcript that has been obtained, is that no seven-day notice was served on the appellant prior to his appearance at court. That was required under the provisions of section 6 of the Immigration Act 1971. Notwithstanding that, and notwithstanding the fact that neither counsel for the prosecution nor the defence were called upon to address the court, or indeed assist, the order recommending deportation was made, ostensibly on the basis that if it was not in order then in some manner at some time thereafter it could doubtless be straightened out.

The fact that a recommendation for deportation has been made does qualify as a sentence under the provisions of the Act. It is therefore quite proper that the matter, if challenged, should be brought to this court by way of appeal.

In this case it is apparent, as we have said, that the provisions of the Act, in particular section 6(2), were not complied with. The appellant was not given notice of not less than seven days and the recommendation should not therefore have been made. In those circumstances there is no alternative but to allow this appeal. In doing so we would wish to draw attention to the clear and strict provisions of the Act and indeed the further guidance that was given in the case of *Nazari* (1980) 71 Cr.App.R. 87. The prime purpose of the legislation and that section was so that the party served with the notice had an opportunity to demonstrate that he was a British subject. As is pointed out in *Nazari*, from a practical point of view in many cases it is also to afford him an opportunity of getting his tackle in order before a

73 Cr.App.R. 1, [1982] A.C. 510 and *R. v. Miller* (1983) 77 Cr.App.R. 17, [1983] A.C. 161, and the decisions of this Court in *Elliot v. C (a minor)* (1983) 77 Cr.App.R. 103, [1983] 2 All E.R. 1005 and of the Court of Appeal in *R. (1984) 77 Cr.App.R. 334*, the defendant was plainly so guilty. The prosecution also referred us to the speech of Lord Roskill in *R. v. Seymour* (1983) 77 Cr.App.R. 215, 223, [1983] 2 A.C. 493, 506 where he said:

"Reckless" should today be given the same meaning in relation to all offences which involve recklessness as one of the elements unless Parliament has otherwise ordained."

For the defendant it was submitted that the above mentioned cases could all be distinguished from the present case in that in none of them was there any gap between the act of the defendant and the resultant harm to the victim during which the defendant had an opportunity to disarm or neutralise the risk whereas in the present case there was such a gap. In the case of a man-trap it was submitted the relevant recklessness did not occur until the setter of the trap abandoned the opportunity to disarm. If such abandonment was for good reason then there could be no offence. Good reason might be constituted, for example, if the defendant had left a dangerous situation such as a man-trap unattended in an emergency in order to go to the rescue of someone being assaulted or to answer a scream for help. In the present case the defendant had left the drier in a dangerous condition through mindless panic and accordingly, it was submitted, the *Caldwell/Lawrence* test was inapplicable.

In my judgment those submissions cannot avail the defendant in the light of the authorities, even if panic was the cause of abandoning the machine in the dangerous condition which he had created. The appeal should in my judgment be allowed and the case sent back to the magistrates with a direction to convict on the section 47 charge and proceed to sentence.

I should add this. In *Elliot's* case (1983) 77 Cr.App.R. 103, 116, [1983] 2 All E.R. 1005, 1010, Goff, L.J. would have decided the other way had he not felt bound by the decisions (mentioned above) to take the course he did. As appears from his judgment in that case, criticisms of and misgivings about the scope of the *Caldwell/Lawrence* test have also been voiced by academic writers of distinction. (see p. 118 and p. 1011 of the respective reports).

In the present case, whilst I respectfully share the misgivings so clearly expressed by Goff L.J., I have no reluctance about concluding that the appeal should be allowed. The justices' findings make it abundantly clear that the defendant knew full well that he had created a dangerous situation and the inescapable inference appears to me to be that he decided to take the risk of someone using the machine before he could get back and render it harmless or gave no thought to that risk. Moreover, although it was on the findings, panic which led him to pour the acid into the machine, that panic had been engendered by the footsteps which had disappeared before he left the machine. There is no finding that panic caused him to abandon the machine in its dangerous condition.

TUDOR EVANS J: I agree and have nothing to add.

*Appeal allowed.*

*Case remitted to justices with directions to convict.*

*Solicitors:* Knowles, Cave & Co, Luton, for the defendant. Crown Prosecution Service, Aylesbury.

MOHAMMED IQBAL KHAN  
MAHESH DHOKIA  
JASWINDER SINGH BANGA  
NAVAID FAIZ

CASE 5

COURT OF APPEAL (Lord Justice Russell, Mr. Justice Rose and Mr. Justice Morland): December 4, 5, 1989, January 26, 1990

*Sexual Offences—Rape—Attempted Rape—Mens Rea—Recklessness—Whether Offence Committed When Defendant Reckless as to Woman's Consent to Sexual Intercourse—Sexual Offences (Amendment) Act 1976 (c. 82), s.1(1)—Criminal Attempts Act 1981 (c. 47), s.1(1).*

1 By section 1(1) of the Sexual Offences (Amendment) Act 1976:

"For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if—(a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and (b) at the time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it . . ."

5 By section 1(1) of the Criminal Attempts Act 1981:

"If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence."

10 [Rape is such an offence]

Bearing in mind the statutory definition of rape in section 1(1) of the Sexual Offences (Amendment) Act 1976 and that of an attempt to commit an offence in section 1(1) of the Criminal Attempts Act 1981 (which applies to rape); although the *actus reus* of rape and attempted rape is different in that sexual intercourse must take place to prove the offence of rape whereas for attempted rape some act which is merely preparatory to but short of sexual intercourse is required, the mens rea for each offence is identical; i.e., an intention to have sexual intercourse knowing that the woman does not consent, or being reckless whether or not she consents. 20 Recklessness in rape and attempted rape arises not in relation to the physical act of the accused but only in relation to his state of mind when engaged in the activity of having or attempting to have sexual intercourse.

A 16 year old girl met one of the appellants at a daytime discotheque, after which she accompanied him and four other youths by car to a house where others joined 25 them. Although the girl, who was a virgin, did not consent to any sexual activity, four of the appellants attempted to have sexual intercourse with her and three others succeeded. At their trial for attempted rape and rape respectively, the judge directed the jury on the offence of rape that if they decided that the girl had not consented, the next question was whether the defendant in question knew that she 30 was not consenting. If they were unsure on that they had to go on and ask whether he was reckless as to whether she was consenting or not, and "reckless" in that context could be simply defined as the state of mind of the particular defendant that he could not care less either way whether she consented or not. Dealing with the charges of attempted rape, the judge told the jury that the principles relevant to consent applied in exactly the same way. On appeal by four of the appellants 35 against their convictions of attempted rape on the ground, *inter alia*, that recklessness was insufficient to constitute the mens rea of attempted rape:

Held, that the *mens rea* necessary in the case of rape and attempted rape were identical; namely, an intention to have or attempt to have sexual intercourse with a woman knowing that she did not consent or being reckless as to whether or not she consented. Accordingly, the judge's direction to the jury was correct and the appeals against conviction would be dismissed.

*Millard and Vernon* [1987] Crim. L.R. 393, considered.

*Per curiam*: The *mens rea* in all criminal attempts is not identical to that required to prove the full offence. Where, for example, as in causing death by reckless driving or reckless arson, since recklessness constitutes the only state of mind involved in the full offence, there can be no attempt to commit it.

{For s.1 of the Sexual Offences ((Amendment) Act 1976, see *Archbold*, 43rd edn, para. 20-338. For s.1 of the Criminal Attempts Act 1981, see, *ibid.*, para. 5028-51.}

Appeals against conviction and sentence.

On June 24, 1987, at the Central Criminal Court (Judge Rant, Q.C.) the appellants Khan, Dhokia, Banga and Faiz were all convicted of attempted rape of a 16-year old girl. Khan was sentenced to five years' youth custody, Dhokia to nine years' youth custody, Banga and Faiz to seven years' youth custody. Three other appellants, Atwal, Hear and Lakhanpal were at the same time convicted of raping the same girl. They were sentenced, Atwal to seven years' youth custody, Hear to nine years' youth custody and Lakhanpal to seven years' youth custody. The appeals against sentence do not call for report. The Court dismissed those of Khan, Faiz, Atwal and Lakhanpal. The appeals of Dhokia, Hear and Banga were allowed, the Court substituting in each case seven years' youth custody in respect of Dhokia and Hear and five years' youth custody in respect of Banga. Khan was 16, and the others' ages ranged between 17 and 18 with the exception of Faiz, who was 19.

The facts are summarised in the judgment.

The appeal was argued on December 4 and 5, 1989 when the following cases were cited in addition to the two referred to in the judgment: *Gannon* (1959) 43 Cr. App. R. 155; *Henry and Manning* (1968) 53 Cr. App. R. 150; *James v. R.* (1970) 55 Cr. App. R. 299; *Mohun* (1975) 60 Cr. App. R. 272, [1976] Q.B. 1; *D.P.P. v. Morgan* (1975) 61 Cr. App. R. 136, [1976] A.C. 182; *Price (Herbert)* (1968) 52 Cr. App. R. 295, [1969] 1 Q.B. 541; *Riley* (1979) 70 Cr. App. R. 1 and *Stewart (John)* (1986) 83 Cr. App. R. 327.

*Howard Shaw* (assigned by the Registrar of Criminal Appeals) for Khan.  
*Peter Corrigan* (assigned by the Registrar of Criminal Appeals) for Dhokia.  
*Michael West, Q.C.* and *Miss Indira Ramsahoye* (neither of whom appeared below) for Banga.

*William Boyce* (who did not appear below, assigned by the Registrar of Criminal Appeals) for Faiz.  
*Michael Austin-Smith* for the Crown.

*Cur. adv. vult.*

January 26. RUSSELL, L.J. read the judgment of the Court: These appeals raise the short but important point of whether the offence of attempted rape is committed when the defendant is reckless as to the woman's consent to sexual intercourse. The appellants submit that no such offence is known to the law.

Before examining the submissions, we deal briefly with the facts. On June 24, 1987, at the Central Criminal Court before His Honour Judge Rant, Q.C. and a

jury, the appellants Mohammed Iqbal Khan, Mahesh Dhokia, Jaswinder Singh Banga and Navaid Faiz were convicted of the attempted rape of a 16-year-old girl. The case for the Crown was that on March 19, 1986 the girl met and danced with the appellant Dhokia at a daytime discotheque in Uxbridge. Thereafter she accompanied Dhokia and four other youths in a motor-car which was driven to an address in Waltham Road, Uxbridge where the occupants of the car, who included Faiz and Khan as well as Dhokia, were joined by others, including Banga.

Inside the house Dhokia, without success, attempted to have sexual intercourse with the girl. He was followed by others. Three youths succeeded in having sexual intercourse; three others, the remaining appellants, attempted to have sexual intercourse, but failed. The girl did not consent to any sexual activity in the house. After her ordeal, she left and travelled to a friend's house where she made a complaint.

The judge dealt with the offence of rape as follows:

"Members of the jury a man commits rape if he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it and also at that time he knows that she does not consent to the intercourse, or is reckless as to whether she consents to it or not. Therefore it must first be proved in this case that Miss Vardell did not in fact consent. If she did or if in your view she may have done in relation to any of these defendants you may acquit them without considering the position further. If, however, you decide that she did not in fact consent the next question is did the defendant in question know that she was not consenting? If you are unsure about that go on to ask whether he was reckless as to whether the girl was consenting or not and reckless in this context could be simply defined as it has been throughout the case as the state of mind of the particular defendant that he could not care less either way whether she consented or not. If you are sure that was his state of mind then he was behaving recklessly and he would be guilty of the offence.

Sexual intercourse is proved if you are satisfied any degree of actual penetration took place whether the man ejaculates or not but in this case in relation to these men as is pointed out to you already there is no dispute that sexual intercourse actually occurred.

Please do not confuse consent with submission. By that I mean there may be cases, and the prosecution say this is one of them, where a girl allows a man to have sex with her without a struggle. That does not amount to consent at all. If a girl decides that it is better to suffer being violated than run the risk of possible injury she is obviously not giving her consent to what is happening. It is a common sense to do that rather than struggle and probably risk more aggression and also the best weapon of the rapist is fear.

A defence to this charge is that a defendant believed that the girl was consenting, even if in fact she was not and that belief need not be reasonable provided that it is genuinely and honestly held. In this case you as a jury must have regard, and this is your approach to this, as to whether there were any reasonable grounds at the time to have such a belief. You must also take into account all the relevant matters. That is to say all the surrounding circumstances in deciding what is probably in this case you may think an important issue; because the defence relied upon for each of these men is one, she did consent. In fact, and two, even if she did not I genuinely believed that she did consent.

So how do you decide on a man's state of mind. You cannot open up his head and look inside. You must think about the facts as you find them to be, what he did and said then and look into what he said to the police and to you and draw the conclusion as to what must have been his state of mind at the time.



No complaint is made about this direction. The judge then turned to the charges of attempted rape and said:

"Now I turn to counts three, five, nine and eleven and again members of the jury count three is put quite starkly, and this means you are concerned with attempted rape. An attempt to commit a criminal offence is in law itself a crime. I have explained what rape amounts to. The question for you where attempted rape is the charge is to ask whether the defendant in question did more than merely prepare to commit the crime, but took a positive step that led directly to advance his objective. I should say it matters not that he was not in the end capable of carrying out the final act. Thus a lack of erection would not be fatal for a charge of attempted rape provided the defendant made a real effort to effect the crime and was only prevented by lack of erection that would amount to it in law. In this case Miss Vardell says each of the accused, except Mr. Faiz, jabbed his erect penis against her vaginal area. If that is so, and it is only disputed in the case of Mr. Faiz, you may think the defendant could not have done more to achieve penetration. Only the final act of inserting the penis remained to be done. It is your decision but in this case you may think that there was an attempt to have sexual intercourse with her in the legal sense and it has not I think really been argued to the contrary."

150 "...As in the case of rape the principles relevant to consent apply in exactly the same way in attempted rape. I do not suppose you need me to go through it again. Apply the same principles as to rape."

It is these last three sentences that counsel submits amount to a material misdirection, for it is argued that recklessness as a state of mind on the part of the offender has no place in the offence of attempted rape.

We remind ourselves first of the statutory definition of rape to be found in section 1(1) of the Sexual Offences (Amendment) Act 1976:

"1(1) For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it; . . ."

Section 1(1) of the Criminal Attempts Act 1981 created a new statutory offence as follows.

165 "If, with intent to commit an offence to which this section applies, a person does an act which is more than preparatory to the commission of the offence merely, he is guilty of attempting to commit the offence."

This section applies to rape.

170 The impact of the words of section 1 of the 1981 Act and in particular the words "with intent to commit an offence" has been the subject matter of much debate amongst distinguished academic writers. We were referred to and we have read and considered an article by Professor Glanville Williams entitled "The Problem of Reckless Attempts" [1983] Crim.L.R. 365. The argument there advanced is that recklessness can exist within the concept of attempt and support is derived from 175 *Pigg* [1982] 2 All E.R. 591, albeit that authority was concerned with the law prior to the Criminal Attempts Act 1981. This approach also receives approval from Smith and Hogan *Criminal Law* 6th ed. (1988) at pp. 287 to 289.

Contrary views, however, have been expressed by Professor Griew and Mr. Richard Buxton, Q.C. who have both contended that the words "with intent to commit an offence" involve an intent as to every element constituting the crime. Finally we have had regard to the observations of Mustill, L.J. giving the judg-

ment of the Court of Appeal Criminal Division in *Millard and Vernon* [1987] Crim.L.R. 393. That was a case involving a charge of attempting to damage property, the Particulars of Offence reading:

185 "Gary Mann Millard and Michael Elliot Vernon, on May 11, 1985, without lawful excuse, attempted to damage a wooden wall at the Leeds Road Football Stand belonging to Huddersfield Town Association Football Club, intending to damage the said wall or being reckless as to whether the said wall would be damaged."

190 Mustill L.J. said:

"The appellants' case is simple. They submit that in ordinary speech the essence of an attempt is a desire to bring about a particular result, coupled with steps towards that end. The essence of recklessness is either indifference to a known risk or (in some circumstances) failure to advert to an obvious risk. The 195 two states of mind cannot co-exist. Section 1(1) of the Criminal Attempts Act 1981 expressly demands that a person shall have an intent to commit an offence if he is to be guilty of an attempt to commit that offence. The word 'intent' may, it is true, have a specialised meaning in some contexts. But even if this can properly be attributed to the word where it is used in section 1(1) 200 there is no warrant for reading it as embracing recklessness, nor for reading into it whatever lesser degree of *mens rea* will suffice for the particular substantive offence in question. For an attempt nothing but conscious volition will do. Accordingly that part of the particulars of offence which referred to recklessness was meaningless, and the parts of the direction which involved a definition of recklessness, and an implied invitation to convict if the jury found the appellants to have acted recklessly, were misleading. There was thus, so it was 205 contended, a risk that the jury convicted on the wrong basis and the verdict cannot safely be allowed to stand.

At the conclusion of the argument it appeared to us that this argument was 210 logically sound and that it was borne out by the authorities cited to us, especially *Whybrow* (1951) 35 Cr.App.R. 141, *Cunliffe v. Goodman* [1950] 2 K.B. 237, 253 and *Mohan* (1975) 60 Cr.App.R. 272, [1976] Q.B. 1, and that it was not inconsistent with anything in *Hyam v. Director of Public Prosecutions* (1974) 59 Cr.App.R. 91, [1975] A.C. 55. Our attention had however been 215 drawn to a difference of opinion between commentators about the relationship between the *mens rea* in an attempt and the ingredients of the substantive offence, and we therefore reserved judgment so as to consider whether the question was not perhaps more difficult than it seemed.

In the event we have come to the conclusion that there does exist a problem 220 in this field, and that it is by no means easy to solve; but also that it need not be solved for the purpose of deciding the present appeal.

In our judgment two different situations must be distinguished. The first exists where the substantive offence consists simply of the act which constitutes the *actus reus* (which for present purposes we shall call the 'result') coupled 225 with some element of volition, which may or may not amount to a full intent. Here the only question is whether the 'intent' to bring about the result called for by section 1(1) is to be watered down to such a degree, if any, as to make it correspond with the *mens rea* of the substantive offence.

The second situation is more complicated. It exists where the substantive 230 offence does not consist of one result and one *mens rea*, but rather involves not only the underlying intention to produce the result, but another state of mind

directed to some circumstance or act which the prosecution must also establish in addition to proving the result.

257 The problem may be illustrated by reference to the offence of attempted rape. As regards the substantive offence the 'result' takes the shape of sexual intercourse with a woman. But the offence is not established without proof of an additional circumstance (namely that the woman did not consent), and a state of mind relative to that circumstance (namely that the defendant knew she did not consent, or was reckless as to whether she consented).

240 When one turns to the offence of attempted rape, one thing is obvious, that the result, namely the act of sexual intercourse, must be intended in the full sense. Also obvious is the fact that proof of an intention to have intercourse with a woman, together with an act towards that end, is not enough: the offence must involve proof of something about the woman's consent, and something about the defendant's state of mind in relation to that consent.

246 The problem is to decide precisely what that something is. Must the prosecution prove not only that the defendant intended the act, but also that he intended it to be non-consensual? Or should the jury be directed to consider two different states of mind, intent as to the act and recklessness as to the circumstances? Here the commentators differ: contrast Smith & Hogan, *Criminal Law*, 5th ed., pp. 255 *et seq.*, with a note on the Act by Professor Griew in *Current Law Statutes 1981*.

We must now grapple with the very problem that Mustill L.J. identifies in the last paragraph of the passage cited.

257 In our judgment an acceptable analysis of the offence of rape is as follows:

- (1) the intention of the offender is to have sexual intercourse with a woman;
- (2) the offence is committed if, but only if, the circumstances are that:
  - (a) the woman does not consent; AND
  - (b) the defendant knows that she is not consenting or is reckless as to whether she consents.

260 Precisely the same analysis can be made of the offence of attempted rape:

- (1) the intention of the offender is to have sexual intercourse with a woman;
- (2) the offence is committed if, but only if, the circumstances are that:
  - (a) the woman does not consent; AND
  - (b) the defendant knows that she is not consenting or is reckless as to whether she consents.

270 The only difference between the two offences is that in rape sexual intercourse takes place whereas in attempted rape it does not, although there has to be some act which is more than preparatory to sexual intercourse. Considered in that way, the intent of the defendant is precisely the same in rape and in attempted rape and the *mens rea* is identical, namely, an intention to have intercourse plus a knowledge of or recklessness as to the woman's absence of consent. No question of attempting to achieve a reckless state of mind arises; the attempt relates to the physical activity: the mental state of the defendant is the same. A man does not recklessly have sexual intercourse, nor does he recklessly attempt it. Recklessness in rape and attempted rape arises not in relation to the physical act of the accused but only in his state of mind when engaged in the activity of having or attempting to have sexual intercourse.

280 If this is the true analysis, as we believe it is, the attempt does not require any different intention on the part of the accused from that for the full offence of rape. We believe this to be a desirable result which in the instant case did not require the jury to be burdened with different directions as to the accused's state of mind,

dependent upon whether the individual achieved or failed to achieve sexual intercourse.

285 We recognise, of course, that our reasoning cannot apply to all offences and all attempts. Where, for example, as in causing death by reckless driving or reckless arson, no state of mind other than recklessness is involved in the offence, there can be no attempt to commit it.

290 In our judgment, however, the words "with intent to commit an offence" to be found in section 1 of the 1981 Act mean, when applied to rape, "with intent to have sexual intercourse with a woman in circumstances where she does not consent and the defendant knows or could not care less about her absence of consent." The only "intent," giving that word its natural and ordinary meaning, of the rapist is to have sexual intercourse. He commits the offence because of the circumstances in which he manifests that intent—*i.e.* when the woman is not consenting and he either knows it or could not care less about the absence of consent.

Accordingly we take the view that in relation to the four appellants the judge was right to give the directions that he did when inviting the jury to consider the charges of attempted rape.

295 The second ground of appeal advanced relates to the direction of the judge as to corroboration. He said:

"... I must give you a warning about Miss Louise Varndell. This warning is not about her in particular but applies to all cases where a charge of rape is made. Experience by the courts when complaints about sexual misconduct are made has shown that people who make these complaints sometimes tell lies.

They tell lies for a variety of reasons and occasionally for reasons that no one can discover. Because it is easy to make an allegation of a sexual crime and not always easy to refute it you must keep in your mind it may be dangerous to rely on the evidence of Miss Varndell. For this reason you should look for corroboration of what she has said and I shall explain in a moment or two what corroboration is. Before doing anything else ask yourselves whether what she has told you is on the face of it credible. That is, capable of belief. If it is not then the prosecution fails straight away. If you feel her evidence first of all is credible then go on to see if there is corroboration of what she says. Suppose you decide there is nothing to corroborate, that is to support her testimony, what then? That would not be an end of the matter because you would in that case think long and hard and carefully about her as a witness. If, having done that, and having borne in mind the warning I have already given you about this class of evidence but if you decide you can be sure she is telling the truth then you can and should both rely and act upon her evidence although there is no corroboration for it."

300 Counsel submits that the words "you must keep in your mind it may be dangerous to rely upon the evidence of Miss Varndell" amounted to a misdirection. Certainly it would have been preferable if the judge had used the words "it is dangerous to convict upon the uncorroborated evidence of Miss Varndell," but in the context in which the phrase was used by the judge, and in particular having regard to what followed in the passage cited, we are quite satisfied that there was no material misdirection such as could conceivably have misled the jury.

305 Finally our attention was directed to that part of the summing-up where the judge dealt with lies told by a defendant which, it was submitted by the Crown, afforded corroboration of the victim's allegations. Suffice it to say that we see no merit in the complaints made on behalf of the appellants as to the judge's approach upon these evidential issues. There was nothing unsafe or unsatisfactory in any of

them against any of the defendants. Four of the children gave evidence, three of them aged 11, 10 and eight and a half took the oath. The applicants were convicted and applied for leave to appeal on the grounds, *inter alia*, (i) that it was an unfair and prejudicial act to erect the screen, and thereby the jury might have been unduly influenced, unfairly prejudiced against X, Y and Z by seeing the screen there, the suggestion being that the person in the dock had already in some way intimidated the child who was going to give evidence; and (ii) that the judge was wrong in allowing three of the children to take the oath on account of their age:

Held, refusing the applications, that (1) the trial judge had a duty to see that justice was done; *i.e.*, that the system operated fairly not only to the defendant but also to the prosecution and also to the witnesses; and sometimes he had to make a decision where the balance of fairness lay. In the instant case, the Court agreed with the judge's conclusion that in the circumstances the necessity of trying to ensure that the children would be able to give evidence outweighed any possible prejudice to the applicants by the erection of the screen. What the judge did, in his discretion, was a proper and laudable step to take.

(2) In order to determine whether the children should or should not be sworn the judge, in the presence of the jury, called the children one by one in front of him and asked them certain questions in order to establish whether in their own minds they were sufficiently apprised of the importance in the particular circumstances of telling the truth. Again, in each case the judge was perfectly entitled in the exercise of his discretion to take the course he did and allow the child in question to be sworn.

Dictum of Bridge, L.J. in *Hayes* (1977) 64 Cr. App. R. 194, 196, [1977] 1 W.L.R. 234, 237 A-D applied.

Applications for leave to appeal against conviction and sentence.

On November 3, 1987 at the Central Criminal Court (the Common Serjeant: Judge Pigot, Q.C.) the applicants X, Y and Z were convicted or pleaded guilty, and were sentenced as follows: X, on four counts of indecent assault on a female, to which he pleaded guilty; four years' imprisonment; to two counts of indecency with a child to which he pleaded guilty; two years' imprisonment on count 13 and five years' imprisonment on count 19; three counts of indecency with a child of which he was convicted after trial: six years' imprisonment; two counts of indecent assault on a male, of which he was convicted: five years' imprisonment; sexual intercourse with a girl under 13: nine years' imprisonment; two counts of buggery with a female of which he was convicted: 12 years' imprisonment; and two counts of buggery with a male: 12 years' imprisonment. All the sentences to run concurrently, making 12 years' imprisonment in all. Y was charged with 15 counts. To six of them, four of indecent assault on a female and two of indecency with a child, he pleaded guilty, and in respect of which he was sentenced to three years' imprisonment. He was convicted of three counts of indecency with a child: six years' imprisonment. He was convicted of two counts of indecency with a child: six years' imprisonment; also of two counts of indecent assault on a male: five years' imprisonment; also of two counts of buggery with a female: 12 years' imprisonment, and two counts of buggery with a male: 12 years' imprisonment. All the sentences were ordered to run concurrently with each other, making 12 years' imprisonment in all. Z was convicted of aiding and abetting indecent assault on a female, and aiding and abetting indecency with the same child: four years' imprisonment; for two counts of indecent assault on a male: six years' imprisonment; and for indecency with the same two boys: six years' imprisonment; on two counts of buggery with a male: nine years'

the verdicts which were returned unanimously by the jury. Accordingly all the appeals against conviction are dismissed.

*Appeals against conviction dismissed.*

*Sentences of Dhokia, Hear and Banga varied.* \*  
Solicitors: Mackenzie Knight, Southall, for Banga. Crown Prosecution Service, Central Courts.

D.J.X.  
S.C.Y.  
G.C.Z.

COURT OF APPEAL (The Lord Chief Justice, Mr. Justice Hutchison and Mr. Justice Rougier): October 31, 1989

*Evidence—Child—Screen Protecting Child Witnesses—Children Giving Evidence Prevented by Screen from Seeing or being Seen by Defendants in Dock—Whether Permissible.*

*Evidence—Oath—Child—Capacity of Child to Take Oath—Discretion of Trial Judge.*

The applicants X, Y and Z and the children victims were all related to each other. The children were abused in almost every permutation of sexual perversion imaginable. X pleaded guilty to four counts of indecent assault and two of indecency and not guilty to 10 other counts concerning indecent assault, unlawful sexual intercourse, indecency and buggery; Y pleaded guilty to four similar offences and not guilty, *inter alia*, to nine counts concerning indecency, indecent assault and buggery; and Z not guilty to two counts of aiding and abetting indecent assault and indecency with children, and to six other counts concerned with indecent assault, indecency and buggery. The children victims were two boys aged nine and 10 and three girls eight, eight and a half and 12 years. All the counts were sample counts. As it had become apparent from experience that in such cases children were shown to be reluctant to give evidence, and that cases in the past had collapsed because the children were unwilling or unable to speak as to the facts about which they were expected to speak, it seemed to the court of trial from representations from the C.P.S. that steps ought to be taken to remedy that situation if that could be done without unfairness to X, Y and Z. Information had come from the social services that certainly some of the children were likely to be so affected. Accordingly, some days before the trial was due to start the judge assembled counsel and sought to gain their views as to the propriety or otherwise of having a screen erected in court, the purpose being to obscure the children from seeing or being seen from the dock. The screen was erected in court so that counsel who were to appear could see exactly what was proposed. Counsel could plainly see the child in question and the judge could personally see no objection to that procedure. Defence counsel opposed the idea, submitting that it would not be proper to have the screen in position as was suggested. The judge, in his discretion, allowed the screen to be set up in court as suggested above. At the outset of the trial the judge told the jury not to allow the mere presence of the screen in any way to prejudice

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CASE 6

URIAH SAMUEL BROWN

COURT OF APPEAL (Lord Justice May, Mr. Justice Tudor Evans and Mr. Justice Simon Brown): March 24, 30, 1988

Sexual Offences—Rape—Evidence of Complainant's Promiscuity—Whether Such Evidence Relevant to Defence of Consent or Only to Defence of Genuine Belief in Complainant's Consent—Sexual Offences (Amendment) Act 1976 (c.82), s.2.

By section 2 of the Sexual Offences (Amendment) Act 1976:

"(1) If at a trial any person is for the time being charged with a rape offence to which he pleads not guilty, then, except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience of a complainant with a person other than that defendant. (2) The judge shall not give leave in pursuance of the preceding subsection for any evidence or question except on an application made to him in the absence of the jury by or on behalf of a defendant; and on such an application the judge shall give leave if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked."

The appellant was charged, *inter alia*, with rape. At his trial his defence was that the complainant had consented to sexual intercourse with him. His counsel applied for leave to the trial judge to cross-examine the complainant about her sexual relations with other men, submitting that there was evidence of promiscuity, *i.e.* that not only had she had sexual experience with men to whom she was not married but that she had done so casually and with little discrimination, and that that went to the issue of consent. The judge refused the application, ruling that since the defence was consent rather than that the appellant believed that the complainant consented, the question of promiscuity did not go to the issue of the case. The appellant was convicted of, *inter alia*, rape, and appealed on the ground that the trial judge had wrongly refused to exercise his discretion to allow the appellant to cross-examine the complainant under section 2 of the Sexual Offences (Amendment) Act 1976:

Held, that (1) when the judge is deciding whether or not to allow questioning of the type referred to in section 2(1) of the Sexual Offences (Amendment) Act 1976, he is not exercising a discretion. However, if the judge is satisfied, in the terms of section 2, that it would be unfair to exclude the evidence, then the evidence must be admitted and the questions allowed. (2) The question was whether, on the facts of a particular case, the complainant's attitude to sexual relations could be material upon which a jury could reasonably rely to conclude that the complainant might indeed have consented to sexual intercourse on the material occasion, despite her evidence to the contrary. It was a question of degree in every case. (3) On the facts of the present case the Court did not think that the evidence of sexual promiscuity of the complainant was sufficiently strong or closely contemporaneous in time to the event as to reach the border between mere credit and an issue in the case. Accordingly, the appeal would be dismissed.

Vicola (1982) 75 Cr.App.R. 125 applied.

admitted to bail than when an unconvicted man is being refused bail altogether".

It may be that paragraph 8 has special impact upon the other "requirements" which may be imposed under section 3 to provide sureties and security (see sections 3(4) and (5)). But we see no reason further to pursue this aspect of the matter. In our judgment the justices were empowered by section 3 to impose the condition which they did impose, since they were clearly of the view that such a condition was necessary in each case to secure that the applicants did not commit an offence on bail. Furthermore, in our judgment, the extent and ambit of the condition was plainly reasonable and cannot be attacked upon "Wednesbury" principles.

Thus none of the applicants is entitled to relief in respect of the condition imposed, and in Cross' case its enforcement on November 9, 1988, was effected properly in pursuance of section 7 of the Bail Act.

We pass then to Pamment's case, since he complains that he was wrongfully remanded in custody on November 26, when he failed to accept the condition proposed to him.

In our judgment, the justices at Blandford were in error when they remanded Pamment in custody. Section 3(6) allows conditions to be imposed (or more strictly "requirements" to be complied with) before or after release or later.

But there is, in our judgment, no power to withhold bail except upon the prescribed grounds. The justices' condition could have been imposed upon Pamment, and any later indication that he would attend a hunt could have been dealt with under section 7 ("Liability to arrest for . . . breaking conditions of bail"); see in particular section 7(3)(b), which would have allowed arrest without warrant provided a constable had reasonable grounds for believing that Pamment was likely to break the condition of his bail.

If expression of consent to the requirement desired by the justices had been made a condition to be complied with before release, the matter might have been different.

In these circumstances Pamment's detention after the Blandford justices' order on November 26 until his release (which appears to have been about 1 p.m. on November 29 at Exeter Crown Court, or alternatively at Wimborne Magistrates' Court on that day), was unlawful. We so declare, and the order made remanding him in custody on November 26 is quashed.

If Pamment wishes to pursue his claim for damages the matter can be restored for further hearing. But since the order could have been made in the alternative way described above there may be little purpose in pursuing such a claim. That must, however, be a matter for Pamment and his advisers to consider.

Orders accordingly.

Solicitors: T & S.P. Pope, Exeter, for the applicants. Treasury Solicitor.

#### Appeal against conviction.

On July 17, 1987, in the Crown Court at Sheffield (Judge Michael Walker) the appellant was convicted on indictment on one count of abduction and one count of rape. He was sentenced to concurrent terms of seven years' imprisonment.

The facts appear in the judgment.

The appellant appealed on the ground that the trial judge had wrongly refused to exercise his discretion to allow him to cross-examine the complainant under the provisions of section 2 of the Sexual Offences (Amendment) Act 1976, and that in all the circumstances the verdict of the jury was unsafe and unsatisfactory. The appeal was argued on March 24, 1988.

*Robin Denny* (assigned by the Registrar of Criminal Appeals) for the appellant.

*K. R. Keen* for the Crown.

*Cur. adv. vult.*

March 30. *MAY L.J.* read the judgment of the Court. On July 17, 1987, in the Crown Court at Sheffield, the appellant was convicted of one offence of abduction and one of rape and was sentenced to seven years' imprisonment on each count concurrent. He now appeals against his conviction by leave of the single judge.

In brief the Crown case was that on the night of September 26, 1986, the complainant, Sylvia Martin, went out to a night-club in Sheffield with some friends. At about 1.30 or 2 a.m. she met the appellant there. She had had some trouble with him the previous week at a public house, when he had slapped her and threatened a friend of hers with a glass. She therefore did not want anything to do with him, but he kept on asking her to dance. He continued to press his attentions on her, saying that he was feeling sexy and that she had to go with him that night. She refused and attempted to get away from him, but as she was leaving he came up to her again and pulled her into a passage way. He again told her that she was coming with him, but she refused and tried to fight him off. Two girl friends of hers tried to intervene, but the appellant threw stones at them and was abusive. In the end he forced her to go with him to a nearby house and upstairs to the bedroom. In the course of doing so he pulled her along and hit her on the head. She was shaking and frightened. He then told her to take her clothes off, and shouted and screamed when she refused. As she was terrified she agreed to undress. The appellant then pushed her on to the bed. She was crying her eyes out. Between then and the following morning the appellant had intercourse with her on three occasions against her consent. At 8.30 a.m. the complainant asked if she could leave, not for the first time. After they had both dressed and when she said she wanted a taxi the appellant showed her where she could telephone, and stayed with her until the taxi arrived.

Once back at home the appellant went straight to bed. Earlier, when her friends had been unable to find her, they had telephoned the police and an officer had come to her house at about 3.50 a.m. On her return home her friends told her that the police had been and that she was to telephone them. However, she refused to do so because she was afraid that she might be beaten up. Ultimately she was seen by police at 10 a.m., and their evidence was that she had been driving and appeared to be dishevelled and upset.

alleged offence on the first occasion they had met. She had asked him not to tell her friends. On the night of the alleged offence they had danced and talked and he had left by himself. He had met the complainant outside the club, and she said that she would come home with him, having already said when they were dancing that she might do so. They went home, and after talking for about half an hour they went upstairs.

There they had intercourse together with her complete consent on two occasions. In the morning he woke her up and at her request walked her to a telephone box to call a taxi.

The police surgeon who examined the complainant on the day following the alleged offences said that there were no marks of violence or injuries to any part of the complainant. The doctor's report also contained material, not given in evidence before the jury, from which the clear inference was that in her opinion the complainant was suffering from some venereal disease. The appellant in the cross-examination said that as a result of the intercourse that he had had with the complainant he had himself also contracted that disease.

After the complainant had given evidence-in-chief, counsel for the appellant applied to the learned judge for leave to cross-examine her about her sexual relations with other men. He relied on the decisions in *Lawrence* [1977] Crim.L.R. 492, and *Viola* (1982) 75 Cr.App.R. 125. He indicated that he wished to put to the complainant, first, the evidence of the police surgeon that she had found signs of venereal disease; secondly, that part of the complainant's own deposition where she described her relationship with her then boy-friend as a "casual sex relationship," and which he (the boy-friend) had said had been going on for only some 10 days; thirdly, that the complainant had had a child six months earlier by yet another man. Counsel submitted that this was evidence of promiscuity and that it went to the issue of consent.

Counsel for the Crown resisted the application on the basis that, even if these matters did show promiscuity on the part of the complainant, this was not relevant to the defence that she consented, although it might have had some relevance if the defence had been a genuine belief in her consent.

The learned judge ruled that, since the defence was that the complainant was consenting rather than that the appellant believed that she was consenting, the question of promiscuity did not go to the issue in the case. He therefore refused the application. With respect we do not think that this by itself was a sufficient reason for rejecting the application. Clearly it is easier to justify such cross-examination under the section when the defence is that a defendant knew of the complainant's sexual history and in consequence had a genuine or mistaken belief that she was consenting. It does not follow that cross-examination on these lines can never be permitted where the defence is merely that the complainant consented to the act of sexual intercourse complained of.

The sole ground of appeal is that the learned judge wrongfully refused to exercise his discretion to allow the appellant leave to cross-examine the complainant under the provisions of section 2 of the Sexual Offences (Amendment) Act 1976, and that in all the circumstances the verdict of the jury was unsafe and unsatisfactory.

Section 2 is in these terms:

"(1) If at a trial any person is for the time being charged with a rape or an offence under section 2 of the Sexual Offences Act 1956, then except with the leave of the

any sexual experience of a complainant with a person other than that defendant. (2) The judge shall not give leave in pursuance of the preceding subsection for any evidence or question except on an application made to him in the absence of the jury by or on behalf of a defendant; and on such an application the judge shall give leave if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked."

The only authority to which we need to refer is that of *Viola* (1982) 75 Cr.App.R. 125. On that decision the first point to make in the present appeal is that, when he was deciding whether or not to allow questioning of the type referred to in section 2(1) of the Act, the learned judge was not exercising a "discretion," as is suggested in the grounds of appeal. As was said by Lord Lane C.J. in *Viola* at p. 130:

"The judge has to make a judgment as to whether he is satisfied or not in the terms of section 2. But once having reached his judgment on the particular facts, he has no discretion. If he comes to the conclusion that he is satisfied it would be unfair to exclude the evidence, then the evidence has to be admitted and the questions have to be allowed."

What counsel for the appellant wished to do at the trial in this case, as he told us and as appears from the transcript, was to seek to show that the complainant was promiscuous, that is to say, that not only had she had sexual experience with men to whom she was not married but that she had done so casually and with little discrimination. It was, of course, in any event fundamental to such a submission that there was a factual basis for suggesting sexual promiscuity in this case.

Nevertheless, if the purpose of such questions was merely to show that for that reason the complainant ought not to be believed under oath, then the judge properly excluded the evidence. On the other hand, if the proposed questions were relevant to the issue of consent, as opposed merely to credit, then they would be likely to be admitted. As was said in the judgment of the Court in *Viola* at p. 130, this is because:

"To exclude a relevant question on an issue in the trial as the trial is being run will usually mean that the jury are being prevented from hearing something which, if they did hear it, might cause them to change their minds about the evidence given by the complainant."

This is in many cases not an easy concept, because in one sense questions even going only to credit can be said to be relevant to the issue of consent. If a complainant who gives evidence of a defendant having sexual intercourse with her without consent is not to be believed in the witness-box, then the absence of that consent will not be proved. However, again as was pointed out in *Viola's* case, in the present climate of opinion a jury would be unlikely to be influenced, nor should it be influenced, when considering veracity by the mere fact that the complainant may have been promiscuous in the sense indicated.

This was realised by the Court in *Viola* in this passage at p. 130:

"Inevitably in this situation, as in so many similar situations in the law, there is a grey area which exists between the two types of relevance, namely

the evidence to an issue in the case may be so slight as to lead the Judge to the conclusion that he is far from satisfied that the exclusion of the evidence or the question from the consideration of the jury would be unfair to the defendant."

The real inquiry is whether on the facts of the particular case the complainant's attitude to sexual relations could be material upon which in these days a jury could reasonably rely to conclude that the complainant may indeed have consented to the sexual intercourse on the material occasion, despite her evidence to the contrary. It is in every case a question of degree.

Further, the question whether it is unfair to exclude such cross-examination in a case on or near the borderline referred to may be affected by the consideration whether there are other features relevant to consent which could tip the balance between fairness and unfairness. In the present case the complainant did not seek help from her boyfriend when the appellant, on her evidence, was forcing her away from the club. She did not shout out to her friends who were there at the time and who saw what was happening. She did not complain to the taxi-driver the following morning when she was picked up at the appellant's home. May these features have been due to her attitude towards casual sexual relations, and in combination with that attitude sufficiently material to the question whether she consented or not so as to make it unfair to exclude the questions sought to be asked?

In our opinion, this was a case near the borderline. Clearly the complainant was prepared to have intercourse with a number of different men, but we do not think that the mere fact that she was suffering from some venereal disease is necessarily evidence of substantial promiscuity. Before it could be so considered there would have to be cross-examination, largely on a "fishing basis," to discover the circumstances in which she came to be infected. There are also the other features to which we have referred.

Nevertheless, although we have not found it easy to reach a decision on this appeal, in the end we do not think that the "evidence of sexual promiscuity" of the complainant was "so strong or so closely contemporaneous in time to the event in issue as to . . . reach the border between mere credit and an issue in the case."

For these reasons we dismiss this appeal.

*Appeal dismissed.*

*Solicitors: Crown Prosecution Service, Sheffield.*

1989  
The Crown's appeal is dismissed

any prosecutor handed over such documents as the court found necessary to be in the hands of the defence in order that justice should be done. Alternatively, a civil action can be brought.

I have already indicated that there is in any event procedure which allows an application to be made in cases where the police have possession of property (Police (Property) Act 1897, s.1). It could well be desirable that such procedures should be made available in Customs and other cases. But this is of course entirely a matter for the Legislature. The absence of such procedures in Customs cases does not, in my judgment, affect the interpretation of section 48.

If magistrates' courts are using section 48 in the wide manner described in the solicitor's evidence in this case, then in my judgment they are in error. And so was the editor of the Justice of the Peace Journal (1956) J.P.N. 205, who suggested a wider application for section 48 than that which in my judgment is permissible.

I would accordingly dismiss this application.

WATKINS L.J.: I agree. It ought not to be necessary for a person whose property has been taken away from him by officers of Customs and Excise to bring a civil action to recover it. There is so much activity, in the investigation of drug offences, especially by these officers, these days during which they seize documents and other things from the homes of persons suspected of crime that a Magistrates' Court should, in my view, have a statutory power to deal effectively at any time with applications for restoration of such property. The lack of that power following seizure of property by Customs and Excise officers is an anomaly which ought to be speedily disposed of. This application is dismissed.

*Application refused.*

Solicitors: Tom McGoldrick, for the applicant. Solicitor, Customs & Excise.

CASE 7

WILLIAM BRUCE FOTHERINGHAM

COURT OF APPEAL (Lord Justice Watkins, Mr. Justice McNeill and Mr. Justice McCowan): July 18, 19, 1988

*Sexual Offences—Rape—Defence—Mistaken Identity of Victim Owing to Self-Induced Intoxication—Whether Such Defence Available—Sexual Offences (Amendment) Act 1976 (c. 82), s.1.*

By section 1 of the Sexual Offences (Amendment) Act 1976:

"(1) For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if—(a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and (b) at that time he knows that she does not consent to the

the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed."

The appellant was charged with raping a 14-year-old girl, who had been babysitting for him and his wife. His defence was, *inter alia*, that he was so drunk at the time of the offence that he thought he was having sexual intercourse with his wife. The jury were directed, *inter alia*, that they had to ask themselves whether there were reasonable grounds for the appellant to believe or not he was sleeping with his wife—reasonable grounds which would be reasonable to a sober man. The jury convicted the appellant. On appeal:

Held, dismissing the appeal, that on a charge of rape contrary to section 1 of the Sexual Offences (Amendment) Act 1976 self-induced intoxication was no defence whether the issue was intention, consent or, as in the instant case, mistake or a combination of both as to the identity of the victim. The judge was correct in directing the jury as he did.

*O'Grady* (1987) 85 Cr.App.R. 315, [1987] Q.B. 995 and dictum of Lord Diplock in *R. v. Caldwell* (1981) 73 Cr.App.R. 13, 21, [1982] A.C. 341, 355 applied. Dictum of Griffiths L.J. in *Woods* (1982) 74 Cr.App.R. 312, 314 considered.

[For drunkenness in sexual offences, see *Archbold* (43rd ed.), para. 20-53; for s.1 of the Sexual Offences (Amendment) Act 1976, see, *ibid.* para. 20-338].

*Appeal against conviction.*

On October 14, 1987, in the Crown Court at Bristol (Nolan J.) the appellant was convicted by a majority of rape and sentenced to six years' imprisonment.

The facts appear in the judgment. The ground of appeal was that the judge had erred in law in directing the jury to disregard the appellant's self-induced intoxication as a defence.

The appeal was argued on July 18, 1988, when the following case was cited in addition to those referred to in the judgment: *Tolson* (1889) L.R. 23 Q.B.D. 168.

The appellant also applied for leave to appeal against sentence which does not call for report.

*Ian Glen* (assigned by the Registrar of Criminal Appeals) for the appellant.

*Mark A. Horton* for the Crown.

*Cur. adv. vult.*

July 19. WATKINS L.J. delivered the following judgment of the Court: On October 14, 1987 in the Crown Court at Bristol before Nolan J. the appellant was convicted of rape and sentenced to six years' imprisonment.

He appeals against conviction on a point of law.

The facts are these. The Crown's case was that in the early hours of May 31, 1987 the appellant raped a 14-year-old girl who was at his home babysitting for his wife. He and his wife had two children, a small boy and a baby. The girl, whose statement was read to the court, stated that she was friendly with the appellant and his wife. She had often babysat for them, sometimes staying overnight when she did so. On May 30, she was asked to babysit. She went to the appellant's home for that purpose. Before the appellant's wife went out with the appellant she, probably in the absence of the appellant, told the girl that she

a pair of knickers and a night shirt and a brassiere. She lay in bed facing the child. She was woken up by someone pulling her knickers down and turning her over on to her back. Understandably she was very frightened. She did not resist what was happening. The person who was assaulting her in that way got on top of her. She quickly realised it was the appellant. She realised too that he had been drinking. No word was spoken. He pushed her legs apart. She was a virgin but she appreciated that he was after sexual intercourse. She did not want that to happen, but she was too scared to resist. He penetrated her and was moving up and down upon her. Fortunately before he could do any more harm (he had surely done enough), the wife suddenly appeared in the bedroom. She stopped what was going on straight away, as one would expect.

That is sufficient to say about what happened. No such thing had of course ever happened or anything approaching it between the appellant and this young girl before.

At the trial a forensic scientist gave evidence of finding traces of semen on the knickers which the girl had put on after the incident had finished.

There was talk between the wife and the girl after this incident. Later on the police were informed of what had taken place. Two police officers spoke on the following Sunday evening to the appellant and arrested him.

In the interview which followed he told the officers that he had drunk about seven or eight pints of lager during the evening. He said to them that he was well over the limit. When he went home with his wife, he went straight up to bed, while she stayed downstairs. The girl was in bed with his son. He got into the bed naked and then he described what happened. He was not, he said, actually trying to have intercourse with the girl because his wife came in at the last moment. Later on he admitted he had in fact had sexual intercourse with the girl before his wife arrived. He said he thought the girl was frightened, and he accepted that she had never encouraged him nor given him any reason previously or then to think that she would consent to having sexual intercourse with him. The only explanation for what happened was, according to him, that he had had a lot to drink and it was a natural reaction to get into bed with the girl who was there. The police asked him further questions. He said that he was disgusted with himself.

There was no suggestion by him in that interview that he had mistaken the girl for his wife. But when he gave evidence to the jury that indeed was his explanation. He claimed not that his wife, as he said to the police, had remained downstairs when he went up to bed, but that his wife had preceded him upstairs so that when he got into the bedroom he expected his wife to be in bed, and assumed, when he had stripped himself of his clothing and got into bed, that his wife was lying alongside him.

So his defence, to put it as shortly as possible, was simply that he made an honest mistake. He mistook the 14-year-old girl for his wife, entirely because he was so much under the influence of alcohol that he could not appreciate the difference. On any view it was an unattractive defence and a very surprising one. Nevertheless the jury took more than two hours to reach its verdict, and then by a majority.

The direction complained of has to be read in full in order to appreciate the complaint that is made of it. The judge said:

"What does reckless mean? A man is reckless if he does not believe the girl is consenting, and could not care less whether she consented or not, but presses on regardless. In those homely words the Lord Chief Justice has explained the concept of recklessness and I adopt them. So here, say the prosecution, even if you were to feel that he may not have positively known that it was [the girl] with whom he was having intercourse and that she was not consenting, you can be sure that he did not believe she was consenting and could not have cared less about the matter; he simply wanted to have sexual intercourse with the girl in the bed willy-nilly and that is what he did. It was, say the prosecution, a simple case of drunken, reckless rape. Parliament has said in a section of the Sexual Offences Act that: 'if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters in considering whether he so believed.' That may seem to be a direction for you to consider the matter as you might have done yourselves as reasonable people, but it is clear law that what it means is that you have to look at the situation from the point of view of the defendant and ask whether from his point of view there were reasonable grounds for him to believe or not to believe that he was sleeping with a consenting woman, sleeping with his wife, lawfully. But I must stress that in doing so you must ignore the effects of the drink that he had taken, the seven or eight pints of lager which he has spoken about. The reasonable grounds are grounds which would be reasonable to a sober man. You can understand that it would be impossible for the law to say that a man is not guilty of rape if he says, and is believed: 'I was so drunk that I could not tell whether she was consenting or not; I thought she was,' or: 'I was so drunk that I thought the woman was my wife though in fact she was not.' That is not a defence. You have to ask whether there were reasonable grounds which bear the name of reasonable in the proper sense, that would appeal to the reason of the defendant, he being sober and able to appreciate them. You have heard the defendant admit that, if he had been sober, he would not have made the mistake he says he did, that he would not have mistaken [the girl] for his wife, and that, you may think, is a crucial admission, but that you must come to in the context of the evidence as a whole. So, members of the jury, what is your task? It is to look at all the circumstances and say: Are we sure that he knew he was having sexual intercourse with [the girl]? Or: If we are not sure about that, are we sure that he was reckless in his treatment of [the girl] and had no reasonable grounds which could have led a sober man to think that he was sleeping with his wife and it was therefore a case of consensual, lawful intercourse?"

Mr. Glen, who appeared for the appellant in the court below and who with conspicuous ability has argued his appeal here, has submitted that in that



The point of law which therefore, he says, comes before us for resolution is whether it is a defence to a charge of rape under section 1(1) of the Sexual Offences (Amendment) Act 1976 that a defendant, as a result of self-induced intoxication, has an honest but mistaken belief that he was having conjugal relations.

There is no direct authority on the point which, we agree with him, must very rarely arise: indeed we know of no previous instance of it having done so.

At the outset of his argument counsel referred us to the full terms of section 1 of the Act, which are:

"(1) For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if—(a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it; and references to rape in other enactments (including the following provisions of this Act) shall be construed accordingly.

(2) It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed."

Counsel had to recognise, as in fact he did, that where the issue in rape is consent, a defendant's self-induced intoxication is not a relevant matter which a jury are entitled to take into account in deciding whether there were reasonable grounds for the defendant's belief that the woman consented—see *Woods* (1982) 74 Cr.App.R. 312. Likewise he had to face the law, which is that "self-induced intoxication is no defence to a crime in which recklessness is enough to constitute the necessary *mens rea*"—see as to that the speech of Lord Diplock in *R. v. Caldwell* (1981) 73 Cr.App.R. 13, 21, [1982] A.C. 341, 355, where Lord Diplock refers to *D.P.P. v. Majewski* (1976) 62 Cr.App.R. 262, [1977] A.C. 443, where it was held that rape is a crime of basic intent to which self-induced intoxication is no defence.

It should be noted that in *Woods* (*supra*) Griffiths L.J., giving the judgment of the Court, stated at p.314:

"As the law stood immediately before the passing of this Act self-induced intoxication was no defence to a crime of rape (see *D.P.P. v. Majewski* (*supra*)). If Parliament had intended to provide in future that a man whose lust was so inflamed by drink that he ravished a woman, should nevertheless be able to pray in aid his drunken state to avoid the consequences we would have expected them to have used the clearest words to express such a surprising result which we believe would be utterly repugnant to the great majority of people. We are satisfied that Parliament had no such intention and that this is clear from the use of the word 'relevant' in the subsection. Relevant means, in this context, legally relevant. The law, as a matter of social policy, has declared that self-induced intoxication is not a legally relevant matter to be taken into account in deciding as to whether or not a woman consents to intercourse."

Here he says the mistake was as to the identification of the person with whom the appellant was having sexual intercourse. There is nothing in the cases so far mentioned in this judgment and others referred to by him and in *D.P.P. v. Morgan and others* (1975) 61 Cr.App.R. 136, (1976) A.C. 182 which states that self-induced intoxication in a case of mistaken identity cannot be a defence. But we are firmly of the view that mistake, as is consent, being a question of fact cannot be raised as a defence if, as here, it arises from self-induced intoxication. For that *O'Grady* (1987) 85 Cr.App.R. 315, [1987] Q.B. 995 is very clear authority in our view.

That is a case in which the appellant, who was intoxicated killed a man and stated to the police, "if I had not hit him I would be dead myself." He was tried on a count charging murder. The jury were directed that if the appellant mistakenly believed he was under attack, he was entitled to defend himself, but was not entitled to go beyond what was reasonable. He was convicted of manslaughter. It was held, dismissing the appeal, that "so far as self-defence was concerned, reliance could not be placed on a mistake of fact induced by voluntary intoxication; and that accordingly, the appeal failed."

The judgment of the Court was given by Lord Lane C.J. At p.319, and p.1000 of the respective reports he stated:

"This brings us to the question of public order. There are two competing interests. On the one hand the interest of the defendant who has only acted according to what he believed to be necessary to protect himself, and on the other hand that of the public in general and the victim in particular who probably through no fault of his own, has been injured or perhaps killed because of the defendant's drunken mistake. Reason recoils from the conclusion that in such circumstances a defendant is entitled to leave the Court without a stain on his character. We find support for that view in the decision of the House of Lords in *D.P.P. v. Majewski* (1976) 62 Cr.App.R. 262, [1977] A.C. 443, and in particular in the speeches of Lord Simon of Glaisdale and Lord Edmund Davies. We cite a passage from the speech of Lord Simon of Glaisdale, at p.272 and 476: '(1) One of the prime purposes of the criminal law, with its penal sanctions, is the protection from certain proscribed conduct of persons who are pursuing their lawful lives. Unprovoked violence has, from time immemorial, been a significant part of such proscribed conduct. To accede to the argument on behalf of the appellant would leave the citizen legally unprotected from unprovoked violence, where such violence was the consequence of drink or drugs having obliterated the capacity of the perpetrator to know what he was doing or what were its consequences . . . ."

Lord Edmund-Davies said at p.284 and 492 respectively: 'The criticism by the academics of the law presently administered in this country is of a twofold nature: (1) It is illogical and therefore inconsistent with legal principle to treat a person who of his own volition has taken drink or drugs any differently from a man suffering from some bodily or mental disorder of the kind earlier mentioned or whose beverage had, without his connivance, been "laced" with intoxicants; (2) it is unethical to convict a man of a crime requiring a guilty state of mind when *ex hypothesi*, he lacked it.'

Lord Edmund-Davies then demonstrated the fallacy of those criticisms."

"Reverting to the same topic immediately after the decision in *D.P.P. v. Beard* (1920) 14 Cr.App.R. 159 [1920] A.C. 479, Stroud added ((1920) 36 L.Q.R. at p. 273): '... it would be contrary to all principle and authority to suppose that drunkenness can be a defence for crime in general on the ground that "a person cannot be convicted of a crime unless the *mens rea*." By allowing himself to get drunk, and thereby putting himself in such a condition as to be no longer amenable to the law's commands, a man shows such regardlessness as amounts to *mens rea* for the purpose of all ordinary crimes... His drunkenness can constitute a defence only in those exceptional cases where some additional mental element, of a more heinous and mischievous description than ordinary *mens rea*, is required by the definition of the crime charged against him, and is shown to have been lacking in consequence of his drunken condition.'"

Ingenious and well argued though Mr. Glen's whole argument was, it in our view clearly runs counter to authority, which is that in rape self-induced intoxication is no defence, whether the issue be intention, consent or, as here, mistake as to the identity of the victim. We do not doubt that the public would be outraged if the law were to be declared to be otherwise and particularly in accordance with Mr. Glen's submissions.

In our judgment the judge was correct to rule as he did, namely, I repeat, "But I must stress that in doing so you must ignore the effects of the drink that he had taken, the seven or eight pints of lager which he has spoken about. The reasonable grounds are grounds which would be reasonable to a sober man." In other words a mistake arising from self-induced intoxication is no defence in rape.

The appeal against conviction is dismissed.

[The Court then considered an application for leave to appeal against sentence and refused it].

*Appeal dismissed.*

*Application refused.*

Solicitors: Crown Prosecution Service, Bristol.

## REGINA V. CENTRAL CRIMINAL COURT (RESPONDENT), Ex parte FRANCIS & FRANCIS (APPELLANTS)

HOUSE OF LORDS (Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Griffiths, Lord Oliver of Aylmerton and Lord Goff of Chieveley): July, 13, 14, 18, 19, November 3, 1988

*Police—Powers—Legal Privilege—Drug Trafficking Investigation—Police Suspecting Proceeds From Drug Trafficking Used by Third Party to Purchase Property—Ex Parte Order Requiring Third Party's Solicitors to Produce Files Relating to Purchase—Whether "Items Subject to Legal Privilege" or Excluded by "Intention of Furthering a Criminal Purpose"—Police and Criminal Evidence Act 1984 (c. 60), s.10(2)—Drug Trafficking Offences Act 1986 (c. 32), s.27(4)(b)(ii).*

By section 10 of the Police and Criminal Evidence Act 1984:

"(1) Subject to subsection (2) below . . . in this Act 'items subject to legal privilege' means—(a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client; (b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and (c) items enclosed with or referred to in such communications and made—(i) in connection with the giving of legal advice; or (ii) in connection with or in contemplation of legal proceedings and for the purposes of such proceedings, when they are in the possession of a person who is entitled to possession of them. (2) Items held with the intention of furthering a criminal purpose are not items subject to legal privilege."

By section 27(4) of the Drug Trafficking Offences Act 1986:

"The conditions referred to in subsection (2) above are— . . . (b) that there are reasonable grounds for suspecting that the material to which the application relates—(i) is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purpose of which the application is made, and (ii) does not consist of or include items subject to legal privilege or excluded material. . . ."

On June 2, 1987, a detective constable obtained an order under section 27 of the Drug Trafficking Offences Act 1986 requiring the appellant solicitors to produce within seven days all files in their possession relating to the affairs of one of their clients, Mrs. G., it being thought that she had been provided with money to purchase property by a person engaged in drug trafficking. On June 12, 1987, on an *ex parte* application by the appellants, the judge varied the order to apply only to Mrs. G.'s dealings with a particular property. The appellants applied for judicial review to have the order quashed on the ground, *inter alia*, that the files were "items subject to legal privilege" as defined by section 10 of the Police and Criminal Evidence Act 1984, and as such by virtue of section 27(4)(b)(ii) could not be made the subject of an order under section 27. The Divisional Court in refusing the application concluded that the "intention of furthering a criminal purpose" referred to in section 10(2) could not, by a process of literal construction, be restricted to the intention of the person having

any disallowance should affect any individual counsel or solicitor and the amount of any such disallowance. His decision will depend on the circumstances of the case.

9.3 In the Crown Court, in proceedings specified in paragraph 1 of Part II of Schedule 1 to the Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989 where standard fees would otherwise be payable, where the trial judge is satisfied with the solicitor's conduct of the case or he considers that for exceptional reasons, the fees should be determined by the appropriate authority, he may direct that such determination take place.

9.4 Where the judge or the Court has in mind that observations under paragraph 9.1 or that a direction under paragraph 9.3 should be made the solicitor or counsel whose fees or expenses might be affected must be informed of the precise terms thereof and of his right to make representations to the appropriate authority and be given a reasonable opportunity to show cause why the observations or direction should not be made. This should normally be done in chambers at such time as the judge or the Court thinks proper. If it is decided to make the observations or direction the decision may be announced in open Court if the judge or the Court considers that it is in the interests of justice to do so.

9.5 Where such observations or direction are made the appropriate authority must afford an opportunity to the solicitor or counsel whose fees might be affected to make representations in relation to them.

9.6 Whether or not observations under paragraph 9.1 have been made the appropriate authority may consult the judge or the Court on any matter touching the allowance or disallowance of fees and expenses, but if the observations then made are to the effect mentioned in paragraph 9.1, the appropriate authority should afford an opportunity to the solicitor or counsel concerned to make representations in relation thereto.

#### PART X: LEGAL AID CONTRIBUTIONS

##### *In the Crown Court and the Court of Appeal Criminal Division*

10.1 When a defendant who is acquitted on all counts or successfully appeals against his conviction has paid a contribution under a Legal Aid Order the Court should normally order the repayment of the contribution and remit any unpaid instalments due under the order, unless there are circumstances which make such a course of action inappropriate. Details of any contribution order and payments should be given to the Court before it considers what order should be made.

10.2 The exercise of the power to remit unpaid instalments regardless of the outcome of the trial or appeal will depend upon the circumstances of each case.

#### PART XI: ADVICE OF APPEAL TO THE COURT OF APPEAL CRIMINAL DIVISION

11.1 In all cases the procedure set out in "A guide to proceedings in the Court of Appeal Criminal Division" published by the Criminal Appeal Office with the approval of the Lord Chief Justice in 1989 should be followed. The reference to Appendix I which follows is to the Appendix to the said Guide.

11.2 This procedure requires written advice to be delivered to the defendant within 21 days of conviction or sentence. In simple cases this will involve little or no expense. If the procedure is not followed and the work has not been done with due care, fees may be reduced accordingly. Counsel will have received instructions in the form of Appendix I from the Solicitor which specifically refer him to the Guide. Counsel is required to complete Appendix I immediately following the conclusion of the case and the solicitor should give a copy to the defendant at that stage.

Where counsel's immediate and final view in Appendix I is that there are no reasonable grounds of appeal, no additional fees should be allowed. In any other circumstances counsel must further advise in writing within 14 days and where it was reasonable for counsel so to advise an allowance should be made for the advice.

11.3 When both (a) counsel or solicitor has given positive advice to appeal, and (b) notice of application for leave to appeal or of appeal has been lodged with the Crown Court on the strength of that advice, the Registrar of criminal appeals is the appropriate authority to determine the fees in respect of the work in connection with the advice and notice of application etc. The Crown Court should not determine those fees unless the solicitor confirms that the notice of application etc. was not given on his or counsel's advice. Where no notice of application etc. is given, either because of unfavourable advice or despite favourable advice, the appropriate authority is the appropriate officer for the Crown Court.

11.4 If it appears that the defendant was never given advice the Crown Court should direct the solicitor's attention to this fact and if there is no satisfactory explanation as to why no advice was sent the determining officer should bear this in mind when determining the Solicitor's costs and should draw the solicitor's attention to the above mentioned Guide of 1989.

#### PART XII: REVOCATIONS

12.1 The Practice Directions listed below are hereby withdrawn.

February 16, 1968: [1968] 1 All E.R. 778, [1968] 1 W.L.R. 389, Parker C.J.

February 7, 1977: (1977) 64 Cr.App.R. 113, [1977] 1 All E.R. 540, [1977] 1 W.L.R. 181, Widgery C.J.

February 7, 1977: (1977) 64 Cr.App.R. 112, [1977] 1 All E.R. 542, [1977] 1

W.L.R. 182, Widgery C.J.

June 30, 1980: (1980) 73 Cr.App.R. 371, [1980] All E.R. 336, [1981] 1 W.L.R.

697, Lane C.J.

November 5, 1981: [1981] 3 All E.R. 703, [1981] 1 W.L.R. 1383, Lane C.J.

November 25, 1982: [1982] 3 All E.R. 1152, [1982] 1 W.L.R. 1447, Lane C.J.

May 26, 1989

Lane C.J.

CASE 8

#### MAXIE ANGUS ANDERSON ENSOR

COURT OF APPEAL (The Lord Chief Justice, Mr. Justice Kennedy and Mr. Justice Hutchison): March 6, 13, 1989.

*Barrister—Conduct of Case—Practice—Implied Authority of Counsel to Conduct Case—Decision of Counsel to Decline Client's Request to Apply to Sever Count in Indictment—Whether Ground of Appeal—Whether Ground for Quashing Conviction.*

*Evidence—Corroboration—Rape where both Corroboration and Consent in Issue—Direction by Judge Necessary for Jury to Look for Corroboration and Danger of Convicting without it.*

1 The appellant was charged with two counts of rape involving two different women, Miss P and Miss H. Though the two counts were properly joined in the

same indictment, leading counsel defending him declined the appellant's request to apply for the indictment to be severed, an application which would normally have been expected to succeed. In respect of count 1 involving Miss P it was not disputed that the appellant had had sexual intercourse with her, the only issue was consent; but there was no scientific support for the allegation of rape although Miss P denied giving the appellant any encouragement. As to count 2 both the fact of sexual intercourse with Miss H and the absence of consent were in issue. In the summing-up the judge, as to count 1, directed the jury that the only issue that required corroboration was the issue of consent and that a lie the appellant told about a whip which Miss P thought mistakenly that he was going to use on her was capable of amounting to corroboration. As to count 2, nowhere did the judge refer to the need of corroboration of the act of intercourse. The jury convicted the appellant on both counts. On appeal (1) that the failure of defence counsel to apply for the severance of the indictment had resulted in a miscarriage of justice; further (2) that the judge had misdirected the jury on the need for corroboration:

Held, that (1) if the Court had any lurking doubt that the appellant might have suffered some injustice as a result of flagrantly incompetent advocacy by his counsel, then it would quash the conviction; in the present case leading counsel's carelessly considered decision not to apply to sever the two counts in the indictment might have been mistaken; but it could not possibly be regarded as incompetent, let alone flagrantly incompetent, advocacy; thus that ground of appeal failed.

*Gautam, The Times*, March 4, 1987 applied.  
*Novac* (1977) 65 Cr.App.R. 107 considered. *Irwin* (1987) 85 Cr.App.R. 294, [1987] 2 All E.R. 1085 doubted.

(2) As to count 1, the fact that sexual intercourse was admitted by the appellant, the only issue remaining was consent, and as the judge's direction left the jury in no doubt that it was to the absence of consent that his warning as to corroboration applied, the appeal on that count would be dismissed. (3) As to count 2, as the law stood the warning about the need to look for corroboration and the danger of convicting without it had to be given in relation to each of the two ingredients of the offence where both were in dispute. As on that count the failure to give such a direction constituted a material misdirection, the appeal would be allowed and the conviction quashed.

**Per curiam:** In almost all cases where a direction on corroboration is required, it is desirable that the judge should, at the conclusion of the evidence, hear submissions from counsel on the need to look for it and the danger of convicting without it.

[For discretion of counsel in conducting case, see *Archbold* (43rd ed.), para/4-393. For corroboration in rape cases, see, *ibid.*, paras. 16-21, 20-351.]

Appeal against conviction.

On December 17, 1986, the appellant was convicted in the Crown Court at Birmingham (Judge Ross Q.C.) on two counts of rape, count 2 by a majority of 11 to one. He was sentenced to five years' imprisonment on count 1 and to four years' consecutive on count 2, making nine years' imprisonment in all.

two men. After a meal at about 10.30 p.m. they all went to the club. The other three went home at various times after midnight, leaving Miss P behind.

The appellant was employed as a doorman or "bouncer" at the club. She danced with him and he, eventually, so she said, offered to drive her home, an offer which she accepted, only to find that she was being taken to his home and not hers. She accepted his invitation to go in for coffee. The time by now was about 4.30 a.m.

When she in due course sought to telephone for a taxi, he stopped her doing so, pushed her into the bedroom and ordered her to take off her clothes. He pushed her on to the bed and, according to her, raped her. She went to the bathroom and when she came out he took her back to the bedroom and then produced what she thought was a whip. She was terrified that she was going to be whipped, but instead of that he wound the lash round his private parts and had sexual intercourse with her again, this time from behind. She was by now crying out for him to stop; he for his part was crying out at the self-inflicted pain he was suffering by reason of the ligature and it was in those circumstances that he raped her for the third time.

By this time it was about 7.30 a.m. and she was able to telephone for a taxi, taking the address from a letter which had shortly before been delivered by the postman.

Very shortly after she got home she telephoned to her boyfriend. He went straight round to see her and to him she appeared very distressed, complaining that she had been raped. She was terrified and too scared, it was said, to go to the police in case the appellant came after her. She told the boyfriend about the whip. He also rang her solicitor who advised her to go to the police. It was not however until February 25 that she made a complaint to the police. That was after she had heard that the appellant had been arrested in respect of the second alleged rape. On February 28 she made a statement to the police, *inter alia*, describing the whip.

The appellant's account of this incident was that Miss P had been a willing participant in everything that had happened; that she had been both willing and cooperative first in the performance of "oral sex," and later when sexual intercourse proper had taken place; that it was true that he had put a ligature round his private parts in order, it seems, to engorge and enlarge his penis for his own satisfaction. The ligature was formed however not by any whip, he said, but by the cord from his track suit. Miss P could not have seen any whip, she must have imagined it.

On March 3 police went to his house with a search warrant and there they found two whips, one of which was of the sort described by the complainant, and also a number of potential accessories for paranormal sexual activities.

The complainant in the second count was Miss H, aged 22. She was an employee at the same club as the appellant. In the early hours of February 23 she accepted a lift home in the appellant's car. There had earlier been some horse-play in a jacuzzi upstairs in the club, in the course of which she had been soaked. As a result she was clad only in a blanket for the drive home.

Once there, he accepted her invitation to a cup of coffee. As she was dressing in the bedroom, she said, he came in naked and took hold of her. She struggled. He pushed her down on her back, punched and slapped her face, probed her private parts with his hands and raped her. She denied giving him encouragement. She admitted that she had given him her mother's telephone number in order, she said, to prevent any more violence.

She complained to a friend later that morning. The police were called and Miss H was examined by a doctor who observed a number of scratches, abrasions and in particular a swelling below the left eye. Samples were taken

The appellant's account of this event was that he was too tired to achieve proper sexual intercourse. He performed "oral sex" upon Miss H with her consent. He could provide no acceptable explanation for her injuries.

The main grounds of appeal were (1) that against the appellant's wishes his then counsel declined to apply for the two counts to be severed; and (2) the judge had misdirected the jury on corroboration.

The appeal was argued on March 6, 1989, when the following two cases were cited in argument in addition to those referred to in the judgment: *West* (1984) 79 Cr.App.R. 45 and *Wilson* (1973) 58 Cr.App.R. 169.

*David Jeffreys, Q.C.* and *Michael Wolkind* (neither of whom appeared below) for the appellant.

*B. R. Escott-Cox, Q.C.* and *Timothy Raggatt* for the Crown.

*Cur. adv. vult.*

March 14. **THE LORD CHIEF JUSTICE** read the judgment of the Court. On December 17, 1986, in the Crown Court at Birmingham before His Honour Judge Ross and a jury, this appellant was convicted on two counts of rape, as to the second by a majority of 11 to one, and was sentenced on the first count to five years' imprisonment and on the second to four years' imprisonment to run consecutively, making a total of nine years' imprisonment.

He now appeals against conviction by leave of the single judge.

[His Lordship stated the facts and continued:]

We have gone into some detail as to the facts of the two counts in order to cast light on the submissions made to us by Mr. Jeffreys on the question of corroboration.

Before we come to that aspect, we turn to examine the facts which gave rise to the original notice of appeal. This was the subject of Mr. Jeffreys' first submission to us which was as follows:

Although the two counts of rape were properly joined in the same indictment, counsel who appeared for the appellant at the trial should have applied for the two counts to be severed. It is clear from the information available to us that the appellant himself wanted such an application to be made, and made his wishes known to his lawyers. Mr. Jeffreys submitted that if the application had been made, it ought to have succeeded, because there was no such similarity between the alleged offences as to enable the prosecution to rely upon the facts of one to prove guilt in respect of the other. Indeed that was conceded by Mr. Escott-Cox, who has appeared for the prosecution throughout.

At least for the purposes of argument we are prepared to accept Mr. Jeffreys' further submission that if the indictment had been severed the appellant's chances of acquittal would have been improved, but in fairness to both counsel who appeared for the defence at the trial, it must be said that they did not overlook the possibility of applying for the indictment to be severed. On the contrary they discussed that possibility, and concluded that if the application were to be made, it would fail.

According to leading counsel, he also came to the conclusion that there were certain advantages to be gained by the defence if the two counts of rape were heard together, the principal advantage being that it could be openly said to the jury of the first complainant, with whom the appellant admitted having had sexual intercourse, that she made no complaint to the police until 10 days later and only then when she knew that the appellant was in custody as a result of the second complain-

suggestion that she was only prepared to pursue a false allegation of rape when she heard of the fresh rape charge. As the second complainant's case against the appellant was apparently less strong than that of her predecessor, if her case failed, so the appellant might well be acquitted on both counts.

In developing his first submission Mr. Jeffreys submitted that although it is not the obligation of counsel to discuss with his client every step which he proposes to take during the course of a criminal trial, it was here the duty of leading counsel to inform the appellant of his decision not to apply for the indictment to be severed, and of his reasons for that decision, and that his failure to take that step, coupled with his failure to make the application, a failure of which the appellant was never aware until the end of the trial, constitutes a material irregularity in the conduct of the trial the consequences of which were such that this Court ought to intervene.

Mr. Escott-Cox has submitted that, although on the evidence the appellant right up to the end of the pre-trial consultation with his leading counsel clearly wanted counsel to apply to sever the indictment, nevertheless it must be inferred that the appellant tacitly accepted and acceded to counsel's decision not to make that application. He says, with force, and we accept, that it is inconceivable that this appellant, who was no stranger to court procedure, should have sat in the dock for days within a few feet of his legal representatives without ever inquiring whether the application had been made and in the mistaken belief that it had been made and rejected.

But that does not deprive Mr. Jeffreys of his basic submission, which is that leading counsel, contrary to what he must have known to be the wishes of his client, declined to make an application in circumstances in which this Court would normally expect a successful application to have been made, and that in consequence a miscarriage of justice has occurred, which we should now correct.

We must therefore look a little more closely at the extent to which this Court will concern itself with what passes between an accused person and his legal representatives.

Mr. Escott-Cox contends that in a criminal trial defending counsel is only obliged to seek specific instructions from his client in relation to two matters: first, as to plea, and secondly, as to whether the client himself wishes to give evidence. All other decisions are for counsel, and it is for him to decide, as a matter of discretion, which matters, if any, needed to be discussed with the accused. The discretion is one, he submits, which this Court will not attempt directly to review, although it might, for example, in a wholly exceptional case be prepared to consider whether compelling evidence which was available but which defence counsel for no good reason refused to lead renders the conviction unsafe and unsatisfactory.

Mr. Jeffreys relied heavily on the case of *Irwin* (1987) 85 Cr.App.R. 294, [1987] 2 All E.R. 1085 decided by another division of this Court on February 19, 1987. That was a case in which at a retrial counsel for the defence decided not to call alibi witnesses who had given evidence at the earlier trial which had ended in a disagreement. On appeal it was said (at p. 6G) that the question was not whether counsel was right in thinking that the witnesses should not be called but whether he was entitled to bind his client. The Court held that he was not entitled to do so, asserting (at p. 6H) that on this topic there is no authority to be found in any criminal case.

It seems that the Court in *Irwin's* case was not referred to the decision of this Court in *Novac and Others* (1977) 65 Cr.App.R. 107. There the Court was con-

alleging specific offences, and one defendant, Raywood, applied for the specific offence count against him to be severed from the conspiracy count. The application was refused but his appeal succeeded on the basis that the application ought to have been allowed, and at p. 112, Bridge L.J., giving the judgment of the Court, continued as follows:

"It is surprising that no application similar to that made on behalf of Raywood should have been made on behalf of Novac or Andrew-Cohen to sever the specific offence counts against them. [Counsel] for Novac told us that he thought it pointless to make such an application after the application on behalf of Raywood had been refused. But we can see no basis which would have justified him assuming that the one application must necessarily be determined in the same way as the other. It was for him to make an application to sever on his own client's behalf if thought appropriate. *No such application having been made there can be no basis for complaint in this Court that the conspiracy and related counts were heard together in Novac's case with the specific offence count.*" (our emphasis).

In *Novac* the Court does not seem to have considered it necessary to inquire whether counsel in refraining from making an application to sever acted with or without the express authority of his client, no doubt because generally speaking this Court will always proceed upon the basis that what counsel does is done with the authority of the client who has instructed counsel to conduct his case.

In *Gautam*, *The Times*, March 4, 1987, which was decided by this Court on February 27, 1987, a few days after the appeal in the case of *Irwin* had been heard, Taylor J. said:

"... it should be clearly understood that if defending counsel in the course of his conduct of the case makes a decision, or takes a course which later appears to have been mistaken or unwise, that generally speaking has never been regarded as a proper ground for an appeal."

That was a shoplifting case in which counsel, for what were patently good reasons, had declined to lead medical evidence at the trial until after the jury had returned a verdict.

On March 12, 1987, another division of this Court heard the appeal of *Alan John Swain*, unreported, who contended, with apparent justification, that his counsel, by incompetent cross-examination, had introduced evidence which was prejudicial to his case, which was then amplified by the witness in answer to a question put to him by the judge. In an attempt to circumvent the difficulties which he faced arising out of what was said in *Gautam*, counsel at the hearing of the appeal sought to rely mainly on the intervention of the judge, but the Court found that what was said in answer to the judge added nothing to what had already been said by the witness to counsel. Various other points were considered with which we need not now be concerned, but O'Connor L.J. said that if the Court had any lurking doubt that the appellant might have suffered some injustice as a result of flagrantly incompetent advocacy by his advocate, then it would quash the convictions, but in that particular case it had no such doubts.

We consider the correct approach to be that which was indicated by this Court in the case of *Gautam*, (*supra*), subject only to the qualification to which O'Connor L.J. referred in the case of *Swain*. We consider further that the decision in *Irwin*, (*supra*) even if it can be reconciled with *Novac* (*supra*) (which we doubt), should be regarded as being confined to its own facts. This ground of appeal accordingly fails.

As to corroboration, Mr. Jeffreys makes a number of criticisms of the summing up.

First, he submits that the warning given by the learned judge to the jury was inadequate. What the judge said was this (transcript p. 5A):

"The essence of the offence is the absence of consent. In all offences of this sort, where it is alleged that a woman has been subjected, without her consent, to sexual familiarities of any kind, whether it be indecent assault or the full offence of rape, it is the duty of the Judge to give you this warning. It is not safe to proceed to conviction of a case of this sort on the uncorroborated testimony of the woman who makes the complaint. That is not an element advertising upon the female sex, it is simply that the . . . courts, through years of experience, have come to the conclusion that unless the complaining woman's evidence is supported by other evidence, independent of hers, it simply is not safe to convict even although you may be satisfied in your own minds that she is telling the truth."

In support of his general criticism, Mr. Jeffreys makes two points. He argues that it would have been preferable for the judge to direct the jury that it was dangerous to convict on the uncorroborated evidence of the complainant. Further, he submits, the judge's language was too wide, and would, or could, have left the jury with the impression that it was in relation to the truth of the complainant's evidence generally rather than to the specific issues of the fact of intercourse and the absence of consent that the warning was directed.

Delivering the judgment of this Court in *Stewart* (1986) 83 Cr. App. R. 327, Mus-till L.J. said this at p. 335:

"Whilst the language in which the 'full' warning on corroboration is expressed in the judgments has tended to follow a pattern, there is ample authority that no set formula is required, and indeed that the words 'danger' or 'dangerous' need not themselves be employed. At the same time, however, the courts have emphasised that (as Salmon L.J. said in *Henry and Manning* (1968) 53 Cr. App. R. 160, 163), there must be clear and simple language that will without any doubt convey to the jury that it is really dangerous to convict on the evidence of the impugned witness alone . . ."

In our view the words used by the learned judge in the present case fulfilled this requirement. Having told the jury that it was "not safe" to convict on uncorroborated evidence, he reinforced that warning with the words "it is simply not safe to convict . . ." This plainly would have conveyed to the jury that it was dangerous to convict in the absence of corroboration.

As to the second limb of this submission, which is that the judge's language was too wide and may not have been understood as referring to those vital ingredients of the offences that were disputed, it is necessary to consider the two cases separately. So far as count 1 is concerned, the fact of intercourse was admitted by the appellant, and the vital issue was consent. The passage we have already cited began with the words "The essence of the offence is absence of consent . . ." When he began a few lines later to deal with the facts, the learned judge said this:

"In the case of [Miss P] . . . there is only one issue and that is the issue of consent . . . It is not disputed in her case that the defendant had intercourse with her, so the only issue that requires corroboration is the issue of consent."

The jury can therefore have been in no doubt that it was to the issue of absence of consent that the warning in relation to corroboration applied. We accordingly find that the second limb of Mr. Jeffreys' general criticism.

stating that the matter of the whip was capable of constituting corroboration of Miss P's assertion that she did not consent to intercourse. He directed the jury that it was the only matter capable of constituting corroboration and, having reminded the jury of the conflict of evidence as to whether it was a whip or merely a tracksuit cord which was produced and used in the manner already described, he said this:

"On February 28, it is common ground that the statement that she then gave to the police included a description of this leather dog whip and when the police went to the house and searched it they found a leather dog whip which resembled the thing that she was talking about. There you have something outside Miss P's evidence which you are entitled to bear in mind when asking yourselves: 'Well, was she telling the truth about this or not?' That is really the only point where her evidence is supported from something outside because . . . she was describing something that the defendant denies he ever produced and it turns out in fact he possesses such a thing . . ."

In this connection it is important to note that the evidence of Miss P was that when the whip was produced she thought the appellant was going to use it on her, and was terrified, though in the event what the appellant proceeded to do was to make use of it in the way already described.

Mr. Jeffreys submits that whereas the finding of a whip such as the one described provided some general confirmation of her account, it did not in any way support her assertion of lack of consent. It was not suggested by her that he actually threatened her, or used the whip on her, to secure compliance. At most, submits Mr. Jeffreys, it supports the conclusion that he was lying, and the way the judge dealt with it was in effect to invite the jury to regard his lie as being capable of amounting to corroboration. Mr. Jeffreys submits that such a lie does not satisfy the tests laid down in the well known case of *Lucas* (1981) 73 Cr.App.R. 159. [1981] Q.B. 720: and that in any event the judge did not—as he would have had to do had he been inviting the jury to consider a lie as possible corroboration—give them a direction in accordance with that case.

We do not however accept that this was the way in which the jury were being told they might regard the matter. The evidence that required corroboration was Miss P's evidence that the admitted intercourse was without her consent. When she was describing the immediate circumstances of two of the acts of intercourse Miss P described the production of a whip which she said she thought the appellant was going to use on her and which terrified her: so that, notwithstanding the fact that he did not expressly threaten her or use it, the whip was plainly an element and an important element in her submission to intercourse.

The appellant denied the production of such an article: and yet one, corresponding with Miss P's description, was found by the police in his house. No doubt, incidentally, that tended to show that he had been lying: but it also supported in a material particular her assertion of lack of consent. In our view it was in the latter rather than the former sense that the learned judge invited the jury to consider it as possible corroboration. We find nothing in his language to suggest the contrary: and indeed it would be surprising if this very experienced judge, had he intended to invite the jury to treat a lie by the appellant as possible corroboration, had omitted to give them a *Lucas* direction.

We therefore reject Mr. Jeffreys's submissions as to corroboration in connection with the first count.

question of what evidence was capable of amounting to corroboration, the judge directed the jury that if they were satisfied that Miss H came by her injuries when she was with the appellant they were entitled to ask themselves "whether they are or are not wholly consistent with whatever went on between her and this man being with her consent." He spoke of them as something which might "go to corroborate and support her."

This direction was of course perfectly accurate in relation to the issue of lack of consent. But the nature of the injuries was such that they were not capable of corroborating the fact of intercourse. Moreover, even had they been so capable, nowhere did the learned judge direct the jury that they should, in the case of Miss H, look for corroboration of Miss H's evidence that intercourse had occurred.

It is not necessary further to elaborate this point, because Mr. Escott-Cox accepted that nowhere did the judge refer to the need for corroboration of the act of intercourse. He submitted, however, that given that the appellant's account in evidence was that there was oral intercourse to which Miss H readily consented, and that he was unable sensibly to account for her injuries, it could be said that there was corroboration; or that at least this was a case in which we should apply the proviso.

There is no doubt that, as the law stands, the warning as to the need to look for corroboration and the danger of convicting without it must be given in relation to each of the two ingredients of the offence, where both are in dispute. There was here a failure to give such a direction, which in our view constituted a material misdirection. We might well have acceded to Mr. Escott-Cox's invitation to apply the proviso had there not been features of the evidence in relation to count 2, some of which appear from the facts we have recited and others of which we have in mind but need not specifically mention, which in our view make it impossible to say that, had they received a proper direction, the jury would inevitably have convicted.

Accordingly the appeal will be allowed in relation to count 2, and the conviction on that count quashed.

There is one observation that we wish to add. Counsel for the Crown told us that, as far as he could recall, the judge did not invite, nor did counsel volunteer, any submissions in connection with corroboration. This was a case which was by no means straightforward in that respect, and we feel that the judge would have been assisted by submissions from counsel, in the course of which there would have been explored, separately in relation to each count, both aspects of the matter, namely, (i) what were the ingredients of the offences in respect of which the jury should be told to look for corroboration and (ii) what evidence was there capable of amounting to corroboration. In almost all cases where a direction on corroboration is required, it is desirable that the judge should, at the conclusion of the evidence, hear submissions from counsel—they will often be very brief—on these two important matters. If this practice is followed, the sort of problems exemplified by the present appeal will usually be avoided.

In the upshot the appeal against conviction is dismissed as to count 1, and allowed as to count 2, upon which the conviction is accordingly quashed.

*Appeal allowed in part.*

*Appeal on count 1 dismissed.*

*Conviction on count 2 quashed.*

When I first saw that, it seemed to me, first of all, quite apart from any question as to whether you bail him or you do not bail him, those terms ran foul of a number of authorities, which say that when one is deferring sentence one cannot directly or indirectly start imposing conditions on a person whose sentence is deferred.

It is well known that judges very often when they defer sentence quite properly say to the defendant what the judge has at the back of his mind and what he expects the defendant to do during the period of deferment and the possible consequences of what might happen if he does not, but one is very careful never to impose conditions.

There are two cases which come to mind that shows that that is right. The first case I looked at was *Dyer* (1974) 60 Cr.App.R. 39, which is a decision of the Court of Appeal with Roskill L.J. presiding. What had happened in that case was that the judge had not only deferred sentence, but at the same time purported to bind over the defendant at common law to be of good behaviour and to bind him over at the same time for a period to come up for judgment when called upon to do so. The Lord Justice said that that was not something that you could do at the same time as deferring sentence.

The other case appears as a note in *Archbold* (42nd ed.), para. 5-123. It was reported in *The Times*, May 18, 1983 ([1983] Crim.L.R. 686). It is the case of *Skelton*.

"Deferment of sentence is designed to discover whether the subject of it is capable of behaving himself of his own accord during the prescribed period, so that when he was sentenced the Court might pass a sentence lighter than otherwise it might have done. Sentence cannot be deferred upon the basis of an undertaking by the defendant that during the period of deferment he would subject himself to some form of medical treatment or become (by way of undertaking or condition) the subject of some kind of discipline."

Of course, the condition in this case which the recorder imposed, quite clearly imposed upon him some kind of discipline, he has got to reside in a particular place and be there every night.

If the recorder had power to consider questions of bail, the conditions which he did indeed impose are against general principles upon which one would exercise the powers of deferment. If one had any power to impose bail at all, it would have to be unconditional bail. That does not seem to be what the recorder intended in this case.

When one looks at section 1(6A) of the Powers of Criminal Courts Act 1973, as amended, it provides in terms notwithstanding any enactment, a court which under this section defers passing sentence on an offender shall not on the same occasion remand him. I think section 1(6A) was indeed introduced by way of amendment to deal with the arguments that used to take place as to whether or not one bailed a man when deferring sentence.

It seems perfectly clear from that amendment, if one cannot remand him at the same time, the remand, of course, being basically remanding him in custody, questions of bail cannot arise at all.

The conclusion I have reached is that I think this is clear that on a deferment of sentence one is not concerned with granting or refusing bail. One cannot remand him. His obligations are to come up and attend at the time the court fixes at the end of the deferred period.

Unfortunately, I think that the recorder thought he had jurisdiction to remand him and therefore granted him bail on terms. The surety was the unfortunate

cause of the present dilemma because if she had not gone to the police and complained he would never have been arrested and would have remained at liberty and never been arrested had he attended on the appointed day and nobody would have heard of the difficulty I am found with.

What am I to do? I have already indicated I am not a Court of Appeal for the learned recorder, but it seems to me I am faced here with a man who is clearly unlawfully in custody, and the only proper thing that this court can do is to order and direct he be released forthwith. That is what I propose to do.

*Order accordingly.*

*Solicitors:* Crown Prosecution Service, Guildford. Goodhand & Forsyth, Redhill for the defendant.

## CASE 9

### ROY KOWALSKI

COURT OF APPEAL (Lord Justice Stocker, Mr. Justice Kenneth Jones and Mr. Justice Ian Kennedy): October 8, 1987

*Indecent Assault—Husband and Wife—Whether Act of Fellatio by Husband on Wife without Consent Capable of Being Indecent Assault—Whether State of Marriage Implies Consent to Such an Act.*

Although the state of marriage implies consent by a wife to intercourse *per vaginam*, so that her husband may not be guilty of raping her, it does not imply consent to an act of fellatio, and, without actual consent, such an act may constitute an indecent assault.

The appellant and his wife were married in January 1985. By September 1986 sexual intercourse between them had ceased, and the wife had served a divorce petition on the appellant. On September 14 the appellant forced his wife, at knife-point, to undergo an act of fellatio, and then went on, still at knife-point, to have intercourse with her. The act of fellatio formed the basis of a count of indecent assault to which the appellant pleaded guilty, after a ruling by the trial judge that it was capable of being an indecent assault. He appealed against that conviction.

Held, dismissing the appeal, that although an act of fellatio was not unlawful, it was not, like the act of intercourse *per vaginam*, an act to which the parties gave consent by their marriage. If the act was performed without actual consent, it was capable of being an indecent assault. The fact that the wife had previously consented to such acts did not prevent her from withholding her consent on a subsequent occasion. It was irrelevant that the act of fellatio might be a preliminary to an act of intercourse *per vaginam*.

Appeal against conviction and sentence.

On February 25, 1987 in the Crown Court at Exeter (Judge Sir Jonathan Clarke) the appellant was convicted of indecent assault on his wife (count 2) and of assaulting her with intent to do her actual bodily harm (count 3).

He was sentenced to four years' imprisonment concurrent.



The facts appear in the judgment.

The main ground of appeal on count 2 was whether oral intercourse (fellatio) could in the circumstances of the instant case amount to indecent assault. The appellant appealed against sentence on counts 2 and 3.

*John C. Haynes* (assigned by the Registrar of Criminal Appeals) for the appellant.

*Francis H. S. Gilbert* for the Crown.

**IAN KENNEDY J.:** On February 25, 1987 at the Crown Court at Exeter the appellant pleaded guilty to an indecent assault upon his wife and to an assault upon her which occasioned actual bodily harm. He was on each count sentenced to four years' imprisonment concurrent.

The first charge, indecent assault, was the subject of submissions to the learned judge before arraignment. The appellant contended that he could not be guilty of the offence in the circumstances in which it was committed, and he invited the learned judge to quash the count. Having heard those submissions, the learned judge ruled against them, whereupon the appellant pleaded guilty to that count, and to the count of assault occasioning actual bodily harm, to whose validity he had no objection.

He now appeals against his conviction for indecent assault, and against his sentence upon both counts by leave of the single judge.

We deal first with the appeal against conviction. For that purpose we begin with the relevant part of the history. The appellant was married to his wife (the complainant) in January 1985. They were both people of mature years. By May of the following year the marriage was failing. By September of that year sexual intercourse between the parties had ceased. Although they continued to occupy the same home, they lived separate lives. Early in the month of September the complainant served a divorce petition upon the appellant.

On Sunday, September 14, 1986 the relevant events took place. The complainant returned to the house at about 6.15 in the evening. She had occasion to go to the lavatory. While she was there, the appellant burst in, carrying a knife, he placed the point against her throat. He told her not to do anything foolish and then ordered her to take off all her clothing. This she did, including the tampon that she was wearing. He then forced her, still at knifepoint, to walk to the bedroom and there he made her undress him, again at knifepoint. In the middle of this process he remembered that she had an appointment elsewhere later that evening, so he took her to the telephone and made her telephone to say that she would be late. They returned to the bedroom: he had provided drinks for them both—a bottle of rum and a plastic bottle of Pepsi Cola, which, because it could not be undone, he cut open with the knife. He compelled her to pour them each a drink. He said to her that she should take a drink in advance of what was going to happen. She took a few sips while she was kneeling in front of him.

He then began an act of oral intercourse with her. She objected, and took her hands away from his buttocks where she had had to place them. She took her hands away to wipe her mouth, and then she tried to put her hand between his body and hers. He said to her, angrily, that she must put her hands back on his buttocks. She did so, and he put his penis back in her mouth. While it was there he kept thrusting; because of the force of his thrusting she choked and began to,

he had before. Throughout the whole of this episode the knife was at the nape of her neck.

He then stopped, withdrew his penis from her mouth and said, "Get on the bed." She lay on the bed. He told her to get on her front and instructed her to kneel, to put her head down and her hands behind her back. She obeyed. With her kneeling in that position he put his penis into her vagina. She could feel the knife in the region of her neck the whole while. He continued the act of sexual intercourse. She did not co-operate and he said to her, "You can do better than that. If you help me you will live, if you don't you will die; I am going to die tonight anyway." So she did something to appease him.

Although he was to continue the intercourse for some little time, that is a sufficient description of the events for the purposes of this case.

The question which arises therefore on this appeal is whether that act of oral intercourse (fellatio) can in the circumstances amount to an indecent assault. It was that act which was relied upon by the Crown as justifying the second count of the indictment. Mr. Haynes, for the appellant, argues that it cannot.

It is clear, well-settled and ancient law that a man cannot, as actor, be guilty of rape upon his wife. That exception, which traces its history back to Hale's *Pleas of the Crown* (1778 ed.) Vol. 1, ch. 58, is dependent upon the implied consent to sexual intercourse which arises from the married state, and which continues until that consent is put aside by decree nisi, by a separation order or, in certain circumstances, by a separation agreement. Self-evidently, none of those limitations in time arise in this case. It can also be argued that the exception may be founded on the use of the word "unlawful" to qualify the words "sexual intercourse" in the statutory definition of the offence of rape.

Similarly, it is clear that it is not the law that a man may never be guilty of an indecent assault upon his wife. Mr. Haynes does not contend that the law is otherwise. He gave, by way of example, the case of a man who chose to take his wife into a public place and there to do indecent things to her in order to humiliate her. The validity of that example is shown by the decision of this Court in the case of *Court* (1987) 84 Cr.App.R. 210, [1987] Q.B. 156.

Mr. Haynes argues that because the fellatio was done as a preliminary to, or as part of, an act of sexual intercourse *per vaginam*, and because in the past such acts had taken place consensually between these parties, the fellatio fell within the consent which existed between this couple, or was a permissible adjunct to the sexual intercourse *per vaginam* to which the complainant had by her marriage consented.

That argument was considered and, as we have said, rejected by the learned trial judge. He said, at p.11F of the short transcript:

"The argument is that within the sexual context of sexual acts between husband and wife or on the facts disclosed in this case, what happened cannot be said to be indecent solely because there was lack of consent. It seems to me that that argument must fail and fail whether one looks at it from the objective or the subjective point of view. Circumstances of indecency depend essentially on the whole circumstances and upon the facts of a particular case. It must, I think, go without saying that there can be a proposed situation in which what happens in the sexual context between a

"Even had, in happier days, the wife found oral sex to be other than indecent, I see no reason at all, as a matter of common sense, why circumstances should not alter to the point where she is entitled to say of a particular act: 'I agree I have done that with you before. I agree I did not find it indecent when we did it as an act of love, but I now do find it indecent; I find it repellant; I find it abhorrent.' And if she so says, it is clearly capable in my view of being properly described as an indecent assault, an assault shown in the papers coupled with circumstances of indecency."

With that ruling by the learned judge we entirely agree.

There can be no question in this case but that there was no positive consent to this act in the sense of a consent given immediately and upon that occasion to what was done. His conduct and her protests—and indeed the rupture of relations in the weeks preceding this very event—make that clear beyond any argument.

The consent which arises on marriage is shown by many authorities to arise, it is variously said, from the marriage contract or from the marriage vows. It is clear, as Professor Smith points out in his commentary upon the case of *Caswell* [1984] Crim.L.R. 111, to which we shall shortly refer, that *Hale* was referring to intercourse *per vaginam*. That is so for two reasons: first, because *Hale* was speaking of rape and rape requires intercourse *per vaginam*, and also because of the references to marriage, which in this context carries with it its purpose of the procreation of children.

Professor Smith in the same commentary points out—and, with respect, he is plainly right—that fellatio is not unlawful. But it is not a practice to which parties give their consent by their marriage. If, having married, they do consent to it, then the act so performed is performed with consent and is not an assault. But such a consent once given, and even long continued, cannot relate back and attach itself to the marriage vows or to the marriage contract or to the married state. Actual consent to such an act of fellatio must then exist if the particular incident is not to be an assault. In this case, it is, as we have said, very plain indeed from all the circumstances that this appellant knew perfectly well that his wife was not consenting.

In our judgment, it matters not for this purpose whether the fellatio is undertaken as a preliminary to an act of sexual intercourse *per vaginam* or as an end in itself. It is irrelevant that it may be a preliminary.

We have referred to the case of *Caswell* [1984] Crim.L.R. 111. This was a decision of Mr. Assistant Recorder Fox at the Wakefield Crown Court in October 1983. The facts of that case were different from those of the present case in detail, but for practical purposes they may be taken as identical. As it is recorded in this report, which is not in the nature of a verbatim report, the learned assistant recorder held:

"If the law implies her consent to the act of sexual intercourse, whether she wills it in fact or not, then a lesser sexual act cannot in law be indecent or repugnant to her. Further or alternatively, if her deemed consent were limited to the act of intercourse, it would mean that any other act preliminary to or during intercourse would be capable of being an indecent

It is upon that decision that Professor Smith has made the comments to which we have already referred. He also made this point:

"A marriage is consummated by natural sexual intercourse so that this may fairly be regarded as the object of the 'mutual matrimonial consent and contract.' A refusal to have natural sexual intercourse is a 'wilful refusal to consummate'—a wrongful withdrawal of 'the mutual matrimonial consent.' A refusal to indulge in fellatio is not."

Then he points out the problem when he says:

"A difficulty about this view is that in the present case it seems to have been a preliminary to ordinary sexual intercourse and the difficulty of drawing a line between 'acceptable' and 'unacceptable' sexual acts must be acknowledged."

We have carefully considered that view, but in our judgment the answer in the instant case is that which we have given, namely that the married state does not imply consent to fellatio. It must be obtained as occasion requires. In this case it was plainly absent. Therefore the offence was committed. It is not necessary for us to go further and consider whether any and, if so, what acts in the nature of familiarity or preliminaries to sexual intercourse would fall within the shadow of the protection that a husband has against prosecution for rape upon the person of his wife.

For those reasons the appeal against conviction fails and is dismissed. [The Court then went on to consider the appeal against sentence and allowed it to the extent of reducing the period of four years' imprisonment concurrent to two years' imprisonment concurrent.]

*Appeal against conviction dismissed.  
Sentence varied.*

*Solicitors:* Crown Prosecution Service, Exeter.

## R. v. HAMMERSMITH JUVENILE COURT,

Ex parte O

QUEEN'S BENCH (DIVISIONAL COURT) (Lord Justice May and Mr. Justice Nolan): February 23, 24, 1987.

*Justices—Juvenile Court—Trial—Jurisdiction—Juvenile Charged with Indictable Offence—Justices Deciding to Deal with Case Summarily—Case Adjourned—At Adjourned Hearing Justices Declining to Deal With Case Summarily on Learning of Juvenile's Criminal Record—Whether Justices' Decision At Adjourned Hearing Correct—Magistrates' Courts Act 1980 (c.43), ss.24(1), 25(5)(b).*

By section 24(1) of the Magistrates' Courts Act 1980: "Where a person under

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# CASE 10 ROBERT DEMPSTER

COURT OF APPEAL (The Lord Chief Justice, Mr. Justice Farquharson and Mr. Justice Gatehouse): April 9, 1987

*Sentence—Life Imprisonment—When Justified*  
*Sentence—Rape—Rape on Two Women by Defendant—Evidence of Mental Instability Not Susceptible to Psychiatric Treatment—Whether Life Imprisonment Justified*

A sentence of life imprisonment is justified if the following criteria are satisfied: (1) the offence is grave enough to warrant a very long sentence; (2) the nature of the offences or the defendant's history shows instability of character and the likelihood of the committal of such offences in the future; (3) where, if the offences are committed the consequences to others may be especially injurious, i.e. sexual offences or crimes of violence.

*Hodgson* (1967) 52 Cr.App.R. 113 applied.

The appellant, aged 34 with a bad criminal record but with no convictions for sexual offences, repeatedly raped two women after threatening them with a knife, one at night in her home and the other five days later in an underground garage whence he had dragged her by the throat. On arrest he admitted the offences, adding that he had been drinking and taking drugs on both occasions. At his trial he pleaded guilty to the offences. Medical and psychiatric reports showed mental instability but no evidence that the appellant would benefit from psychiatric treatment. He was sentenced to concurrent terms of life imprisonment, the recorder remarking that his duty was not merely to punish and exert deterrence, but rather more importantly to ensure the protection of women.

On appeal against sentence, that a determinate rather than an indeterminate sentence was called for.

Held, dismissing the appeal, that taking the above criteria into consideration, the second giving rise to the problem in the instant appeal; the Court doubted whether the recorder would have been justified in passing the life sentences solely on the facts of the instant case, thoroughly unpleasant though they were; nevertheless in the light of the further evidence of mental instability contained in the psychiatric reports, the Court took the view that the sentence of life imprisonment imposed by the recorder was correct.

*Blackburn* (1979) 1 Cr.App.R.(S.) 205 and *Owen* (1980) 2 Cr.App.R.(S.) 45 distinguished.

*De Havilland* (1983) 5 Cr.App.R.(S.) 109 considered.

Per The Lord Chief Justice: "As problems of sentencing become more and more complicated, so help from the Crown becomes more and more necessary. We very much hope that the Crown will in future be represented on an increasing number of occasions before this Court when questions of sentence are being considered."

[For life imprisonment, see *Archbold* (42nd ed.), paras. 5-28 to 32.]

Appeal against sentence.

The facts appear in the judgment.

He appealed on the ground that a life sentence was inappropriate because of the absence of physical injuries, full admissions, pleas of guilty and absence of previous convictions for sexual offences.

The following case was cited in argument in addition to those referred to in the judgment: *Billam* (1986) 82 Cr.App.R. 347.

*J. Goldberg* (assigned by the Registrar of Criminal Appeals) for the appellant. *Alan Green* for the Crown.

**GATEHOUSE J.** On November 10, 1986, at the Central Criminal Court before the Recorder of London, the appellant pleaded guilty to two counts (counts 1 and 3) of rape and was sentenced to life imprisonment on each. He now appeals against sentence by leave of the full Court.

The relevant facts are these. The complainant in count 1 was a 41-year-old woman living in Poole. In May 1986 the appellant lived next door to her. During the night of May 8/9 he gained entry to her house, woke her up holding a knife to her throat and saying "Do not scream or you are dead." He led her downstairs, again threatening to kill her if she did not do as she was told, and checked that the door was locked.

Then he took her back upstairs, pushed her on the bed and raped her. He tried to make her give him oral sex but she moved away. He then tied her up spreadeagled on the bed and gagged her. Later he cut her bonds, allowed her to wash and then he raped her on certainly one, possibly as many as three, further occasions, again threatening to kill her if she did not submit. Finally he left taking some money from her purse.

Some five days later, on the evening of May 13, a 25-year-old girl, the second complainant, was walking along the South Bank near the National Theatre. She decided to relieve herself in an alcove. As she was doing that the appellant dragged her by the throat, threatened to put a knife through her and dragged and pushed her into an underground garage. There he pushed her into a corner and forced her to submit to oral sex. He then attempted to rape her standing up but failed to enter her, so he raped her on the ground. He threatened to kill her if she told the police. Then he dragged her to an open air seating area and raped her again.

On May 19 he was arrested and admitted that he had had sexual intercourse with both women, but said that they had consented. Later in a statement under caution he admitted having raped the second complainant on the South Bank. He said he had been drinking and had been taking different drugs. He went on to admit raping, tying up and gagging the first complainant and again said he had been on drink and drugs.

This appellant is now aged 34. He has a bad record: two findings of guilt as a juvenile and 14 previous convictions for a variety of offences, including burglary, assault occasioning actual bodily harm, malicious wounding, living on the earnings of prostitution, criminal damage, possessing a firearm and possessing an offensive weapon. But, as Mr. Goldberg points out, he has no conviction for sexual offences. He was sentenced to a term of three years and three months some eight years ago. He was last sentenced in October 1985 to 18 months' imprisonment, being released on April 12, 1986, only a matter of a few weeks before these offences.

It is said by Mr. Goldberg, who has referred us helpfully to the main authorities, that there are five reasons why a life sentence in this case was wrong. He points out that the psychiatric evidence does not show mental illness but rather inadequate personality. He points out that that is frequent enough in criminals before the courts. He points to the fact that this was a guilty plea, and that the court, perhaps in sexual cases more than others, would normally give a considerable discount for that, for the fact that the complainants are spared the ordeal of giving evidence. Mr. Goldberg asks is he likely to commit such an offence in the future? and he stresses the word "likely." He says that the only evidence to justify that consists of the actual facts of these two rapes. There we disagree with Mr. Goldberg, and it is a matter to which I will return.

He points out that the courts have said in the past that the fact that the appellant will be a great deal older after a determinate sentence is a fact that is taken into account, because in this sort of case sexual drive is likely to lessen with the passing of years. So, on the authorities to which he referred the Court, Mr. Goldberg asks us to substitute a determinate sentence, and he accepts that the sentence suggested by the learned recorder of 15 years would not be one he could quarrel with.

Both Mr. Goldberg and Mr. Green have referred us helpfully to the principal authorities on this question of determinate or indeterminate sentences, principally of course the case of *Hodgson* (1967) 52 Cr.App.R. 113, the recent case of *O'Dwyer* (unreported—decided May 6, 1986), and the case of *de Havilland* (1983) 5 Cr.App.R.(S.) 109.

The general principles are not in doubt. In *Hodgson* Mackenna J., giving the judgment of the Court, said at p.114:

"When the following conditions are satisfied, a sentence of life imprisonment is in our opinion justified: (1) where the offence or offences are in themselves grave enough to require a very long sentence; (2) where it appears from the nature of the offences or from the defendant's history that he is a person of unstable character likely to commit such offences in the future; and (3) where if the offences are committed the consequences to others may be specially injurious, as in the case of sexual offences or crimes of violence."

Those three criteria were reiterated by the Lord Chief Justice in *O'Dwyer ipsissima verba*, and it is the second of these criteria which has given rise to the problem in the instant appeal. The court has to be satisfied that the defendant is a person of unstable character likely to commit such offences in the future. Normally the court will require medical evidence about this, although exceptionally it may pass a life sentence without such evidence, as appears from the case of *de Havilland* (*supra*), which is probably the fullest of the reports on this subject, because it reviews many of the intervening cases between *Hodgson* (*supra*), decided in 1967, and 1983.

One of the difficulties in this case arises from some remarks made by the learned recorder when passing the life sentences. After pointing out that his duty was not merely to punish and exert deterrence, but rather more importantly to ensure the protection of women, with which remarks this Court agrees, he continued: "Your conduct shows you to be a menace to them and it matters not

As Mr. Goldberg has pointed out, although this appellant has a long record, the fact is that there have been no previous sexual offences. If one looks at those two remarks of the learned recorder in isolation, it does rather look as though he felt satisfied that the second criterion necessary for the passing of a life sentence was established simply from the facts of the two rape offences to which the appellant had pleaded guilty. That in turn might be thought to run counter to what this Court said in the case of *Blackburn* (1979) 1 Cr.App.R.(S.) 205, and *Owen* (1980) 2 Cr.App.R.(S.) 45. In both those cases a life sentence was quashed and a determinate sentence substituted. In the first there was positive medical evidence that the appellant would not be a danger to the community, but the trial judge decided otherwise simply by reference to the circumstances of the particular offences. In *Owen* there was no evidence at all that he would be a danger to the community, and again the trial judge inferred that he would be a danger simply on the basis of the offence itself.

In order to be satisfied that the second of the three criteria is established, there must be clear evidence, usually but not essentially medical evidence, of mental instability which would indicate that the defendant is likely to be a danger to the public. A history of similar offences, as in the cases of *Hodgson* and *O'Dwyer*, may well be sufficient. Where a defendant is convicted of, or pleads to, a series of similar offences, that too may be enough. Mr. Green points out here that the plea was to two thoroughly disgraceful and horrible incidents within a matter of days of each other, and each of them involving at least two, possibly more, incidents of rape on the complainants. Where there is a series of similar offences, that may be enough, and that is what this Court meant when it referred to "the nature of the offences."

On the facts we doubt whether the learned recorder would have been justified in passing life sentences in this case based solely on the facts, thoroughly unpleasant though they were, of the two occasions of rape committed within a few days of each other, without any previous history of sexual offences.

But in fact there was further evidence of mental instability in this case, and that is contained in the psychiatric reports to which Mr. Goldberg particularly has drawn our attention. The relevant passages are in Dr. Briscoe's report of October 15, 1986, where he said:

"The diagnosis made at Tooting Bec Hospital" [that was an institution to which the appellant was admitted following an attempted suicide] "is that of 'unstable and inadequate personality from an extremely deprived background, unable to cope with personal and social difficulties.' . . . At interview Mr. Dempster shows no formal signs of mental illness, and I think the diagnosis of an isolated type of personality disorder is the correct one. . . . He can give little explanation for the alleged attacks on the two girls in May. He tells me that he had been taking barbiturates regularly since his release from prison on April 11, but cannot really say why he takes them, since he knows they make him more aggressive, and he knows that he does not get on with people in the ordinary way."

He refers to a drinking problem as well, although the appellant does not think he was drunk on these two occasions.

"Were it not for the serious charges Mr. Dempster is facing, and for the risk to women which he has recently allegedly demonstrated, one would say that Mr. Dempster was either a sad person, I think he feels he belongs

behaviour and there are reports of numerous overdoses and two admissions to psychiatric hospitals."

Later Dr. Briscoe said: "The only Mental Health Act category which under such an order might be contemplated would be that of psychopathic disorder, but I think the prospects of psychiatric treatability are not sufficiently high to make it likely that a bed would be offered."

Finally he says:

"I think the best understanding that can be reached is that Mr. Dempster is a private individual living very much for himself and by himself, relating to no one, reacting aggressively if crossed, and taking what he needs when he needs it with little thought for the morality or the consequences of what he does."

He had said a little earlier that it was difficult to know what state of mind the appellant was in when he carried out the recent rapes, because he was not a particularly communicative man, "and," says Dr. Briscoe, "believes I think that if mental illness is diagnosed he will go to prison or some other place for life whereas if it is not he will receive a lesser fixed sentence. In these circumstances he may not wish to reveal any hidden thoughts or symptoms he may experience."

Finally the doctor says:

"I think the prognosis is rather poor in this case unless perhaps as he gets older Mr. Dempster can remain long enough in one locality and learn to trust a professional helper whether it be a social worker or a psychiatrist and start to learn to make relationships which have some meaning for him."

As my Lord pointed out during argument, that seems to indicate a hope that there might in the future be some remission so far as social behaviour is concerned, rather than simply his dishonest behaviour shown in his past record.

There is then the brief letter from Dr. de Zulueta, in which she says:

"There has been no evidence of mental illness . . . In my opinion, there is nothing in his mental state to suggest he would benefit from psychiatric treatment and I have, therefore, no medical recommendations to make to the Court. His behaviour is, I think, due to faults of character and personality of a psychopathic sort."

As Mr. Green has pointed out, if it is shown by the medical evidence that some improvement in the psychopathic disorder is likely in the long run, then that is a matter which militates in favour of a life sentence. But, as this Court said in *de Havilland*, the fact that that is not likely to be the long term outcome does not militate against a life sentence.

In the light of the evidence and the other circumstances which are set out above, we take the view that the sentence imposed by the learned recorder in this case was correct. Therefore this appeal is dismissed.

on behalf of the Crown. As problems of sentencing become more and more complicated, so help from the Crown becomes more and more necessary. We very much hope that the Crown will in future be represented on an increasing number of occasions before this Court when questions of sentence are being considered. Thank you both.

*Appeal dismissed.*

*Solicitors:* Crown Prosecution Service, Headquarters,

## STEPHEN ASHLEY

COURT OF APPEAL (Lord Justice Watkins, Mr. Justice Michael Davies and Mr. Justice Owen): February 12, 1987

*Trial—Jury—Direction to Jury—Majority Verdict—General Direction as to Unanimous Verdict—Normal Majority Verdict Not Given—Whether Material Irregularity.*

A *Walshin* direction (1952) 36 Cr.App.R. 167, *i.e.* a general direction urging the jury to reach a unanimous verdict, which was first given to a jury before the introduction of majority verdicts, may not always be appropriate in the changed circumstances which now obtain. However, such a direction, suitably tailored to take account of the present availability of a majority verdict, may be given in lengthy trials involving perhaps many defendants and where the jury have retired for a long time, and designed to assist the jury as to the way they should approach what might appear to them to be deadlock.

After a trial of the appellant on charges in the alternative of wounding and wounding with intent, in which there were several issues, the jury retired for two and a half hours, and were then given a general direction to reach unanimity (the *Walshin* direction). The judge then indicated he could if necessary accept a majority verdict. Within 20 minutes the jury returned with a majority verdict of 10 to 2. On appeal against conviction.

**Held**, that in view of the short period of retirement, particularly having regard to the issues which the jury had to consider, and the fact that a majority direction had not been given, the *Walshin* direction had been given far too early and was quite inappropriate, since the jury may well have felt they were being put under pressure by the judge. Thus there had been a material irregularity in the trial and the appeal would be allowed and the conviction quashed.

*Isequilla* (1974) 60 Cr.App.R. 52, [1975] 1 All E.R. 77 distinguished.

*Walshin* (1952) 36 Cr.App.R. 167 considered.

[For retirement of jury and majority verdicts, see *Archbold* (42nd ed.), paras. 4-444, 445.]

by a jury rather than summarily and then they had gone on to consider, in the case of those who were under 17, whether it was necessary in the interests of justice to commit them for trial together with the adults jointly charged with them. They decided that it was in the interests of justice that that course should be taken. Accordingly, it then only fell to the court to consider whether there was sufficient evidence in each case to put the individual defendants on trial. On May 1, without any contrary submission being made, the justices took the view that the evidence was sufficient to put Mr. McKernan on trial for the offences with which he was charged jointly with the other adult defendants. Accordingly, they made the order for committal.

In my judgment, they acted perfectly properly. They had considered the terms of section 24(1)(b). No complaint is made before this Court as to the validity of the proceedings on March 19, 1986. It follows that the learned judge fell into error in the view which he took of this matter. The terms of the section are quite clear. The justices are required to consider in the case of a juvenile who is charged jointly with a person who has attained the age of 17, whether it is necessary in the interests of justice to commit them for trial together. They had taken that view on March 19. All that remained was to decide whether there was sufficient evidence to put the particular persons on trial.

Counsel for the Crown, Mr. Barber, raised in argument before the judge and again before this Court the question of what the position would be if a defendant, on bail, who was a juvenile, deliberately absented himself from committal proceedings after a decision had been made that it would be appropriate, depending on the sufficiency of the evidence, to commit him for trial together with adult defendants charged jointly with him. One can envisage that such a situation might occur. If the judge's view were correct it would be a very strong inducement, so it would seem, to those in such a position to absent themselves. However, that is not the determining factor in this matter. In my judgment, there is nothing in the terms of section 24(1)(b) to show that the actual order of committal for trial must be made on the same occasion in respect of the juvenile and the adult defendants charged jointly with him. What matters is that there should be a consideration of the application of section 24(1)(b) at a time when both are before the court. That was done in this case on March 19, 1986.

For these reasons, I would allow this application. I would grant the relief sought, though I do not consider it necessary to make an order of mandamus. The Court having indicated its view of the matter, no doubt the learned judge will comply with the view the Court has expressed.

TUDOR EVANS J.: I agree.

*Application refused.*

*Solicitors:* Crown Prosecution Service, Sheffield. Treasury Solicitor.

## CASE 11

KEVIN JOHN BARTON

COURT OF APPEAL (Lord Justice O'Connor, Mr. Justice Simon Brown and Mr. Justice Schiemann): December 4, 18, 1986

*Rape—Defence of Consent—Defendant's Genuine but Mistaken Belief in Consent—Whether Grounds for Such Belief Reasonable or Unreasonable—Where Ground for Belief Knowledge of Complainant's Sexual Past—Whether Cross-Examination of Complainant Permissible—Sexual Offences (Amendment) Act 1976 (c.82), ss.1(2), 2(1)(2).*

By section 1(2) of the Sexual Offences (Amendment) Act 1976: "It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed."

By section 2: "(1) If at a trial any person is for the time being charged with a rape offence to which he pleads not guilty, then, except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience of a complainant with a person other than that defendant. (2) The judge shall not give leave in pursuance of the preceding subsection for any evidence or question except on an application made to him in the absence of the jury by or on behalf of a defendant; and on such an application the judge shall give leave if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked. . . ."

The appellant was charged with rape of a woman who it was said would scream, bang her feet and head and kick during sexual intercourse. The only issue at his trial was consent in both its forms, *i.e.* either the complainant consented to intercourse or, if she did not, the appellant genuinely but mistakenly believed that she had consented. At the end of the complainant's evidence-in-chief the appellant sought to cross-examine her about her past sexual experience and adduce evidence to show that during intercourse the complainant usually behaved in the above manner. The trial judge refused leave and the appellant was convicted.

On appeal, *inter alia*, that the trial judge erred in not permitting the cross-examination of the complainant; in that section 1(2) of the Sexual Offences (Amendment) Act 1976 expressly allowed the jury to consider whether a defendant's grounds for belief that the complainant consented were reasonable or unreasonable, which they could not do without knowing what those grounds were. Where such a ground was the defendant's knowledge of the complainant's previous promiscuity, the prohibition in section 2(1) of the 1976 Act did not apply or, alternatively, it would be necessarily unfair to a defendant within the meaning of section 2(2) to refuse to allow him to tell the jury what his grounds were.

Held, dismissing the appeal, that (1) the presence or absence of reasonable grounds had to be considered by the jury "in conjunction with any other relevant matters". In the light of section 2 of the Sexual Offences

that he pulled her onto the floor, that she was screaming and kicking her legs, but that when he told her to stop that she did and that thereafter she co-operated. He said that he gave her two love bites on the neck. He got up, went to the bathroom, pulled up his trousers and left the flat, passing Miss Bell who had been summoned by another of the occupants. That occupant, Sheila Arundle, had heard a man banging on one of the doors above her and shouting, "Let me in." She had heard a woman's voice shouting, "Go away." She heard a female voice screaming and shouting and she was so worried that she got up and went to summon the social worker, Miss Bell. Miss Bell went up to the complainant's flat. She could not get in. All was silent, so she went down to check with Miss Arundle what had happened. She then went back upstairs and passed the appellant coming out of the flat. When she went in the complainant was in a very distressed condition, crying and trembling. She appeared to be in a state of shock and hysterical. She pointed out injuries to her neck and her left ankle and said that she had been raped. There was other evidence from other occupants that they too had heard shouting and banging.

The learned Lord Justice went on to give some excerpts from the question and answer statement:

"(The Detective Sergeant): So what you are saying is that she was struggling and screaming the majority of the time you were having sex with her. (The Appellant): She was all right when we started having intercourse. She didn't start screaming again until after I'd bit her. (DS): A few questions ago I asked when you held your hand over her mouth to stop her screaming and you told me just before you gave her the love bites. And then later you tell me she didn't start screaming until after you bit her. (A): She screamed before I gave her them. I put my hand over her mouth and she stopped screaming. Then I gave her a love bite and she started screaming again."

Later came the question:

"Do you think that you may have gone a bit too far in wanting sex with her? (A): No. (DS): And yet we are agreed at stages during this incident she's screaming, banging her head and struggling with her feet. (A): Yes. (DS): So I put it to you that that is not really the actions of a willing partner. (A): Not really. (DS): And yet she's doing all this and you still have sex with her. Why? (A): Because I like her. (DS): But her actions really are that you can't have sex with her. She's rejecting you. (A): No. (DS): In your mind did you consider that she was a totally willing partner? (A): Yes. (DS): Why did you consider that she was totally willing? (A): When I went to take her knickers off I pulled them down from one side and she turned over on her side to let me take them down from the other side. She didn't even open her legs to try and stop me taking them down. And when I had got them down she just opened her legs and let me get on top of her. She just opened her legs to let me put it in. That's it."

The appellant appealed on a variety of grounds set out in the judgment; but the case is reported on whether the trial judge had been correct in refusing the appellant leave to cross-examine the complainant as to her previous sexual experience.

The appeal was argued on December 4, 1986.

(Amendment) Act 1976 that must mean "relevant matters before the jury" and the wording of section 1(2) of the Act did not permit a defendant to circumvent the prohibition found in section 2, because that section controlled what matters could be properly placed before a jury; and (2) when considering the effect of the complainant's past promiscuity on the appellant's belief that she was consenting to sexual intercourse, whether such evidence should be adduced was a question for the judge to decide in the context of the facts before him, and in the instant case the judge had been correct in excluding that type of evidence and there was nothing unsafe or unsatisfactory about the conviction.

*Lawrence* [1977] Crim.L.R. 492 and *Viola* (1982) 75 Cr.App.R. 125, [1982] 1 W.L.R. 1138 considered.

[For rape and ss.1, 2 of the Sexual Offences (Amendment) Act 1976, see *Archbold* (42nd ed.), para. 20-338]

#### Appeal against conviction.

On March 11, 1986 in the Crown Court at Coventry (Judge Harold Wilson) the appellant was convicted of rape and sentenced to six years' imprisonment.

The following facts are taken from the judgment. The complainant is a single woman 26 years of age who in July 1984 gave birth to a daughter who was immediately taken into care. From some time in 1983 until January 1985 she lived at 16 Albany Road, Coventry. For some time down to April 1984 Brian Summers, the father of the child, lived at 16 Albany Road and knew the appellant who also had a room in those premises, as indeed had others. The appellant and the complainant were acquainted. He said that on one occasion she had had intercourse with him. She said that she had never had intercourse with him. In April 1984 their paths parted and they did not meet again until the end of July 1985. They met on Saturday, July 27, in company with a mutual acquaintance. They met again on Monday, July 29, and, according to the complainant, the appellant expressed his love for her but she told him that she was going out with another man. According to him, he tried to make love to her. She refused, but told him to come back later in the week and nothing further happened.

On the evening of July 31, the complainant went out with a friend. She got back home to her flat in Monkswood Crescent at about 12.30 a.m. on August 1. She had moved into this accommodation a few weeks before. It is sheltered accommodation with a voluntary social worker, a Miss Bell, living on the estate. The complainant's flat is on the top floor in one of the buildings on the estate. She had a cup of coffee and went to bed. At about 2 a.m. there was a banging on the door with the appellant asking to be admitted. He had been on an expedition to visit a brewery earlier in the evening and he had had a substantial quantity to drink. The complainant got up, quickly pulled on some clothes and told the appellant to go away. However he continued to bang on the door and broke it open and entered the living room. The appellant said that he had kicked the door a couple of times but that the complainant had opened it for him. The police officers said that they found that the door had been broken down.

As to what took place thereafter there is very little dispute. The complainant said that the appellant pulled her down onto the floor, took off her knickers and raped her; that she was screaming and banging her legs on the floor and kicking; that he threatened her, hit her in the face, and that when she went on screaming put a pillow over her face so she stopped. The appellant agrees

*Peter C. Henry* (assigned by the Registrar of Criminal Appeals) for the appellant.  
*Timothy Raggatt* for the Crown.

*Cur. adv. vult.*

December 18. O'CONNOR L.J. read the judgment of the Court: On March 10, 1986 in the Crown Court at Coventry the appellant was convicted of rape and sentenced to six years' imprisonment. He appeals against conviction by leave of the single judge.

At the trial the only issue was consent in both its forms: (1) that the complainant consented to intercourse; alternatively (2) if she did not consent the appellant genuinely but mistakenly believed that she was consenting to intercourse. The main ground of appeal is that the trial judge wrongly refused to permit the cross-examination of the complainant about her sexual past and the adduction of evidence on that topic.

Section 2 of the Sexual Offences (Amendment) Act 1976 provides:

"(1) If at a trial any person is for the time being charged with a rape offence to which he pleads not guilty, then, except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience of a complainant with a person other than that defendant. (2) The judge shall not give leave in pursuance of the preceding subsection for any evidence or question except on an application made to him in the absence of the jury by or on behalf of a defendant; and on such an application the judge shall give leave if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked."

As is usual, the judge was asked to make his ruling at the end of the complainant's evidence-in-chief. At that stage the judge had available to him the committal statements and exhibits, counsel's opening address to the jury and the complainant's evidence-in-chief. That material included a 30-page question and answer statement of the defendant, the bulk of which was taken in the presence of his solicitor and all of which was read over in the presence of the solicitor and signed by the defendant as correct. An examination of that material shows that save for three matters, to which I will refer in due course, there was no dispute as to the facts of this case.

[The learned Lord Justice stated the facts and continued:]  
It will be seen that the case against the appellant was a strong one, with the complainant amply corroborated. Nowhere in the course of the lengthy interview did the appellant suggest that he thought the complainant was consenting because he knew from what he had seen, from what he had heard and from what he had been told that it was a pattern of behaviour for the complainant while enjoying sexual intercourse to scream and bang about with her legs and/or her head on whatever was there.

The first of the perfected grounds of appeal complains that the learned judge's decision was unfair to the appellant in that it deprived him of the opportunity of placing before the jury evidence relevant to their determination of the issue as to whether he had a genuine mistaken belief that the

"The appellant sought to rely upon the following matters, *inter alia*, in so far as they had influenced his belief at the time that the complainant was consenting: (a) The appellant's observation of the complainant on a previous occasion openly and willingly indulging in group sex with a number of other men in the appellant's bedroom during which time she allowed herself to be subjected to sexual indignities and behaved in a manner which was consistent with her behaviour during the alleged rape, in particular by screaming and banging her head and feet. (b) Screaming similar to that at the time of the alleged rape which the appellant had heard on numerous occasions coming from the complainant while she was having sexual intercourse with other men in her bedroom which was immediately adjacent to the appellant's own room. (c) Further to his own observations the appellant sought to give evidence as to matters that he had been told by Brian Summers who had lived with the complainant and fathered her child as to the complainant's bizarre behaviour during sexual intercourse in so far as his belief had been influenced by them. (d) The complainant's reputation for sexual promiscuity based upon the appellant's own observations and her general reputation as it was known to him at the time."

There is a very short answer to this ground of appeal. It is that this submission was not made to the learned trial judge. We think it self-evident that the judge's decision must be assessed on the material placed before him and that it is not open to the appellant to challenge the judge's decision on material not placed before him.

We must set out the terms of the application made by Mr. Henry in some detail, and we quote from page 1 of the transcript:

"(Mr. Henry): Your Honour, there are several matters and perhaps I can take you to them at different stages. The first is this: I make the general application that I should, in this particular case, be given leave to cross-examine about what the defence would say is the promiscuity of this witness prior to this event. There are a number of reasons and the first is this. The defence have evidence which I would seek to call that this witness on previous occasions has had sex with not only numerous men, but with more than one man on one occasion, the relevance to this case being that she was confronted immediately after that act, this one particular one happening in August 1984. She was confronted by somebody 'in authority' and her reaction was to cry and become hysterical. Her reaction to that conversation, in my submission, could be and is extremely relevant to her reaction, or alleged reaction, when the social worker came upon the scene. A further act in which sex took place with more than one man in about the beginning of 1984 I would seek leave to cross-examine about for the reason that not only does it show that contrary to perhaps the image of the evidence that she has sought to convey, she is sexually experienced, but that this act took place in Mr. Barton's own bedroom; it didn't start with Mr. Barton there, but it started during the course of one evening and it happened to be that Mr. Barton returned to his bedroom later that evening and together with another witness the defence have available, both of them saw what can only be described as something like an orgy going on. Or course the



was saying, 'a nodding acquaintance' and certainly, although it hasn't been put to her, in her second statement this witness says that she never gave Mr. Barton any encouragement and as the evidence stands at the moment it looks as though somebody who had had a nodding acquaintanceship has burst into her flat and had sex. That is something which the defence say is abundantly untrue and it would be unfair on Mr. Barton, within the principles of *Viola* (1982) 75 Cr.App.R. 125, [1982] 3 All E.R. 83, if I were unable to explore that.

The third area I seek leave to cross-examine about is this: Not only is she a woman of previous sexual experience, as I say, but that on occasions she has made previous false allegations of rape against people that she knew and of course in order to establish that by necessity I will have to refer to other sexual activity, but of course the relevance of that, in my submission, is plain.

(Judge Wilson): This is in a different category from everything else?

(Mr. Henry): I was breaking them down into different categories. The fourth category I seek leave to cross-examine about is this: As to whether, since the birth of the child called Katie—the one that is referred to in the papers—she has in fact given birth to another child some time at the beginning of 1985 and on the back of that . . .

(Mr. Wilson): What relevance can that have?

The judge ruled out the application save for permitting questions as to previous false allegations of rape.

The second of the perfected grounds is that the judge should have permitted questioning and evidence on the first of the topics referred to in the passage which we have set out, namely two incidents when the caretaker at 16 Albany Road is said to have come upon the complainant having sexual intercourse whereupon she had become hysterical. It is said that this went to a proper assessment of the condition in which the social worker found her after the appellant had left. As the learned judge said in ruling, "This was miles away from the sort of evidence which this Court held was wrongly excluded in *Viola* (1982) 75 Cr.App.R. 125, [1982] 1 W.L.R. 1138." In that case, after considering the judgment of this Court given by Roskill L.J. (as he then was) in *Mills (Leroy)* (1979) 68 Cr.App.R. 327, the Lord Chief Justice said, at p.130 and pp.1142, 1143 respectively:

"The judge has to make a judgment as to whether he is satisfied or not in the terms of section 2. But once having reached his judgment on the particular facts, he has no discretion. If he comes to the conclusion that he is satisfied it would be unfair to exclude the evidence, then the evidence has to be admitted and the questions have to be allowed. Having said that, when one considers the purposes which lay behind the passing of this Act as expounded by Roskill L.J., it is clear that it was aimed primarily at protecting complainants from cross-examination as to credit, from questions which went merely to credit and no more. The result is that generally speaking—I use these words advisedly, of course there will always be exceptions—if the proposed questions merely seek to establish that the complainant has had sexual experience with other men to whom she was not married, so as to suggest that for that reason she ought not to be believed under oath, the judge will exclude the

words questions of this sort going simply to credit will seldom be allowed. That is borne out by the cases to which we have been referred: not only those which I have cited, but other unreported cases which have been before this court, to which perhaps it is not necessary to make reference. On the other hand if the questions are relevant to an issue in the trial in the light of the way the case is being run, for instance relevant to the issue of consent, as opposed merely to credit, they are likely to be admitted, because to exclude a relevant question on an issue in the trial as the trial is being run will usually mean that the jury are being prevented from hearing something which, if they did hear it, might cause them to change their minds about the evidence given by the complainant. But, I repeat, we are very far from laying down any hard and fast rule. Inevitably in this situation, as in so many similar situations in the law, there is a grey area which exists between the two types of relevance, namely relevance to credit and relevance to an issue in the case. On the one hand evidence of sexual promiscuity may be so strong or so closely contemporaneous in time to the event in issue as to come near to, or indeed to reach, the border between mere credit and an issue in the case. Conversely, the relevance of the evidence to an issue in the case may be so slight as to lead the judge to the conclusion that he is far from satisfied that the exclusion of the evidence or the question from the consideration of the jury would be unfair to the defendant.

We have had drawn to our attention some of the difficulties which face a judge. It is perfectly true to say that normally he has to make this decision at an early stage of the trial. It will be, generally speaking, when the complainant's evidence in chief is concluded that counsel in the absence of the jury will make the necessary application under section 2. At this stage it may not be easy for the judge to reach a conclusion, but this is a problem which is continually being faced by judges, sometimes in even more trying circumstances, for example when he is asked to determine whether a count should be tried separately or whether defendants should be tried separately and so on, before the trial has got under way at all. He has to reach the best conclusion that he can. The second matter is, is this Court entitled to differ from the conclusions of the learned judge? As already pointed out, this is the exercise of judgment by the judge, not an exercise of his discretion. This court is in many respects in as good a position as the judge to reach a conclusion. The judge has certainly heard the complainant give evidence, but only in chief. So far as the proposed questions are concerned, the statements upon which the questions were to be asked or the way in which the matter was going to be put to the jury are presented in exactly the same way to this court as they were to the judge at first instance."

Mr. Henry has submitted that the topics on which he wished to cross-examine and lead evidence did not go solely to the credit of the complainant but were relevant to the issue of consent both as to the question of whether the complainant in fact consented and alternatively to the question whether the appellant genuinely but mistakenly believed that she was consenting. He submitted that a defendant charged with rape was entitled as of right to put before the jury any matter which he said had persuaded him to believe that

promiscuity. In support of that submission he relied on section 1(2) of the Sexual Offences (Amendment) Act, 1976 which provides:

"It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed."

This subsection is declaratory of the law as it was (see *Smith and Hogan Criminal Law*, 5th ed. (1983), pp.404-405).

Mr. Henry submitted that that subsection expressly provided for the jury to consider whether the grounds put forward by a defendant for his belief that the complainant consented were reasonable or unreasonable and that they could not do that unless they were told what the grounds were. He submitted that where the issue was genuine but mistaken belief in consent and a ground was the defendant's knowledge of the complainant's previous promiscuity, the prohibition in section 2(1) did not apply. Alternatively, that a refusal to permit the defendant to tell the jury what his grounds were must be necessarily unfair to him within the meaning of that word in section 2(2). He submitted that the interpretation put on section 2(2) by May J. (as he then was) in *Lawrence* [1977] Crim.L.R. 492, approved by this Court in *Mills (Leroy)* (*supra*) and declared binding on us in *Viola* (*supra*), has no application in cases where genuine but mistaken belief in consent is an issue. In *Lawrence* May J. said:

"The important part of the statute which I think needs construction are the words 'if and only if he (the judge) is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked,' and, in my judgment, before a judge is satisfied or may be said to be satisfied that to refuse to allow a particular question or a series of questions in cross-examination would be unfair to a defendant he must take the view that it is more likely than not that the particular question or line of cross-examination, if allowed, might reasonably lead the jury, properly directed in the summing-up, to take a different view of the complainant's evidence from that which they might take if the question or series of questions was or were not allowed."

The Court was not concerned with genuine but mistaken belief in any of the three cases *Lawrence*, *Mills (Leroy)* or *Viola*, and the wording of May J.'s dictum is not appropriate when the judge is considering whether it would be unfair to a defendant where the issue is genuine but mistaken belief. On that issue the complainant's credit is not being attacked but only arises where it is accepted that she did not consent.

If the construction which Mr. Henry submits to be the correct construction of section 1(2) is correct, then it will be seen that for practical purposes the protection given to complainants by section 2 of the Act would disappear in consent cases. We cannot accept that the subsection has that effect. As was pointed out in *Viola* (1982) 75 Cr.App.R. 125, 128 the protection given by section 2 of the Act is not required for questions in cross-examination and/or evidence which is not relevant. It follows that Parliament must have intended to exclude relevant matters by section 2 of the Act. We think that the answer to Mr. Henry's submission is to be found in the wording of section 1(2). The

"in conjunction with any other relevant matters." In the light of section 2 of the Act these words must mean "relevant matters properly before the jury" and the wording of section 1(2) does not permit a defendant to circumvent the prohibition found in section 2, because that section controls what matters can be properly placed before the jury.

When an application is made in a case such as the present that is where both consent and a genuine but mistaken belief are in issue, the trial judge has a difficult task. On the one hand the application necessarily involves an attack upon the credit of the complainant who has asserted in her evidence that she did not consent to intercourse and this aspect has to be considered in the context of the dictum of May J. in *Lawrence* (*supra*). On the other hand when considering the effect of the complainant's past sexual promiscuity upon the defendant's belief that she was consenting to intercourse the judge must decide in the context of the facts of the case. It must be remembered that there is a difference between believing that a woman is consenting to intercourse and believing that a woman will consent if advances are made to her. In the end it is the application of common sense to the facts of the individual case. We are satisfied that in the present case the learned trial judge approached the problem correctly, and in our judgment he came to the right decision.

The third ground of appeal is that in summing-up the learned judge did not give an adequate direction on the issue of genuine but mistaken belief. The initial direction as to the constituents of the crime of rape was inadequate for the judge said quite simply, at p.14 of the transcript: "It is an offence which is committed when a man has sexual intercourse with a woman without her consent." However, at the end of his summing-up the learned judge corrected any possible defect in this direction, at p.26A, when he said:

"So, members of the jury, at the end of the day it may come down to a series of questions. 'Did this girl, Tina O'Doherty, consent to intercourse, or might she have done?' If your answers to those questions, or either of them, is, 'Yes,' then the verdict is not guilty, but if the answers are, 'No,' the next question is, 'Did the accused genuinely, even if mistakenly, think that she was consenting?' The accused says that at the very least he genuinely believed that she was and the prosecution must, on the evidence that is put before you, which includes the defence evidence, rule that possibility out, so that you are sure either that the accused knew that she did not consent, or that he was reckless whether she did or not."

There was no misdirection.

The fourth ground of appeal is that the learned judge wrongly admitted evidence in rebuttal of the defence witness Caroline Howarth. The witness was called to say that she had been a friend of the complainant but that that friendship had come to an end because the complainant was going around making false accusations of rape including an accusation against her brother. She said that she was very sympathetic to the complainant because she was herself a victim of rape and that a man had been convicted for raping her. Inquiry revealed that the latter assertion was entirely untrue. There had been a question of consensual buggery but no proceedings had ever been brought. The prosecution applied to put that evidence before the jury and the judge ruled it in. In the result the matter was dealt with by an admission. Mr. Henry submitted to the judge, and has submitted to us, that this went solely

to the credit of the witness on what was in any event a peripheral matter and should not have been admitted. We do not agree. The witness had gone before the jury as a sympathetic, wronged woman to give evidence that the complainant was making false accusations. It was right that the jury should know that she was in fact a barefaced liar.

The fifth and last ground of appeal is that the learned judge in summing-up the complainant's evidence failed to remind the jury that in cross-examination she had said that she was worried when the social worker appeared that she might not have her child restored to her from the care of the local authority because she had been found with a man in her flat. This complaint against the summing-up falls into the category of complaints that are frequently made that the judge failed to remind the jury of some piece of evidence. This Court has said time and again it is not the function of the judge to try and go through a witness's evidence sentence by sentence and in our judgment the judge is not to be criticised for not making reference to this particular answer.

For these reasons we are satisfied that in this case there is nothing unsafe or unsatisfactory about the conviction and the appeal against conviction must be dismissed.

*Appeal dismissed.*

*Solicitors:* Crown Prosecution Service, Birmingham, for the Crown.

## STANLEY RICHARD BRITTON

COURT OF APPEAL (The Lord Chief Justice, Mr Justice Kennedy and Mr. Justice Roch): March 9, 1986

*Evidence—Admissibility—Document—Aide Memoire—Defendant's Own Notes Used to Refresh Memory as to Circumstances of his Arrest—Cross-Examination of Defendant on Matters Outside Arrest and Surrounding Circumstances Thereto—Whether Aide Memoire Should be Put in Evidence and Made Exhibit.*

The appellant, a trade union official, was arrested on a charge of assault during a demonstration of Sogat members one night outside the premises of a national newspaper during a printing dispute. He was released on bail and when he got home he typed out a note as an *aide memoire* of his recollections of the events of the night. At his trial he was examined in chief and allowed to refresh his memory from the *aide memoire* of the circumstances leading up to his arrest. The cross-examination did not confine itself to that, but referred to matters other than his arrest. An application on behalf of the appellant to allow the *aide memoire* to be made an exhibit and shown to the jury was rejected by the trial judge. The appellant was convicted and appealed on the ground that the judge had wrongly exercised his discretion in rejecting the appellant's application.

Held, that although cross-examining counsel was entitled to inspect a note in order to check its contents and could do so without making the document evidence and might go further and cross-examine on it; nevertheless, in the

present case as counsel for the Crown in his cross-examination of the appellant went outside those parts of the *aide memoire* which had been used by the latter to refresh his memory in examination-in-chief, that document did become evidence and should have been admitted in evidence. Thus, there had been a material irregularity in the trial, for the jury must have wondered why they were being denied the sight of the document in question and may have felt that failure to show them it may have been indicative that the appellant had something to hide. Accordingly, as the appellant's credit was in issue, the case was not one for the application of the proviso to section 2(1) of the Criminal Appeal Act 1968, the appeal would be allowed and the conviction quashed.

Dictum of Gurney B. in *Gregory v. Tavernor* (1833) 6 C. & P. 280 at 281, of Sir Creswell Creswell in *Palmer v. Maclear* (1858) 1 Sw. & Tr. 149 at 151 and of Sir Jocelyn Simon P. in *Senat v. Senat* [1965] P. 172, 177; *Virgo* (1978) 67 Cr.App.R. 323 and *Sekhon* (post, p.19), *The Times*, January 2, 1987, considered. [For refreshing memory of matters arising out of examination-in-chief, see *Archbold* (42nd ed.), para. 4-294.]

Appeal against conviction.

On June 23, 1986, in the Crown Court at Southwark (Mr. Recorder Evan Stone, Q.C.) the appellant was convicted of assault occasioning actual bodily harm (count 1) and assault with intent to resist arrest (count 2) and was sentenced to concurrent terms of two months' imprisonment.

The facts appear in the judgment.

His main ground of appeal was that the trial judge erred in refusing a defence application for the appellant's *aide memoire* to be put in evidence and made an exhibit.

The following cases were cited in argument in addition to those appearing in the judgment: *Fenlon* (1980) 71 Cr.App.R. 307; *Owen v. Edwards* (1983) 77 Cr.App.R. 191 and *Payne v. Ibbotson* (1858) 27 L.J.Ex. 341.

*Andrew Buchan* (assigned by the Registrar of Criminal Appeals) for the appellant.  
*Kenneth Aylett* for the Crown.

**THE LORD CHIEF JUSTICE:** On June 23, 1986, in the Crown Court at Southwark this appellant, as he now is, this Court having given him leave to appeal, was convicted of assault occasioning actual bodily harm (count 1), assault with intent to resist arrest (count 2), and he was sentenced to two months' imprisonment on each count to run concurrently, and an order for costs was made.

The facts of the case are these. This was another incident arising out of the trouble at the News International plant at Wapping. On the night of February 19, 1986 two police constables, Wolliscroft and Skerriff, were on duty at a demonstration at that place. There was a good deal of unrest. Missiles were being thrown and the officers went into the crowd of demonstrators towards the place from where the missiles seemed to have emerged. Police Constable Wolliscroft had his helmet knocked off from behind. He turned round and saw the appellant who, according to him, struck him in the mouth, nose and chin with his left hand, whereupon the police constable, again according to him, arrested the appellant, who pulled away telling the officer "let me go." The officer then went up to the appellant, who had escaped. The appellant turned round, hit him on the forehead and told the officer that he was not going to be arrested by him.

**Blackburn:**

On the same indictment, all sentences will be reduced to nine months, and the sentences in indictment 900158 will run concurrently rather than consecutively. The remaining sentences will run consecutively or concurrently as ordered.

**Moore:**

On indictment 900101, all sentences will be reduced to nine months. The sentence of one week's detention consecutive will be quashed, as such a sentence is not permitted. The proper sentence would have been one month concurrent and that will replace the one week consecutive sentence. The remaining sentences will take effect concurrently or consecutively as ordered.

**Marshall:**

On indictment 900101 all sentences will be reduced to six months. The remaining sentences, whether consecutively or concurrently, will run as ordered. To that extent these appeals will be allowed.

Solicitors: Crown Prosecution Service, Southampton.

*Appeals allowed.  
Sentences varied.*

CASE 12

**WARED MHAYWI KABARITI**

**COURT OF APPEAL (Lord Justice Watkins, Mr. Justice Hirst and Mr. Justice Poplewell): November 6, 7, 1990**

*Sexual Offences—Rape—Direction on Good Character of Defendant—Whether Proviso to Criminal Appeal Act 1968 (c. 19), s.2(1) Should be Applied Where Such Direction Inadequate.*

*Sentence—After Effects Suffered by Victim of Rape—Whether Affecting Sentence.*

A 14 year old girl visited London for the first time from her home in Durham. She came to see a show at the Palladium. Late at night, when the show had finished she lost her way back to King's Cross station and was accosted by the appellant who offered to assist her; but in fact he took her back to his flat, plied her with drink and then raped and buggered her. She had never taken alcohol before and was a virgin. After she left she was seen by two or three people staggering along the street and was given a lift by two men, who also sexually assaulted her and were never apprehended, and eventually she was taken to a police station. The appellant was arrested and at his trial for rape and buggery he denied the offences, which were confirmed by medical evidence, but said it was with the girl's consent.

He was convicted and sentenced to concurrent terms of 12 years' imprisonment. On appeal against conviction on the ground that the trial judge had misdirected the jury on the appellant's good character; and also against sentence:

Held, dismissing the appeal that (1) it was clearly necessary for a trial judge, when the giving of the character direction was called for, to give it despite the fact

that an accused, having a previous good character, had told lies to the police or anyone else before the trial. In the instant case, although a proper direction on character was not given by the judge, the evidence against the appellant was so overwhelming that the Court would unhesitatingly apply the proviso to section 2(1) of the Criminal Appeal Act 1968, for the appellant had properly been convicted.

*Berrada* (1990) 91 Cr. App. R. 131 applied.

(2) As to sentence, the judge had remarked that the fact the victim suffered dreadful problems afterwards did not affect the sentence passed upon the appellant: it should have done so, for it was part of the whole relevant scene. Accordingly, the appeal against sentence would also be dismissed.

[For direction on defendant's good character in summing-up, see *Archbold*, 43 ed., para. 4-436.]

Appeal against conviction and sentence.

On October 7, 1988, at the Central Criminal Court (Judge Nina Lowry) the appellant was convicted of rape (count 1) and buggery with a female (count 2) and on October 8, 1988, he was sentenced to 12 years' imprisonment concurrent on each count.

The facts appear in the judgment of the Court.

The main ground of appeal against conviction was that the trial judge had misdirected the jury on the question of character. He also appealed against the length of his sentence.

*John Harwood-Stephenson* (who did not appear below) (assigned by the Registrar of Criminal Appeals) for the appellant.

*David Bate* for the Crown.

**WATKINS L.J.:** The appellant is now 23 years of age. He is a Jordanian. He came to this country in 1981 as a student. He is apparently still of that status. He is therefore a long-term student. At the material time he was living with a girlfriend in a small bed-sitter in Catford. When the events I shall have to describe in some detail occurred his girlfriend was on holiday in Spain. Those events culminated in the appellant's appearance before Her Honour Judge Lowry at the Central Criminal Court in the latter part of September and October 1988. He was tried for very serious offences indeed. On October 7, he was convicted of rape, Count 1, and buggery with a female, Count 2. He was sentenced to concurrent terms of 12 years' imprisonment. A recommendation was made for his deportation. He appeals against conviction and sentence by leave of the single judge.

The facts, to many of which much publicity was given almost immediately after they came into existence, are briefly speaking these. The victim of the appellant's crimes was at the time about 14 years of age. She was an impressionable young girl, small of stature and extremely good-looking. She lived in Durham with her parents and her brother. She has had a conventional upbringing. It is a Christian home. She had developed a strong liking for an actor who appeared in a well-known television series and who was appearing at the times of which I speak at the London Palladium. One day she took money from a small account she had, either in a bank or building society. She had, in addition to the return fare which she had to pay, about £60 in her pocket after she had obtained the money from her account. Without her parents knowing, or anyone else for that matter save perhaps a girl friend, she bought herself a return ticket to London, to where she had never been in her life before, and travelled on that day to the metropolis. She did some shopping in the afternoon. In the evening she went to the show at the Palladium where this young man to whom she was attracted was appearing. When she emerged from that well-

known theatre she was bemused by the hustle and bustle of London life at that time of the evening and obviously had no idea how to get back to Kings Cross in order to catch the train to go home again. Her intention was to catch the train from Kings Cross round about midnight, which would take her back to Durham where she, if she had caught it, would arrive in the early hours of the morning. She was directed to a tube station. That was closed. She was wandering around not knowing where on earth she was and suddenly, as fate would have it, she was accosted by the appellant. They had a conversation in which she revealed what her predicament was. He seems to have told her that he could assist her in one way or another. He in fact assisted her to this end. First of all he took her to a place in Bayswater, where he and a friend of his had something to eat, and from there by tube train to his place in Catford. She thought she was on her way to Kings Cross. Before she knew where she was she was being taken to the appellant's abode; we have photographs of that, as did the jury.

What happened thereafter almost begs description. She was plied with drink. She had never taken alcohol before. She was following that raped by the appellant. She was then buggered by him and raped again. She, after these terrible events had occurred, dressed herself—she had been stripped of her clothing by him—and staggered out into the street. She did not know it but as she was winding her way along the street looking for a taxi—obviously this was an unearthly hour to expect to get one—she was seen by two or three people who eventually became witnesses at the trial. They told the jury the extraordinary state that she was in, crying and going in anything but a straight line along the street. She spoke very briefly and incoherently to the driver of a stationary car who found her in a remarkable state. She almost ran away from him, as well as she could. A car stopped alongside her. She thought that the driver—there was another man inside there—could help her if she asked for help. She was still clearly in a very distressed state indeed. He invited her into the car. Her expectation was that she would be assisted by them and taken to Kings Cross Station. Their roles as good Samaritans ostensibly turned out to be anything but that. They both raped her in turn. One of them endeavoured to bugger her before she was cast out into the street, where she spoke eventually to about the only sensible and decent person she had seen that evening and who quickly took her to a police station. There was, understandably, publicity given to these awful happenings in order that the police could be assisted by anyone who happened to know anything about them. Unfortunately, the men who were in the car, as I have mentioned, have never been found. If they had been no judge could possibly have dealt with them otherwise than by sending them to prison for a very long time indeed. The appellant was found. His reaction to being found was to tell lies. He denied that he had had sexual intercourse with this girl and maintained that attitude for some time. He had before then been considering his position here very carefully. He was minded to leave the country. He had certainly changed his address. He wrote to his girlfriend. He clearly had to do some explaining to her pending the time he returned. He stated in the letter that he was sorry to leave England but he had to leave, he had told someone and that person would tell her, Julie, why he had to leave. He asked for her understanding and so on. There was a very long series of interviews after the police had arrested the appellant. The girl incidentally had left the programme for the Palladium in his bed-sitter. The interviews were attended by a solicitor. According to the record the solicitor was there throughout. At the trial the appellant asserted that the solicitor was absent for some of the time. It is quite clear from what he was maintained to the police that he was very much a wronged person. At his trial he maintained not that there had been no sexual intercourse but that there had been with this 14 year old girl's consent. She was a virgin. The story

he told the jury was very involved. If the jury were to accept what he said, far from being a girl who came from a good home and was well brought up, she was a hussy who was only too anxious to nip into bed with him in this extraordinary circumstance, namely that she was far from home not knowing where she was and where on earth she was going to go the following morning. We have looked very carefully at the evidence which he gave. It is just about as improbable a story as one could read, even in fiction.

The girl, as we have said, was extremely good looking. What we also know about her—this is material of course to sentence—was that she has been very gravely affected by what happened to her and, so far as we know, still is. More of that later. Medical evidence was called at the trial by the prosecution. That evidence put out of this appellant's mind the maintenance of his denial that he had not had sexual intercourse with this girl. As to buggering it went further, in relation particularly to whether the buggering occurred in the house or in the motor car. The learned judge when summing-up on p. 72 of the transcript stated:

"Now the defendant denies any act of buggering, so naturally the question arises: Could the injuries to her anus have been caused by the man in the car buggering her more than once on the back seat? Well now the doctor's answer is 'extremely unlikely, but it could happen if her bottom was lifted up.' Equally, members of the jury, it is obviously easier to penetrate an anus if the passive person is on her face, lying on her tummy or on her hands and knees and the man is behind her. And you may think, members of the jury, you do not need a doctor or any experts to tell you that."

The judge was absolutely right. No medical evidence really was needed to inform the jury of that.

Following this man's conviction, we have read what he himself has written about what he calls, quite expansively, an unfair trial. That is the effect of what he states. The most able leading counsel who defended him at the Central Criminal Court was asked to express an opinion as to whether or not there was a viable appeal against conviction. He expressed the opinion that there was not, save that possibly an appeal could be launched on the basis that the judge had not directed the jury properly upon the matter of character. Even so, that counsel expressed a further opinion that this court would in the circumstances surely apply the proviso if it was dissatisfied with that direction. Nevertheless, the appellant persisted in his application for leave to appeal and, as I have said, he obtained it. In this Court he has been most ably represented by Mr. Harwood-Stephenson, who did not appear in the court below. No one could possibly have furthered the cause of this appellant better than Mr. Harwood-Stephenson has done. We have also been extremely helpfully assisted by Mr. Bate, who prosecuted at the Central Criminal Court. The ground of appeal—a number of others were in contemplation but this is the only one relied upon—is that the learned judge misdirected the jury upon the issue of character. What she said as to that on p. 37 was this:

"I turn, members of the jury, to the defendant's evidence as to events so far. Mr. Lawson has asked questions and indeed called a witness to tell you that the defendant is a young man of good character. Well, what is the relevance of that? Character does not tell you what the verdicts ought to be, only the evidence can tell you, the jury, what the verdicts ought to be. And Mr. Lawson does not suggest that character can tell you what the verdicts ought to be. When you assess the defendant's evidence and when you decide the verdicts guilty or not guilty, you know that you are deciding about a young man of the character you have heard."

Mr. Bate has pointed out to us that at the time there was a passage in *Archbold* to the effect that it is not always necessary in criminal cases for a judge when summing-up to make reference to a defendant's character. In addition to that he informed us that the appellant's counsel had explicitly, not very long before the judge began to sum up in his final address to the jury, referred to, by reference to authority, the guidance which a judge should give to the jury upon the matter of character. Hence the judge's reference, in the direction I have just quoted, to what had been said by Mr. Lawson. So the jury had had the benefit from Mr. Lawson of hearing what the proper direction was, which was plainly not given by the judge. That we are bound to say was regrettable, regardless as to whether Mr. Lawson had, so to speak, dealt with the matter in his final address to the jury. It was the duty of the judge upon the then existing authority to direct the jury along the lines clearly set out in *Berrada* (1990) 91 Cr. App. R. 131 and which had been the kind of direction which judges had been bidden by this Court to give a very considerable time before that.

It is a material misdirection usually for a judge to neglect to give such a direction. There can be no case of any seriousness in which that excusably can be neglected. Indeed it has been suggested by Mr. Harwood-Stephenson that what the judge did here in effect, in what she said, was to pour cold water upon what Mr. Lawson had clearly and rightly said to the jury. Whether that is a justifiable comment or not is we think of little or no consequence. The fact is that the proper direction on character was not given to the jury by the judge as it should have been. This we think needs to be emphasised. Otherwise the judge summed up this extraordinary and difficult case admirably. No criticism is made of her summing-up in law nor do we think any could have been. True it is that the judge's choice of subject for the jury's consideration of corroboration has been referred to by Mr. Harwood-Stephenson but in another context. It is to that which I shall now turn. The submission which Mr. Harwood-Stephenson makes is that there was before the jury a clear issue between two people, the appellant and the 14 year old girl. The jury therefore upon the account which each gave—this is how the submission goes—had to make up their minds which of these two people they could rely on for the truth of the matter or whether in the end they were left in doubt as to which of them was telling the truth. The issue being so absolutely clear cut and no proper direction upon character having been given, and this man being of previous good character, that failure, the material irregularity which it was claimed to be that is to say, was so crucial that this court is disabled from applying the proviso.

In furthering that submission Mr. Harwood-Stephenson referred us to the items of corroboration which the judge put before the jury for them to consider in contemplating whether or not the girl was telling the truth. Those items can be stated very shortly. First, there was the fact, if the jury accepted it, that the girl left in a hurry and in a very distressed condition. Secondly, the appellant took steps to make himself scarce, to avoid being identified as the man who was with this young girl that night, and to book himself into Baden Powell House stating that he was doing so because he was having trouble with his landlord. Thirdly, there were the lies which he told when he was first questioned about this matter by the police, that is to say that he had no sexual relations with the complainant, a story which he adhered to until genetic fingerprinting compelled him to do otherwise.

What the judge did not do, it is submitted, and ought to have done, was to refer to the ambiguity of those matters seeing that as like as not, having regard to the publicity given to this affair soon after it happened, the appellant was in a panic because he knew perfectly well that that was the girl he had taken to his home and had had sexual intercourse with.

The sharp difference between the evidence of the girl and this appellant is demonstrated, he said, in that and in other ways, referred to us by Mr. Harwood-Stephenson. We do not think it necessary to rehearse the whole of his submissions to that effect. He was bringing to his aid these and others matters for the precise purpose of demonstrating that this really is a case in which the jury were driven simply to decide from the words of the girl and the words of the man where the truth lay.

In the most cogent further submissions he referred us to the long line of authorities upon the subject of the character direction. He started with *Bryant and Oxtley* (1978) 67 Cr. App. R. 157, a case in which I gave the judgment of the Court, and proceeded from there to go through the authorities including *Berrada* (1990) 91 Cr. App. R. 131 and *Cohen* (1990) 91 Cr. App. R. 125. In addition to that he brought our attention to the more recent judgment in *Anderson* [1990] Crim. L.R. 862, which was given by me on behalf of the Court on July 2, of this year, and, among others, to *Watson*, (unreported), a judgment given on behalf of this Court by Macpherson J. on February 19, 1990.

Mr. Bate followed him by making his own references to these cases. What Mr. Harwood-Stephenson maintains is that this was unquestionably a case in which the judge should have given the by now conventional direction as to character in its entirety, that is both elements of it. What we said in *Berrada* (*supra*) as to it at p. 134 was this:

"In the judgment of this Court, the appellant was entitled to have put to the jury from the judge herself a correct direction about the relevance of his previous good character to his credibility. That is a conventional direction and it is regrettable that it did not appear in the summing-up in this case. It would have been proper also (but was not obligatory) for the judge to refer to the fact that the previous good character of the appellant might be thought by them to be one relevant factor when they were considering whether he was the kind of man who was likely to have behaved in the way that the prosecution alleged. I think that the trial judge verged on saying something to that effect but she did not in fact say so in clear terms, because the point was submerged in other comment."

In *Anderson* that was spelt out again. The Chief Justice, Lord Lane, has referred to it on a number of occasions, notably when he gave judgment in *Marr* (1990) 90 Cr. App. R. 154 and more recently in this Court on July 6, this year in *Thanki* (unreported). One other case requires to be mentioned among the number which were referred to. It is *Watson*. In that case, in the course of giving judgment, the passage in *Berrada* (*supra*) was cited with approval and stress was laid upon the need to give that direction wherever there was a credibility issue. The judgment went on in a way to which we should refer because, it is said, it may give the impression that in a case where a man of good character has told lies previously it may not be necessary to give the conventional direction. If that is how the judgment is to be read then we feel bound to say that we do not agree with it. It may be, however, that the words used in the judgment were not intended to convey that impression. It clearly is necessary, for a court, when giving the character direction called for, to give it despite the fact that a defendant, having a previous good character, has told lies to the police or to anyone else before the trial.

We turn now to the question of the proviso to section 2(1) of the Criminal Appeal Act 1968. Most skilfully, Mr. Harwood-Stephenson has endeavoured to persuade us that this is a case in which the proviso simply cannot be used. He points to the fact that many of the subsidiary issues, some of those going to corroboration for instance, are matters essentially for the jury's determination and therefore it is

not right for this court to assume that the jury would have thought about corroboration in the same way that this court might. The medical evidence was not conclusive as to where the act of buggery took place. There are a number of other issues which fell exclusively within the jury's domain, and this court is therefore not competent to say one way or the other how the jury would have regarded them if a proper direction on character had been given.

To all of that, we have listened with the utmost care. We have no doubt at all, aided by Mr. Bate's careful excursion through the sordid facts, that no jury faced by this girl, considering her background and all else, could possibly have avoided convicting this man. The case was overwhelming. If a character direction had been given we have not the slightest doubt that it would not have had the effect of turning this jury away from what we regard as their plain duty. They did not take long about doing it, including the luncheon adjournment they were out for two hours. That does not surprise us.

We unhesitatingly apply the proviso here. This man was rightly and properly convicted. He has no ground of appeal.

So much for conviction. As to sentence, Mr. Harwood-Stephenson has directed us to a number of cases where this court has had to deal with appeals against sentence in rape and buggery cases, including *Billam* (1986) 82 Cr.App.R. 347, [1986] 1 All E.R. 985, which is a guideline case. The factors stated in *Billam* which courts are urged to consider were gone through by him and comparison made with the facts here. What is most telling about this case is its very inception. This girl was literally taken off the streets of London. She was hopelessly lost, had no idea how she would get to Kings Cross and, as I have said earlier, fate intervened in the shape of this man who pretended to befriend her. As he said at one stage, he had intended to have sexual intercourse with her from the very beginning. We do not doubt he was right. One way or another he got her all the bewildering way down to his home and there treated her in this unspeakable way. It would not have surprised us in the least if the learned judge had given him 14 or 15 years. She was lenient. She said in her final sentencing remarks: "I make it plain, that the fact that she suffered afterwards dreadful problems does not affect the sentence I pass upon you."

It affects us; it certainly should have affected the judge. It is part of the whole relevant scene. This girl has been dreadfully affected. We have taken the trouble to ask counsel about the status a note, which is before us, had in sentencing. It seems to have been before the judge. It would be embarrassing to make public what has happened since this girl was treated in the way which we have described. It would be unhelpful to her and to her parents. We shall not say anything of it save to repeat that she has been very very badly affected indeed. The appeal against sentence is dismissed too.

*Appeal dismissed.*

*Solicitors:* Crown Prosecution Service, Headquarters.

## KENNETH CRAMPTON

COURT OF APPEAL (Lord Justice Stuart-Smith, Mr. Justice Tucker and Mr. Turner): November 16, 1990

*Evidence—Confession—Confession of Drug Addict—Defendant Heroin Addict Interviewed by Police while Undergoing Withdrawal Symptoms—Whether Confession Reliable or Should be Excluded Under Police and Criminal Evidence Act 1984 (c. 60), ss. 76(2)(b), 78(1).*

By section 76(2) of the Police and Criminal Evidence Act 1984:

"If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained . . . (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid."

By section 78(1):

"In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

The appellant, a heroin addict, had made admissions at interview in the police station 19 hours after his arrest, *inter alia*, for conspiracy to supply heroin, a Class A prohibited drug, after he had been undergoing withdrawal symptoms. At his trial the confession was the subject of a *voir dire*, the defence submitting that the confession should have been excluded by the trial judge either under section 76(2)(b) of the Police and Criminal Evidence Act 1984 or through the exercise of his discretion under section 78. The trial judge rejected that submission. The trial proceeded. The police relied on their own judgment to determine whether the appellant was fit to be interviewed and agreed they would not have interviewed him if they had known he was withdrawing. The appellant was convicted and appealed.

Held, that the ruling of the trial judge had been correct because it was doubtful whether the mere holding of an interview when the appellant was withdrawing from the symptoms of heroin addiction was something done within the meaning of section 76(2)(b) of the Police and Criminal Evidence Act 1984. The question whether a drug addict was fit to be interviewed in the sense that his answers could be relied on, was a matter for those present at the time. In the instant case, experienced officers had considered the appellant fit to be interviewed and a doctor who saw him later agreed, it followed *a fortiori* that the appellant would have been fit at the time of his interview. Further, there was no reason for the judge to have excluded the confession in the exercise of his discretion under section 78 of the 1984 Act. Accordingly, the appeal would be dismissed.

Dictum of Lord Lane, C.J. in *Rennie* (1982) 74 Cr.App.R. 207, 212 applied. *Goltenberg* (1989) 88 Cr.App.R. 285 considered.

[For ss. 76, 78 of the Police and Criminal Evidence Act 1984, see *Archbold*, 43rd ed., paras. 15-48, 85.]

CASE 13

R (A HUSBAND)

COURT OF APPEAL (The Lord Chief Justice, The President (Sir Stephen Brown), Lord Justice Watkins, Lord Justice Neill and Lord Justice Russell): February 27, March 14, 1991.

Sexual Offences—Rape—Husband and Wife—Marital Exemption—Whether Rape Within Marriage Possible.

A husband can be convicted of raping his wife: because a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim.

A husband was charged with, inter alia, the rape of his wife. At his trial the judge overruled a defence submission that a husband cannot be guilty of rape upon his lawful wife; whereupon the husband changed his plea to guilty of attempted rape. On appeal against the judge's ruling.

Held, the appeal would be dismissed because the common law fiction that a husband could not be guilty of rape upon his wife was an anachronism, and offensive. S. v. H.M. Advocate 1989 S.L.T. 469, 1989 S.C.R. 248 approved and applied. Popkin v. Popkin (1794) 1 Hagg. Ecc. 765n., Clarence (1888) 22 Q.B.D. 23, O'Brien [1974] 3 All E.R. 663, Steele (1976) 65 Cr.App.R. 22, Roberts [1986] Crim.L.R. 188, C (rape: marital exemption) [1991] 1 All E.R. 755 and J (rape: marital exemption) [1991] 1 All E.R. 759 considered.

[For rape and marital exemption thereto, see Archbold, 43rd edn., para. 20-344] Decision of Owen J. [1991] 1 All E.R. 747 affirmed on other grounds.

Appeal against ruling of trial judge.

In the course of the trial of the appellant on charges of rape (count 1) and assault occasioning actual bodily harm (count 2), both on his then wife, before Owen J. at the Crown Court at Leicester on July 30, 1990, the trial judge was asked to give a ruling on whether R could be convicted of raping his wife. The parties were married in 1984 but separated in October 1989 because the wife complained that she was being forced by her husband, R, to have sexual intercourse. The wife left the matrimonial home with the child of the marriage and went to her parents' home. Two days later R telephoned his wife to say that he was going to see about a divorce. The following month R broke into the parents' home and either forced his wife to have sexual intercourse with him or attempted to do so. The judge ruled that he could not believe that it was part of the common law of England that where there had been withdrawal of either party from cohabitation, accompanied by a clear indication that consent to sexual intercourse has been terminated, that that did not amount to a revocation of the implicit consent by the wife, and that there was ample evidence to enable the prosecution to prove a charge of rape or attempted rape against R. R thereupon changed his plea to one of attempted rape and was sentenced to three years' imprisonment on count 1 and 18 months' imprisonment concurrent on count 2. He appealed against the judge's ruling. The appeal was argued on February 27, 1991, when the following additional cases were cited: Audley (Lord), sub nom. Lord Castlehaven's case (1794) 1 Hagg. Ecc. 767, Mohamed v. Knight [1969] 1 Q.B. 1, Henry, unreported, March 14, 1990, Kowalski (1988) 86 Cr.App.R. 339, Reid (1972) 56 Cr.App.R. 703, [1973] 1 Q.B. 299 and Sharples, unreported, December 6, 1989.

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Criminal Appeal Reports will continue to be the most authoritative and accessible source in practice of full text reports (revised by the Court of Appeal) covering all aspects of the criminal law other than sentencing matters.



G. J. Buchanan (instructed by the Registrar of Criminal Appeals) for the appellant R.

John B. Milmo Q.C. and Peter Joyce for the Crown.

Cur. adv. vult.

March 14 **THE LORD CHIEF JUSTICE:** This is the judgment of the Court. On July 30, 1990, at the Crown Court at Leicester, this appellant appeared before Owen J. upon an indictment containing two counts. The first count alleged rape and the second assault occasioning actual bodily harm. A submission was made to the judge that the charge of rape was one which was not known to the law by reason of the fact that the appellant was the husband of the alleged victim. The judge rejected the submission. Thereupon the appellant pleaded not guilty to rape but guilty to attempted rape on count 1 and guilty to assault occasioning actual bodily harm on count 2. He was sentenced to three years' imprisonment for the attempted rape and 18 months' imprisonment to run concurrently in respect of the assault. He now appeals against conviction upon the ground that the judge's ruling was erroneous. The facts of the case are these. The appellant, to whom we shall refer as the husband, married his wife on August 11, 1984. They had one son who was born in 1985. On November 11, 1987, the parties had separated for a period of about two weeks before becoming reconciled. On October 21, 1989, as a result of further matrimonial difficulties, the wife left the matrimonial home with their son, who was then aged 4, and returned to live with her parents. She had by this time already consulted solicitors regarding her matrimonial affairs and indeed had left a letter for the husband in which she informed him that she intended to petition for divorce. However no legal proceedings had been taken by her before the incident took place which gave rise to these criminal proceedings. It seems that the husband had on October 23 spoken to his wife by telephone indicating that it was his intention also to "see about a divorce." Shortly before 9 o'clock on the evening of November 12, 1989, that is to say some 22 days after the wife had returned to live with her parents, and while the parents were out, the husband forced his way into the parents' house and attempted to have sexual intercourse with the wife against her will. In the course of that attempt he assaulted her, in particular by squeezing her neck with both hands. That assault was the subject of count 2. The husband was interviewed by the police after his arrest and admitted his responsibility for these events as his eventual plea of guilty indicates. The only other matter which need be noted is that on May 3, 1990, a decree nisi of divorce was made absolute. The question which the Judge had to decide was whether in those circumstances, despite her refusal in fact to consent to sexual intercourse, the wife must be deemed by the fact of marriage to have consented. The argument before us has ranged over a wider field and has raised the question whether there is any basis for the principle, long supposed to be part of the common law, that a wife does by the fact of marriage give any implied consent in advance for the husband to have sexual intercourse with her; and secondly, the question whether, assuming that that principle at one time existed, it still represents the law in either a qualified or unqualified form. Any consideration of this branch of the law must start with the pronouncement by Sir Matthew Hale in his "*History of the Pleas of the Crown*": (1 Hale P.C. 629):

"But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."

That was published in 1736, although Hale C.J. had died 60 years earlier in 1676. He held the office of Chief Justice for five years, and there can be little doubt that

what he wrote was an accurate expression of the common law as it then stood, despite the fact that it was contained in a part of the work that his revision had not yet reached.

It is of interest to note that immediately before the passage we have cited, Hale C.J. says that the wider defence based on cohabitation stated by Bracton was no longer the law. Hale explained the change in the law on the basis that though "unlawful cohabitation" might be evidence of consent, "it is not necessary that it should be so, for the woman may forsake that unlawful course of life." It seems clear from the passage we have cited and from a later passage in the same chapter where Hale wrote "in marriage [the wife] hath given up her body to her husband," that he founded the proposition that a husband could not be guilty of rape upon his lawful wife on the grounds: (a) that on marriage a wife "gave" her body to her husband; and (b) that on marriage she gave her irrevocable consent to sexual intercourse. These two grounds are similar, though not identical. The theory that on marriage a wife gave her body to her husband was accepted in matrimonial cases decided in the Ecclesiastical Courts. Thus in *Popkin v. Popkin* (1794) 1 Hagg. Ecc. 765 n.767, 162 E.R. 745, 747, Lord Stowell, in a suit by a wife for divorce *a mensa et thoro*, stated: "The husband has a right to the person of his wife," though he added the important qualification, "but not if her health is endangered."

These concepts of the relationship between husband and wife appear to have persisted for a long time and may help to explain why Hale's statement that a husband could not be guilty of rape on his wife was accepted as an enduring principle of the common law. The first edition of *Archbold* in 1822, at p. 259, stated simply: "The husband also cannot be guilty of rape upon his wife." However, in *Clarence* (1888) 22 Q.B.D. 23, there was no unanimity among the judges of a full Court of Crown Cases Reserved on the effect of Hale C.J.'s proposition. Wills J. at p. 33 said this:

"If intercourse under the circumstances now in question constitute an assault on the part of the man, it must constitute rape, unless, indeed, as between married persons rape is impossible, a proposition to which I certainly am not prepared to assent, and for which there seems to me to be no sufficient authority."

Field J. in the course of his judgment at p. 57 said this:

"But it is argued that here there is no offence, because the wife of the prisoner consented to the act, and I entertain no doubt that, if that was so, there was neither assault nor unlawful infliction of harm. Then, did the wife of the prisoner consent? The ground for holding that she did so, put forward in argument, was the consent to marital intercourse which is imposed upon every wife by the marriage contract, and a passage from *Hale's Pleas of the Crown*, vol. 1, page 629, was cited, in which it is said that a husband cannot be guilty of rape upon his wife, 'for by their mutual matrimonial consent and contract the wife hath given up herself in this kind to her husband, which she cannot retract.' The authority of Hale C.J., on such a matter is undoubtedly as high as any can be, but no other authority is cited by him for this proposition, and I should hesitate before I adopted it. There may, I think, be many cases in which a wife may lawfully refuse intercourse, and in which, if the husband imposed it by violence, he might be held guilty of a crime."

Apart from those *dicta* in *Clarence*, no one seems to have questioned Hale C.J.'s proposition until Byrne J. in *Clarke* (1949) 33 Cr.App.R. 216, [1949] 2 All E.R. 448, held that the husband's immunity was lost where the justices had made an order providing that the wife should no longer be bound to cohabit with the defendant. In the course of his ruling Byrne J. said this at p. 217 and p. 448:

"As a general proposition it can be stated that a husband cannot be guilty of

rape on his wife. No doubt, the reason is that on marriage the wife consents to the husband's exercise of the marital right of intercourse during such time as the ordinary relations created by the marriage contract subsist between them." However, in *Miller* (1954) 38 Cr.App.R. 1, [1954] 2 Q.B. 282, Lynskey J., having examined the authorities, ruled that Hale's proposition was correct and that the husband had no case to answer on a charge of rape although the wife had before the act of intercourse presented a petition for divorce, which had not reached the stage of a decree nisi. In *O'Brien* [1974] 3 All E.R. 663, Park J. ruled that a decree nisi effectively terminated a marriage and upon its pronouncement the consent to marital intercourse given by a wife at the time of marriage was revoked:

"Between the pronouncement of a decree nisi and the obtaining of a decree absolute a marriage subsists as a mere technicality. There can be no question that by a decree nisi a wife's implied consent to marital intercourse is revoked. Accordingly, a husband commits the offence of rape if he has sexual intercourse with her thereafter without her consent."

In *Szele* (1976) 65 Cr.App.R. 22, this Court held that where a husband and wife are living apart and there is in existence an undertaking given by the husband to the court not to molest the wife, that is in effect equivalent to the granting of an injunction and eliminates the wife's implied consent to sexual intercourse. In the course of delivering the judgment of that Court, at p. 25, having referred to the cases already mentioned here, I said this:

"Here there has been no decree of the Court, here there has been no direct order of the Court compelling the husband to stay away from his wife. There has been an undertaking by the husband not to molest his wife. The question which the Court has to decide is this. Have the parties made it clear, by agreement between themselves, or has the Court made it clear by an order or something equivalent to an order, that the wife's consent to sexual intercourse with her husband implicit in the act of marriage, no longer exists?

I then went on to set out, *obiter*, a number of matters which would not be sufficient to remove the husband's immunity, having the judgment of Lynskey J. in *Miller* (*supra*) in mind. *Roberts* [1986] Crim.L.R. 188 was another decision of this court. The husband had been restrained from molesting or going near to his wife for two months; an ouster order was made ordering him out of the matrimonial home. On the same day a formal deed of separation was entered into; there was no non-cohabitation or non-molestation clause. The trial Judge had rejected a submission that the wife's implied consent to intercourse with her husband revived when the injunction ran out in August 1984. It was held that the lack of a non-molestation clause in the deed of separation could not possibly have operated to revive the consent of the wife which had been terminated. It is against that brief historical background that we turn to consider the submissions of the appellant advanced by Mr. Buchanan in a carefully researched argument that the husband's immunity was not lost by what had happened between his wife and himself and that accordingly he was not liable to be tried or convicted for rape. In the course of his ruling upon the submission, the learned judge, Owen J., having set out the authorities, reached a conclusion in the following terms at [1991] 1 All E.R. 747, 754c:

"... what, in law will suffice to revoke that consent which the wife gives to sexual intercourse upon marriage and which the law implies from the facts of marriage? . . . It must be sufficient for there to be agreement of the parties. Of course, an agreement of the parties means what it says. It does not mean something which is done unilaterally . . . As it seems to me, from his action in telephoning her and saying that he intended to see about a divorce and thereby to accede to what she was doing, there is sufficient here to indicate that there was

an implied agreement to a separation and to a withdrawal of that consent to sexual intercourse which the law, I will assume and accept, implies.

"The next question is whether the third set of circumstances may be sufficient to revoke that implicit consent. Mr. Milmo argues that the withdrawal of either party from cohabitation is sufficient for that consent to be revoked . . .

"I accept that it is not for me to make the law. However, it is for me to state the common law as I believe it to be. If that requires me to indicate a set of circumstances, which have not so far been considered as sufficient to negative consent as in fact so doing, then I must do so. I cannot believe that it is a part of the common law of this country that where there has been withdrawal of either party from cohabitation, accompanied by a clear indication that consent to sexual intercourse has been terminated, that that does not amount to a revocation of that implied consent. In those circumstances, it seems to me that there is ample evidence here, both on the second exception and the third exception, which would enable the prosecution to prove a charge of rape or attempted rape against this husband."

Since that ruling in July 1990 there have been two other decisions at first instance to which reference must be made. The first was on October 5, 1990, when Simon Brown J. in the Crown Court at Sheffield was asked to rule upon a similar question in the case of *C (rape: marital exemption)* [1991] 1 All E.R. 755. The judge examined in detail the pros and cons of the various suggested solutions to the problem and came to the conclusion that Hale C.J.'s proposition was no longer the law. This is what he said at p. 758:

"Were it not for the deeply unsatisfactory consequences of reaching any other conclusion upon the point, I would shrink, if sadly, from adopting this radical view of the true position in law. But adopt it I do. Logically, I regard it as the only defensible stance, certainly now as the law has developed and arrived in the late twentieth century. In my judgment, the position in law today is, as already declared in Scotland, that there is no marital exemption to the law of rape. That is the ruling I give."

The mention of Scottish law by Simon Brown J. is a reference to the decision of the High Court of Justiciary in *S. v. H.M. Advocate* 1989 S.L.T. 469, delivered by the Lord Justice General, Lord Emslie. The proposition which had governed courts in Scotland for very many years in the same way as Hale's proposition had operated in England, emanated from Baron Hume, the first edition of whose work *Commentaries on the Law of Scotland Respecting Crime* appeared in 1797, and contained the following passage:

"This is true without exception even of the husband of the woman, who though he cannot himself commit a rape on his own wife, who has surrendered her person to him in that sort, may, however, be accessory to that crime . . . committed upon her by another."

In the course of his opinion, Lord Emslie said this at 473:

"... the soundness of Hume's view, and its application in the late 20th Century, depends entirely upon the reason which is said to justify it. Our first observation is that if what Hume meant was that by marriage a wife expressly or impliedly consented to sexual intercourse with her husband as a normal incident of marriage, the reason given affords no justification for his statement of the law because rape has always been essentially a crime of violence and indeed no more than an aggravated assault. . . . If . . . Hume meant that by marriage a wife consented to intercourse against her will and obtained by force, we take leave to doubt whether this was ever contemplated by the com-

mon law, which was derived from the canon law, regulating the relationship of husband and wife."

The final decision to which we must refer is a ruling of Rougier J. in *J (rape: marital exemption)* [1991] 1 All E.R. 759. The argument in that case proceeded upon different lines from those adopted in *C (supra)*. The submission addressed on behalf of the prosecution to Rougier J. was based on the wording of the Sexual Offences (Amendment) Act 1976, section 1(1)(a) which provides:

"For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if—(a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it."

Section 1(1) of the 1956 Act provided: "It is a felony for a man to rape a woman."

The contention was that the 1976 Act for the first time provided a statutory definition of rape; that the only possible meaning which can be ascribed to the word "unlawful" is "illicit," that is to say outside the bounds of matrimony, and that accordingly Parliament's intention must have been to preserve the husband's immunity. This argument was reinforced by reference to the decision of this Court in *Chapman* (1958) 42 Cr.App.R. 257, [1959] 1 Q.B. 100, which gave that interpretation to the use of the word "unlawful" in the 1956 Act, which of course was dealing with the same type of offence. Moreover, it was pointed out that if the word in section 1 of the 1976 Act is mere surplusage, this would, it is said, be the only place in the Act where that is so. The judge rejected the contentions of the prosecution and ruled that the intervention of the 1976 statute has, as he put it, "precluded any up-to-date declaration of the state of the common law on this subject. The matter has become one of statutory interpretation and remains so." The learned judge also rejected the subsidiary argument addressed to him by the prosecution, namely that the wording of the Act still left it open to the court to enlarge the number of exceptions to the husband's immunity and did so in the following terms [1991] 1 All E.R. 759, 767:

"Once Parliament has transferred the offence from the realm of common law to that of statute and, as I believe, has defined the common law position as it stood at the time of the passing of the Act, then I have very grave doubt whether it is open to judges to continue to discover exceptions to the general rule of marital immunity by purporting to extend the common law any further. The position is crystallized as at the making of the Act and only Parliament can alter it."

Those three recent decisions, including that of Owen J. in the instant case, neatly exemplify the possible solutions, each with its concomitant drawbacks, with which we are confronted. They may be summarised as follows:

1. *The literal solution:*

The 1976 Act by defining rape as it did and including the word "unlawful" made it clear that the husband's immunity is preserved, there being no other meaning for the word except "outside the bounds of matrimony." It is not legitimate to treat the word as surplusage when there is a proper meaning which can be ascribed to it.

2. *The compromise solution:*

The word "unlawful" is to be construed in such a way as to leave intact the exceptions to the husband's immunity which have been engrafted on to Hale's proposi-

tion from the decision in *Clarke (supra)* onwards and is also to be construed so as to allow further exceptions as the occasion may arise.

3. *The radical solution:*

Hale's proposition is based on a fiction and moreover a fiction which is inconsistent with the proper relationship between husband and wife today. For the reasons expressed by Lord Emslie in *Sv. H.M. Advocate (supra)*, it is repugnant and illogical in that it permits a husband to be punished for treating his wife with violence in the course of rape but not for the rape itself which is an aggravated and vicious form of violence. The court should take the same attitude to this situation as did Lord Halsbury L.C., albeit in different circumstances, in *Jackson* [1891] 1 Q.B. 671, 681 as follows:

"I confess to regarding with something like indignation the statement of the facts of this case, and the absence of a due sense of delicacy and respect due to a wife whom the husband has sworn to cherish and protect."

The drawbacks are these: The first solution requires the word "unlawful" to be given what is said to be its true effect. That would mean that the husband's immunity would remain unimpaired so long as the marriage subsisted. The effect would be to overrule the decisions in *Clarke*, *O'Brien* and *Steele*, and all the other cases which have engrafted exceptions on to Hale's proposition. It is hard to believe that Parliament intended that result. If it was intended to preserve the exceptions which existed at the time the Act came into force, it would have been easy to say so. The second or compromise solution adopts what is, so to speak, the open-ended interpretation of the 1976 Act and would permit further exceptions to be engrafted on to Hale's proposition. In particular, an exception in circumstances such as those in the instant case where the wife has withdrawn from cohabitation so as to make it clear that she wishes to bring an end to matrimonial relationships. There would be formidable difficulties of definition and interpretation. How, one asks, would it be possible accurately to define "withdrawal from cohabitation"? It is not every wife who can, as the wife here could, go to live with her parents or indeed has anywhere else other than the matrimonial home in which to live. It may be thought that a total abolition of the immunity would be a preferable solution, as has been the experience in some other common law jurisdictions. Canada, Victoria, New South Wales, Western Australia, Queensland, Tasmania and notably in New Zealand, where the compromise solution was found to be unworkable.

The third or radical solution is said to disregard the statutory provisions of the 1976 Act and, even if it does not do that, it is said that it goes beyond the legitimate bounds of judge-made law and trespasses on the province of Parliament. In other words the abolition of a rule of such long standing, despite its emasculating by later decisions, is a task for the legislature and not the courts. There are social considerations to be taken into account, the privacy of marriage to be preserved and questions of potential reconciliation to be weighed which make it an inappropriate area for judicial intervention. It can be seen that these are formidable objections, and others no doubt exist, to each of the possible solutions.

*What should be the answer?*

Ever since the decision of Byrne J. in *Clarke* in 1949, courts have been paying lip service to the Hale proposition, whilst at the same time increasing the number of exceptions, the number of situations to which it does not apply. This is a legitimate use of the flexibility of the common law which can and should adapt itself to changing social attitudes. There comes a time when the changes are so great that it is no longer enough to create further exceptions restricting the effect of the proposition,

a time when the proposition itself requires examination to see whether its terms are in accord with what is generally regarded today as acceptable behaviour.

For the reasons already adumbrated, and in particular those advanced by the Lord Justice General in *S v. H.M. Advocate (supra)* with which we respectfully agree, the idea that a wife by marriage consents in advance to her husband having sexual intercourse with her whatever her state of health or however proper her objections (if that is what Hale meant), is no longer acceptable. It can never have been other than a fiction, and fiction is a poor basis for the criminal law. The extent to which events have overtaken Hale's proposition is well illustrated by his last four words, "which she cannot retract."

It seems to us that where the common law rule no longer even remotely represents what is the true position of a wife in present day society, the duty of the court is to take steps to alter the rule if it can legitimately do so in the light of any relevant Parliamentary enactment. That in the end comes down to a consideration of the word "unlawful" in the 1976 Act. It is at the best, perhaps a strange word to have used if the draftsman meant by it "outside marriage." However sexual intercourse outside marriage may be described, it is not "unlawful" if one gives to the word its ordinary meaning of "contrary to law." We have not overlooked the decision in *Chapman (supra)* to which we have already referred, but if the word is to be construed as "illicit" or "outside marriage," then it seemingly admits of no exception. The husband who is the subject of an injunction or undertaking to the court or in respect of whose marriage a decree nisi has been pronounced or is a party to a formal separation agreement would be nevertheless immune from prosecution for raping his wife. This would apply equally to a husband who is the subject of a Family Protection Order, a situation which was the subject of a judgment by Swinton Thomas J. in the case of *S* (unreported, Stafford Crown Court, January 15, 1991). The alternative to that unwelcome conclusion would be to interpret the word as including the various exceptions to the husband's immunity which we have examined earlier in this judgment. If so, one asks whether the situation crystallises at the date the Act came into force. If that is the case, then all the decisions since the time when the 1976 Act came into force which have narrowed the husband's immunity would have been wrongly decided. It may be on the other hand that the draftsman intended to leave it open to the common law to develop as it has done since 1976. The only realistic explanations seem to us to be that the draftsman either intended to leave the matter open for the common law to develop in that way or, perhaps more likely, that no satisfactory meaning at all can be ascribed to the word and that it is indeed surplusage. In either event, we do not consider that we are inhibited by the 1976 Act from declaring that the husband's immunity as expounded by Hale no longer exists. We take the view that the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim.

The remaining and no less difficult question is whether, despite that view, this is an area where the court should step aside to leave the matter to the Parliamentary process. This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it.

Had our decision been otherwise and had we been of the opinion that Hale's proposition was still effective, we would nevertheless have ruled that where, as in the instant case, a wife withdraws from cohabitation in such a way as to make it clear to the husband that so far as she is concerned the marriage is at an end, the husband's immunity is lost. The appeal fails and is dismissed.

*Appeal dismissed.*

The Court certified under section 33(2) of the Criminal Appeal Act 1968, the following point of law of general public importance was involved in its decision viz.: "Is a husband criminally liable for raping his wife?" The Court granted leave to appeal to the House of Lords, and granted legal aid, one counsel and solicitor, for the prosecution of the appeal.

*Solicitors:* Crown Prosecution Service, Leicester and Headquarters.

## RODNEY DOUGLAS GIBSON

COURT OF APPEAL (The Lord Chief Justice, Mr. Justice Hutchison and Mr. Justice Mantell): April 12, 1991

*Trial—Summing-up—Direction to Jury where One Defendant of Previous Good Character and the Other Not.*

In summing-up to the jury in a case where there are two defendants, one of previous good character and the other having a previous relevant conviction of which the jury are unaware, it may be advisable for the judge to say very little if anything about the good character of the one. In those circumstances it will be prudent for him in the absence of the jury to indicate to counsel that such is his intention, to enable counsel to address him on the point and in due course to address the jury appropriately.

[For direction as to defendant's good character in summing-up, see *Archbold*, 43rd ed., para. 4-436.]

Appeal against conviction.

On May 25, 1989, in the Crown Court at Southwark (Judge Paiba) the appellant was convicted by a majority verdict on one count of gross indecency. He was fined £150 and ordered to pay a sum towards the costs of the prosecution.

The facts appear in the judgment.

The case is reported on the direction to be given to the jury in a trial of more than one defendant where one is of previous good character and the other not.

*Edward Quist-Arcton* for the appellant.

*Nigel Ingram* for the Crown.

**THE LORD CHIEF JUSTICE:** On May 25, 1989, in the Crown Court at Southwark this appellant, Rodney Douglas Gibson, was convicted by a majority verdict of the jury on one count of gross indecency. He was sentenced to a fine of £150 with 14 days' imprisonment in default, and ordered to pay a sum towards the costs of the prosecution. There was a man accused with him, a man called Alan Thomas Wood. He was also convicted of a similar offence, also by the same majority, and he was fined £250 and ordered to pay a sum in respect of the prosecution costs. This appellant now appeals against conviction by leave of the single judge.

The facts of the case were these. This was a second hearing. The original hearing had been aborted on February 17, 1989. The jury were discharged because it seems either counsel, or one of the defendants, had an engagement to go away on holiday. The hearing of the case as appealed against in this Court was bedevilled by one

## KENNETH MARK ROBINSON

## CASE 14

COURT OF APPEAL (The Lord Chief Justice (Lord Taylor), Mr. Justice Potts and Mr. Justice Judge): November 23, 27, 1992

*Sexual Offences—Attempted Rape—Whether “Sexual Offence” Restricted Definition and “Violent Offence” Broad Definition—Sexual Offences Act 1956 (4 & 5 Eliz. 2, c. 69), s.37, Sched. 2, Pt. 1—Criminal Attempts Act 1981 (c. 47), s.1—Criminal Justice Act 1991 (c. 53), s.31(1).*

*Sentence—Detention of Young Offender—Date for Determination of Age for Purpose of Sentence—Children and Young Persons Act 1933 (23 & 24 Geo. 5, c. 12), s.53(2).*

By section 1 of the Criminal Attempts Act 1981:

“(1) If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence . . . (4) This section applies to any offence which, if it were completed, would be triable in England . . . as an indictable offence . . .”

By section 31(1) of the Criminal Justice Act 1991:

“(1) In this Part . . . ‘sexual offence’ means an offence under the Sexual Offences Act 1956 . . . other than . . . (b) an offence under section . . . 31 . . . of the said Act of 1956 . . . ‘violent offence’ means an offence which leads, or is intended or likely to lead, to . . . physical injury to a person . . .”

Although attempted rape was indictable under section 1 of the Criminal Attempts Act 1981; nevertheless, in the light of section 37 of and Part I of Schedule 2 to the Sexual Offences Act 1956, the offence was properly regarded as an offence under the 1956 Act. Thus, attempted rape came within the definition of sexual offence for the purposes of the Criminal Justice Act 1991. The definition of sexual offence in section 31(1) of the 1991 Act meant “an offence which leads . . . to physical injury to a person” and did not require the injury to be serious. The broad definition focused not on the classes of offences specified in statutory provisions but on the individual facts of each case.

The appellant, charged with attempted rape, was aged 16 at the time of the offence. The victim, an elderly lady approaching 90 years of age, was in her home at night and did in fact suffer actual physical injury as a direct result of the attempted rape. It was, therefore, a violent offence within section 31(1) and the appellant was properly convicted.

As to sentence, eight years’ detention under section 53(2) of the Children and Young Persons Act 1933 was correct. The sentence was not limited to a maximum of 12 months under section 63 of and Schedules 8 and 12 to the 1991 Act, because the appellant was aged 16 at the time of his conviction, the operative date, although he had attained the age of 17 at the time of sentence. Had the appellant been older, the sentence imposed might well have been longer.

*Danga* (1991) 12 Cr.App.R.(S.) 408 and *Pesapane* (1992) 13 Cr.App.R.(S.) 438 applied.

[For s.53(2) of the Children and Young Persons Act 1933, as amended, see *Archbold* (1993) paras. 5-332, 333; for s.1 of the Criminal Attempts Act 1981, see, *ibid.*, para. 33-72; for s.31 of the Criminal Justice Act 1991, see *ibid.*, 5-150.]

Appeal against sentence.

On June 29, 1992, in the Crown Court at Teesside before Judge Herrod, Q.C., the appellant pleaded guilty to burglary (count 2) and not guilty to attempted rape (count 1). On July 28, before Waite J., upon rearraignment, the appellant pleaded guilty to count 1. Sentence was adjourned for reports. On October 8, 1992, before Blofeld J., he was sentenced to eight years’ detention under section 53 of the Children and Young Persons Act 1933, as amended, on count 1 and to two years’ detention concurrent on count 2.

The facts appear in the judgment.

The appellant appealed against sentence pursuant to a certificate granted by Blofeld J. under section 81(1B) of the Supreme Court Act 1981 and section 11(1A) of the Criminal Appeal Act 1968, as amended.

The appeal was argued on November 23, 1992.

*Andrew Robertson* (assigned by the Registrar of Criminal Appeals) for the appellant.

*Jeremy Richardson* as *amicus curiae*.

*Cur. adv. vult.*

November 27. **THE LORD CHIEF JUSTICE** read the following judgment of the Court. This is a truly shocking case. On June 29, 1992, in the Crown Court at Teesside, this appellant pleaded guilty to burglary (count 2) and not guilty to attempted rape (count 1).

On July 28, 1992 he was re-arraigned, and pleaded guilty to count 1. Sentence was adjourned for the preparation of reports.

On October 8, 1992, before Blofeld J., he was sentenced as follows: on count 1, attempted rape, eight years’ detention under section 53 of the Children and Young Persons Act 1933; on count 2, burglary, two years’ detention concurrently. The total sentence, therefore, was one of eight years’ detention under the 1933 Act.

He appeals against sentence, the learned trial judge having granted a certificate pursuant to section 81(1B) of the Supreme Court Act 1981 and section 11(1A) of the Criminal Appeal Act 1968.

The complainant was a widow, aged 87, described in the case as a frail old lady fitted with a pacemaker. Her husband died in 1979 and she lived alone in a ground floor flat in Hartlepool.

On January 31, 1992, at about 9 p.m., she was watching television having already changed into her night clothes ready for bed. There was a knock at her front door. Being nervous and cautious, she turned the lights and the television off, went to the letter box, opened it and said, “Who is it?” The appellant replied, “It’s the police.” She saw the appellant’s blue trousers and, thinking it was in fact a police officer, opened the door.

The appellant forced his way in, pushing the complainant into the living room and onto the settee. He pulled her trousers down and exposed his penis. Her legs were forced apart and the appellant attempted to have sexual intercourse with her. She tried to resist, but found this impossible, due to the appellant’s weight upon her.

Having failed to penetrate her, the appellant dragged her into the bedroom. He pulled off her pyjama trousers completely, lifted her right leg and pushed it over his shoulder. He roughly opened her private parts and tried to insert his penis. Again he failed to penetrate her. Instead he inserted his finger. Throughout, the appellant tried to kiss and insert his tongue into the complainant’s mouth, slobbering over her, as she put it. He also attempted to insert his penis into her mouth.

He then asked her if she had any money, to which she replied, no. He tried to

pull her out of the bedroom, but she managed to push him out of the door, shut the door and lock it. She raised the assistance of her neighbour by banging upon the wall. The appellant ran away.

The complainant was medically examined. She had sustained swelling and bruising to the back and to the side of her right ankle and inside her lower leg. There was a tear to her private parts which had bled.

The appellant was arrested on February 4, 1992, after his fingerprints had been found in the complainant's flat. During interview he initially denied even being at the flat. When told of the fingerprint evidence, he admitted his guilt of burglary but still denied any form of sexual assault. He maintained that denial at the hearing on June 29, so that the complainant had to attend court on July 28, believing until then she would face the second ordeal of having to give evidence. However, that day the appellant changed his plea.

He is now aged 17, but was only 16 at the time of the offence. He was of previous good character.

A social enquiry report described him as a very sad and pathetic young man, yet clearly dangerous. The psychiatric report confirmed that there was no evidence of mental illness, mental impairment or psychopathic disorder.

On the appellant's behalf, it was urged before the learned judge that he had been in custody for a period of eight months on remand, which had been a difficult time for him. His delay in entering a guilty plea to the charge of attempted rape had been due to shame and fear. It was submitted that he had shown remorse when interviewed by the psychiatrist. He was sexually inexperienced and emotionally immature. The only explanation for the offence which was put forward was the alcohol which he had consumed.

The learned judge granted a certificate of appeal so that this Court could rule whether the offence was (a) a sexual offence and (b) a violent offence within the meaning of the Criminal Justice Act 1991. The learned judge held that it was both.

The first submission on behalf of the appellant was that attempted rape was not a "sexual offence" within the meaning of the Act. As a matter of common sense this submission may seem so absurd that it should simply be dismissed without further consideration.

However, section 31(1) of the Criminal Justice Act 1991 provides:

" 'sexual offence' means an offence under the Sexual Offences Act 1956, the Indecency with Children Act 1960, the Sexual Offences Act 1967, section 54 of the Criminal Law Act 1977 or the Protection of Children Act 1978, other than—(a) an offence under section 12 or 13 of the Sexual Offences Act 1956 which would not be an offence but for section 2 of the Sexual Offences Act 1967; (b) an offence under section 30, 31 or 33 to 36 of the said Act of 1956; and (c) an offence under section 4 or 5 of the said Act of 1967 . . . "

This narrow definition confines "sexual" offence to specific statutory provisions. It expressly excludes some crimes which in ordinary language would amount to sexual offences, such as procuring buggery by adult males in private and offences related to prostitution and brothel-keeping. It also omits some crimes which would normally be regarded as sexual offences, such as indecent exposure or, more important, burglary with intent to rape, an offence against the Theft Act 1968.

In this, as in any other similar case, attempted rape was charged as an offence contrary to the Criminal Attempts Act 1981. This statute is omitted from the statutory provisions included in the definition of sexual offence in the 1991 Act. Accordingly it was submitted that, however absurd it may appear at first sight, attempted rape was not included within the definition.

This argument requires careful analysis. It is not enough to hold that it would be

an affront to common sense if it were accepted. Although it is surprising, burglary with intent to rape is outside the statutory definition of a sexual offence for the purposes of the 1991 Act. The Court is obliged to approach the issue as a matter of construction of the definition section.

Several arguments have been deployed. Section 4(1)(b) of the Criminal Attempts Act 1981 provides that on conviction of an attempt to commit an indictable offence other than murder or any other offence the sentence for which is fixed by law, the maximum penalty will coincide with the maximum penalty available for the substantive offence itself. For sentencing purposes therefore, the statutory provisions relating to substantive offences and attempts to commit them are clearly aligned. In our judgment this is insufficient to bring attempted rape within the statutory definition.

Section 7 of the Sexual Offences (Amendment) Act 1976 expressly includes in the definition of "rape offence" both rape and attempted rape. This Act may be cited together with the Sexual Offences Act 1956 as the Sexual Offences Acts 1956-1976. There is therefore not only a close alignment in the relevant sentencing provisions but "attempted rape" is a "rape offence." However, the definition section in the 1991 Act makes no reference to the Sexual Offences Acts 1956-1976 and in view of its express terms it is not possible to construe it in such a way as to include the 1976 Act.

Section 37 of the Sexual Offences Act 1956 provides for the prosecution and punishment of rape and attempted rape as well as other sexual offences. In Schedule 2, Part I, rape and attempted rape are listed together in the column marked "Offence." Attempt to commit rape is treated in exactly the same way as the full offence of rape, in effect, for these purposes, as identical. In other words, attempted rape is an offence under the 1956 Act for the purpose of specifying the court's statutory powers of sentence. Although this offence is *indicted* under the Criminal Attempts Act 1981, it is in our judgment properly regarded as an offence "under" the Sexual Offences Act 1956. In these circumstances, we have concluded that attempted rape comes within the definition of a "sexual offence" for the purposes of the Criminal Justice Act 1991.

The second submission was that this offence was not a "violent offence" within the Criminal Justice Act 1991.

Section 31(1) of the 1991 Act provides:

" . . . 'Violent offence' means an offence which leads, or is intended or likely to lead, to a person's death or to physical injury to a person, and includes an offence which is required to be charged as arson . . . "

In contrast to the definition of "sexual offence," this is a broad definition which focuses not on classes of offences specified in statutory provisions but on the individual facts of each case. By contrast with section 31(3), this definition does not include psychological harm, nor is there any requirement that the physical injury should be serious. In the present case, the unfortunate victim was likely to suffer, and did in fact suffer actual physical injury as a direct result of the offence of attempted rape. It was therefore a violent offence for the purposes of the 1991 Act.

The next submission made on behalf of the appellant was that the sentence of eight years' detention under the Children and Young Persons Act 1933 was unlawful because the court had exceeded its jurisdiction. The basis of the submission was that as the appellant was convicted before he reached his 17th birthday, the effect of section 63 and Schedules 8 and 12 to the 1991 Act was to provide that the maximum available sentence on him in October 1992 would have been 12 months' detention in a young offender institution. The appellant would have been 12 months' old. He was then 16 years old. It was accepted that, if sentenced, then he would

have been liable to an order under section 53(2) of the Children and Young Persons Act.

In *Danga* (1991) 12 Cr. App. R. (S.) 408 this Court considered a situation not dissimilar from the present case. *Danga* was 20 years old when convicted, and 21 years old when he was sentenced to imprisonment at the Crown Court. This Court considered that the proper sentence should have been an order for detention in a young offender institution rather than imprisonment as an adult on the ground that, for the purposes of sentencing, the age of the defendant was his age at the date of conviction (see also *Pesapane* (1992) 13 Cr. App. R. (S.) 438). In our judgment, the same principle should be applied to the present case. This appellant was accordingly liable to be sentenced under section 53(2) of the 1933 Act and the jurisdiction of the court was not limited to a maximum of 12 months' detention.

We have considered the sentence itself. We have borne in mind the youth and the eventual plea of the appellant. Nevertheless, this was an appalling crime committed against a lady approaching 90 years of age who was in her home alone at night. In our judgment, the sentence was right: if the appellant had been older the sentence might well have been longer. This appeal is dismissed.

*Appeal dismissed.*

*Solicitors:* Crown Prosecution Service, Headquarters.

## BRIAN GREGORY CUNNINGHAM

COURT OF APPEAL (The Lord Chief Justice (Lord Taylor), Mr. Justice Potts and Mr. Justice Judge): November 23, 27, 1992

*Sentence—Restrictions on Sentencing Defendants—Criminal Justice Act 1991 (c. 53), ss. 1(2)(a), 2(2)(a).*

By section 1(2) of the Criminal Justice Act 1991:

"... the court shall not pass a custodial sentence on the offender unless it is of the opinion—(a) that the offence, or the combination of the offence and one other offence associated with it, was so serious that only such a sentence can be justified for the offence . . ."

By section 2(2):

"The custodial sentence shall be—(a) for such term (not exceeding the permitted maximum) as in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and other offences associated with it . . ."

The purposes of a custodial sentence must primarily be to punish and deter. Thus the phrase "commensurate with the seriousness of the offence" in section 2(2) of the Criminal Justice Act 1991 must mean commensurate with the punishment and deterrence which the seriousness of the offence requires. However, section 2(2)(a) prohibits adding any extra length of sentence which by the above criteria is commensurate with the seriousness of the offence, simply to make a special example of the defendant.

*Dicta of Lord Lane C.J., in Attorney-General's Reference (No. 9 of 1989) (Lacey) (1990) 12 Cr. App. R. (S.) 7, 9 applied.*

Robbery by a 22-year-old offender, of previous good character, in a small shop at knife-point, which clearly fell within section 1(2)(a) of the 1991 Act, well merited the four years' imprisonment imposed by the trial judge. However, on appeal, the court varied the sentence to three years' imprisonment in view of matters relevant in mitigation within the meaning of section 28(1) of the 1991 Act.

[For ss.1, 2, 28 of the Criminal Justice Act 1991, see *Archbold* (1993) paras. 5-148, 150.]

*Appeal against sentence.*

On September 1, 1992, in the Crown Court at Chichester (Judge Writmore), the appellant pleaded guilty to two indictments—(1) to robbery and (2) to theft. On October 2, 1992, he was sentenced to four years' imprisonment for the robbery and to two years' imprisonment concurrent for the theft. The facts appear in the judgment of the Court.

The appeal was argued on November 23, 1992.

*Philip G. Meredith* (assigned by the Registrar of Criminal Appeals) for the appellant.

*David Calvert Smith* and *David Thomas* as *amici curiae*.

*Cur. adv. vult.*

November 27. **THE LORD CHIEF JUSTICE** read the following judgment of the Court.

On September 1, 1992, at Chichester Crown Court, this appellant pleaded guilty to two indictments and on October 2, 1992, was sentenced on the first indictment for robbery to four years' imprisonment and on the second indictment for theft to two years' imprisonment concurrently.

He now applies for leave to appeal against sentence, which we have granted. The offence of theft was the first in time. It was committed jointly with co-accused Dunkerton, aged 29, and Cole, aged 26. Dunkerton was employed by a newsagent in Crawley as a deputy manager. On the morning of April 6, 1992, he staged a fake robbery. He pretended that he had been tied up against his will and was found secured to a chair. Cash, cigarettes and confectionery to the value of £1,500 had been stolen. The appellant, who was in possession of stolen cigarettes, was arrested initially for robbery. The police then discovered it had been a fake.

The appellant, when first interviewed, denied any involvement. Later, he admitted being fetched to the shop by Dunkerton and Cole. They had all three stolen the property. He helped carry out the cigarettes and secured Dunkerton to a chair with his tie. He expected to get "something" from Dunkerton for his part.

The offence of robbery took place on the evening of April 24, 1992. Whilst on bail for the offence of theft, the appellant, brandishing a knife and accompanied by Cole, went to a corner shop in Crawley. They demanded money from the shopkeeper, who had a small child in his arms. There was a struggle during which the knife was bent against the counter. Cole grabbed the till containing some £2,700, and ran off. The till itself was worth £600. It was damaged when recovered. The shopkeeper managed to overpower the appellant and detained him, still holding the knife, until the police arrived. When interviewed, the appellant said he had been given the knife and some gloves by Cole. He admitted robbing the shopkeeper at knife-point and claimed he had been threatened with death if he did not participate.

Cole pleaded guilty to the same offences as the appellant and was also sentenced to four years' and two years' imprisonment concurrently. Dunkerton pleaded guilty

1554 - Vol. 15 - Ed. David Thomas. London: Sweet & Maxwell  
p. 816 on  
p. 381 on  
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(1994) 15 Cr.App.R.(S.)

ULUS ARSLAN

COURT OF APPEAL Lord Justice Rose and Mr. Justice Turner): May 11, 1993

*theft of money from telephone box—whether offence so serious that only a custodial sentence could be justified—length of sentence.*

months' imprisonment for theft of £82 in coins from a public telephone box to four months. The appellant pleaded guilty to theft. The appellant drilled through the back of the box of a public telephone box in the early hours of the morning and stole £82 in coins. He was arrested shortly afterwards. Sentenced to eight months' imprisonment.

(considering *Decino*, *The Times*, May 10, 1993) the sentence was entitled to view that the offence was so serious that only a custodial sentence could be imposed, and that an element of deterrence was not inappropriate. The offence was planned and involved a measure of specialist knowledge, and was committed by the appellant was on bail. The Court was persuaded, however, that the sentence was too long and a sentence of four months would be substituted.

cited: *Decino*, *The Times*, May 10, 1993.

reference: theft, *Current Sentencing Practice* B6-1.3.

*J. E. White* for the appellant.

*E.L.J.*: On March 5, 1993, at the St. Albans Crown Court, His Honour Judge [redacted] sentenced this appellant to eight months' imprisonment. In February 1993 [redacted] pleaded guilty to an offence of theft. He was also ordered to forfeit a sum of £82 in his possession, in circumstances to which we shall come in a moment. [redacted] a screwdriver which he had ordered to be confiscated.

On August 3, 1992, at 4 o'clock in the morning, the appellant broke into a public telephone box in Hemel Hempstead and stole just over £82 in coins. He did so by drilling through the back of the cash box. He was stopped shortly afterwards by the police. The money was in a plastic carrier bag together with a piece of the lock. In the [redacted] his car was a cordless drill and a drill bit. He declined to make any comment and was interviewed. Against the sentence imposed he appeals by leave of the [redacted] judge.

The appellant is 34 years of age. He has only one potentially relevant previous conviction. In June 1992 he was seen attempting to steal money from a telephone box using a crowbar.

The offence with which the learned judge dealt was, as is apparent from the dates which we have referred, committed prior to a sentence of imprisonment imposed in November 1992 for a motoring offence. He was released from that sentence in February 1993. The pre-sentence report, which was before the learned judge, stated that at the time of this offence the appellant was physically sick—he had been diagnosed as suffering from tuberculosis—mentally depressed and emotionally unstable. However, the offence was committed at a time when he was on bail for a [redacted] offence.

The suggestion was made in the pre-sentence report that probation might be appropriate. The learned judge did not take that view. He was concerned, and in the opinion of this Court rightly concerned, about the prevalence of offences of this [redacted] kind.

C.A. ULUS ARSLAN (Rose L.J.) 91

kind in Hemel Hempstead, and indeed elsewhere. He was, in the judgment of this Court, entitled to take the view, first, that this was so serious an offence that a custodial sentence was necessary and, secondly, that an element of deterrence was not inappropriate.

On behalf of the appellant, Miss White accepts that it is not possible before this Court to pursue what was her first ground of appeal, namely, that the offence is not of so serious a kind as to require a custodial sentence. She takes that view, rightly, having regard to the decision of another division of this Court in the case of *Decino*, *The Times*, May 10, 1993. But she submits that eight months was too long a sentence.

So far as the inconvenience to the public was concerned, there were, in the circumstances of the present case, other telephones in the vicinity. This was not the case of an isolated telephone being attacked. This Court has some doubt as to the force of that point, bearing in mind the appellant's swift apprehension after he had committed this offence. She concedes that this offence, as is apparent from the circumstances in relation to the drill and the manner in which this offence was carried out, was pre-planned and indeed disclosed a degree of specialist knowledge. She concedes also the aggravating feature of the fact that the appellant was on bail. She says that, so far as the previous offence of this kind in June 1992 was concerned, that should not be regarded as an aggravating feature because the circumstances of that offence were quite different, in that, in the first place, it had not been pre-planned, and, in the second place, it arose because the appellant for some reason believed that he was entitled to money in relation to an overseas call which he had made but which had not been repaid to him.

It is to be noted that in the case of *Decino* the sentence imposed by the judge at first instance, in relation to this kind of offence, was a sentence of two months' imprisonment, that sentence having been ordered to run consecutively to a sentence of 10 months imposed for quite different offences. The Court of Appeal ordered that the sentences should run concurrently. It does not seem to this Court that it follows that two months should be regarded as being necessarily an appropriate sentence for an offence of this kind.

We are, however, persuaded that, in the circumstances to which Miss White has adverted, eight months was too long. Accordingly, that sentence will be quashed. There will be substituted for it a sentence of four months' imprisonment. Having regard to the time which this appellant has spent in custody he will in the very near future be released. To that extent this appeal is allowed.

CASE 15

FARAG MOHAMMED ALI GUNEM

COURT OF APPEAL (Lord Justice Rose and Mr. Justice Turner): May 12, 1993

*Rape—rape of elderly woman by intruder in her home—length of sentence.*

Fifteen years' imprisonment for rape of an elderly woman by an intruder in her home reduced to 13 years.

The appellant was convicted of rape and assault occasioning actual bodily harm. The appellant broke into the home of a woman aged 74 in the early hours of the [redacted] night.



morning. He pressed a knife at her throat, and threatened to kill her. The woman resisted and the appellant attacked with some violence and raped her. The appellant told the victim that he had AIDS. The woman was subsequently admitted to hospital suffering from depression. Sentenced to 15 years' imprisonment.

**Held:** (considering *Billam* (1986) 8 Cr.App.R.(S.) 48; *Malcolm* (1987) 9 Cr.App.R.(S.) 487; *Gearing* (1987) 9 Cr.App.R.(S.) 465; *Bojang* (1987) 9 Cr.App.R.(S.) 517; *Rowe* (1989) 11 Cr.App.R.(S.) 342; *Att.-Gen.'s Reference No. 25 of 1990*, (1991) 13 Cr.App.R.(S.) 220 and *Att.-Gen.'s Reference No. 33 of 1992* (1993) 14 Cr.App.R.(S.) 712 this was a very bad case of rape, involving five of the aggravating features mentioned in *Billam*, and the additional aggravating feature of the appellant's claim that he was suffering from AIDS. Some distinction was necessary between single cases of rape and campaigns of rape; the sentence of 15 years was longer than was appropriate and a sentence of 13 years would be substituted.

**Cases cited:** *Billam* (1986) 8 Cr.App.R.(S.) 48; *Malcolm* (1987) 9 Cr.App.R.(S.) 487; *Gearing* (1987) 9 Cr.App.R.(S.) 465; *Bojang* (1987) 9 Cr.App.R.(S.) 517; *Rowe* (1989) 11 Cr.App.R.(S.) 342; *Att.-Gen.'s Reference No. 25 of 1990* (1991) 13 Cr.App.R.(S.) 220; *Att.-Gen.'s Reference No. 33 of 1992* (1993) 14 Cr.App.R.(S.) 712.

**References:** rape, *Current Sentencing Practice* B4-1.3D.

*A. M. Rimmer* for the appellant.

**ROSE L.J.:** On April 27, 1992, at the Central Criminal Court this appellant was convicted after a trial lasting four days of an offence of rape for which he was sentenced by Her Honour Judge Nina Lowry to 15 years' imprisonment, and an offence of assault occasioning actual bodily harm for which he was sentenced to three years' imprisonment concurrently. Against that sentence he appeals by leave of the single judge.

The victim was 74 years old. She lived alone. The appellant lived nearby. In the early hours of New Year's Day 1992, the victim was asleep in a chair at home. She awakened suddenly. There was a man wearing a black stocking over his head, sitting next to her. He was pressing a pointed knife to her throat. He had, as subsequently appeared, gained entry by breaking three panes of glass in a rear window. He said, "If I don't get what I want, I'm going to kill you." His victim recognised his voice. It was the appellant. She was a lady of some spirit. She hit the appellant with an alarm clock and tried to seize the knife. In consequence she sustained two cuts to her hand. The appellant then went mad. He seized her by the arms, pulled her to the floor, ripped off her underwear and dragged her to the settee. She continued to fight back. Eventually he got her on her back and forced her legs around his neck. This not only caused her considerable pain but it prevented her from struggling further. The appellant made a number of remarks to her. He fondled her breasts, her private parts and raped her. He told her he had AIDS. He left. Bleeding, his victim made her way to a neighbour. The police were called.

The physical injuries which the victim sustained amounted to a swollen lip with two small lacerations, marked bruising and swelling of her lower gums and extensive bruising to her chin. Her hand, as we have indicated, was cut. She also had marked bruising around and within her private parts.

On March 18, 1992, she was admitted to hospital after taking an overdose of sleeping tablets and anti-depressants. The medical report before the judge and before this Court indicated that she was suffering at that time from depression,

although it is right to say that there were causes other than, and in addition to, this appalling experience which contributed to that depression.

Because of what the appellant had told her in relation to AIDS, she has had to undergo tests, examinations and counselling and not surprisingly she has been under considerable stress by reason of the fear from what she was told.

The appellant is 42 years of age and divorced from his wife. He has no relevant convictions and he was treated by the learned judge as a man of good character. Before this Court Mr. Rimmer submits first, that a sentence of 15 years is the sort of sentence which is appropriate to a campaign of rape and inappropriate in relation to a single offence. Secondly, he does not suggest that a sentence in single figures is appropriate. Thirdly, he concedes that five out of the eight aggravating features listed in the case of *Billam* are present in this case. He also concedes that the threat by the appellant that he was suffering from AIDS is capable of being an additional feature to those listed not exhaustively by Lord Lane in *Billam*.

In order the more clearly to understand the nature of that submission, we refer first to *Billam* (1986) 8 Cr.App.R.(S.) 48. At page 51, giving the judgment of this Court, the Lord Chief Justice identified eight factors in particular which should be treated as aggravating the offence:

"(1) violence is used over and above the force necessary to commit the rape; (2) a weapon is used to frighten or wound the victim; (3) the rape is repeated; (4) the rape has been carefully planned; (5) the defendant has previous convictions for rape or other serious offences of a violent or sexual kind; (6) the victim is subjected to further sexual indignities or perversions; (7) the victim is either very old or very young; (8) the effect upon the victim, whether physical or mental, is of special seriousness."

Mr. Rimmer accepts that factors, (1), (2), (4), (7) and (8) there identified are present in the instant appellant's case and, as I have indicated, he also accepts that the reference to AIDS was capable of being an aggravating factor in addition.

He referred to a decision of this Court in *Malcolm* (1987) 9 Cr.App.R.(S.) 487 where the possibility that such a matter could give rise to an aggravating factor was contemplated by another division of this Court. He also referred us to *Gearing* (1987) 9 Cr.App.R.(S.) 465 where this Court upheld a sentence of 12 years' imprisonment on conviction for raping a young woman who was acquainted to the defendant and who was not unduly badly affected by the experience. He referred to *Bojang* (1987) 9 Cr.App.R.(S.) 517 where on a guilty plea a sentence of 14 years was reduced by this Court to 11 years following the rape of a victim acquainted with the appellant. He referred to *Rowe* (1989) 11 Cr.App.R.(S.) 342 where this Court reduced the sentence of 15 years to one of 13 years in relation to an attack upon one woman over a substantial period of time which involved two offences of rape, two of buggery and the performance of oral sex. He referred to the *Att.-Gen.'s Reference No. 25 of 1990* (*Doheny*) (1991) 13 Cr.App.R.(S.) 220 where the sentence of eight years was increased to 12 years in a case in which the victim had not had to give evidence at the trial and where, as is implicit in the title of the authority, there was an element of double jeopardy by reason of the re-sentencing of a defendant following a reference by the Attorney-General: the 65-year-old victim had been subjected to buggery and very considerable violence.

Finally, Mr. Rimmer referred to us the *Att.-Gen.'s Reference No. 33 of 1992* (*Oxborough*) (1993) 14 Cr.App.R.(S.) 712 where, upon a plea of guilty to rape, the sentence was increased from five to nine years. So far as that authority is concerned, it seems to us to be of limited assistance, first, because it involved the double jeopardy aspect to which we have already referred; secondly, because as we have indicated, Mr. Rimmer does not suggest that the present case is one calling for a

sentence in single figures; and thirdly, because in any event the most serious offence with which the court was there dealing was an offence of manslaughter in relation to which the court increased the sentence from seven to 11 years.

In our judgment it is plain that this was a very bad case of rape. It involved five of the aggravating features specifically referred to in *Billam* and the additional feature of aggravation arising from the appellant's claim to his victim that he was suffering from AIDS. However, it is possible to imagine, as is implicit in what we have just said, the presence of other aggravating features such as were identified in *Billam*, and such as were present in *Rowe* and in *Doherty*.

Furthermore, this was a single offence and it does appear to this Court that, as *Billam*'s case recognised, some distinction is generally to be drawn between single offences of rape and cases where there has been a campaign of rape involving more than one victim. Accordingly, we take the view that the sentence imposed by the learned judge in this case was longer than, in all the circumstances, was appropriate. The sentence of 15 years will accordingly be quashed; there will be substituted for it a sentence of 13 years' imprisonment. To that extent this appeal is allowed.

### SAMANTHA BREEZE

COURT OF APPEAL (The Lord Chief Justice, Mr. Justice Judge and Mr. Justice Blofeld): May 13, 1993

*Obtaining by deception—assisting in large scale fraud on DSS as "footsoldier"—whether offence so serious that only a custodial sentence could be justified.*

Four months' imprisonment for participating in a large scale fraud on the DSS as a "footsoldier" varied to a probation order on the ground that the offences committed by the appellant were not so serious that only a custodial sentence could be justified. A previous conviction for conspiring to obtain property from the DSS in 1988 did not disclose aggravating factors of the offence.

The appellant pleaded guilty to two counts of obtaining by deception. The appellant cashed cheques which had been fraudulently obtained by others from the DSS. The total value of the cheques was £264.70. The appellant was treated as having acted as a "footsoldier" in relation to a larger enterprise. The appellant had a conviction in 1988 for conspiring to obtain property by deception from the DSS. Sentenced to four months' imprisonment.

**Held:** (considering *Bexley, Harrison and Summers* (1992) 14 Cr.App.R.(S.) 462) there was a fine line between those cases where the circumstances of previous offences could be said to show aggravating factors of the offence, and those where they could not. The information about the earlier offences which was available was limited; it could not be said that they showed an element of planning or deliberation which was not otherwise revealed by the instant offences, or that they showed a continuous degree of conduct. The position was simply that the appellant had done the same thing as she had done previously. That did not reveal any circumstances which were admissible by virtue of section 29(2). Taking the two offences without reference to the previous offences, the Court did not consider that s.1(2)(a) applied. The total amount involved was only £264 and the period involved was relatively short. The threshold laid down by Criminal Justice Act 1991, s.1(2)(a) was not

crossed and a custodial sentence could not properly be imposed. The Court would substitute a probation order for two years.

**Case cited:** *Bexley, Harrison and Summers* (1992) 14 Cr.App.R.(S.) 462.

**References:** benefit fraud, *Current Sentencing Practice* B6-3.3F.

*P. A. Curran* for the appellant.

**LORD TAYLOR C.J.:** On December 22, 1992, at Manchester Crown Court this appellant pleaded guilty to two counts of obtaining property by deception, counts 11 and 12. She was put back for sentence on bail and on April 2 before the same judge, she was sentenced to four months' imprisonment. She now appeals against that sentence by a certificate of the trial judge. He, although he granted the certificate, refused an application for bail, but on April 28 Mantell J. granted bail with a condition of residence. The result is that the appellant spent some 26 days in custody in pursuance of the sentence before being released on bail.

There were co-accused, in particular a man called Smith, aged 32 and two brothers called Kavanagh—Martin Kavanagh, aged 26 and Patrick aged 32. On arraignment they all pleaded guilty to count 1 on the indictment, conspiracy to obtain property by deception, and received sentences of 18 months' imprisonment. Another man Gargan pleaded guilty on arraignment to the same charge, but had not been sentenced. There were a number of other co-accused, six in all. Five of those received sentences ranging from nine months' imprisonment to a conditional discharge and one has not yet been sentenced.

The conspiracy to which Smith, the Kavanaghs and Gargan pleaded guilty related to a sophisticated plan to commit frauds on the Department of Social Security. The result was that a number of people who were involved fraudulently encashed social security pension allowance book vouchers at various post offices. When this was discovered the police set up video equipment in the post offices. That was in October 1991. As a result of the evidence obtained by that equipment, a number of people were arrested. It was proved that there had been encashments of a total of nearly £5,000.

The appellant's part in this was that between September 19 and 26—a comparatively short period—in 1991 she encashed cheques to the value of £264.70. She had received £15 for each encashment.

She was arrested on February 27, 1992, with her boyfriend Martin Kavanagh, one of the two brothers who has pleaded guilty to conspiracy. She was interviewed the same day, but declined to answer any questions.

She is 22 years old. She has a daughter now aged 20 months and we have been told this morning by her counsel that she is again pregnant. She was unemployed at the time of these offences and in receipt of benefits. She had been before the courts on 10 previous occasions for various offences, mostly of dishonesty. In particular on November 18, 1988, at Manchester Crown Court, she was sentenced to 12 months' detention in a young offender institution for one count of conspiracy to obtain property by deception, three counts of obtaining property by deception, three counts of attempting to obtain property by deception and one count of handling.

In regard to the conspiracy count, the facts briefly described in the antecedent history—and this was all the information that was before the court—read: "Between March 15, 1988, and June 6, 1988, conspired with others to defraud the DHSS of cash by presenting stolen allowance books." A pre-sentence report noted that the two offences for which she was sentenced on this occasion were committed within a fortnight of the birth of her baby. The report says: "She saw cashing books as a means to alleviate financial hardship at a time when she needed essential items for the

**DEREK JOHN HIND**

COURT OF APPEAL (Lord Justice Rose and Mr. Justice Turner):  
May 21, 1993

CASE 16

*Rape—rape by former partner—length of sentence.*

Ten years' imprisonment for rape by a man of his former partner reduced to six years.

The appellant pleaded guilty to rape. The appellant had lived with the victim for some time and they had bought a house in joint names. Eventually the appellant moved out of the house, but they continued to see each other for some months until the victim told the appellant that the relationship was over. The appellant broke into the house at about midnight, prevented the victim from calling the police, and tied her hands behind her. The appellant then removed her underwear, put a pillow case over her head and raped her. He then put his penis into her mouth and raped her again. He later put his hands round her throat and squeezed until she became unconscious. Following the appellant's arrest, the victim wrote to him and visited him in prison repeatedly. Sentenced to 10 years' imprisonment.

**Held:** (considering *Billam* (1986) 8 Cr. App. R. (S.) 48) this was a very serious case of rape, involving at least four of the aggravating features listed in *Billam*. It was a striking and unusual feature of the case that the victim had had a long-term relationship with the offender, and had not suffered the degree of mental trauma which is sometimes associated with such offences. The victim had gone a long way to forgiving the appellant. This was a very different category of case from many of the cases of rape which came before the courts. Taking these matters into account, the sentence of 10 years was too long; a sentence of six years would be substituted.

**Case cited:** *Billam* (1986) 8 Cr. App. R. (S.) 48.

**References:** rape, *Current Sentencing Practice* B4-1.3G.

*N. Mitchell* for the appellant.

**ROSE L.J.:** On February 18, 1992, at the St. Albans Crown Court, this appellant pleaded guilty to an offence of rape and was sentenced by His Honour Judge Colston, Q.C. to 10 years' imprisonment. He pleaded not-guilty to offences of false imprisonment, attempted buggery and assault occasioning actual bodily harm. The counts in relation to those matters were ordered to lie on the file. Against that sentence he appeals with leave of the single judge.

The victim of the attack was a woman with whom the appellant had not only lived but they had together jointly bought the house in which they lived. By June 1990, some 15 months or so after they had bought their house, there were difficulties in the relationship and the house was transferred into the woman's name. In December the appellant moved out. In February 1991 they started seeing each other again, but by May the complainant had told the appellant that the relationship was over and asked for his keys. He left. Thereafter he called several times, seeking to renew the relationship. The complainant was not willing to do so.

On June 24, 1991, the appellant arrived on a pretext. In the course of his presence in the house, he dragged the complainant upstairs by the hair and left her crying. She informed the police and consulted solicitors.

Two days later he was back again. It was about midnight. The complainant had gone to bed. She heard the front door being broken open. The appellant ran into her

bedroom. She started to call the police but the appellant took the telephone from her. He seized her from behind, put his hand over her mouth to stop her screaming—she could scarcely breathe—and he made her go upstairs into the bedroom. He took off the dressing gown that she was wearing, tied her hands behind her back with a belt, removed her knickers, struck her on the back of the head and put a pillow case over her head, apparently as a gag. He then turned her on her back and raped her. He took her downstairs and removed the pillow case but left her hands tied. Then he told her to go upstairs again. This time he tied her ankles together and then tied them to her wrists behind her back and then untied her ankles. He made her sit up. He knelt in front of her and put his penis in her mouth. He put his fingers in her anus and then his penis in her anus. Because of the pain she said she would allow oral sex if he stopped. He did stop. Then he masturbated, holding her by the belt on her wrists. He raped her again. They then went downstairs. The appellant said that he would leave but demanded oral sex before he did so. She said that she could not go through that again and he might as well kill her. He pushed her on her back, put his hands on her throat and squeezed hard until she blacked out. When she came round she was sick. A little later she was sick again. Eventually he fell asleep. She left the house and sought help from the police.

The injuries sustained by the complainant were not as severe as they might have been. The back of her head was bruised. She had a scratch on her arm, bruising round her neck, throat, jaw, lips and cheeks. There were petechial haemorrhages inside her mouth, several scratches around her nose, a graze on her knee, bruising on the shin and tenderness around the vagina.

The appellant was arrested. He claimed that the complainant had consented to intercourse. He denied tying her up or assaulting her but he admitted breaking into the house by force. He denied that anything other than normal sexual intercourse had taken place. He agreed that she had been trying to get rid of him. He accepted that she had been sick but said that he did not know why.

The appellant was born in August 1959. He was a married man in the process of obtaining a divorce and was a self-employed builder. He had no material previous convictions. The social inquiry report upon him referred to him being sexually assaulted at the age of 14.

The additional feature of this case, to which reference needs to be made, is the attitude of the complainant since these events. She wrote to him many times while he was awaiting his appearance at the Crown Court, and then and subsequently she has repeatedly visited him in prison. In a statement made on May 1, 1993, she refers to having been very hurt and confused but as never having felt hatred or resentment towards the appellant. She had understandably experienced considerable difficulty with her emotions and with building a new life. She has had an association with another man which has come to an end. She said:

"I am still very confused as to whether the appellant and I could have another relationship."

She goes on: "It is impossible to know how we really feel about each other when all we have is . . ." visits in prison.

It is apparent from the recital of the facts of this case that this was a very serious offence of rape. Certainly, there were present at least three, if not four, of the aggravating features listed by this Court in *Billam and Others* (1986) 8 Cr. App. R. (S.) 48 at 51. On the other hand, it is a striking and unusual feature of this case that not only was the victim of this appalling offence one who had had a long-standing and intimate relationship with the appellant, but she has not suffered the degree of mental trauma which is sometimes associated with offences of this kind. Furthermore, to put it no higher, she has gone a long way along the road towards

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forgiving her attacker. Those are clearly highly material matters when the question of what is the appropriate sentence is considered.

The submission made to this Court by Mr. Mitchell on the appellant's behalf is that the learned judge in passing sentence failed to have adequate regard to those features and failed adequately to reflect the plea of guilty, and in consequence imposed too high a sentence.

This was not an easy case in which to pass sentence. There were, as we have indicated, both aggravating features and unusual mitigating features. It is to be borne in mind this Court has the advantage, not enjoyed by the sentencing court, of knowing that this complainant is continuing to visit the appellant in prison and, although her state of mind is understandably ambiguous, this is in a very different category from many of the cases of rape which come before this court.

Taking all these matters into account, we take the view that 10 years' imprisonment was considerably too long a sentence in all the circumstances. That sentence will be quashed. There will be substituted for it a sentence of six years' imprisonment. To that extent this appeal is allowed.

**LEE ANDREW P.**

COURT OF APPEAL (Lord Justice Rose and Mr. Justice Turner):  
May 21, 1993

*Incest—incest by brother with sister aged 28—whether so serious that only a custodial sentence could be justified.*

Six months' imprisonment, suspended, for incest by a man with his sister aged 28 varied to a conditional discharge on the ground that the offence was not so serious that only a custodial sentence could be justified.

The appellant pleaded guilty to incest with his sister. He was acquitted of rape. The appellant's sister, aged 28, lived alone in a flat. The appellant visited her and sexual intercourse took place. Sentenced to six months' imprisonment, suspended for 12 months.

**Held:** the Court had come to the conclusion that the offence was not so serious that only a custodial sentence could be justified for the offence. A conditional discharge would be substituted.

**References:** incest, *Current Sentencing Practice* B4-2.3D.

*P. Richards* for the appellant.

**TURNER L.J.:** On July 31, 1992, this appellant pleaded guilty to an offence of incest, which was count 2 on the indictment. Count 1 of the indictment charged this appellant with rape of the same victim on the same occasion as the offence of incest. The appellant stood his trial from October 26-27, 1992. The jury failed to agree. He stood his re-trial between December 8-10, 1992, where he was acquitted of that offence. The sentence imposed by the learned judge in respect of the plea to count 2 of the indictment was one of six months' imprisonment suspended for 12 months. At the time of the offence the appellant was aged 21 and had not previously come before the courts.

The circumstances of the offence of incest were that it was an offence committed with the appellant's sister who was seven years older than this appellant. The sister lived alone in a council flat, having previously been a resident at a hostel for the recovery of the mentally ill. She and her brother had been very close to one another. The circumstances of the offence were that at some time in the early hours of Sunday, March 29, 1992, the appellant arrived at his sister's flat. He and she talked. Later the appellant entered her bedroom and after initial activity the offence was committed. The following morning the victim telephoned the residential hostel where she had been staying and made an accusation that her brother had raped her. The appellant was arrested later that day. He admitted that intercourse had taken place but said, as the jury's verdict substantiated, that it had been with his sister's consent. He denied having threatened his sister in any way. He admitted that he had taken some amphetamine in the course of the previous few days. He realised that what he had done was wrong.

It was submitted on his behalf in mitigation that what had happened was largely at the instigation of the victim, a view not inconsistent with the jury's verdict. There was considerable doubt as to the extent to which the victim was a different person from an ordinary member of the community.

This Court has considered carefully the grounds of appeal and the social inquiry report, and has had regard to the question whether the offence was so serious that only a custodial sentence could be justified for it. Concentrating upon that last question, this Court has, in the particular circumstances of this case, come to the conclusion that it was not so serious. In all the circumstances of the case, we have come to the conclusion that the sentence imposed must be quashed and that the appropriate sentence would have been one of conditional discharge. Before we can make that order, we require an undertaking from counsel that he will explain to the appellant what that means. It will be an order of conditional discharge for a period of six months.

**ATTORNEY-GENERAL'S REFERENCE NO. 36 OF 1992  
(GARY WILLIAM HILLS)**

COURT OF APPEAL (The Lord Chief Justice, Mr. Justice Owen and Mr. Justice Blofeld): May 24, 1993

*Robbery—robbery at market premises by men armed with an imitation firearm and other weapons—adequacy of sentence.*

Three years' imprisonment for a robbery at market premises by two men armed with an imitation firearm and other weapons increased to five years.

The offender pleaded guilty to robbery. Together with another man the offender went to market premises where he had previously worked. The two men, wearing balaclava masks and armed with an imitation firearm, a knife and a two foot long stake, held up five employees; one employee had the firearm held to her temple. The employees were made to open the safe and £5,700 was stolen. The appellant was recognised by his voice and arrested a few days after the robbery. Sentenced to three years' imprisonment. The Attorney-General asked the Court to review the sentence on the ground that it was unduly lenient.

his feelings of remorse, we consider that it is proper to quash the sentence of 12 months' imprisonment and to impose a sentence of six months' imprisonment. To that extent this appeal is allowed.

CASE 17

### JAMES KEVIN HUTCHINSON

COURT OF APPEAL (The Lord Chief Justice, Mr. Justice Owen and Mr. Justice Blofeld): May 25, 1993

*Rape—rape of former partner—length of sentence.*

Six years' imprisonment for the rape of a former partner reduced to five years. The appellant was convicted of rape. The appellant had lived with the victim for about seven years; they had two children. Following a separation, the appellant saw the victim at weekends and sexual intercourse took place. Following a further dispute, the victim obtained an injunction which was not served on the appellant. The appellant came to the victim's home late at night, and after being refused entry broke some windows and climbed into the house. The police were called and removed him from the house. The appellant returned to the house in the small hours of the morning and entered the house again through the broken window. When the victim refused to have sexual intercourse with him, he took her upstairs, removed her clothes and had sexual intercourse with her. The victim indicated at the committal proceedings that she wished to withdraw the complaint. Sentenced to six years' imprisonment.

**Held:** (considering *Stephen W.* (1993) 14 Cr.App.R.(S.) 256) rape was rape whether it was within a relationship, after the termination of relationship or between strangers. It was no avail to the appellant that he had intercourse with the victim five days before the rape. The fact that the victim had attempted to withdraw the charge and had indicated that she had forgiven the appellant suggested that the psychological and mental suffering must be less than in other circumstances. The forgiveness of the victim provided some mitigation. The sentence would be reduced to five years.

**Case cited:** *Stephen W.* (1993) 14 Cr.App.R.(S.) 256.

**References:** rape, *Current Sentencing Practice* B4-1.30.

**Commentary:** [1993] Crim.L.R. 718.

*C. P. Tonge* for the appellant.

**OWEN J.:** On March 20 of last year, in the Crown Court at Sheffield, this appellant was convicted of rape. He pleaded guilty to another offence of theft. He was sentenced to six years' imprisonment for the offence of rape and sentenced to three months' imprisonment for the theft, to run concurrently. It is not necessary to refer any more to that offence. He now appeals against sentence by leave of the single judge.

The appellant, who is 27 years of age, and the victim, Mrs. E. lived together from time to time for some seven years. They had two children, one aged four and the other aged two. According to Mrs. E., that relationship was always stormy, with outbursts of temper and violence by the appellant.

In about January 1991 the two again separated. They continued, however, to see each other at weekends and during those weekends sexual intercourse took place between them. The last such occasion was on April 6, 1991. The following day there was some further altercation between them and on April 11, 1991 Mrs. E. obtained an injunction from the local county court. That was not in fact served upon the appellant.

On the evening of April 11, at about 10.45 p.m., the appellant arrived at Mrs. E.'s home. He requested entry. She told him to go away. He shouted at her and he kicked the door. He then broke some windows in the kitchen. He climbed into the house. He was eventually removed from the house by the police who had been called by neighbours. In breaking the windows he had cut his hand. He was taken to the local hospital to receive treatment.

At about one o'clock in the morning of April 12, he returned to the house. He again entered through the broken window. The first thing that he said to Mrs. E. was: "Why have you brought the fucking police?" It seems that he then became calm and made himself a drink. After a time he said that he wanted to have sexual intercourse with her. She refused, whereupon he pulled her upstairs to the bedroom and he took off her clothes. It is clear that she was crying and telling him to stop. His explanation later was: "Yes, she was telling me to stop, but the crying was not really crying, it was a sobbing without tears."

Having taken her upstairs, he then had sexual intercourse with her. He told her to get him a drink of milk and a cigarette and when she had done that he said: "Now you can go and get your fucking friends." She left the house and she went to a friend's house to call the police. The police arrived yet again. This time it was about five o'clock in the morning and he (the appellant) was arrested.

He was interviewed at some length. He admitted that he had asked her if she wanted sexual intercourse. He admitted that which has been referred to already: he took her upstairs, he took her clothes off and he had sexual intercourse with her. He said that she stopped protesting once they were in the bedroom. He admitted to the police that he is a tall chap and there are not many people who can get the better of him. She is quite small. Of course there is no way in which she could have fought him off.

When she was examined, she was found to have some injuries to her face. There was a one-inch bruise and graze to the skin on the inside of her nose. Those had probably been caused when her glasses were broken. There was a soft-tissue swelling on the left side of her forehead. There was some swelling on her left cheek bone. There was a one-inch scratch on her upper lip. There was a soft-tissue swelling on her scalp and she had some scratches on her left upper arm. It was noted that she was menstruating at the time.

In mitigation it was pointed out that there had been this ongoing relationship. However, the mitigation only came after there had been a conviction because this appellant was denying there had been any rape. The consequence of his denial was that the judge was able to see the lady herself and he made a comment after the trial about the way in which she had appeared. He said to her: "I do not wish to cause you any more suffering. I do not think I have seen anybody quite so racked with conflicting emotions and loyalties as you have been these last few days. I am sure you have everybody's sympathy." She had explained very early on that she no longer wished to pursue the complaint which she was making against the appellant. When she gave evidence before the magistrates, she indicated that she still loved this man. She indicated to the magistrates that she had done all she could to withdraw the complaint. However, it has to be appreciated that the offence was one not only

during her evidence? Of course, there must always be a suspicion that the attempt to withdraw the charges had come about through fear. It does not seem to us that that was the case. Here Mrs. E. was saying, and has continued to say—certainly for some considerable time after the conviction and sentence she was saying—that she continues to love this appellant. It seems that she has not visited him in prison for some time, but she does send the children to visit him. It is not easy to assess what the situation is and was between them. However, it seems to us that Mrs. E. is one of those remarkable women who is prepared to forgive, and has forgiven, that which was done to her by somebody whom she loved and probably still does love.

What effect does that have? It seems that the fact of forgiveness must mean that the psychological and mental suffering must be very much less in those circumstances than would be the case in respect of a woman who very understandably could not forgive such an offence as that with which we are dealing. Accordingly, some mitigation must be seen in that one factor. It is not provided by anything which this appellant has done; it is provided by the forgiveness of his victim. Having considered that matter and the sentence in general, we have decided that it would be right to quash the original sentence of six years' imprisonment and to substitute for it a sentence of five years' imprisonment. To that extent, and only that extent, this appeal succeeds.

**STEPHEN EVANS**

COURT OF APPEAL (Lord Justice Rose, Mr. Justice Garland and Mr. Justice Turner): May 25, 1993

*Aggravated vehicle taking—young man taking car without consent while under influence of alcohol and driving it so as to kill passenger—whether so serious that only a custodial sentence could be justified.*

Two years' detention in a young offender institution upheld for aggravated vehicle taking in the case of a young man who took a car while under the influence of alcohol and drove it in a manner which led to an accident in which his passenger was killed.

The appellant pleaded guilty to aggravated vehicle taking. His plea of not guilty to causing death by reckless driving was accepted. The appellant spent the afternoon and evening drinking with his friends. On their way home they found a car with the keys left in it. The appellant and his friends took the car, the appellant driving it. After about a mile, the appellant lost control; the car struck a tree and one of the passengers was killed. The appellant was later found to have a blood alcohol level of 142 milligrammes per 100 millilitres of blood. Sentenced to two years' detention in a young offender institution.

**Held:** (considering *Bird* (1992) 14 Cr.App.R.(S.) 343) the sentence was appropriate.

**Case cited:** *Bird* (1992) Cr.App.R.(S.) 343.

**References:** aggravated vehicle taking, *Current Sentencing Practice* B12-1.3B.

*M. D. Hornfray-Davies* for the appellant.

**ROSE L.J.:** On December 23, 1992, at the Mold Crown Court, this appellant

committed against her, but against the whole peace of the country. It is not possible for somebody who has suffered in this way to withdraw the complaint.

The mitigation also referred to the fact that they had been living together and the fact that they had lived together for some time after the committal by the magistrates. It is hard to know for how long because there were a number of applications for injunctions and it is difficult to see how those applications fit in with the history of the two of them living together. Enough has been said to indicate the turmoil that there was in this woman's mind.

The sentence for the rape was six years' imprisonment. The judge said: "Well, James Kevin Hutchinson, this really was a despicable act on your part. I am quite satisfied that you have pleaded not guilty to this offence and fought it out to the last in the hope that that unfortunate woman in the end would not give evidence against you. But, in the end, she suffered in doing so, and it is you that has brought her to that suffering." Of course, he could not be sentenced for that suffering which he had caused by his plea of not guilty. Equally, it would have been quite impossible to give him any credit in those circumstances for a plea of guilty. In cases of this kind, a plea of guilty is of the greatest importance because it means that a woman who has suffered enough already is not made to suffer more. That mitigation was not available to him.

The appellant was a man who had been in trouble on a number of previous occasions, but none of those convictions had relevance here, although they did include threatening behaviour and grievous bodily harm. That violence did not relate to this relationship, although the complainant did say that he had been violent to her.

There are a number of grounds of appeal put forward by Mr. Tonge. One is bound to say that a good deal of the argument seems unrealistic. It is said that there were no aggravating features in the case. That just is not so. There were aggravating features. Of course, it was an aggravating feature that this man returned to the complainant's home and, as the single judge said, invaded that home, having been put out at an earlier stage by the police. In addition, Mrs. E. was menstruating and complaining that she did not wish to have sexual intercourse with him. It is said that there were mitigating circumstances in that they had lived together for seven years and had two children. Rape is rape whether it is within a relationship, whether it is after the termination of a relationship, or whether it is in fact between strangers. Indeed it might be said that to rape the mother of your children makes the offence that much worse.

My Lord referred counsel for the appellant to the case of *Stephen W.* (1993) 14 Cr.App.R.(S.) 256 where my Lord said this:

"In our judgment it should not be thought that a different and lower scale of sentencing attaches automatically to rape by a husband as against that set out in *Billam*. All will depend on the circumstances of the individual case. Where the parties were cohabiting normally at the time and the husband insisted on intercourse against his wife's will, but without violence or threats, the consideration identified in *Berry* and approved in *Thornton* in the passage already cited, will no doubt be an important factor in reducing the level of sentencing. Where, however, the conduct is gross and does involve threats or violence, the fact of the marriage, of long cohabitation and that the defendant is no stranger will be of little significance. Clearly between those two extremes there will be many intermediate degrees of gravity which judges will have to consider case by case."

Accordingly, what can be said here? It is of no avail to the appellant that there had been sexual intercourse five days before the rape. But what of the fact that Mrs. E. had attempted to withdraw the charge twice before the trial, as well as before and

in which a suspended sentence should be activated if the offender had been convicted of an offence punishable with imprisonment which was committed during the operational period of a suspended sentence. It provided in effect that the Court should activate the suspended sentence in full unless it was of the opinion that it would be unjust to do so in all the circumstances.

That was a long time ago. Since then it has been said in a number of cases that if the offences for which the offender is presently before the court do not justify a term of imprisonment, it would not be just to implement a suspended sentence. That was a considerable gloss upon the statute. But that was the course which was generally adopted.

The question arises whether the Court should follow the same course since the passing of the Criminal Justice Act 1991, when the only reason a custodial sentence is not passed for offences is because of the restriction in section 1(2). That point also arose in the case of *Crawford*. Sedley J., delivering the judgment of the Court said this:

"The second question is whether the offence then warranted the activation of the suspended sentences, or indeed whether it and the offence of driving while disqualified warranted the activation of the suspended sentences? The answer to that, again, is 'No'. In the case of *Bextley* already referred to, at page 201H, this Court said:

'However, Miss Johnson further submits that where the fresh offence or offences before the court do not justify a custodial sentence, it is usually inappropriate to activate a suspended sentence, especially where it was imposed for a different class of offence: see *McElhorne* (1983) 5 Cr.App.R. (S.) 53 and *Brooks* (1991) 12 Cr.App.R.(S.) 756.'

So it would seem that both in *Crawford* and in *Bextley* the Court did not activate a suspended sentence in a case where it did not consider custody justified for the instant offences. However, we do not regard those decisions as imposing an absolute prohibition on doing so. In our judgment, whilst it may be usually inappropriate, it was by no means inappropriate in this case.

The defendant was charged and pleaded guilty to handling stolen goods and obtaining property by deception. He also had two convictions for possessing cannabis. He had very bad record, although that of itself is not a matter to be taken into account. He had been continuously in trouble since January 1969. He was then aged 39 but he had not been sentenced to more than two years' imprisonment, which was in March 1981 for robbery.

In our judgment it was not inappropriate in the circumstances of this case to activate the suspended sentence, reduced as it was by the judge to a period of 12 months. In the result, therefore, we quash the sentences of six months' imprisonment on counts 1 and 2 of the first indictment and impose no separate penalty. We leave the 12 months' imprisonment which was activated from the suspended sentence. The conditional discharges remain on the two drugs counts. To that extent only, the appeal is allowed.

## CASE 18 LAURENCE McINTOSH

COURT OF APPEAL (Lord Justice Simon Brown, Mr. Justice McCullough and Mr. Justice Swinton Thomas): May 28, 1993

*Detention in a young offender institution—rape by 16-year-old boy of widow aged 100—length of sentence.*

Nine years' detention in a young offender institution for rape of a widow aged 100 by a boy aged 16 at the time of the offence reduced to seven years.

The appellant pleaded guilty to rape. At the age of 16, the appellant broke into a flat occupied by a widow aged 100 who lived alone. When the widow woke up and challenged him, he threatened to kill her, then threw her onto the bed, raped her and put his penis into her mouth. The appellant was arrested 18 months after the incident and was 18 when he appeared in the Crown Court. Sentenced to nine years' detention in a young offender institution.

**Held:** the rape was aggravated by the threat to kill, the great age of the victim, that fact that the appellant entered the victim's home, and the further indignity of oral intercourse. The case had to be slotted into its appropriate place in the overall spectrum of sentencing for the range of appalling cases that came before the Court. It was necessary to recognise the appellant's youth at the time the offence was committed and his plea of guilty. Having had regard to reported cases of young rapists, in particular *Walker* (1989) 11 Cr.App.R.(S.) 109, the Court was persuaded that the right sentence was seven years' detention in a young offender institution.

**Case cited:** *Walker* (1989) 11 Cr.App.R.(S.) 109.

**References:** detention in a young offender institution—rape, *Current Sentencing Practice* E2-4H.

*B. F. Houlder* for the appellant.

**SIMON BROWN L.J.:** Laurence Neil McIntosh is now aged 19. On June 10, 1990, eight days after his sixteenth birthday, he raped a 100-year-old woman. Exactly two years later, on June 10, 1992, he pleaded guilty to that rape at Norwich Crown Court. Cazalet J. sentenced him to nine years' detention in a young offender institution. It is against that sentence he now appeals by leave of the single judge.

Before indicating something of this appellant's background, it is necessary to say a little more about the circumstances of the rape. It occurred late at night whilst the appellant was out burgling. He broke into the victim's ground floor flat. She was a widow living alone and in bed at the time. Having taken £5 from the front room, he went into the bedroom. When the old lady became aware of his presence, she asked who he was. He told her to, "Shut up, I'll kill you." He told her if she put the light on he would kill her. She got out of bed. He grabbed her by her arms and threw her onto the bed. He then raped her. Having done so, he put his penis into her mouth. He then let himself out of the flat. The old lady activated the alarm and the relief warden came to her flat. The police were called.

She was examined by a doctor, who found bruising on her arm and knees and bleeding from her vagina. Astonishingly, despite the appalling ordeal to which the appellant had subjected her, in her very full statement she felt able to say this: "Although this man seemed horrible by the things he did, I feel he wasn't a bad man underneath." On March 5, 1992, 21 months later, the appellant was arrested. He was

Accordingly we quash the nine year sentence and substitute for it one of seven years' detention. To that extent this appeal succeeds.

## TERENCE JAMES NORMAN

COURT OF APPEAL (Lord Justice Rose, Mr. Justice Garland and Mr. Justice Turner): May 28, 1993

*Manslaughter—manslaughter by reason of provocation—stabbing after fight between neighbours—length of sentence.*

Seven years' imprisonment for manslaughter by stabbing in the course of a fight reduced to five years.

The appellant was convicted of manslaughter. The appellant lived in a flat above that of the deceased. Following an argument about smoke from a barbecue, the deceased came up to the appellant's flat and kicked the door in; a fight followed in the course of which the appellant received various injuries. After the fight had finished, the appellant picked up a kitchen knife and stabbed the deceased twice. The deceased bled to death. The jury rejected a defence of self defence and returned a verdict of manslaughter on the grounds of provocation. Sentenced to seven years' imprisonment.

**Held:** having regard to the general level of sentences in cases of manslaughter on the grounds of provocation, the sentence of seven years fell right at the top of the relevant range. Having regard to the appellant's age and his remorse, the Court would substitute a sentence of five years' imprisonment.

**References:** manslaughter, *Current Sentencing Practice* B1-2.3B.

*R. Tansey, Q.C.* for the appellant.

**GARLAND J.:** On March 23, 1992, this appellant pleaded not guilty to the murder of Andrew Kyriacou at the Central Criminal Court. On April 6 he was convicted of manslaughter by a majority of 10 to two and sentenced to seven years' imprisonment. He now appeals by leave of the single judge who granted the necessary extension of time.

The killing arose from a tragic disagreement between neighbours. The deceased, Andrew Kyriacou, lived with his partner Kay and their children on the ground floor of a block of flats. The appellant and his wife lived in the flat above. On the afternoon of July 7, 1991, a hot day, the deceased and his family were having a barbecue in their small patio garden. The smoke and fumes from the barbecue annoyed the appellant and his wife who had their windows and balcony door open. The appellant and his wife remonstrated angrily from the balcony and received an angry and abusive response. The appellant unwisely emptied two buckets of water from the balcony on to the barbecue, some of which went on to a small child being held by Kay Kyriacou. There was further abuse and there was evidence that when Mr. Kyriacou remonstrated the appellant shouted at him: "Come on. What are you going to do about it?" Mr. Kyriacou ran upstairs to the appellant's flat. The door of course was closed. He proceeded to kick it in. He forced his way into the appellant's flat. There was then evidence of a lot of movement and shouting. The appellant was then 53 and

interviewed and asked for a blood sample. Initially he had denied the offence, but later admitted going into the house to look for money, adding that he had been drinking and smoking cannabis. He said he had not realised that the victim was an old lady. When he went into her bedroom "something clicked" in his head. He then admitted raping the old lady, and said he ejaculated inside her. He denied anal sex—that had been the subject of a second count, a count of buggery, which was left on the file. He also admitted threatening to kill the old lady.

By the time the appellant came before the court, he was aged 18. He had previously appeared in court three times as a juvenile (on one of the occasions for burglary), and on a fourth occasion in February 1992 he appeared at the Norwich Crown Court, for a series of offences, including burglaries and the possession of an offensive weapon, all committed after this rape.

A social inquiry report commented that there was no doubting the appellant's remorse for his victim's suffering and the deep shame which he was currently experiencing. It stated he had attempted suicide. Also before the Court was a report from a consultant psychiatrist who noted that the appellant was the youngest of six children in the family, an overprotected child showing early neurotic signs, devastated by his mother's death when he was 12. Thereafter he showed general signs of delinquency, instability and a tendency to drug taking and alcohol abuse. He led an increasingly criminal lifestyle, chaotic, nomadic, much of it nocturnal, finding greater security in the criminal fraternity than within his family circle. The offence itself appeared to the psychiatrist to be "out of character." His mental profile did not indicate the need either for violence or an habitually aberrant sexual/lifestyle. The rape occurred at a time of chaos, insecurity and humiliation with life when, it was said, his judgments, control and perceptions were very severely reduced by drug and alcohol intake. His remorse and regret were genuine. The doctor expressed concern about the "self damaging potential which his ruminations may cause," and recommended professional counselling, together with guidance and support. Although his potential for dangerousness needed to be examined, the psychiatrist thought he could not be regarded as a serious danger within the community.

The enormity of this offence needs no underlining. It was a rape accompanied by several aggravating features, most notably the threats to kill, the great age of the victim, the fact that the appellant had entered the victim's home as a burglar in the first place, and the fact that the rape had been accompanied by the further sexual indignity of oral intercourse. It is perhaps hardly surprising that the sentencing judge felt nine years to be an appropriate sentence.

One's first reaction to the case is inevitably one of outrage and revulsion. The thought of invading an old woman's home and subjecting her to this dreadful ordeal is almost unthinkable. But the Court must have regard to other considerations too and, at the end of the day, like all others must be slotted into its appropriate place in the overall spectrum of sentencing for the great range of appalling cases that come before it. Of course, society's outrage at such an offence must be marked and reflected in the sentence. But it is necessary too to recognise the youth of this appellant when he came to commit this offence; he was, as stated barely past his sixteenth birthday. Bearing in mind that consideration, and of course his plea of guilty (perhaps his only other mitigation), and having regard too to various reported cases dealing with other young rapists, (perhaps most helpfully the case of *Walker* (1989) Cr.App.R.(S.) 109) we have come to the conclusion, albeit with hesitation, is that this sentence was marginally on the long side. This Court, in mercy, having regard to the youth of the appellant at the time of this offence, concludes that the right sentence here was one of seven years' detention in a young offender institution.



learned judge and for which he stated he gave credit. A further factor was that the defendant was now a broken man who would never be allowed to practise again as a solicitor. That is, of course, a tragic aftermath of this conduct; but the other side of that coin, pulling in the opposite direction, is that that is because he was a professional man and a solicitor. As such he was in a position of trust towards his clients. He had a duty to the public and to his profession to act with the utmost integrity. He failed in that duty and manifestly broke that trust. It is submitted that there is no "pot of gold" waiting for this appellant to plunder at the end of his sentence. That, unhappily, is simply because it has already been plundered; the money has already gone. It can only have gone to this appellant or his family. It is, we acknowledge, possible that some money might have gone in the running of the business, but that is at best speculation.

Mr. Simpson, who appeared for this appellant both in the Crown Court and here, produced further grounds of appeal before us in the form of schedules tracing the movement of some at least of the funds during the last year. I should perhaps have noted that the 18 counts in the indictment were all examples of misappropriation of funds during that period. It is common ground that the amounts on the indictment, which represent over a million pounds, do represent broadly the general deficit. Mr. Simpson's submission was to the effect that the schedules show that some of the transactions during the last year were in truth legitimate. He has sought, with infinite skill and charm, to persuade the Court that this is not a case of a dishonest solicitor suddenly deciding to steal a million pounds, but looking at the matter more broadly and fairly, the deficit started to accumulate probably fairly soon after the illness and accident around 1984 and that therefore, he says, the deficit had been growing for some five years and some of the moneys that went missing were used to pay other clients and so forth. Despite Mr. Simpson's skilful and succinct submissions—and nothing more could have been said by anybody on behalf of their client—the fact remains that about a million pounds did go missing and on any view most, if not all, of that went to, or for the benefit of, the appellant.

The final point relied upon, as it was before the trial judge, was the effect of the illness and head injury. There were a host of medical reports. Some more than others pointed to those factors as affecting his mental capacity. A Dr. Black was actually called at the trial. In summary, the thrust of his evidence was confirmed in his last answer to Mr. Simpson which was to this effect: "I remain," said Dr. Black, "convinced that the viral meningitis in 1982 contributed materially to Mr. Chisnall's mental health and subsequent professional behaviour." As we have indicated, there was support for that by the various letters of reference and from the other witnesses called.

It was not, and could not, be suggested that the appellant did not know what he was doing, or that it was wrong. Perhaps a fair approach would be that the illness and the accident to which we referred impaired his capacity to operate his practice in the manner that he had in the past, that that led to stress and frustration in both his professional and private life and played a material part in that it was the background against which these offences were committed. The fact is that this was and remains a startling case of dishonesty by a professional man. It boils down to no more and no less than a solicitor who has stolen over a period of time—over whatever period is appropriate—amounts totalling something like a million pounds.

Other cases involving such large sums of money are rare but not wholly absent from the Court's experience. In *Ross* (1989) 11 Cr.App.R.(S.) 324, the appellant pleaded guilty to 25 counts of theft, with many other similar offences to be considered. He conducted a business receiving money from the public for investment. The total sum involved was about £1½ million. He was sentenced to

14-and-a-half years' imprisonment. That was reduced on appeal by this Court to nine years.

In *Wheeler* (1991) 13 Cr.App.R.(S.) 73, the sum involved was £800,000 taken from the company's client account for the use of the appellant; a total of eight years' imprisonment was imposed. Those sentences indicate to our eyes that the learned judge did not err in principle in this case and we find ourselves quite unable to describe the sentence as manifestly excessive. It was a severe sentence, particularly on a man who perhaps is, as we have described, broken and will not be able to pursue his profession again, but for all the reasons we have given, the sentence must remain. It was a very serious case of theft of clients' money to the tune of about a million pounds. For those reasons this appeal must be dismissed.

## ATTORNEY-GENERAL'S REFERENCE NO. 35 OF 1992 CASE 13 (DAVID VERNON TAYLOR)

COURT OF APPEAL (The Lord Chief Justice, Mr. Justice Alliot and Mr. Justice Buckley): July 8, 1993

*Rape—length of sentence.*

Four years' imprisonment for the rape of a girl aged 16 increased to six years.

The offender was convicted of rape. The offender, a man aged 39 at the time, approached a 16-year-old girl who had just left a public house. He grabbed her arm, pulled her into an alley and pushed her to the ground. He then partially undressed her, forced his penis into her mouth and raped her. The offender was arrested the next day but denied having sexual intercourse with the girl. Sentenced to four years' imprisonment. The Attorney-General asked the Court to review the sentence on the ground that it was unduly lenient.

**Held:** (considering *Billam* (1986) 8 Cr.App.R.(S.) 48) it was submitted that the offence was aggravated by the age of the victim, the injuries and infection she had received, the degree of force that was used, and the fact that the offender put his penis into her mouth. The offender was not entitled to any discount for a plea, and the only mitigation was his previous good character. The offence involved several of the aggravating features mentioned in *Billam* (1986) 8 Cr.App.R.(S.) 48, and the appellant had taken too low a starting point. The sentence was unduly lenient; allowing for the stress and suspense involved in a reference by the Attorney-General, the sentence would be increased to six years.

Case cited: *Billam* (1986) 8 Cr.App.R.(S.) 48.

References: rape, *Current Sentencing Practice* B4-1.3F.

Commentary: [1993] Crim.L.R. 891.

*D. P. Spens* for the Attorney-General; *J. Markson* for the offender.

**LORD TAYLOR C.J.:** This is an application by Her Majesty's Attorney-General under section 36 of the Criminal Justice Act 1988 whereby he seeks leave to refer to the Court a sentence he regards as unduly lenient. We have granted leave.

The offender's name is David Vernon Taylor. On October 2, 1992, he was convicted of rape and was sentenced to five years' imprisonment. On October 16, 1992, the case was re-listed at the request of the trial judge who then varied the sentence to one of four years' imprisonment. The offender is now 41 years old, but he was 39 at the time of the offence. The victim was 16 years old, not far short of her seventeenth birthday. She lived with her parents and, at the time of the offence, was a virgin.

On Friday, August 9, 1991, she spent the evening with girlfriends in the centre of Darlington. They visited public houses and in one of them she was approached by the offender who attempted without success, to engage her in conversation.

About an hour or so later, around 11.00 p.m., whilst at another public house, the girl left the company of her friends and went outside to get some fresh air. She was standing a short distance away from the public house when the offender again approached her. He asked if she wanted to go for a walk with him. He then grabbed her right arm and pulled her across the road into an alley-way. It was an alley-way which went round the back of the building. He forced her into a "squalid yard behind a shop." She was so terrified that she could not scream or shout. Once out of view, the offender pushed her on to the ground, partially undressed her and forced his penis into her mouth—it may be only briefly—before raping her. She was crying. He then hurriedly adjusted his clothing and ran away, leaving her in the alley-way. She went back to her friends. She was clearly shocked and upset. She explained what had happened. She was taken home to her parents. Her mother telephoned the police.

Medical examination showed that there were cuts and abrasions to her back and elbow where she had been on the ground. There was pin-point bruising and redness on her left breast. There were considerable injuries to her genitalia. They were said to be consistent with forcible sexual intercourse with a virgin. There was marked swelling and a split in the skin of part of her vulva and there was marked tenderness of the whole genital area. Several days after the incident, it was discovered that she had contracted a vaginal infection.

Examination by the police of the alley-way revealed a card which the offender had dropped and which bore his name. He was arrested at home in the early hours of August 10. He denied having been out after 10.00 p.m. on the relevant night. In a formal interview, he admitted that an encounter had taken place with the victim in the alley-way. However, he claimed that she had enticed him to have sexual intercourse. He had failed to achieve an erection. He claimed to have done no more than masturbate the girl with his fingers. He said that she had performed oral sex upon him, but he had still been unable to achieve an erection and had walked away. He claimed, therefore, that he had not had sexual intercourse with her.

On behalf of the Attorney-General, it is submitted that there were a number of aggravating features to this offence. First of all, the age of the victim. Secondly, the effect upon her of this experience; she had these serious injuries to her genital area; the act of rape had been her first experience of sexual intercourse; she had contracted an infection; and she was obliged to take a contraceptive pill the morning after, all of which caused her great distress and embarrassment. Thirdly, the degree of force that was used is relied upon; the injuries and the swelling to her genitalia were described by the doctor as the worst she had seen, save for cases of severe infection. Lastly, it is said that the attack included an added indignity in that the offender forced his penis into the victim's mouth.

He pleaded not guilty; he contested the allegation that intercourse had taken place at all. He claimed again at trial that the victim had sought to have sex with him. Accordingly, his approach to the case entitled him to no discount. Had a plea of guilty been entered, he would have saved the victim the added ordeal of giving

evidence and of having her character attacked. The only matter put in mitigation of the offence was that the offender was a man of previous good character. But good character in this class of offence does not carry a great deal of weight.

On behalf of the Attorney-General it is submitted that the sentence of four years' imprisonment is unduly lenient. An offence of this nature, it is submitted, should attract a more substantial sentence to reflect both its gravity and the aggravating features; to act as a deterrent to the offender and others; and to reflect public repugnance. It is suggested, although the learned judge gave no supplementary judgment, that he reduced the sentence from five years to four years because of the incidence of the Criminal Justice Act 1991, which has altered the regime for early release and because of a Practice Direction drawing attention to that change.

The leading authority is *Billam* (1986) 8 Cr.App.R.(S.) 48. Lord Lane C.J., in the course of his judgment in that case, indicated the basis upon which, in general, sentencing courts should proceed with regard to offences of rape. At page 50, he said this:

"For rape committed by an adult without any aggravating or mitigating features, a figure of five years should be taken as the starting point in a contested case." It may well be that the learned judge took that as the starting point and indeed, until he altered the sentence, the finishing point. He then, it would appear, reduced it from five to four years because of the 1991 Act. However, the learned Lord Lane C.J. went on to say at page 51: "The crime should in any event be treated as aggravated by the any of the following factors." He then listed eight factors, which were not intended to be an exhaustive list, but which included those features which might not infrequently be found in cases of this kind. In the present case there can be no doubt that the last three factors that he mentioned were extremely relevant:

"(6) The victim is subjected to further sexual indignities. [Here she was subjected to oral sex.]

(7) The victim is either very old or very young.

(8) The effect upon the victim, whether physical or mental is of special seriousness."

Lord Lane C.J. went on to say:

"Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point."

In our judgment, the learned trial judge took too low a figure as his starting point. There were here the aggravating features to which attention has been drawn; they were matters of considerable substance individually and even more so when taken in aggregate. We consider, therefore, that the sentence imposed by the learned judge was not merely lenient but was unduly lenient. By that, we mean that it was outside the range of sentences which a judge, applying his mind to all the relevant features in the case, could reasonably have reached.

Mr. Markson has pointed out to us that there are special circumstances which the Court ought to take into account in this case. He submits that they are sufficient to persuade the Court that even though we have reached the view that this was an unduly lenient sentence, as a matter of discretion we ought to refrain from increasing it. Of course, the Court will always take into account on an Attorney-General's reference the stress and suspense which this procedure imposes upon the offender. He is sentenced once and he is then informed that the matter is to be brought up in court again with a view to the sentence being increased, an element that has been likened to double jeopardy. Mr. Markson submits that this case goes further than that. It would appear that the listing for the hearing of this reference was originally on February 18 of this year. For some reason it was postponed until April 6. On that day, this offender was brought from prison in the north-east of England to London to

attend the hearing, no doubt with a heavy heart, and again the matter was put off. This is the third time that the case has been listed and it is only now that it is coming to a close. We do bear that particularly in mind and, because of it, we shall impose a lesser sentence than we otherwise would, but having taken that and all other matters into account, we consider that the minimum sentence which we can properly substitute here for the sentence of four years is one of six years.

## STEPHEN JOHN FITZGERALD AND OTHERS

COURT OF APPEAL (Lord Justice Watkins, Mr. Justice Scott Baker  
and Mr. Justice Auld): July 8, 1993

*Importing amphetamines in substantial quantity—length of sentence.*

Eleven years' imprisonment upheld for importing amphetamines in substantial quantity.

The appellants and applicants were convicted of being concerned in the importation of amphetamines, or of conspiring to do so. They were concerned in arranging the importation by sea of 33.1 kilogrammes of amphetamine sulphate with a street value of between £800,000 and £2,900,000. The scheme was disclosed to the Customs and Excise by a man who was invited to take part and the participants were arrested as the amphetamine was being brought ashore. The principals were sentenced to 11 years' imprisonment each; those who had played lesser roles to seven years.

**Held:** the sentencer was entitled to infer that the principal actors were not new to drug smuggling and that the activities of the informer had not contributed significantly to their decision to commit the offence. The sentences of 11 years imposed on the principals were not excessive; the sentences of seven years on the two who had played lesser roles were excessive, having regard to the parts they had actually played, and would be reduced to five years and four years respectively.

Cases cited: *Sosiek* (1982) 4 Cr.App.R.(S.) 205; *Solomon and Triumph* (1984) 6 Cr.App.R.(S.) 120; *Wilcox* (1984) 6 Cr.App.R.(S.) 276; *McGlade* (1990) 12 Cr.App.R.(S.) 105; *Saunders* (1990) 12 Cr.App.R.(S.) 344; *Wood* (1991) 13 Cr.App.R.(S.) 207; *Aramah* (1982) 4 Cr.App.R.(S.) 407; *Morgan* (1985) 7 Cr.App.R.(S.) 443; *Shaw* (1986) 8 Cr.App.R.(S.) 8.

References: importing amphetamines, *Current Sentencing Practice* 11-3.3

*Miss H. Kennedy, Q.C., M. Wolkind, R. Emmerson and N. Dale* for the applicants and appellants; *M. Lucraft* for the Crown.

**AULD J.:** The appellant, Stephen John Fitzgerald, stood trial in late May and early June 1991 in the Crown Court at Southwark before His Honour Judge Ricker, charged on two counts of an indictment with offences in connection with the importation of a large quantity of amphetamine sulphate. The first count, which he faced jointly with five others, Lee, Allen, Austin, McDonnell and Collins, was of

being knowingly concerned in the fraudulent evasion of the prohibition on the importation of that class B drug. The second count, effectively an alternative, and which he faced alone, was of conspiracy with his co-accused on the first count to evade that prohibition. He was acquitted on the first count, importation, and convicted, by a majority of 10 to two, on the second count, conspiracy to import. His five co-accused were all convicted, by a majority of 10 to two, on the first count, importation.

On July 24, 1991, before the same court, Lee, Allen, Austin and Collins were sentenced to 11 years' imprisonment, and McDonnell was sentenced to seven years' imprisonment on count 1, and Fitzgerald was sentenced to seven years' imprisonment on count 2. In the case of each accused, save Fitzgerald, the court also made a confiscation order.

Fitzgerald appeals against conviction and sentence by leave of the single judge; McDonnell appeals against sentence by leave of the single judge; and Lee, Allen, Austin and Collins each renews his application for leave to appeal against sentence after refusal of leave by the single judge.

We deal first with the appeal of Fitzgerald against conviction. The prosecution case against all the appellants on count 1 was that they had all been concerned in one way or another from about March 1990 in arranging the importation from Holland on July 16, 1990, of 33.1 kilogrammes of amphetamine sulphate with a street value of between £800,000 and £2,900,000. Fitzgerald alone was charged, by way of alternative, with conspiracy between June 1 and 30, 1990, to import amphetamine sulphate because the only evidence of his involvement in the whole affair was between about June 13 and 28, 1990. He thus played no part in the actual importation on July 16, 1990.

The principal prosecution witness against all the accused was a man named Christian. He had a considerable criminal record. This was his account in outline. In late March 1990 Allen invited him to join him, Lee, Austin and Collins in a venture to smuggle amphetamine sulphate from Holland into the United Kingdom. Allen introduced him to the others, all of whom were clearly parties to the proposal. His, Christian's, role was to be the actual smuggler. He was to obtain a boat for the purpose and select a landing site. They promised him £100,000 for his involvement.

Christian pretended interest but quickly informed Customs and Excise officers of the approach. He then agreed with the officers to act as their agent and to co-operate with the four men to enable the officers to observe their activities and contacts, to catch them in the act of smuggling in the drug, and to arrest them and others concerned. In return they agreed to ensure his immunity from prosecution and to pay him for his services.

Thereafter Christian involved himself with the four men in the arrangements for the importation of the drug. They showed him a large sum of money—£50,000 in cash. He selected a landing site and, with money provided by them, he chartered a boat. In the meantime Customs officers kept them all under observation.

However, after these preparations, there was a lull in activity until about mid-April, 1990. Then they instructed Christian to buy a boat, providing him with £10,000 in cash to do so. He bought a boat and eventually brought it to Ramsgate. There were then some changes of plan, the detail of which does not matter, as to the part each should play in the smuggling operation. The one part of the plan that did not change was that Christian, with the assistance of another, was going to bring the boat back from Holland with the drugs.

On June 13, 1990, Fitzgerald first appeared on the scene. Lee introduced him to Christian in Ramsgate as "a tried and trusted member of the team" and as his crew for the return journey with drugs. Fitzgerald's job was also to ferry the drugs ashore

## ROBERT LEONARD T. CASE 20

COURT OF APPEAL (Lord Justice Steyn, Mr. Justice Ognall and Mr. Justice Blofeld): August 19, 1993

*Rape—rape by husband during co-habitation—length of sentence.*

Thirty months' imprisonment upheld for the rape of a wife by her husband during the marriage, following the wife's withdrawal from sexual relations after childbirth. The appellant pleaded guilty to assault occasioning actual bodily harm, indecent assault and rape. The appellant married the complainant in 1987; in 1992 she had a baby. Before the baby was born the appellant punched his wife on several occasions. After the complainant gave birth, she had internal stitches and indicated that she was unwilling to have sexual relations for the time being. On a number of occasions the appellant made sexual approaches to the complainant, on one occasion removing all her clothes and forcing her to perform oral sex. One morning the baby woke up and was brought into bed with the appellant and the complainant; the appellant forced the complainant's legs open and penetrated her briefly before withdrawing. The complainant went to the police that day; the appellant admitted her allegations immediately, expressed distress and concern for what he had done and wrote to his wife apologising for what he had done. Sentenced to 30 months' imprisonment. The sentence attributed the offence to the appellant's immaturity, and to feelings of rejection and jealousy over the attention his wife was paying to the child.

**Held:** (considering *Workman* (1988) 10 Cr.App.R.(S.) 329) it had been said that the fact that the victim had a sexual relationship with the offender did not give him a licence to rape or a significant advantage in terms of sentence. It was made perfectly clear to the appellant that his wife did not, for good reason, wish to have anything to do with him sexually at the time. All the mitigating factors were taken into account by the sentencer. The guideline cases indicated that for this type of rape committed by someone who was living with the complainant, who persisted in the way that the appellant did, the normal sentence on a plea of guilty was around four years. The sentence of 30 months took into account the mitigating factors and was correct.

Cases cited: *Workman* (1988) 10 Cr.App.R.(S.) 329.

References: rape, *Current Sentencing Practice* B4-1.3G.

Commentary: [1993] Crim.L.R. 983.

*G. Trembath* for the appellant.

**BLOFELD J.:** On January 13, 1993, in the Crown Court at Winchester, the appellant was convicted on his own confession of three counts: assault occasioning actual bodily harm, indecent assault and rape. He was sentenced to 30 months' imprisonment on the rape, two years concurrent on the indecent assault, and no separate penalty was passed in respect of the assault occasioning actual bodily harm. He now appeals against his sentence by leave of the single judge.

This is an unhappy case. The defendant was married to the complainant at the time, and living with her. They met in 1987; they separated at some stage and then came together again. They married in August 1990. In May 1992, their baby was born. Prior to the baby being born, sometimes there had been arguments and, during those arguments, on occasions the appellant had punched his wife. He did not punch her in the face, but he punched her around the body. Those incidents of violence,

namely before the birth of the baby, were the sort of conduct relied upon for the assault occasioning actual bodily harm for which no separate penalty was imposed.

When the complainant gave birth on May 14, 1992, she had internal stitches. Shortly after that, she indicated to the appellant that she was unwilling to have sexual relations for the time being. The appellant was not prepared to accept that, and from time to time he started grabbing her breasts which was painful to her because she was feeding the baby.

The next matter relied upon by the Crown occurred on June 24, some five or six weeks after the birth of the baby. The two of them were in the car. The appellant stopped the car. He grabbed at her and he started to pull her T-shirt out of her trousers. That is only significant because of what happened in the car on later occasions. He went no further on that occasion and, indeed, he apologised soon afterwards, which was his normal habit. On June 28, again they were in the car. They drove to a secluded spot and there, after he persuaded her, she agreed to some form of sexual activity. He then drove home, but not until after he had received that promise.

On July 1, they left her parents' house and drove home. Again he parked the car in a secluded place. He pulled her hair, started grabbing her breasts and making sexual overtures towards her. He began undoing the jeans she was wearing, but he could not get them off. It was clear that she was totally averse to any form of sexual intercourse. He started to drive home and on the way he tried to push his hand between her legs. At home he continued to try to force himself upon her, but there were people in the house and so he desisted.

On July 5, again he stopped the car in a secluded place. He pulled off her top garment and her jeans. He then left her standing outside the car naked except for her shoes. After she had complained, eventually he let her back into the car and forced her to perform oral sex on him.

They next day they went to her parents' house and, having left, again he parked the car in a private place. He again started touching her; again he took all of her clothes off; he said that he wished to take photographs of her with nothing on. It is perfectly clear from that course of conduct that in no way had his wife consented to this activity, or any of it. It had distressed her, and he knew that because on each occasion he apologised to her for his behaviour.

It was with that background, which so far are the facts relied on to support the indecent assault, that one comes to the rape. On July 8, in the early hours of the morning, before they got up, the baby was crying. The baby was brought into bed with them. Suddenly, the appellant became rough with his wife. He pulled her nightie over her head; he lay on top of her; he forced her legs open and forced his penis partially inside her. It was clear that that hurt her; it was clear to him that she did not consent. He had second thoughts very quickly and he withdrew. That was, so far as she was concerned, the last straw. She had, in fact, arranged with him to drive her to her mother's. She went to her mother's and then complained to the police. He was seen by the police. He was interviewed at length and in detail. He expressed complete agreement with all the allegations put to him. He expressed his concern and distress for what he had done and indicated how much he loved his wife. He then wrote a letter to his wife apologising for his conduct and saying how much he loved her. He pleaded guilty at the first opportunity. Indeed, he let it be known that he intended to plead guilty, because he was concerned that he should not put his wife through the ordeal of giving evidence.

After his arrest, he contacted Relate in order to try to get some guidance. He has been seen by a psychologist who has described him as sexually immature and deeply distressed and ashamed of his conduct.

All those matters were before the learned sentencing judge who said:

"I have considered carefully the contents of the pre-sentence report and the psychologist's report . . . But, as I have said, you did treat your wife very badly. Before your child was born you physically assaulted her by punching her legs and arms and during the period of about eight weeks after the child was born you sexually assaulted your wife on several occasions and you humiliated her. That conduct culminated in an offence of rape. It was a transitory act of sexual intercourse from which you soon desisted but you knew that because of her recent childbirth she did not want intercourse and that it would hurt her. Those sexual offences were, I am convinced, caused by your immaturity and by your unfounded feelings of rejection by your wife and your jealousy over the attention which she was paying to the child."

Mr. Trembath today invites this Court to reduce the sentence of 30 months' imprisonment because of the particular circumstances relating to the appellant. This Court asked him if he could put forward some principles on which it would be possible to make a distinction from the normal line of cases relating to marital rape. Having listened to what Mr. Trembath has had to say, this Court regrets to say that it finds it impossible to glean any principles from Mr. Trembath's submissions. It may well be that his failure to put forward a principle is because none exists. In *Workman* (1988) 10 Cr. App. R. (S.) 329, Staughton L.J. said:

"It could not be said that if the victim was someone who was known to the defendant in a sexual context, he had thereby a licence to rape, or at any rate a significant advantage in terms of sentence, when she has shown herself unwilling to have anything more to do with him."

That is certainly the situation here. It was made perfectly clear to this appellant that his wife did not, for good reason, wish to have anything to do with him sexually at that time. He continued in his conduct, and finally he raped her.

It can be said that he is a young man; he is sexually immature; he has no previous conviction. He expressed immediate contrition and followed that by pleading guilty. He also did his best to obtain treatment. All those matters, in our view, were taken into account by the sentencing judge. The guideline cases indicate that, for this type of rape committed by somebody who is living with the complainant, and who persists in the way that this man did, the normal sentence on a plea of guilty is around four years. Here, the sentence of the court was 30 months. In our view, all the mitigating factors urged by Mr. Trembath before the sentencing judge and repeated before us today, were taken into account. In our view, that was the correct sentence. It must be remembered that however tragic the case is from the point of view of this appellant, it is infinitely more tragic for the complainant who had to suffer the conduct which this appellant perpetrated. This appeal is dismissed.

## ASHRAF ULLAH KHAN

COURT OF APPEAL (Lord Justice Steyn, Mr. Justice Ognall and Mr. Justice Blofeld): August 19, 1993

*Suspended sentence—'exceptional circumstances.'*

Twelve months' imprisonment imposed for participating in mortgage frauds suspended, on the ground that the appellant was suffering from paranoid psychosis

and this constituted "exceptional circumstances" for the purposes of Powers of Criminal Courts Act 1973, s.22(2).

The appellant, aged 69, was convicted of conspiring to procure the execution of valuable securities. The appellant, a solicitor, has been concerned in a series of mortgage frauds initiated by a client which eventually resulted in losses to building societies of between £145,000 and £150,000. Sentenced to 12 months' imprisonment.

**Held:** (considering *Oknikan* (1992) 14 Cr. App. R. (S.) 453) medical reports obtained for the purpose of the appeal indicated that the appellant was suffering from a paranoid psychosis which would have affected his concentration and judgment. In the light of *Stevens and Others* (1993) 14 Cr. App. R. (S.) 372 it could not be said that the sentence was wrong in principle, but in the view of the Court the serious health problems which the appellant faced were capable of being exceptional circumstances, and for this reason the Court would suspend the sentence.

**Cases cited:** *Oknikan* (1992) 14 Cr. App. R. (S.) 453; *Stevens and Others* (1993) 14 Cr. App. R. (S.) 372.

**References:** suspended sentence, *Current Sentencing Practice* A11-3B; *Archbold* 5-196.

**Commentary:** [1993] Crim. L. R. 982.

*D. Farrington* for the appellant.

**BLOFELD J.:** Ashraf Ullah Khan is aged 69 and is a solicitor. On June 8 of this year at Middlesex Crown Court, after a trial which lasted more than 20 weeks, that is five months, he was convicted of conspiracy to procure the execution of valuable securities, that conspiracy being laid to cover a period between January 1985 and April 1990. After being remanded for reports, on June 28 he was sentenced to 12 months' imprisonment. He now appeals by leave of the single judge.

The facts can be dealt with shortly. A man called Rangolam, who pleaded guilty and was sentenced to three years, was the initiator of a mortgage fraud. That mortgage fraud followed the usual course of mortgage frauds. False particulars were submitted to obtain mortgages. Those mortgages were then processed through solicitors. One of the two firms of solicitors used was the firm which effectively was the firm of this appellant. On occasions, those properties were threatened with repossession, because the instalments were not paid by Rangolam, whereupon Rangolam arranged for a fictitious third party to purport to purchase those properties and to take out a fresh mortgage with a different building society. This was one of those frauds that gained Rangolam substantial profits on a rising market, but once the housing market started to fall, of course he was unable to carry it on and he was exposed. The loss to the building societies was approximately £145,000 to £150,000.

The case against the appellant was that it may well be he started unsuspectingly, not appreciating that Rangolam's information was false, but the time came and had continued for a substantial period when he must have appreciated that those transactions were bogus transactions, because effectively there was no one else involved except Mr. Rangolam and a few of his criminal associates.

This appeal is not put forward on his behalf that this sentence was wrong in principle. Indeed the recent guidelines case of *Stevens and Others* [1993] 14 Cr. App. R. (S.) 372 makes that entirely clear. At the time of sentence, the sentencing judge said this:

CASE 21 ROBERT C

COURT OF APPEAL (Lord Justice Farquharson, Mr Justice Garland and Mr Justice Cazalet): February 7, 1994

Rape—rape of wife by estranged husband—length of sentence.

Six years' imprisonment for the rape of his wife by an estranged husband reduced to five years. The appellant pleaded guilty to rape. The appellant's wife asked the appellant to leave the matrimonial home and he did so. Just under a month later he returned in the early hours of the morning, gained access to the house using a back door key which he had retained, and had sexual intercourse with her against her will. Sentenced to six years' imprisonment.

Held: (considering Attorney-General's Reference No. 7 of 1989 (1990) 12 Cr.App.R.(S.) 1 and Berry (1988) 10 Cr.App.R.(S.) 329) the Court had recognised that a distinction might be drawn between cases of rape by a stranger and rape by a former husband or co-habitee. The offence was carefully planned and committed in the complainant's own home; the appellant had entered by stealth and cut the telephone wires. However, the sentence would be reduced to five years.

Cases cited: Attorney-General's Reference No. 7 of 1989 (1990) 12 Cr.App.R.(S.) 1, Berry (1988) 10 Cr.App.R.(S.) 329.

References: rape, Current Sentencing Practice B4-1.3G.

J. Davis for the appellant.

GARLAND J.: On July 16, 1993 in the Crown Court at Lewes sitting at Hove before Judge Gower Q.C., this appellant pleaded guilty to the rape of his wife, from whom he had been separated, and was sentenced to six years' imprisonment.

He now appeals by leave of the single judge. The complainant had asked the appellant to leave the former matrimonial home in the middle of September. He did so. She changed the locks. He went to live elsewhere and they led entirely separate lives.

Just under a month later on October 10, in the early hours of the morning, the appellant got into the house having first torn out the telephone wire from the junction box, and he did so by using a key to the back door which he had acquired, and it is to be noted that when his car was searched subsequently a number of Chubb keys were found in it.

The offence took place in the early hours of the morning. The complainant had got up to adjust the central heating because she felt cold. She saw the appellant dressed in dark clothing and carrying a torch standing in a doorway. He led her into the bedroom, turned the lights out, pushed her onto the bed and, despite her making it abundantly clear that she was not consenting to what he was attempting to do, had sexual intercourse to ejaculation with her. He then tried to persuade her not to tell anybody, kissed her, told her he still loved her and left.

He subsequently said that he had intended to kill himself by taking an overdose after making love to his wife for the last time, and he pulled out the telephone wire so that she would not be able to summon help when he did that.

The appellant then ran off. Mr Court-Johnson, whose behaviour at this time was beyond praise, ran after him and managed to detain him. I have already said that the appellant's case throughout was that he was the victim acting in self-defence. Plainly the jury did not take that view because they convicted him, as we have already indicated, of manslaughter.

Going back to the day of the incident, Paul Luker, who collapsed and was lying on the ground, was subsequently taken to hospital. He was found to be suffering from a sub-arachnoid haemorrhage and died a short time afterwards. It is in those circumstances that the appellant came before the court.

There are some elements of his background which it is right to mention. He lived with his parents, brothers and sisters in a caravan in Cardiff. He had had no formal education and had never been employed. The point that tells in his favour is that he had no previous convictions. He was the subject of a psychiatric report but no abnormality of mind was discovered by the psychiatrist.

When my Lord gave leave for him to appeal against the sentence imposed upon him he ordered that a report should be sent from the place where the appellant was detained. That report has come back from the Kingswood Special Unit, which shows that whilst he has been detained there the appellant has been of very good behaviour; the report says that he is a pleasure to teach, and it also appears from the contents of the report that he gets on very well with the staff.

Accordingly, the grounds that have been advanced on his behalf include the content of those reports as well as the fact that, as we have already mentioned, he was a youth of no previous convictions.

However, the matter did not end there so far as the reports are concerned, because we now have the advantage of a pre-sentence report from the probation officer. Perhaps surprisingly, having regard to the appellant's conduct on that November afternoon, the probation officer reports that:

"[he] presents as a very quiet, polite young man who is extremely likeable. He has a ready smile, which is predominant when feeling safe and secure and a stammer, which when ill at ease, insecure or feeling threatened, worsens."

During the time of his work with the appellant the officer reports that:

"It has been impossible to fault or criticise him, he is genuine in his attitude toward us, as are the rest of the family... He has maintained throughout that the action he took was in no way pre-determined and regrets that it ever happened."

The features of those reports would not in themselves have saved him from the sentence that was passed upon him by the learned judge, but we are all very conscious of the fact that he was at the time of this offence only 15 years of age and indeed he is only 16 years old now.

Having regard to the general line of the authorities which Mr Mather-Lees has helpfully placed before us, we have come to the conclusion, bearing in mind also his good character, that perhaps five years was an excessive sentence.

However, it is not a case where one can make any substantial reduction. The fact of the matter is that a young life was lost. Secondly, one has to bear in mind that it is essential that people in this country are able to walk about city centres without quarrels being picked and weapons used, as they were so disgracefully in this case. However, in all the circumstances we think justice would be met if we quash the sentence of five years and substitute therefor a sentence of four years' detention under the Children and Young Persons Act.

The appeal will therefore be allowed to that extent.

Today a most helpful and powerful submission has been addressed to this Court on the appellant's behalf to the effect that perhaps the learned trial judge overlooked the point discussed at some length in *Attorney-General's Reference No. 7 (1989)* 12 Cr.App.R.(S.) 1, when this Court looked at the different situation that may arise as between rape by a total stranger and rape by somebody who has been a cohabitee of the complainant or a former spouse of the complainant. It is to be discerned from the cases there referred to that a distinction can, in proper circumstances, be drawn. In particular the case of *Berry (1988)* 10 Cr.App.R.(S.) 329 was considered by the Court where it was held that a lesser sentence could be appropriate where the defendant is not a total stranger, and indeed as in this case somebody who had cohabited with the complainant for many years, and where the complainant had borne him children.

There was mitigation of course in the plea. No violence was used other than the minimal degree of force necessary to commit the offence, but it has to be borne in mind that it was committed in the complainant's own home at night. It was carefully planned. The appellant had entered by stealth and he had pulled out telephone wires. Nevertheless, bearing in mind that he is a man of positive good character, this Court takes the view that the sentence was too great, and is prepared to do what we normally do not do, and that is to make a small reduction in the sentence passed to reflect what, in the view of this Court, would have been an appropriate sentence bearing in mind the mitigating factor to which reference has been made.

What we propose to do is to reduce the sentence of six years to one of five years and to that extent the appeal succeeds.

## LOUIS CHARLES VIANNA

COURT OF APPEAL (Lord Justice Farquharson, Mr Justice Garland  
and Mr Justice Cazalet): February 7, 1994

*Perjury—subornation of perjury—length of sentence.*

Thirty months' imprisonment for subornation of perjury in connection with divorce proceedings reduced to 18 months.

The appellant was convicted of subornation of perjury. The appellant was involved in protracted divorce proceedings. He engaged a private inquiry agent and offered to pay him £1,000 if he swore a false affidavit. The affidavit was prepared and signed, but the agent had reported the matter to the police and eventually gave evidence for the appellant's wife. Sentenced to 30 months' imprisonment.

**Held:** subornation of perjury was a very serious offence, but having regard to the unusual facts of the case and the mitigation, the sentence could be reduced to 18 months.

**References:** perjury. *Current Sentencing Practice* B8-1.3B.

*S. Waine* for the appellant.

**CAZALET J.:** On May 7, 1993 in the Crown Court at Warwick the appellant was convicted on a count of subornation of perjury (count one) and on May 21, 1993 in the same court he was sentenced to 30 months' imprisonment. No evidence was offered on the alternative count of doing an act tending and intended to pervert the course of public justice (count two).

He appeals now against sentence by leave of the single judge.

We have been told that there is no outstanding appeal at this stage in so far as his conviction is concerned, but that consideration is likely to be given to such an appeal. However, the only matter before the Court today is this appellant's appeal against sentence by leave of the single judge.

The facts may be summarised as follows. The appellant was involved in a protracted and acrimonious divorce suit and throughout 1988 and on into 1989 and 1990 he employed inquiry agents to carry out observations on his former spouse. The first of these agencies he dismissed without payment. The other, for various reasons, was unlikely to be able to give evidence on his behalf in the divorce proceedings.

In May 1990 he instructed another inquiry agent, Mr Hobson, to carry out fresh observations. Mr Hobson carried out the work and incurred substantial expenditure. The appellant did not pay him and it was the prosecution case that the appellant lied to him about how he would be paid. Eventually, so the prosecution case maintained, he told Mr Hobson that he would be paid £1,000 providing he, Mr Hobson, swore a false affidavit.

Mr Hobson went to the police to report the appellant's failure to pay the bill: he also told them that he thought that the appellant was going to make him swear a false affidavit. He was told to record by tape all of his conversations with the appellant and not to sign the affidavit, but to inform the police when the appellant asked him to sign it. In fact when Mr Hobson was asked to sign the affidavit he was unable to contact the police and he swore the affidavit as prepared by the appellant. It set out around 35 observations over a number of years, falsely suggesting that he, Mr Hobson, had carried out those observations.

In his sentencing remarks the judge pointed out that virtually all of those observations had in fact been maintained and reflected what had been observed, although the observations had not been carried out by Mr Hobson.

The appellant told Mr Hobson that he would get the remainder of the money when he gave evidence to substantiate the false affidavit. He told Mr Hobson to produce a series of false invoices to substantiate the fact that he had carried out all the observations in question. The appellant withheld the affidavit from his solicitors until shortly before the divorce hearing in October 1990, and then pretended to them that Mr Hobson had prepared the affidavit himself, had had it sworn and had only handed it to the appellant a day or two previously.

On about October 11, 1990, four days before the hearing, the appellant telephoned Mr Hobson and attempted to coach him as to the evidence he was to give. The appellant told him to say that the observations had been carried out by him personally and that he had had the affidavit typed himself and had only just given it to the appellant. In fact Mr Hobson subsequently gave evidence on behalf of the appellant's wife to the effect that the contents of the affidavit were false.

The appellant was arrested in October 1990 and when interviewed denied the offence.

He is now some 49 years of age, divorced, with three children from the marriage. At the time he was sentenced he was involved in a new relationship, having twin boys some five months old by that person. He was a man of no previous convictions.

In the pre-sentence report his background and family history are fully set out. He has expressed considerable remorse over the offence and it was stated in terms that he was considered unlikely to re-offend.

Further there was a psychiatric report before the court which again sets out the appellant's background and family history. He is an engineer. His company appears to have gone into liquidation as a result of the divorce proceedings, and in particular the freezing order which was made in respect of the company bank balance. That

would crush his testicles, you got him to lie down again upon the bed in the bedroom, again lying on top of him and rubbing your groin into his. You then, at one stage, tied his wrists behind his back, you put a plastic bag over his head, you threatened to kill him if he was not quiet, and it was only after an ordeal lasting over six hours that you allowed him to go from your flat."

Having recited the circumstances of that earlier offence, the learned judge went on to say in his sentencing remarks:

"You are entirely remorse in respect of that offence, as well as in respect of these offences."

Pausing there, the appellant said throughout not only that he was not guilty of these offences, but that he had been not guilty of the earlier one as well. The learned judge continued:

"I have considered all the evidence in the case and the impression made upon me at the trial ... I believe you have a lustful interest in young men and boys. I believe that you are a very real danger to the public. Your unwillingness to face up to your guilt means that that danger is still prolonged."

The learned judge then indicated how he arrived at the sentence which he imposed: "In relation to the general seriousness of the case, I would have regarded a sentence of two-and-a-half-years imprisonment as being appropriate, but bearing in mind my duty to protect the public, in my judgment a proper sentence here, in respect of each of the offences upon which you were found guilty is one of five years imprisonment, and I impose such a sentence in respect of each count concurrently."

From that passage, it appears that the learned judge was implementing section 2(2)(b) of the Criminal Justice Act 1991 which provides as follows:

"Section 2(2) the custodial sentence shall be—

(b) where the offence is a violent or sexual offence for such longer term (not exceeding the maximum) as in the opinion of the court is necessary to protect the public from serious harm from the offender."

The question may have arisen as to whether, appalling though the appellant's conduct was, it was actually conduct which might give rise to serious harm to the public, bearing in mind the definition of serious harm which is to be found in section 31(3) of the same Act:

"In this Part any reference, in relation to an offender convicted of a violent or sexual offence, to protecting the public from serious harm from him shall be construed as a reference to protecting members of the public from death or serious personal injury whether physical or psychological, occasioned by further such offences committed by him."

Mr Atherton, who has appeared on behalf of the appellant, has frankly conceded that this case was one in which the learned judge was justified in applying section 2(2)(b). In making that concession, he had in mind and specifically considered the decision of this Court in *Bowler* (1993) 15 Cr.App.R.(S.) 778. That was a case of an appellant who was addicted to indecent assaults on female persons, assaults which went no further than seeking to touch them over their clothes on their private parts and to put his hand upon their skirts. In giving the judgment of the Court Smith J. said:

"... as has been pointed out in the course of argument, there are some adult women who might be seriously disturbed by conduct such as this. Many women might shrug off this kind of unwelcome attention which this man gives to women indiscriminately, but some will not. It seems to us that the purpose of this section should include the protection of those women, less robust than average, who may be vulnerable to the kind of conduct that this man is likely to perpetrate and who might in those circumstances suffer serious psychological harm."

By analogy, we consider that in the present case the judge was justified in considering that similar psychological harm and possibly even physical harm, having regard to the earlier offences, could well result from the appellant's continuation of conduct to which it seems he was addicted. Accordingly, we consider that Mr Atherton was right to concede that the application of section 2(2)(b) was appropriate.

The question remains as to what the level of sentencing should be. Mr Atherton submitted that the learned judge's starting point, which he frankly stated as being two-and-a-half years, had there been no question of protecting the public, was too high. We cannot agree. These were three offences against young men who were put in extreme distress by the conduct of the appellant. The sentences of two-and-a-half years, which the learned judge was contemplating, would have been concurrent. In our judgment, even for those offences without any question of protecting the public, two-and-a-half years would not have been an excessive sentence to be imposed in respect of each of those offences concurrently.

However, when one goes on to consider what would be the appropriate period to add, the learned judge has to perform a balancing act. In theory, someone who is addicted to conduct which could cause serious harm to members of the public may need to be prevented from doing that for a very long time. In the ultimate case, an indeterminate sentence may be necessary where the harm is likely to be very serious and the predilection for indulging in such conduct looks likely to continue for an indefinite time, but the learned judge in each individual case has to try to balance the need to protect the public on the one hand with the need to look at the totality of the sentence and to see that it is not out of all proportion to the nature of the offending.

In the present case, it is sufficient to say that in our judgment the learned judge's sentence could not be faulted in the way in which he struck the balance. It is quite impossible to give any guidance as to what length of sentence would be appropriate for the purposes of protecting the public as between one case and another. Each case turns on its own facts, and different offences committed in different ways may require different responses from the court in regard to the protection of the public. All we need to say in the present case is that in our judgment the sentence which was passed by the learned judge was appropriate. It was certainly not manifestly excessive or wrong in principle. Accordingly, this appeal is dismissed.

## CASE 22

### DAVID JAMES SHIELDS

COURT OF APPEAL (Lord Justice Hirst, Mr Justice Tudor Evans and Mr Justice Laws): February 11, 1994

*Rape—rape of woman encountered in street—length of sentence.*

Ten years' imprisonment upheld for the rape of a woman encountered in the street.

The appellant was convicted of rape. The appellant encountered a woman who was walking home alone in the early hours of the morning. He pulled her into an unlit pathway and caused her to fall to the ground. He then removed her lower clothing, forced his fingers into her vagina, forced her to suck his penis and then raped her, ejaculating over her stomach. Sentenced to 10 years' imprisonment.

**Held:** (considering *Billam* (1986) 8 Cr.App.R.(S.) 48, *McCue* (1987) 9 Cr.App.R.



up by raping her followed again by oral sex. A sentence of seven years was passed which was reduced on appeal by this Court to a term of five years' imprisonment. Looking at the facts, at first sight it is surprising that a sentence of only seven years was imposed initially but then there were special circumstances in that case. First, there was a plea of guilty which is not present here; secondly, there were matters of personal mitigation of which there is no evidence in this case. In *McCue*, the appellant had drink problems, marriage difficulties and he was a man of hitherto good character. But above all the appellant in that case actually surrendered himself to the police and no doubt that was taken to be a matter of such outstanding mitigation as to justify the Court of Appeal in reducing what in our view would seem otherwise to be a moderate sentence for that particular offence.

Counsel has also referred us to *Ashmeil* reported in (1987) 10 Cr.App.R.(S.) 126, where the appellant was convicted of rape in these circumstances: he had accosted a girl whom he did not know on an underground train. He had engaged her in conversation and then he took some of her possessions from her. She followed him to his flat in order to get her possessions back. She was persuaded to enter the flat where he threatened her with a knife which he held to her throat and raped her. A sentence of 10 years' imprisonment was reduced on appeal to seven years. That was a case in which there were no sexual indignities. The knife was not used to cause any physical injuries and there were general mitigating factors.

Counsel has also referred us to two *Attorney-General's References*, first *No. 16 of 1992* in which four years was imposed for a serious rape but the Lord Chief Justice, while concluding that the sentence was lenient, declined to vary it. There are aspects of *Attorney-General's References* to which we must draw attention. First of all, specifically in *No. 16*, the last sentence of the judgment indicates that a sentence of four years is not in any sense to be taken as the sort of standard sentence for cases of rape on the similar facts of that particular case. Moreover, as my Lord, Laws J. pointed out to counsel in the course of the argument, in *Attorney-General's References* the appellant has already served part of his sentence and he has to be re-sentenced.

The second *Attorney-General's Reference*, to which counsel referred us, was *No. 12 of 1992*. That was a case, in what appears to be a serious case of rape, a two year sentence was increased to three years. The victim of that offence was a prostitute who had been picked up by the appellant. She was fully prepared, because this was the proposition which had been put to her, to have sexual intercourse and oral sex with him. When they went to whatever premises they went to, the appellant was not prepared to pay and he took, what the victim had agreed to do, by violence. A sentence of two years in that case was increased by this Court to three years. That was a case which is wholly different on its special facts.

Indeed, each of the cases to which counsel has referred us can be distinguished from the facts of this case and counsel fully accepted that each case must depend upon its facts. We have to look at the facts in this case bearing in mind the submission of counsel that there were not many aggravating features. It has to be remembered that a case of rape is marked in its gravity by a maximum sentence of life imprisonment in an appropriate case and that fact in our view ought not to be forgotten.

What is the position here on the question of aggravating factors? First, the girl was walking along a public street when she was attacked. She was dragged by her hair and violence was used on her. We do not accept that the violence in this case was in no way exceptional. In addition to the violence to which we have referred, she was struck a violent blow to her abdomen. She was subjected to the degradation of having her assailant masturbate over her body. She was subject to oral sex and she was raped. In

(S.) 17, *Ashmeil* (1987) 9 Cr.App.R.(S.) 126, *Attorney-General's Reference No. 16 of 1992*, (1992) 14 Cr.App.R.(S.) 319 and *Attorney-General's Reference No. 12 of 1992*, (1992) Cr.App.R.(S.) 233) the victim was attacked while walking along a public street, and subjected to violence and oral sex. This was a grave case of rape, and the sentence was fully merited.

Cases cited: *Billam* (1986) 8 Cr.App.R.(S.) 48, *McCue* (1987) 9 Cr.App.R.(S.) 17, *Ashmeil* (1987) 9 Cr.App.R.(S.) 126, *Attorney-General's Reference No. 16 of 1992*, (1992) 14 Cr.App.R.(S.) 319, *Attorney-General's Reference No. 12 of 1992*, (1992) Cr.App.R.(S.) 233.

References: rape. *Current Sentencing Practice* B4-1.31.  
*R. Niblett* for the appellant.

**TUDOR EVANS J.:** On February 3, 1993 in the Crown Court at Lewes the appellant, a man aged 41, was convicted of rape and sentenced to 10 years' imprisonment. He now appeals against sentence by leave of the single judge.

The facts are these: at about 1.00 a.m. on January 4, 1992 the complainant, a woman aged 26, was walking home after having spent the evening with friends in Hastings. She was walking along a street when suddenly she was grabbed from behind by the appellant by her shoulders and pulled backwards. He grabbed her by her neck scarf and hair on to an unlit pathway where he struck her in the abdomen causing her to fall to the ground. At first she resisted but then wisely she submitted to the appellant who undid her shirt buttons and felt her breasts. He kissed her; he forcibly removed all her lower clothing; he then dragged her further up the path where he stood over her and masturbated. Then he put himself on top of her and inserted his fingers in her vagina. He then put his penis inside her and had full intercourse. He withdrew his penis and then sat on her stomach. He then ordered her to suck his penis and he thrust it in her mouth. He ejaculated over her neck and face. When he finished he got up and said to her: "You would be better in bed. I have had too much alcohol tonight and that was a fucking disaster". He then left her. She went to a friend's house where she complained. There was bruising on the back of her head and a superficial graze on the back of her right elbow. There was dried seminal fluid over her neck and chest.

The appellant was in due course arrested. He denied any involvement in the offence. On July 17, 1992 he was picked out by the girl on an identification parade. At the time of this offence the appellant was unemployed. He has a number of convictions but it is fair to say, as Mr Niblett has reminded us, that none is for a sexual offence. Mr Niblett accepts that this was a serious offence but he submits that a sentence of 10 years was excessive when one looks at what happened and at the approach which is adopted in various other authorities to which he has referred us.

Counsel started by reminding us of the various aggravating factors indicated by Lord Lane in the judgment he delivered in this Court in *Billam* (1986) 8 Cr.App.R.(S.) 48. Counsel contended that there really was only one aggravating factor in this case and that was his forcing the girl to submit to oral sex. He was minded to submit that there was no extreme violence but we think perhaps he reflected upon that submission and withdrew it. He drew attention to the fact that there was no injury to the genital areas and that the rape was not repeated. We shall come back to whether there were any additional aggravating factors in a moment.

Counsel has referred us to *McCue* reported in (1987) 9 Cr.App.R.(S.) 17. That was a case in which the victim was a girl of 16 who was on her way home when she was accosted by the appellant in a public street, pushed over a fence and into a field where he used violence on her, removed her clothing and forced her to have oral sex, ending

our view, the degrading conduct to which she was subjected are matters of considerable weight.

We have considered very carefully the submissions which Mr Niblett has put before us and we have come to the conclusion that this is a grave case of rape in which, as we have said, the girl was subjected to violent, degrading and insulting conduct. That is an experience which must have terrified this girl, an experience which she is not likely to forget. Notwithstanding the various cases to which we have been referred and the submissions which are made on behalf of this appellant, we have come to the conclusion that a sentence of 10 years is fully merited and cannot be faulted. It follows that the appeal must be dismissed.

## R. v. DOVER MAGISTRATES' COURT, EX P. PAMMENT

DIVISIONAL COURT (Lord Justice Kennedy and Mr Justice Scott  
Baker): February 11, 1994

*Committal for sentence—matters to which magistrates' court may have regard in deciding to commit for sentence under Magistrates' Courts Act 1980, s. 38.*

**Editor's note:** a magistrates' court which decides to try an either way offence summarily has an unfettered discretion to commit the offender to the Crown Court for sentence under Magistrates' Courts Act 1980, s. 38 if he is convicted, whether or not further information is disclosed after the decision to try the case summarily has been made.

The applicant was charged with attempting to obtain £16,309 by deception. He appeared before a magistrates' court, where the facts were fully opened, including certain aggravating factors. Both prosecution and defence submitted that the case was fit for summary trial and the magistrates' court accepted jurisdiction. The applicant and his co-accused pleaded guilty, but disputed the amount which they had attempted to obtain. The case was adjourned for a hearing to determine that issue and to obtain a pre-sentence report. The case came back before a differently constituted bench of lay magistrates, who found that the sum which the applicants had attempted to obtain was £11,487. The pre-sentence report showed that the applicant was of previous good character. The magistrates formed the view that the seriousness of the offence was such that their powers of punishment was insufficient, and committed the applicant to the Crown Court for sentence. The applicant sought to quash the decision of the magistrates' court to commit for sentence.

**Held:** Magistrates' Courts Act 1980, s. 38 in its original form read "where on the summary trial of an offence triable either way ... a person ... is convicted of the offence, then if on obtaining information about his character and antecedents" the court was of the opinion the court's powers of punishment were inadequate, it could commit to the Crown Court for sentence. This provision had been considered in various cases, including *R. v. Doncaster Magistrates' Court, ex p. Goulding* (1992) 13 Cr.App.R.(S.) 428. The former section 38 had been replaced by a new version by Criminal Justice Act 1991, which on the face of it did not require the relevant opinion to be formed as a result of information reaching the court after it had decided to proceed by way of summary trial. It was submitted for the applicant that the old law

should be preserved by implication. The Court agreed that the magistrates' court should consider the adequacy of its powers of sentence when deciding in favour of summary trial, but the court did not accept the submission that the magistrates' court was not entitled to change its mind later on and commit for sentence. There was no obscurity in the section; section 19 and section 38 related to different stages in the proceedings, and *prima facie* there was nothing unreasonable or illogical about permitting a court to form a view at the stage of deciding whether or not there should be summary trial and to form what might well be essentially a different view at the stage of deciding whether or not to commit for sentence. There was no reason to introduce into section 38 words which were not there, restricting the powers of the magistrates' court to commit for sentence to cases where information showing the offence to be more serious than it was originally thought to be was received after the decision to try the case summarily had been made. Section 38 in its new form must be given its ordinary and natural meaning; the discretion which was reflected in the current editions of *Archbold* and *Blackstone*. Magistrates should continue to think carefully when deciding to accept jurisdiction, because normally an accused should be able to conclude that once jurisdiction had been accepted, he would not on the same facts be committed to the Crown Court for sentence. The application would be refused.

**Cases cited:** *R. v. Doncaster Magistrates' Court, ex p. Goulding* (1992) 13 Cr.App.R.(S.) 428.

**References:** committal for sentence, *Current Sentencing Practice* L12-2; *Archbold* 5-96.

**Commentary:** [1994] Crim.L.R. 471.

*A. Peebles* for the applicant; *D. Richards* for the Crown Prosecution Service.

**KENNEDY L.J.:** This is an application for judicial review in which Mr Peebles for the applicant seeks to quash a decision of Dover Magistrates' Court of March 26, 1993, when that court decided to commit this applicant to the Crown Court for sentence pursuant to section 38 of the Magistrates' Courts Act 1980 as substituted by section 25 of the Criminal Justice Act 1991.

The material facts are that the applicant ran a jewellery business. In the course of that business he misrepresented to his insurers that he had lost jewellery in his possession which belonged to a man named Fawcett-Jones. The two men were subsequently charged with an attempt to obtain £16,309.41 by deception.

The matter came before the magistrates' court on February 26, 1993, when the first question to be considered was the mode of trial. At that stage it appears from the affidavits before us that the facts were fully opened, including the aggravating features and the fact, for example, that this applicant had initially not been co-operative in disclosing his part in the offence. Solicitors appearing for the prosecution and for the defence submitted to the magistrates that the case was suitable for summary trial and the court accepted jurisdiction. This applicant and his co-accused then pleaded guilty, but they disputed the amount of money which it was said that they had attempted to obtain. The case was then adjourned so that there could be a hearing in relation to that issue and also so that pre-sentence reports could be obtained.

On March 26, 1993, the case came back before a differently constituted bench of magistrates. On that occasion there was a hearing in relation to the question of how much money they had sought to obtain and the magistrates decided that the sum

approximately six to seven weeks. Furthermore, it is submitted to the Court that despite the depth of the emotional and physical involvement between the appellant and the boy, they both believed it was wrong to continue with this sexual activity and thereafter on a date, as we have indicated, towards the end of February 1993, although they remained good friends they resisted further sexual activity.

We are reminded that the ending of this sexual activity was some five months or thereabouts before the appellant's arrest; this should be, it was submitted, a strong mitigating feature in the case and distinguishes this particular case from, if one can so describe it, the prototype sexual abuse case.

The appellant offered her resignation as soon as these matters came about. We are told, and it must be the case, that she is now blacklisted in the teaching profession and this, as has been urged upon us, must be severe punishment in itself.

The appellant was frank and honest when confronted with the matters and pleaded guilty at the first opportunity.

Miss Weekes accepts that the trend in these cases has been for an immediate custodial sentence to be imposed. However, she says the Court must, indeed as must be the case, consider each individual on the basis of the mitigating facts available. This is a case, Miss Weekes submits, where there are such exceptional circumstances that an immediate custodial sentence is not necessary. She submits that the offence of a female offending in this way is not only not so prevalent as with male adults and younger female victims but also there would be less public outcry towards females who make advances to a 13-year-old boy who seeks sexual involvement in a way that is not so common as with a 13-year-old girl.

Overall Miss Weekes submits that this sentence has had a devastating effect on the appellant and that if a prison sentence is appropriate then it should be substantially shorter than the 12 months imposed.

We have been reminded of authority to the effect that to someone of the appellant's background any sentence is a disaster and inevitably has a devastating effect on her later life. In particular Miss Weekes submits that any detrimental psychological effect to the boy was not demonstrated by the evidence; she submits that the judge was not justified in saying that he did not know what effect it had had on the boy.

We bear in mind all that has been said, indeed all the compliments made to the appellant as an able teacher. We think that the judge was justified in saying that no one can know the full effect on the boy as a result of what happened. Indeed in the letters that were written there was reference to him at times feeling upset, confused and annoyed; of course we bear in mind that there was no evidence specifically put before the court that the boy had suffered some actual psychological upset as at the time of the hearing. It seems to us the judge went no further than was appropriate in the circumstances.

We must bear in mind that the appellant was given firm advice by the headmaster, head of department, and indeed by the mother as to her desisting from involving herself with the boy. It is a fact that the appellant totally disregarded that advice whilst at the same time she was giving reassurances to the effect that nothing improper was happening.

Of course it can be said on the boy's behalf, indeed on her behalf, that together they took the decision to end the sexual relationship. The fact is that this relationship continued for six or seven weeks with regular sexual relations between the boy and the appellant concerned after those assurances had been given. In our view that did justify the judge saying that in this case there was deceit on quite a considerable scale. The trust that parents impose on school teachers is immense and an essential part of their commitment. In our view the appellant broke the trust in a most serious way.

The appellant not only let down the school, but more importantly the boy's mother, who no doubt felt deeply distressed, particularly after the particular assurances given by the appellant.

We have no hesitation in saying that this was an offence that was so serious that it must carry a term of imprisonment. Despite all that has been said on the appellant's behalf for the reasons we have given we do not consider that the sentence imposed by the trial judge was manifestly excessive. Accordingly in the circumstances this appeal against sentence is dismissed.

CASE 23

**ATTORNEY-GENERAL'S REFERENCE NO. 16 OF 1993  
(SHANE LEE GODDARD)**

COURT OF APPEAL (The Lord Chief Justice, Mr Justice Auld and  
Mr Justice Mitchell): February 17, 1994

*Rape—rape by burglar—length of sentence.*

Six years' imprisonment for rape and false imprisonment by a burglar increased to nine years.

The offender pleaded guilty to rape and false imprisonment. In the early hours of the morning he entered a house occupied by two sisters, one of whom was six months pregnant. The offender threatened to kill both of them, and then raped the younger of the two sisters and indecently assaulted her by pushing his penis into her mouth and his fingers into her vagina. The offender then left the house and surrendered to the police the next day. He claimed that he had broken into the house with the intention only of stealing. Sentenced to six years' imprisonment for rape and 18 months' imprisonment concurrently for false imprisonment. The Attorney-General asked the Court to review the sentence on the ground that it was unduly lenient.

**Held:** (considering *Billam* (1986) 8 Cr.App.R.(S.) 48) for the Attorney-General it was submitted that the offence was aggravated by the fact that the offender had broken into the victim's home at night, that the victim had no previous experience of sexual intercourse, and that the offence had caused her long-lasting psychological damage. The offence also involved the use of threats and sexual indignities apart from the rape. On behalf of the offender it was argued that he had given himself up to the police and given a timely indication that the victims would not have to give evidence. In the view of the Court, the aggravating features would greatly increase the sentence beyond the starting point of eight years suggested in *Billam* (1986) 8 Cr.App.R.(S.) 48 for rape by a burglar, before considering any deductions. The sentence would be well into double figures. The sentence of six years was unduly lenient; making due allowance for the offender's unusual frankness and the element of double jeopardy involved in a reference by the Attorney-General, the least sentence which the Court could substitute was one of nine years, with three years' concurrent for false imprisonment.

**Case cited:** *Billam* (1986) 8 Cr.App.R.(S.) 48.

**References:** rape, *Current Sentencing Practice* B4-1.3B.

*O. Pownall* for the Attorney-General; *D. Bate* for the offender.

**LORD TAYLOR C.J.:** This is an application on behalf of Her Majesty's Attorney-General for leave to refer to this Court a sentence which he regards as unduly lenient. The application is made under section 36 of the Criminal Justice Act 1988. We grant leave.

The name of the offender is Shane Lee Goddard. He is 35 years of age. On July 6, 1993, he pleaded guilty to an indictment which contained one count of rape and one count of false imprisonment. He pleaded not guilty to a third count alleging attempted buggery. So far as that is concerned, a verdict of not guilty was entered. The learned judge sentenced him to six years' imprisonment for the rape and 18 months concurrently for the false imprisonment, so that the total sentence was one of six years' imprisonment.

The case arose out of an appalling incident which occurred on March 22, 1993. At the time the victim was a virgin aged 17. She was staying with her 19-year-old sister at the sister's ground-floor flat. The sister was six months pregnant. She slept in the bedroom whilst the victim slept in a sleeping-bag on the floor in the sitting room. In the early hours of the morning, the victim was awoken by becoming aware of someone in the sitting room. The room was dark. She saw a shadow move. She screamed. At that stage, the offender got on top of her, put his hand over her mouth, and told her not to scream or he would kill her. However, the scream that she had already made attracted her sister who came into the sitting room. The offender told the pregnant sister to lie on the sofa next to where the victim was lying. He threatened more than once to kill the two women if they did not do as he told them. The victim said about the sister, "Leave her, don't hurt her, she's pregnant." The offender ripped the sleeping-bag from around the victim, who was lying face downwards. He removed her knickers. The pregnant sister pleaded with the offender to take the stereo which was in the room, and offered him such money as she had. But ignoring those pleas, he took out his penis and started to push it against the victim's buttocks. The acceptance of the plea of not guilty to attempted buggery recognised that, in the prosecution's view, he was seeking to rape the victim from behind, not bugger her. The victim asked him to stop and told him that she was a virgin. He said, "Shut up, your sister will be more than willing."

Having failed to penetrate the victim from behind, he turned her over on to her back, removed her remaining clothing from the top of her body. She was then naked. She again pleaded with him to stop. But he said that if she did not do as he said, he would do it to her sister. Several times he said that it was either to be one girl or the other. He forced his fingers into the victim's vagina, causing her pain, and continued to do so, despite her telling him that he was hurting her. In a jabbing movement, he tried to force his penis fully into her vagina. The victim was terrified, but she was trying to calm her sister who was becoming hysterical. The offender managed only partial penetration. It is not absolutely clear whether or not he ejaculated, although some of the evidence from the forensic scientist suggests that seminal fluid was present. The offender kissed the victim, forcing his tongue into her mouth. She sought to pull her head away. He then proceeded to suck her nipple. He again forced his fingers into her vagina and she felt herself being scratched internally by his fingernails. The offender told the victim to suck his penis. She drew away to try and avoid that. He raised his hand as if to strike her. He said, "Suck my dick, and I won't rape you." That was so repugnant to her that she even offered to use her hand instead. But he again threatened to shift his attack to her sister. He pushed his penis in and out of her mouth so far as to cause the victim to choke and retch. He then resumed pushing his fingers into her vagina. By this stage, both sisters were in the greatest distress. The offender removed a pillow case and stood over the victim, holding the pillow case tightly in his hands and staring at her in a way which led her to

believe that she was about to be killed. However, he then dropped the pillow case and left through the window which he had removed in order to gain entry. The police were called. Later, the victim was examined by a doctor, who found an area of grazing and redness inside the private parts consistent with forced penile penetration and penetration with a finger. The hymen was intact, and there were found traces of what appeared to be congealed semen.

At about 12 noon on that day, the offender gave himself up to a police officer. He admitted that he had broken into the flat and assaulted the victim. He accepted most of the account that she gave, although he claimed that he had not penetrated her or ejaculated. Later, he accepted that some penetration and ejaculation must have taken place, although he claimed not to remember it.

His account of the matter was that, following the break-up of his marriage, he had been depressed and had attempted to kill himself. He had broken into the flat intending to steal items so that he could leave some money to his daughter when he committed suicide. He had not expected to find anyone in the sitting room, and had not broken in with the intention of committing rape.

Before the court, there were a psychiatric report and a social inquiry report, which indicated that the offender had had an unfortunate and deprived upbringing, that he had spent a good deal of his childhood in care, and that in recent times before the attack he had been threatening to commit suicide.

On behalf of the Attorney-General, it is submitted that there are a number of aggravating features to this case. First of all, the fact that the rape was committed after the offender had broken into the victim's home at night. That is accepted by Mr Bate, who has appeared on behalf of the offender, as an aggravating feature. Indeed, it is a grossly aggravating feature when young women cannot feel themselves safe within their own residences from having a break-in and being raped by the intruder. Secondly, it is submitted that this was a young girl of 17 who had not had sexual intercourse before, and accordingly the experience was the more stressful and distressing to her on that account. The rape caused her pain, and clearly it caused her considerable psychological damage. The victim made a second statement in July 1993. From that, it is clear that the effect of the rape has been long-lasting so far as she was concerned. She was sleeping badly, and had a fear of being left alone. She was a student at college; she was unsuccessful in her work and had had poor results in her examinations, so much so that she had decided to give up her college course. Those are factors, it is submitted, which are grave aggravation, since they are a measure of the impact of the offence upon the victim.

Reliance is also placed by the Attorney-General on the threats which were made: the threat to kill each of the sisters; the threat to switch the sexual attack from the one to the other, forcing one to submit in the fear that the other would otherwise become the victim; and the incident with the pillow case. Further, if the offender is right in what he said to the police afterwards, there was also a threat to use a knife; although he did not have a knife, he did have a screwdriver. The aggravation lies in the threat and the operation of the threat upon the mind of the victim to make her submit, whether or not there is actually an intention to use a weapon, or even whether there is a weapon there at all.

The victim was forced to undergo sexual indignities aside from the rape. The thrusting of the offender's penis into the victim's mouth was something wholly repulsive to her, and caused her to retch. Indeed, some victims may find that even more offensive than the act of rape itself. It was particularly stressful to this victim because she had apparently been the victim of sexual abuse of that kind from her grandfather when she had been a child.

There is the most unusual feature in the present case of the presence of the two

is altogether too low for the circumstances of this case. We consider the aggravating features here are in the aggregate of considerable weight and greatly increase the sentence from the eight-year starting point. In our judgment, before considering any deductions, the sentence here would be well into double figures. We say that not only because of the aggravating features in relation to the rape, but because of the wholly unusual circumstance here of the presence of the pregnant sister and the threats to her. Mr Bate's calculation really gave little, if any, significance to that aspect of the case, which we consider was a grave one.

We bear in mind the need to make due allowance for the unusual frankness in the present case, and the other personal circumstances. We also bear in mind on an Attorney-General's reference, there must always be consideration given to the element of double jeopardy, the anxiety of the offender in knowing that his sentence is going to be reviewed and probably reviewed upwards.

Having taken all those factors into account, we have come to the conclusion that the least sentence here which we could substitute for the unduly lenient sentence, as we find it to be, of six years' imprisonment is one of nine years. Accordingly, we impose a sentence of nine years' imprisonment in respect of the offence of rape, and a concurrent sentence of three years' imprisonment in respect of the false imprisonment charge. To that extent this sentence is varied.

## SHARON KRISTINE B

COURT OF APPEAL (Lord Justice Hirst, Mr Justice Tudor Evans and Mr Justice Laws): February 18, 1994

*Indecent assault on male—indecent assault in form of sexual intercourse by mature woman with boy aged 15—whether custodial sentence appropriate—length of sentence.*

Sentences totalling 12 months' imprisonment upheld on a woman aged 27 for indecent assault on a boy aged 15 and gross indecency with younger children.

The appellant pleaded guilty to one count of indecent assault on a male person and three counts of gross indecency. The appellant had sexual intercourse with the 15-year-old son of her neighbour on three or four occasions, in the presence of her own nine-year-old son. She encouraged the 15-year-old boy to commit an act of indecency with her own son, and later permitted both of her sons to touch her indecently. Sentenced to a total of 12 months' imprisonment.

**Held:** this was a shocking case which involved a gross breach of trust and corruption by a mother of her own children. In the ordinary way, such conduct inevitably attracted substantial custodial sentences to mark the public sense of outrage and abhorrence of such behaviour. The sentence made adequate allowance for the mitigation.

**References:** indecent assault on male, *Current Sentencing Practice* B4-8.3A.

*Miss J. Forsyth* for the appellant.

**TUDOR EVANS J.:** On October 18, 1993 in the Crown Court at Liverpool, the appellant pleaded guilty to an indecent assault upon a male person and to three

sisters. The Attorney-General points out that the assault on the victim of the rape was carried out in the enforced presence of her pregnant sister. That would be an added source of anguish to the victim and to the sister. It is right to point out that the charge of false imprisonment related not solely to the victim of the rape, but also to the sister, so that it could be said that consecutive sentences might have been justified in that one of the victims in the offence of false imprisonment was a separate victim from that concerned in the offence of rape.

In a skilful manner Mr Bate has, one by one, sought to reduce the significance of those aggravating features which were relied upon. He says that 17 is not very young, and in the guideline case of *Billiam* (1986) 8 Cr.App.R.(S.) 48, where Lord Lane C.J. gave examples of aggravating features which would add to the sentence, he did refer to a very young victim. Youth is a matter of degree and, in our judgment, a rape of a virgin of 17 can be regarded as having an aggravating feature by that token as against a rape—though it would still be serious—of a woman of greater maturity. Mr Bate submits that the indignity of oral sex is something which is not infrequent in this class of case. That does not prevent it from being an aggravating feature. He submits that the threats to kill were not accompanied, as they are in some cases, by the actual production of a weapon. However, there was here the added pressure that the offender was able to play off the two sisters, the one against the other, by threatening to do to the other what he wanted to do to the immediate victim, unless the immediate victim submitted. Further, there were the threats to kill and the indication of the pillow case that dire acts may be about to be committed.

There were here, Mr Bate says, no actual physical injuries: no force was used over and above what was necessary to commit the rape. Maybe so, but in the present case the psychological damage certainly to the victim of the rape was clearly considerable. On behalf of the offender, it is pointed out fairly by counsel for the Attorney-General that there were mitigating circumstances. The most significant, and clearly the one which played the greatest part in the mind of the sentencing judge, was that the offender gave himself up to the police and made full admissions. It is conceded that had he not done so there is real doubt as to whether he would have been apprehended. Accordingly, his giving himself up on the very day when the offence had been committed and his making an almost complete admission of all the matters alleged was something which clearly had to be borne in mind in his favour. It showed not only remorse, but also gave timely indications to the victims that they would not have to give evidence and go through this ordeal again.

The offender is a man of previous good character. The learned trial judge took into account the psychiatric report, which indicated that probably as a result of his appalling upbringing, the offender suffered from a personality disorder and was thought to be suicidal at the time of the offence and still thought to be suicidal at the time of the hearing.

In the balancing of those factors, it is submitted on behalf of the Attorney-General that the learned judge gave too great an allowance for the personality circumstances, in particular for the appellant's frankness and plea of guilty; alternatively, that he must have taken an insufficiently high starting figure for the term of years to be imposed.

In a very carefully calculated submission, Mr Bate submits that the proper sentence here, before discounting for mitigating circumstances, would have been one of 10 years or perhaps at the most 12. He accepts that where one has a rape involving a breaking into the victim's house, the starting point, according to the guidelines in *Billiam*, is eight years. He sought to minimise the aggravating features which would increase that sentence, and by that route to arrive at a maximum sentence on a plea of not guilty of something of the order of between 10 and 12 years. In our judgment, that

apparent. During the trial the learned judge had the opportunity to see the lady in the witness box and form his own assessment of the psychological damage which had been done. He said this when passing sentence:

"Nearly a year later her distress at what had happened was obvious during her evidence in the witness box, and I regard that as an aggravated feature of this case"

as he did the use of the knife, the period of time over which this took place, during which time she was virtually a prisoner in her own bedroom and, although he did not expressly say so, he would have been entitled to and no doubt did take into account the repetition of the offence and the other forms of sexual abuse to which this Court has already made reference.

Obviously from that short recital of the facts, this was bound to be regarded as a very serious matter. Mr Haines, who appears on behalf of the appellant, has submitted in a very moderate and persuasive way, if we may be permitted to say so, that notwithstanding the seriousness of this offence, eight years was out of line with sentences passed in similar cases by other courts and upheld by this Court. He has referred us to a number of authorities, including that of W. (1992) 12 Cr.App.R.(S.) 256, in which he says that the facts are not wholly dissimilar to those in the instant case, in that in that case the appellant was not a stranger to the victim. In fact he was her husband, and there the Lord Chief Justice in giving the judgment of the Court said this:

"In our judgment, it should not be thought that a different and lower scale of sentencing attaches automatically to rape by a husband as against that set out in *Billam*. All will depend on the circumstances of the individual case. There the parties were cohabiting normally at the time and the husband insisted on intercourse against his wife's will, but without violence or threats, the consideration identified in *Berry* and approved in *Thornion* in the passage already cited, will no doubt be an important factor in reducing the level of sentencing. Where, however, the conduct is gross and does involve threats or violence, the facts of the marriage, of long cohabitation and that the defendant is no stranger will be of little significance. Clearly between those two extremes there will be many intermediate degrees of gravity which judges will have to consider case by case."

In that case a sentence of five years' imprisonment was upheld, and in that case it is right to say that a knife had been used and there had been no plea of guilty. Other authorities to like effect have been cited. But the main burden of Mr Haines' submission is that, notwithstanding the aggravating features present in this case, the sentence in fact imposed failed to take into account that which he asserts is a matter of positive mitigation, namely, that these parties were not strangers to one another.

They were not strangers. That is perfectly true. But they had by the time of the offence ceased to cohabit, ceased to be on intimate terms, and to that extent a distinction may be drawn between the instant case and the other cases cited to us.

There is no doubt that a sentence of eight years' imprisonment in the circumstances of this case was at the extreme upper end of the bracket, a very severe sentence indeed, but this Court is not concerned to interfere with a sentence passed by a trial judge, who has had the advantage of hearing the evidence in the case and of seeing the victim herself give evidence, unless it is demonstrated against the whole background that the sentence was manifestly excessive. This Court has come to the conclusion that this sentence was not manifestly excessive, and consequently declines to interfere, so that the appeal must be dismissed.

before him, and who would have had a far better opportunity than we have to judge the true level of each man's involvement from hearing the witnesses themselves and in this particular case, this appellant, who gave evidence. Those impressions, and that judgment, are far more soundly based than anything that we in this Court can glean from the cold print of a transcript.

We repeat, this was premier league crime, which justified premier league punishment. This is not the first occasion upon which Mr Sutcliffe has been engaged in an offence of this kind. We have come to the conclusion that this sentence was entirely correct both in principle and in amount. This appeal must be dismissed.

CASE 24

**BARRY COX**

COURT OF APPEAL (Lord Justice Rose, Mr Justice Mantell and Mr Justice Bell): April 29, 1994

*Rape—rape of former girlfriend under threat of knife—length of sentence.*

Eight years' imprisonment upheld for the rape by a man of his former girlfriend under the threat of a knife.

The appellant was convicted of rape. The appellant refused to leave his former girlfriend's flat when asked, and held a knife against her neck before raping her twice and committing various other sexual acts. The incident lasted over eight hours. Sentenced to eight years' imprisonment.

**Held:** (considering *W* (1992) 12 Cr.App.R.(S.) 256) by the time the offence took place, the appellant and the victim had ceased to cohabit and to be on intimate terms. The sentence of eight years was at the extreme upper end of the bracket, but it could not be considered manifestly excessive and the Court would not interfere.

**Case cited:** *W* (1992) 12 Cr.App.R.(S.) 256.

**References:** rape, *Current Sentencing Practice* B4-1.3G.

*J. Haines* for the appellant.

**MANTELL J.:** The appellant, Barry Cox, was sentenced to a term of eight years' imprisonment at Hove Crown Court by his Honour Judge Coltart on September 30, 1993 for an offence of rape. He now appeals against that sentence with leave of the single judge.

His conviction came about following a trial lasting three days. The victim was D. She had at one time been the girlfriend of this appellant. On October 31, 1992 the appellant had been in the house where she had her flat at a party, and with a fellow guest had come to her flat for a reefer. After she had asked him and the other man to go, he had refused and followed her, first of all, into one of the children's bedroom where she was proposing to sleep, and then, when she left there, into her own room. Then, having held a knife against her neck, he raped her, forced her to have oral sex, put his finger into her anus and tried to bugger her, and then towards the morning—because all this took place over a period of about eight hours—raped her again. The defence at the trial had been one of consent, rejected by the jury, as is

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contents, his home, which policy included items of jewellery to the value of £13,000. According to Mr Bedding, Mr Sowerby provided him with an itemised valuation certificate in relation to the jewellery for the information of the insurance company. Mr Bedding had never, in fact, owned these items of jewellery.

At the beginning of 1993, he and Mr Sowerby arranged for a fake burglary to take place at Mr Bedding's home. On the night of January 15, 1993, Mr Jones and Mr Corsie carried out the fake burglary. The following morning, Mr Bedding reported the matter to the police and subsequently made an insurance claim to the value of £16,500.

He was arrested on January 20, 1993. In interview, he admitted the offence. He said that he was unaware of the identity of the fake burglars. He had provided Mr Sowerby with a key and he, in turn, had passed it on to Mr Jones and Mr Corsie.

Mr Jones and Mr Corsie were arrested on January 21, 1993. In interview, they admitted the offence and explained that they had been approached by Mr Sowerby, who had asked them to carry out the fake burglary.

In sentencing the appellants, Judge Watling said to Mr Jones and Mr Corsie that they had lent themselves to the plan and were the people who had committed the so-called burglary. They had played an essential, though lesser part, in the conspiracy. The judge took the view that the offence was so serious that only a custodial sentence could be justified. In the case of Mr Bedding, the judge accepted that he had not been the instigator. However, he formed the conclusion that Mr Bedding had been definitely involved in the planning and had stood to gain very considerably. He took the view, so far as Mr Bedding and Mr Sowerby were concerned, that the pair of them had planned the operation, and he saw no grounds for differentiating between the two.

As Judge Watling pointed out, as was the case, and as has often been emphasised in this Court, frauds on insurance companies are serious matters. They are difficult to detect, and, as the judge said, the consequences of a fraud such as this are that premiums paid by policy holders are increased to pay for those frauds. It is conceded on the part of all three appellants that these offences were so serious that only a custodial sentence could be justified. The question is how long that sentence should be.

Of the three appellants, none had convictions for any matters that were related to the offence in question. Mr Bedding himself had no previous convictions at all. Pre-sentence reports were before the court, all of which stressed that the appellants appreciated the seriousness of what they had done, and were concerned about the prospects of going to prison.

We have been referred to various authorities, recent and less recent, in respect of insurance frauds committed by offenders such as the persons before this Court. It has been urged on behalf of the appellants that the sentences imposed upon them, in the light of those authorities, were too long. Without going into those authorities, we just point out that the sum claimed was substantial—£13,000—and that the matter had been carefully planned. Despite that, we nonetheless feel able somewhat to reduce these sentences in the light of the offences having been committed by men of previous good character. We are prepared to accept that the first sentence of imprisonment for men of this sort is going to be a serious matter. However, this was a substantial offence and it must be marked by a period of imprisonment. In those circumstances, in our view, the correct sentences to be imposed in this appeal are that Mr Bedding should serve 12 months' imprisonment, and Mr Jones and Mr Corsie should serve six months' imprisonment. To that extent this appeal succeeds.

# ATTORNEY GENERAL'S REFERENCE NO. 28 OF 1993 (SEAN CAWTHRAY)

## CASE 25

COURT OF APPEAL (The Lord Chief Justice, Mr Justice Hutchison  
and Mr Justice Buxton): May 9, 1994

### Rape—adequacy of sentence.

Six-and-a-half years' imprisonment for rape by a man with a previous conviction for rape increased to eight years.

The offender pleaded guilty to rape. The offender obtained access to a house which was occupied by a number of students, using a key which had been lent to him by one of them. After the victim had gone to bed, the offender (who had earlier left the house and returned) came into her bedroom and demanded sexual intercourse. He attempted to gag her with a knotted tea towel, pushed her face into a pillow, banged her head against a radiator and punched her. He then overcame her resistance by force and raped her, and later left the house. The offender had been convicted in 1990 of rape and attempted rape, for which he was sentenced to four years' detention in a young offender institution. The present offence was committed six months after his release from that sentence. Sentenced to six and a half years' imprisonment with an order under Criminal Justice Act 1991, s. 44. The Attorney-General asked the Court to review the sentence on the ground that it was unduly lenient.

**Held:** (considering *Billam* (1986) 8 Cr.App.R.(S.) 48) while the offender had gained access to the victim's home without breaking in, the element of breach of trust involved in using a key which had been provided to him substituted for that. The offence involved the use of gratuitous violence, a weapon in the form of an appliance used to gag the victim, careful planning and the offender had previous convictions. On a contested case, the proper sentence would have been in double figures. The sentence was unduly lenient; bearing in mind the element of double jeopardy, the Court would substitute a sentence of eight years, with an order under section 44.

**Case cited:** *Billam* (1986) 8 Cr.App.R.(S.) 48.

**References:** rape, *Current Sentencing Practice* B4-1.

**Commentary:** [1994] Crim.L.R. 768.

*W. Boyce* for the Attorney-General; *M. Swift Q.C.* for the offender.

**LORD TAYLOR C.J.:** This is an application, under section 36 of the Criminal Justice Act 1988, on behalf of Her Majesty's Attorney-General for leave to refer to this Court a sentence which he regards as unduly lenient. We have granted leave. The offender's name is Sean Cawthray. He is now 23 years of age, although he was 22 at the time of the offence.

On October 11, 1993, the offender appeared before the Crown Court at Lincoln, charges on two counts of an indictment. Count one charged him with the attempted rape of P.S. on June 29, 1992, and count two with the rape of R.S. on July 1, 1992. The case had been listed for trial on an earlier occasion, when the offender had pleaded not guilty to both counts. After the jury were sworn, and after R.S. had given evidence on a *voire dire*, on the question of whether the counts should be severed, the jury were discharged. That was after both defence counsel, together with their instructing solicitors, withdrew from the case. Accordingly, it was with new counsel

tried to force the victim's legs apart with his knee, but she locked her ankles in resistance. He ordered her to open her legs, but she refused. He then used his legs to break her grip. He forced her legs apart, but before he could penetrate her, she raked her fingernails across his neck. He ordered her to stop and jerked against her. That caused her strength to fail, her legs to buckle, and he managed to rape her whilst she was sobbing. Afterwards, the victim was unable to estimate how long intercourse continued or whether he ejaculated, but it seems that he probably did not. When he had finished, he sat on the bed, gave the victim a cigarette, and told her to calm down. He said he was going to kill himself when he left the house. He appeared to ramble in his speech, and sought to explain the rape by saying he had attempted to rape P (that was the matter on count one, which was left on the file). He went on to say, knowing that he had raped one of his closest friends, he had to prove himself, to prove he was capable of it. He said, "I am frightened of myself and what I can do, and I don't want to live with myself, knowing I have this physical advantage." He then asked the victim what guarantee he had that she would not go to the police. She said she would not go so late at night, and he said she could do what she wanted in the morning. He dressed, left S.'s front door key, and departed, saying as he went, "S, I'm really sorry. Tell P I'm sorry, will you?"

The victim's physical injuries were a bloodied nose and a bruised face, which was tender and swollen. As the learned judge observed when he passed sentence: "I am told that apart from the damage, she has clearly suffered emotionally and psychologically as anyone who has to go through this dreadful ordeal will have suffered. She has not suffered any untoward or unusual psychological damage." Nevertheless, she became socially wary, lost her self-confidence, and required counselling.

On September 9, 1992, the offender was arrested in Newquay. He was conveyed to a police station at Leicester. He was there interviewed in the presence of his solicitor on a number of occasions. Initially he denied the offence, denied ever having had sexual intercourse with the victim, and denied ever having entered her bedroom. On the second day of interviews, he admitted that everything in the victim's witness statement, which had been read to him, was true. He said he could not remember whether or not he had ejaculated inside her. He did not know why he had done it. Afterwards, he had felt sorry and scared, both for the victim and for himself.

When asked for a further explanation, he said, "... I don't think about what's happening, consequences, people." He said he had drunk a bottle of cider and had smoked some cannabis. In a further interview, the offender resiled in some respects from his earlier admission that everything in the victim's witness statement was true. However, he added that before the rape he had already decided what was going to happen. He was going to kill himself because he could not face the prospect of prison again as a result of what he had done to P. It was his intention to "get a last shag off S."

It is submitted, on behalf of the Attorney-General, that there are a number of aggravating features. First, this was a rape committed by an offender who had gained access to the victim's residence and her bedroom by deceit and in breach of trust. Secondly, the violence used was over and above the force necessary to commit the rape: he had tried to gag the victim; that showed that even before he approached her, he had not even contemplated intercourse by consent, but expected to have to silence his victim; he had put his hand over her mouth; he had tried to suffocate her (albeit temporarily) in a pillow; he had banged her head on a radiator, and had punched her several times on the body, arms and back; the gag had been used to frighten or silence the victim. The rape had been carefully planned. He knew the victim was alone in the house; he had fabricated the story to persuade her to allow him entry, and to stay overnight; and he had manufactured the gag before he entered her room.

October 11, 1993. The offender then pleaded guilty to count two. Count one was ordered to lie on the file on the usual terms. On count two, the offender was sentenced to six-and-a-half years' imprisonment. An order was made under section 44 of the Criminal Justice Act 1991 that he was to be subjected to a full-term licence on the grounds: (a) to protect the public from him; (b) to prevent him committing further offences; and (c) to aid his rehabilitation.

On the night of June 30 to July 1, 1992, the victim, a 20-year-old student, was alone at her student lodgings. That was a five-bedroomed house in Leicester. There were a number of other students who lodged there, but they had all left for the summer vacation. One of those was the offender's girlfriend, S. Some time previously, she had provided him with a key to the house for the period whilst she was away.

Meanwhile, the offender was staying nearby at another student lodging house with the permission of one of the residents there, P.S. She was the girlfriend of a close male friend of the offender. The victim of the rape was friendly with both P.S. and S., and through contact with them, knew the offender.

Late on the evening of June 30, the offender knocked on the front door of the victim's house. She did not open the door, since she did not want any visitors. However, using the key he had been given, he entered. He asked the victim if he could watch a video on the television. He said that everyone at P.S.'s was boring. The victim agreed. Whilst the video was playing, the offender fell asleep on the sofa. Meanwhile, the victim had a bath. When she finished at about 2.30 a.m., she woke the offender and told him it was time for him to go home. He appeared to accept that, and left.

The victim went to bed, wearing only a pair of briefs. About a quarter-of-an-hour later, the offender entered her bedroom. She had not heard him re-enter the house. Clearly, he had used his key. He told her that P.S. had bolted the door of his house, and that he was unable to obtain entry. That was a lie. He asked for permission to stay. Trusting him, the victim agreed, saying that he could stay in S.'s room upstairs.

About ten minutes later, the offender came down. As the victim was about to go to sleep, he entered her bedroom, wearing only a pair of jeans. He sat astride her on the bed and said, "You and me are going to shag." He had already prepared two tea towels, which he had taken from the kitchen and knotted together. Several times he tried to gag the victim, whilst she struggled to fight him off. Eventually, she managed to pull the gag away and throw it on the floor.

In an effort to persuade him to stop, she said, "This is rape, Sean." He said, "Yes, I know." She said, "You can't do this, you know me. What about S.?" (referring to his girlfriend). Despite those remarks, the offender continued to attack the victim. As she struggled, cried and screamed, he forced her head into a pillow so that she had difficulty breathing. She begged and pleaded with him to stop, but he told her to shut up and stop screaming. After again pushing her face into the pillow, causing breathing difficulties, he turned her face towards him, covered her mouth with his hand, and said, "You can do this the hard or easy way. I can get very nasty." The victim believed him, and was in real fear. She asked him if he was going to hurt her. He said, "I will if I have to." She asked, "Are you going to kill me?" He replied, "No, I don't think I'll go that far."

The victim continued to resist and to scream. The offender grabbed her by the hair, and struck her head against a radiator on the wall beside her bed. She was momentarily stunned by that blow, stopped screaming, but experienced pain. The offender then punched her on the arms, in the back, and on the side of her body. He pulled off her briefs, put his hand over her mouth, and kept saying, "Shut up! Shut up! I'll get nasty!" He then stood up and took off his own jeans. He was now naked. He



One of the most serious aspects of the aggravation was the fact that the offender had previous convictions for similar offences. On February 5, 1990, he had appeared at Leeds Crown Court charged with rape and attempted rape. He pleaded guilty to both of those offences and was sentenced to a concurrent term of four years' detention in a young offender institution. He had only been released from that sentence on January 3, 1992, and his parole licence did not expire until June 22, 1992, only a week before the instant offence.

It is relevant to refer to the circumstances of the two offences for which he had been sentenced to a period of four years' detention. On November 11, 1989, he had visited a girl aged 15, with whom he had previously lived as foster brother and sister. After the break-up of the family, he had visited the girl from time to time. On the day in question, he had consumed alcohol. He forced himself upon the 15-year-old girl. Despite being rebuffed, he struck her several times on the face and ripped open her blouse. She managed to escape.

That offence, which was the attempt, was committed whilst he was on bail for the offence of rape, which was committed in the following circumstances. On March 23, 1989, he had gone to a dance in Kippax. There, he had seen another girl, aged 15, a schoolgirl. They left together and began walking home. As they passed through a cemetery, he kissed the girl. He then became more aggressive and threatened to strike her. He forcibly removed her trousers and pants, and then raped her three times. She managed to flee from the scene and returned to the club. In each of those cases, there had been threats of a brutal kind.

The only matters which could be put forward by way of mitigation—and they have been put forward persuasively by Mr Swift on the offender's behalf—were: first, his age, and secondly, his plea of guilty. In cases of rape, a plea of guilty is generally regarded as being of particular significance by way of mitigation. That is because usually a plea of guilty will avoid the victim of the rape having to undergo a second ordeal of attending court, expecting and having to give evidence. In the present case, when the matter was first listed for trial, there were legal submissions as to the severance of the two counts on the indictment. The victim was required to give evidence on the *voire dire*. She did not have to give evidence of the circumstances of the rape, but nevertheless she had the ordeal of knowing she was attending court to give evidence, and of actually having to stand up in court and give it.

Further, at the conclusion of the submissions, after defending counsel had withdrawn from the case, the jury were discharged, and the case was re-listed for trial. The victim, therefore, had the further ordeal, over some period, of expecting to have to give evidence when the matter finally came for trial. It was only at the door of the court, at a time when the victim was present, waiting to give evidence, that the plea of guilty was made. In our view, there must be some discount for the plea of guilty, but, in the circumstances just described, that discount cannot be as great as it would have been in a case where the plea of guilty was made at the first opportunity.

In all the circumstances, it is submitted on behalf of the Attorney-General, that the sentence of six-and-a-half years' imprisonment, which is a substantial sentence, was, against the background already described, not merely lenient, but unduly lenient. We have been referred to a number of authorities. It is necessary to refer only to *Billiam* (1986) 8 Cr.App.R.(S.) 48, the leading case in which guidance was given by Lord Lane C.J. as to the level of sentencing. In the course of his judgment, at p. 50, the learned Lord Chief Justice indicated the starting point which ought to be considered as appropriate, "... where a rape is committed by a man who has broken into, or otherwise gained access to, a place where the victim is living", should be eight years.

Mr Swift has sought to argue that that figure of eight years is not to be regarded as a minimum, nor is it to be regarded as applicable without variation in every case. He

accepts that in the present case there was an element of deceit in the way in which the offender entered the victim's house, but he submits that at least the offender was known to the victim, and that this was not as grave a case as those which were in the contemplation of the Lord Chief Justice in the passage cited. We cannot agree. To the extent that there was absent any element of fear from a total stranger having broken in, it was substituted by the breach of trust involved in the offender wheeling his way into the victim's house and using a key provided to him for an entirely different purpose.

In *Billiam*, Lord Lane went on to indicate:

"The crime should in any event be treated as aggravated by any of the following factors: (1) violence is used over and above the force necessary to commit the rape; (2) a weapon is used to frighten or wound the victim (the gag was hardly a weapon, but it was an appliance used to frighten the victim); (4) the rape has been carefully planned; (5) the defendant has previous convictions for rape or other serious offences of a violent or sexual kind."

Each of those aggravating features, in the judgment of this Court, was present in this case.

We have come to the conclusion that, for a contested case, the appropriate sentence here would have been substantially into double figures, even giving allowance for the plea of guilty, for the age of the offender, for the fact that he was not a total stranger to the victim, and for the element of double jeopardy, which would be involved in any case referred by the Attorney-General where an increase in sentence was to be feared by the offender. We take the view that the sentence, which was imposed at first instance here, was not merely lenient, but was unduly lenient.

Bearing all those matters in mind, we consider that the least sentence which can be imposed here is one of eight years' imprisonment. In passing that sentence, we have particular regard to the previous convictions, which were recent, and which, together with the circumstances of this case and the remarks made by the offender, suggest that he is a dangerous person so far as young women are concerned. Accordingly, we substitute the sentence of eight years' imprisonment for that of six-and-a-half years. We shall apply the full-term licence.

**GARY JONES**

**COURT OF APPEAL (Lord Justice Beldam, Mr Justice Ognall and Mr Justice Harrison): May 10, 1994**

*Causing an explosion likely to endanger life—length of sentence.*

Twelve years' imprisonment for causing an explosion likely to endanger life reduced to eight years.

The appellant pleaded guilty to causing an explosion likely to endanger life and various other offences. He placed an explosive device under a van owned by a man with whom he had a dispute over a sum of money. The device exploded when the owner of the van drove away, causing damage to the van. The owner received minor injuries to the leg. There was evidence that the device could have caused injury to anyone in the immediate vicinity. Sentenced to 12 years' imprisonment for causing an explosion, with concurrent sentences for the other offences.

**Held:** this was a deliberate and carefully planned offence, using knowledge which

diagnosis I have no doubt in my mind that a mixture of drinks and drugs caused the state of mind in which he was during the indexed event taking place and he did not fully realise the implications of what he was doing or knowing that what he was doing was wrong."

is suggested in the context of those reports and the history that this was not a case of life sentence. We would disagree. It seems to us that this was classically a case for a sentence. The guidelines are set down in the case of *Hodgson* (1968) 52 Cr.App.R. 113, and the passage in the judgment of McKenna J. at 114. If one follows the three conditions that he there outlined as being conditions which, when they are satisfied, a sentence of life imprisonment is justified, one sees that this case fits them precisely.

he first is that the offence should be grave enough to require a long sentence. It can be, in our judgment, no doubt about that. Secondly, that from the nature of the offence and from the appellant's history it should be clear that the person is of a dangerous character and likely to commit such offences in the future. Again, in our judgment, that is clearly applicable here. Thirdly, if such offences are committed, the consequences to others should be specially injurious. In our judgment, once again, the condition is clearly fulfilled here.

we were also referred to a number of other authorities. It is not necessary to go through all of them. In the case of *Wilkinson* (1983) 5 Cr.App.R.(S.) 105 dealing with their life imprisonment was appropriate, the Court said:

"With a few exceptions, of which this case is not one, it is reserved broadly speaking for offenders who for one reason or another cannot be dealt with under the provisions of the Mental Health Act yet who are in a mental state which makes them dangerous to the life or limb of members of the public, it is sometimes impossible to say when that danger will subside and therefore an indeterminate sentence is required so that the prisoner's progress may be monitored by those who have him under their supervision in prison and so that he will be kept in custody only so long as public safety may be jeopardised by him being let loose at large."

our judgment once again this case clearly fits that category and a life sentence is entirely appropriate.

moving to the second point, it is however, clear to us that the learned judge did not use the precise terms of the provisions of section 34 of the Criminal Justice Act 1991. It is unnecessary to refer to the details of that section. The footnote in *Winey-Generals Reference No. 6 of 1993* (1993), 15 Cr.App.R.(S.) 375 summarises the position succinctly and clearly. What it says is this:

"The Court was obliged to specify a period for the purposes of the Criminal Justice Act 1991 s. 34. This section required the Court to fix a period taking into account the seriousness of the offence and the provisions of sections 34, 33(2) and 35(1). These provisions empowered the Secretary of State to release a long term prisoner once he had served one-half of the sentence and required him to do so when he had served two-thirds of the sentence."

the Court considered that apart from the element of risk, the proper sentence in Attorney-General's reference case would have been 12 years and thus they fixed a relevant period of two-thirds of 12, and there specified the period as eight years. We have already quoted the words used by the learned judge in this instant case. It is clear that what he did was to fix what he thought would have been the appropriate determinate sentence if he were not passing a discretionary life sentence. It should have been done was, having assessed that period, gone on and specified a period having regard to sections 33(2) and 35(1)—that is to say those sections dealing with the requirement to release after two-thirds—or the power to release after

one-half. If he had done that exercise, he would clearly have fixed the specified term in the region of eight years.

Before disposing of this aspect, it is right to mention two further points. First, the judge did not ask counsel to address him on this aspect. Maybe it would not have gone the way it did if he had done that, and he clearly should have done. The Practice Direction of the Lord Chief Justice lays that down. He clearly should have called upon counsel to address him on this aspect. Counsel now has had that opportunity.

That brings us to the second point before disposing of the matter finally. What is submitted is that 12 years was not, and would not have been, the appropriate determinate sentence. In fixing the appropriate determinate sentence for the purpose of section 34 what the sentencing judge has to do is to take out the element of risk to the public aspect and assess the punishment and deterrent aspect. We think that even if the element of risk to the public is taken out of the assessment, and even if what the Court is concerned with is the punishment and deterrent aspect, taking account of the seriousness of this offence, the length of the sentence reflecting those aspects is entirely appropriate as assessed by the learned judge. That is to say, we think that 12 years would have been an entirely appropriate determinate sentence.

Accordingly, we then have to specify the appropriate period under section 34. That has to be between one-half and two-thirds of the figure assessed for a determinate sentence, and on that basis we arrive at the period of eight years as being the period that should be specified under section 34. To that extent this appeal is allowed.

CASE 26

GEORGE MALCOLM

COURT OF APPEAL (The Lord Chief Justice, Mr Justice Hutchison and Mr Justice Buxton): May 26, 1994

Rape—rape of former partner—length of sentence.

Eight years' imprisonment upheld for the rape at knife point by a man of his former partner.

The appellant was convicted of rape. He had a relationship with the complainant for about three years and they had a son. After the breakdown of the relationship, the appellant visited the complainant to discuss the son, and the complainant agreed to visit the appellant at his home. When she arrived, he made sexual advances to her, and threatened her with a knife when she refused them. The appellant then raped the complainant. Sentenced to eight years' imprisonment.

**Held:** (considering *Billam* (1986) 8 Cr.App.R.(S.) 48) the sentence was amply justified.

**Case cited:** *Billam* (1986) 8 Cr.App.R.(S.) 48.

**References:** rape, *Current Sentencing Practice* B4-1.3G.

*D. Bate Q.C.* for the appellant.

**LORD TAYLOR C.J.:** On December 14, 1993, at Leicester Crown Court, the appellant was convicted of rape by a majority of 10 to two. He was sentenced to eight years' imprisonment. He now appeals against sentence by leave of the single judge.

The appellant and the complainant had formed a casual relationship in 1988. As a result of that, in February 1991 a son was born to the complainant. In about June 1991, she decided to end the relationship. She had had enough of the appellant stealing from her, using hard drugs and being violent towards her. Indeed, at about that time the appellant had stabbed her in the left shoulder with a flick knife. After the break-up, and towards the end of January 1993, the appellant had started to show an interest in his son. He began to visit the complainant. At about 4.15 p.m. on February 22, 1993, the complainant met the appellant and a friend of his. They talked about the little boy. The appellant invited her to his house. She was reluctant, but in the end agreed to go with him, meaning to ask him for some maintenance payments for the boy. When they got to the house, the appellant went into the kitchen. He then went upstairs, saying to the complainant, "Come here, I want to show you something." She followed him upstairs. He led her into a small bedroom. There, she became nervous and sat down on a chair. He sat on the bed and said, "Come and sit next to me." She refused. He repeated his request several times. He then said, "What if I don't want to let you go?" "She got up to try and leave. However, he said he would only let her go if she gave him a kiss. She refused, saying that she loved her new boyfriend. There was then a struggle as she tried to get out of the room. She said she wanted to go to the lavatory to try and get away. He said as far as he was concerned, she could wet herself. He repeatedly pressed her to kiss him, and she pressed him to be allowed to leave. Eventually, the appellant bolted the door and stood in front of it. She tried to get him out of the way. There was a scuffle. He twisted his left hand and her arm, which gave her pain. She screamed. He then pushed her towards the bed, and took something out of a pocket of his jacket, which he put in his trouser pocket. He said he wanted sex. She refused, again referring to her boyfriend. He asked her for a kiss. When she refused, he pushed her onto the bed and said to her, "Remember what happened last time." She took that to be a reference to the earlier occasion when he had stabbed her in the shoulder. She then heard what she thought was the click of a flick knife next to her ear. She pleaded with him, but he told her to shut up, and that if she continued to shout he would suffocate her. She then saw a knife blade in his hand. The knife was drawn, with the point touching her flesh, across her forehead. She was terrified and crying. The appellant pulled up her skirt, ripped her tights, and raped her. That lasted for some little time. After it, he told her to fix herself up. "You look like you have been raped." He blocked the door again, and said to her, "You are still going to come down with my son, aren't you?". Finally, he unlocked the door, and allowed her to leave.

He was arrested in the early hours of February 2. A silver penknife was found in his coat pocket, although the complainant was unable to identify it. He was interviewed on three occasions. First, he said that there was consensual sexual intercourse. In the third interview, he admitted having stabbed the woman in the past. In both the first and third interviews, he said that if a woman had had a man's child he was entitled to have sex with her without her consent.

The appellant is 31 years of age. He has a number of previous convictions. However, none is for any sexual offence, although one is for threatening behaviour and another for possession of an offensive weapon. Mr Bate, appearing on his behalf on this appeal, has submitted that the sentence of eight years was too long. He referred the Court to the well-known case of *Billam* (1986) 8 Cr.App.R.(S.) 48, in which guidelines were laid down as to the appropriate level of sentencing for rape. He submits that, applying those guidelines, the sentence of eight years was excessive. The main thrust of the submission was that, apart from the production of the knife, there were no other aggravating circumstances in the case. However, the appellant had locked this woman into the room. He had not merely produced the knife, but had

actually passed it across her forehead, and had accompanied it by a reference to a previous occasion on which he had actually stabbed her. Accordingly, it was being used very prominently as a threat. It was only as a result of that that he was able to effect his purpose of having intercourse with the woman.

Mr Bate submits that a lesser sentence should be passed in a case where there has been a previous relationship between the offender and the complainant. As has been said in a number of cases, the question of whether any difference should be made in such a case, as opposed to any other case of rape, depends upon the specific facts of the case. Clearly, if husband and wife are living together, or they are having an intermittent relationship, sometimes intercourse being allowed and sometimes not, and the intercourse occurs merely by over-persuasion, it may well be that the factor which Mr Bate prays in aid may be very relevant. However, rape at knife-point in a locked room, where a relationship has terminated, is a different matter. Reference was made to a number of other cases in which sentences of less than eight years have either been upheld or have been imposed by this Court in circumstances which Mr Bate submits are similar to those of the present case. This Court has said on many occasions, and we re-emphasise, that arguing from the facts of one case to the facts of another is rarely helpful to the Court. Any previous case which lays down a point of principle or a general guideline may be helpful, but the cases which Mr Bate drew to our attention had in each instance circumstances which caused it to be substantially different from the present case.

We take the view that the sentence which was passed by the learned judge here was amply justified. This was a case in which there was not only rape, but rape at knife-point, with the very real threat that it would be used if submission was not made. The offender, moreover, contested the case. He did not earn himself any discount as he might have done by pleading guilty. In those circumstances, we cannot possibly hold that the sentence of eight years' imprisonment was excessive. This appeal will be dismissed.

## STEVEN DUNSTER

COURT OF APPEAL (The Lord Chief Justice, Mr Justice Hutchison and Mr Justice Buxton): May 26, 1994

*Violence to child—inflicting grievous bodily harm on child—length of sentence.*

Three-and-a-half years' imprisonment for inflicting grievous bodily harm on a child aged 17 months reduced to two-and-a-half years.

The appellant was convicted of inflicting grievous bodily harm on a child aged 17 months. The appellant associated with the mother of the child; while he was briefly left in charge of the child, the child suffered injuries consistent with blows to the head. The child had other injuries, including a fractured skull, which were not linked to the actions of the appellant. The appellant acknowledged his responsibility after the jury had convicted him. Sentenced to 42 months' imprisonment.

**Held:** in such cases the father or step-father had often been left in charge of a young child for a long time, and had been driven to distraction by the child's crying or other behaviour. In this case the appellant had been left with the child for only a few

exercise may well have duplicated that undertaken by the jury, yet terminated with a different conclusion.

At the instance of the Crown, the appellant and the applicant fell to be convicted on the basis of the shorter period. We cannot justify sentencing on the basis of a longer period, not specifically sought by the prosecution. Thus it is, we turn to the remaining submissions. Those relating to the individual circumstances of the appellant and the applicant. There is little now to add to that which has already been recited in this judgment, save to record the provision to us of prison reports. That furnished with respect to Mrs Efonayi contends that the adverse effects of a lengthy custodial sentence are more likely to outweigh any positive benefits accrued during the period of imprisonment in this particular case. That furnished with respect to Mr Efonayi describes him as a model prisoner, but cannot assist as to his attitude to the offence.

This Court's approach is first to follow the same approach as the learned judge, that is to make no distinction between Mr and Mrs Efonayi. Second, we reassess the sentence on the more favourable factual basis that flows from the foregoing considerations, but bearing in mind the considerable public abhorrence for this kind of conduct in no way alleviated when confronted by the dilemma as to which of the two made what contribution to a physical condition that it is an indictment of both. We remind ourselves that Parliament reflected that abhorrence by recently increasing the maximum sentence for cruelty to a child, arising from wilful neglect, from two years to 10 years. Third, and following on from the foregoing, we cannot put aside public interest and take the extreme course that consideration for Mrs Efonayi as an individual might suggest. In the final analysis, this child's life was in danger. The appellant and the applicant had that knowledge. Notwithstanding that knowledge there was delay in securing help. That was intolerable whatever the period, even though no more than two days. In those circumstances what we intend to do on count five, that is the count alleging wilful neglect, is to substitute for the sentences of five years the sentences of three years. Thus it is in the case of Mrs Efonayi we allow the appeal to the extent of setting aside that sentence of five years in favour of three years on count five. That will be concurrent with the three year sentence passed on count three, making a total sentence of three years. In the case of Mr Efonayi we give leave to appeal. We allow that appeal to a like extent; that is on count five we quash the sentence of five years and substitute a sentence of three years.

CASE 27

JAMES HENSHALL

COURT OF APPEAL (The Lord Chief Justice, Mr Justice Ognall and  
Mr Justice Gage): July 28, 1994

*Rape—rape of former partner under the threat of violence—length of sentence.*

Three years' imprisonment upheld for the rape by a man of his partner at knife point on two occasions. Observations on the relevance of the willingness of the victim to forgive the offender.

The appellant pleaded guilty to two counts of rape. The appellant had lived with the complainant for about six years, but the relationship deteriorated, although they continued to live in the same house. After the complainant had spent a night away from the house, the appellant woke her and threatened her with a pair of scissors, and

forced her to have sexual intercourse. The appellant then telephoned the police and told them he had raped the complainant. He was arrested and released on bail. Having moved out of the house, the appellant returned, threatened her with the scissors again and had sexual intercourse with her. The appellant remained in the house for some hours and made several further attempts to have intercourse with her, threatening her with a knife. After the appellant had been arrested a second time, the complainant indicated to the police that she wished to withdraw her allegation relating to the second incident. Sentenced to three years' imprisonment.

**Held:** the complainant indicated to the sentence in court that she did not wish the appellant to be sentenced to imprisonment. There was a public interest in seeing that offences of this kind did not go unpunished. This was rape with aggravating features—the use of a weapon and threats to kill, the fact that the appellant on the second occasion broke into the house, the protracted nature of the second incident, and the infliction of other sexual indignities. If there had been no mitigating features, the sentence would have been in double figures. The sentence would have failed in his duty if he had ignored the gravity of the offences, one of which was committed while the appellant was on bail, in view of what the complainant said. The sentence, in reducing the sentence to three years in a case which would have merited about 10, gave full recognition of the attitude of the victim. The forgiveness of the victim and the desire of the victim not to pursue the matter is a factor which should be taken into account in mitigation, but it could not be the only consideration. The Court had dealt with the question of the rape by a man of his wife in *Stephen W.* (1993) 14 Cr.App.R.(S.) 256, where it was said that in such a case where the offender's conduct was gross and involved the threat of violence, the fact that the parties had been married or had cohabited was of little significance. The present case involved gross conduct and threats of violence of two occasions; the fact of cohabitation was not of the greatest significance. The sentence was not manifestly excessive.

**Cases cited:** *Stephen W.* (1993) 14 Cr.App.R.(S.) 256; *Billam* (1986) 8 Cr.App.R.(S.) 48.

**References:** rape, *Current Sentencing Practice* B4-1.3.

*J. Cowan* for the appellant.

**LORD TAYLOR C.J.:** On February 18, 1994, in the Crown Court at Chester before Wright J., the appellant pleaded guilty to two counts of rape. He was sentenced to three years' imprisonment on each concurrently. He now appeals against that sentence by leave of the single judge.

The appellant is aged 44. The complainant was a woman with whom he had lived for about six years, and indeed they had known each other for about 12 years. The relationship between them had cooled off and to some extent had foundered during the last year that they had lived in the same house. Indeed, sexual relations had almost ceased. During this period, the complainant formed an association with another man.

On November 11, for the first time, the complainant stayed away from the house all night. She returned at about 7.30 a.m. When she arrived, the appellant, who had been drinking, began to abuse her verbally. She left home immediately to take her son to school. She returned and fell asleep downstairs on the settee.

Just after midday, she was woken up by the appellant who was wearing only a pair of underpants. He told her to go upstairs with him. She refused. He produced a pair of scissors and threatened her, holding the scissors to her face. Under those threats, she went upstairs to the bedroom. There, at his insistence, she dressed up for him in underwear which he fancied seeing her wear. She put on a pair of stockings, and

whilst she was wearing nothing else but those, the appellant put the pair of scissors between her legs. He said he would "shove them up there". She was terrified. He threatened not only that he would put the scissors up her private parts, but also that he would cut her breasts. By this stage she was screaming. He put his hand over her mouth and told her to shut up or he would kill her. He placed the blade of the scissors against her throat, forced open her legs, and had sexual intercourse with her. He started off on top of her. He then turned her over onto her stomach and continued to have sexual intercourse with her from behind. She was crying, and was physically sick after the act.

The appellant reproached himself when it was over, and rang the police. He said over the telephone, "I have raped my wife." The officers attended the house. The appellant was arrested. The complainant made a long statement detailing what had occurred. However, having made the statement, she said that her wish was not to take proceedings against him. She said that she had a degree of compassion for him.

Nevertheless, the appellant was arrested. He was interviewed. He said little about the matter, but he was admitted to bail. He was ordered to return to the police station on December 16. At that stage, having regard to the attitude of the complainant, no decision had been made as to what would happen about this first episode.

During the week immediately following it, the appellant moved away to live with another relative, but he kept constantly in touch with the complainant over the telephone. Relations between them improved, but unfortunately a second incident occurred on Saturday November 29. Without warning, early in the morning, the appellant entered the house using a key which he still retained, although he was not, so far as the complainant was concerned, a welcome visitor in the house. The complainant had just had a bath and was dressed only in a towelling robe. She looked round to find that the appellant was in her room. He was carrying a brown paper bag which contained a number of items of female underwear. He repeated his desire that he should be allowed to return to the house, but she said that she did not want that to happen. He then said, "Well, I want you to get dressed up for me again". She remonstrated with him. He then turned the volume up on the radio which was playing, and pulled the telephone lead out of the wall to prevent any telephone call being made. He shut the bedroom door and bolted it. He then went to the dressing table and picked up the same pair of scissors which he had used on the previous occasion. He pushed off the complainant's bath robe, using the scissors. He then threw the contents of the brown bag onto the bed. They comprised a bra, a suspender belt, briefs and stockings. He told the complainant to put them on or she would be killed. He said, "I have got nothing to lose. I'm a dead man anyway". He put the scissors to her neck, and under that threat she put on the underwear. She was crying and manifestly distressed, pleading with him to stop. He took no notice. He said, "You fucked my life up and now I'm going to fuck you to see how you like it". He put the scissors against her private parts again, told her to get her legs open, and pulled off the briefs which she had put on at his behest. She began to scream. He put his hand over her mouth and had intercourse with her against her will. He ejaculated inside her. Afterwards, she went to the bathroom and was again ill.

He went downstairs and obtained a knife. He took the knife upstairs and it lay on the bed for a considerable period. Although the incident had begun early in the morning, it continued until 4.00 p.m. The appellant remained there, drinking from a bottle of vodka, half of which he consumed, and from time to time taking possession of the knife in his hand. He tried to have intercourse with the complainant on a number of further occasions, although he had difficulty in obtaining an erection. He ordered her at knife-point to get back into the bed, and again to dress in some of the underwear he had brought for her. On one occasion, he wanted her to have oral sex

with him. He tried to make her. She managed to avoid that. In the course of the afternoon, he became more and more emotional. On a number of occasions he put the knife to his own chest and invited the complainant to exert the final push, to do to him what he seemed to be unable to do to himself.

It was 4.00 p.m. before the complainant managed to get out of the house. She went to a neighbour. The appellant left, and he was arrested later in the day. He was interviewed. He was reluctant to say anything. However, eventually he said on more than one occasion during lengthy interviews, "I just want to say I did it and I am sorry. I want to save her going to court".

About a month after the incident, although she described what had happened to the police, the complainant indicated that she wished to withdraw the second allegation. She expressed the view that the appellant was emotionally ill, and that she did not want to go on with the case.

Those were the circumstances of the two offences which came before the learned judge and upon which he had to pass sentence. It is clear that the hearing before the learned judge was an emotional one. In the course of the opening of the case by counsel for the Crown, the complainant shouted from the gallery that she had retracted her statement. Because of her intervention, the learned judge invited her at a later stage to go forward and say what she wished. She was not called either by the prosecution or by the defence. She indicated again that she did not wish the appellant to go to prison.

The learned judge had before him a pre-sentence report which was particularly perceptive. It indicated that the motives in this case would appear to have been more of revenge than sexual. It included this remark:

"I have discussed this case with a rape counsellor who informs me that it is not unusual in cases like this for the victim to retract their evidence and even to feel themselves to blame for those who choose to violate them."

The report made it perfectly clear that this was not a case in which the probation officer was suggesting a community sentence. Indeed, the report in its final paragraph included this sentence:

"I cannot propose a realistic community sentence that is commensurate with the seriousness of the offence."

There was also before the court a psychiatric report from Dr Windgassen, which made it clear that the appellant did not suffer from any mental illness.

Those were the matters concerning the appellant himself which the learned judge had to consider. He indicated in his sentencing remarks that he found this a particularly difficult case. At one stage he said:

"Were I concerned only with her (the complainant) and with you (the appellant) I would have had no hesitation in acceding to her implored request of me."

However, the learned judge indicated—rightly in our view—that he had a duty not only to deal with the matter in the way in which parties to the affair wished, but with due regard for the point of view of the public.

Mr Cowan, on behalf of the appellant, has boldly submitted to us first, that this was a case in which, because of its unusual circumstances, it was unnecessary for a term of immediate imprisonment to be passed at all. He says that it was a most exceptional case, in that the victim would not go on with it, and the only basis on which the Crown could proceed was on the confessions of the appellant.

As we have quoted from the pre-sentence report, it is not all that unusual for the victim of a sexual offence to feel diffidence about proceeding with the matter, whether because of the exposure she herself will endure, or because of some lingering affection of compassion for the person who is charged. However, there is a public interest in seeing offences of this kind do not go unpunished. This was not

merely rape without any special feature; it was rape with a number of aggravating features. First, there was the use of the weapon, and there were the threats to kill. On the second occasion, the appellant broke into the house uninvited; the episode was protracted, lasting the whole of the morning and a good deal of the afternoon; the rape was attempted to be repeated; other sexual indignities occurred; and again a weapon was used to the complainant to make her compliant. Mr Cowan accepted that those aggravating features, laid down in the well-known case of *Billam* (1986) 8 Cr.App.R.(S.) 48, would have meant that had there been no mitigating factor such as was provided by the views of the victim here, the appropriate term of years of custody would have been in double figures in the present case. There was two rapes on separate occasions, and the aggravating features we have described, not least that the second was committed whilst on bail for the first.

We cannot possibly accede to the submission that in those circumstances no imprisonment at all should have been imposed. We consider that the learned judge would have been failing in his duty if he had simply, because of what was said in an emotional way by the complainant, ignored the gravity of the offences and the fact that the court had been defied, by the commission of the second offence whilst on bail, and allowed a non-custodial sentence to be imposed.

Mr Cowan's second submission is that if we are against him on the first, as we are, three years was too long a sentence in the circumstances of the present case. We cannot agree. If it is accepted, as he did accept, leaving aside the pleading of the complainant, that this was a case which would have merited 10 years or more by way of imprisonment, in our judgment the learned judge, in reducing the sentence to three years, gave full reduction for the effect of the attitude of the victim.

It should be stressed that the forgiveness of the victim and the desire of the victim not to pursue the matter is a factor which can, and should be taken into account in mitigation, but it cannot be the be-all and end-all of the sentence. Nor can previous cohabitation. We refer to the case of *Stephen W.* (1993) 14 Cr.App.R.(S.) 256. That was an offence of rape in the domestic situation. It was a case of a man who raped at knife-point his wife with whom he was cohabiting. The question arose as to whether the level of sentencing for rape of the wife was to be distinguished from the general level of sentencing for rape laid down in the guidelines in *Billam*. At p. 259 in the judgment, there was reference to an earlier case decided by this Court, presided over by Lord Lane C.J. as follows:

"Lord Lane, in the course of his judgment (that was in *Attorney-General's Reference No. 7 of 1989 (Thornion)* (1990) 12 Cr.App.R. 1) referred to a passage from the judgment of Mustill L.J. in *Berry* (1988) 10 Cr.App.R.(S.) 13 where he said:

'The relevance of a previous settled sexual relationship was made plain by the decision of this court in *Cox* (1985) 7 Cr.App.R.(S.) 422. The rape of a former wife or mistress may have exceptional features which make it a less serious offence than otherwise it would be: ... To our mind these cases show that in some instances the violation of the person and defilement that are inevitable features where a stranger rapes a woman are not always present to the same degree when the offender and the victim had previously had a long-standing sexual relationship.'

Towards the end of the judgment in *Thornion* Lord Lane said:

'The way in which we view the matter is this. The mere fact that the parties have over a period of nearly two years—20 months—been living together and having regular sexual intercourse obviously does not license the man, once that cohabitation or sexual intercourse has ceased to have sexual intercourse with the girl willy-nilly. It is, however, a factor to which some weight can be

given by the sentencing court for the reasons which Mustill L.J. set out in the passage in his judgment which we have cited.'

In our judgment, it should not be thought that a different and lower scale of sentencing attaches automatically to rape by a husband as against that set out in *Billam*. All will depend in the circumstances of the individual case. Where the parties were cohabiting normally at the time and the husband insisted on intercourse against his wife's will, but without violence or threats, the consideration identified in *Berry* and approved in *Thornion* in the passage already cited, will no doubt be an important factor in reducing the level of sentencing. Where, however, the conduct is gross and does involve threats of violence, the fact of the marriage, or long cohabitation and that the defendant is no stranger will be of little significance. Clearly between those two extremes there will be many intermediate degrees of gravity which judges will have to consider case by case."

The present case clearly fell into the category of one where the conduct was gross and did involve threats of violence on two separate occasions. Accordingly, in our judgment, this was not a case in which the fact of the cohabitation was of the greatest significance. We have already alluded to the effect with the complainant's forgiveness ought to have played, and did play. In all the circumstances, we consider that the learned judge, in a difficult case, arrived at a sentence which cannot possibly be described as wrong in principle or manifestly excessive. Accordingly, this appeal will be dismissed.

## JOHN LOUIS SPARKES

COURT OF APPEAL (The Lord Chief Justice, Mr Justice Ognall and Mr Justice Gage): July 28, 1994

*Arson, being reckless whether life would be endangered—accidentally starting fire in occupied flat and leaving without giving warning—length of sentence.*

Six years' imprisonment for arson, being reckless whether life would be endangered, reduced to five years, on the basis that the appellant started the fire accidentally in an occupied flat and left without giving warning.

The appellant pleaded guilty to arson, being reckless whether life would be endangered. The appellant shared a flat with another man; following an argument, the appellant accidentally started a fire, and then left the flat without raising the alarm. The fire caused serious damage to the flat, and the other man was badly burned. Sentenced to six years' imprisonment.

**Held:** (considering *Gannon* (1990) 12 Cr.App.R.(S.) 545) on the basis that the appellant had started the fire accidentally and then left without giving warning, the sentence could be reduced to five years' imprisonment.

**Case cited:** *Gannon* (1990) 12 Cr.App.R.(S.) 545.

**References:** arson, *Current Sentencing Practice* B7-1.3.

*N. Valios Q.C.* for the appellant.

**GAGE J.:** On July 21, 1993, in the Crown Court at Norwich, John Louis Sparkes

## ALBERT THOMAS CASE 28

COURT OF APPEAL (The Lord Chief Justice, Mr Justice French and Mr Justice Longmore): November 10, 1994

*Rape—rape of elderly widow by burglar—length of sentence.*

Fifteen years' imprisonment upheld for the rape of an elderly widow by a burglar. The appellant pleaded guilty to rape, burglary and inflicting grievous bodily harm. The appellant broke into a house occupied by a widow aged 78 who lived alone. When the widow woke up, the appellant pushed her to the floor, then hit her on the face and body and jammed something into her mouth. The appellant demanded money, was given a total of £440, and then raped her. The victim then hit the appellant with a piece of wood; he hit her back with the same piece of wood. The appellant had many previous convictions for burglary and had been released from a sentence of four years' imprisonment four days before the offence. Sentenced to 15 years' imprisonment for rape, with 10 years concurrent for burglary and five years concurrent for inflicting grievous bodily harm.

**Held:** (considering *Billam* (1986) 8 Cr.App.R.(S.) 48, *Gurniem* (1993) 15 Cr.App.R.(S.) 91 and *Williams* (1992) 13 Cr.App.R.(S.) 562) the case contained most of the aggravating features mentioned in *Billam*; the victim's life had been ruined and she could not return to the house where she had lived for many years. The sentence was not manifestly excessive.

**Cases cited:** *Billam* (1986) 8 Cr.App.R.(S.) 48, *Gurniem* (1993) 15 Cr.App.R.(S.) 91, *Williams* (1992) 13 Cr.App.R.(S.) 562.

**References:** rape, *Current Sentencing Practice* B4-1.3B.

*N. Biddle* for the appellant.

**LONGMORE J.:** On April 28, 1994, in the Crown Court at Liverpool before His Honour Judge Wickham, the appellant, Albert Thomas, pleaded guilty to rape, burglary and inflicting grievous bodily harm. He was sentenced to 15 years' imprisonment for the rape, 10 years' imprisonment concurrent for the burglary and five years concurrent for inflicting grievous bodily harm. He now appeals against sentence by leave of the single judge.

The facts are these. In the early hours of the morning of Sunday, October 31, 1993 the appellant broke into the home of Mrs D, who was aged 78. She lived alone at [an address] in Bootle, Liverpool. She had lived there for 53 years, mostly with her husband. However, she had been recently widowed.

Mrs D, who was unable to sleep that night, heard a noise. She went from the rear bedroom, where she slept, to the front bedroom. She looked out of the window. At the time she was wearing a nightdress and a vest. She turned round and saw the appellant in the doorway. She screamed. He ran over and put his hand over her eyes and her mouth, saying, "Shut it." He bit her on the cheek. He pushed her onto the floor and put a pillow over her face. He jerked himself up and down on top of her as if he was sexually working himself up. He put his knees outside her body and touched her breasts and vaginal area. He then pulled her up by her shoulders and began to hit her on her face and body, using his knuckles. She started to bleed. He jammed something in her mouth to stop her screaming. After some minutes he said, "Where is your money?" She said it was in her handbag at the side of her bed. He marched her into the rear bedroom and pushed her through the door. They both fell onto the floor.

He again jerked himself up and down on top of her as if he was having sexual intercourse. He then picked up her handbag. Mrs D assisted him in taking money from it. She gave him her pension money of £140. He said, "That's not enough." She then gave him another purse containing £300. She said, "Here, will you go now, for God's sake?" He said, "Yes." However, he then pushed her onto the bed, lifted up her nightdress, pulled apart her legs and raped her. With considerable bravery, she hit him with a wooden bannister rail which she kept hidden under her pillow. He took it from her and struck her with it, saying, "You stupid bitch. You're dead now." He stood up and said, "If you do tell the police, it'll be five, 10 or 15 years, I'll be back and I'll kill you." He then left.

The appellant was arrested and interviewed on November 2. He admitted the burglary at Mrs D's house and some physical contact with her, but said he could not remember raping her or being violent towards her. After he spoke at some length with his solicitors, the psychiatrists and the probation officer, he accepted that he was guilty of all the offences.

Mrs D suffered severe bruising and swelling on her forehead and around her eyes. She had a 4cm laceration inside her mouth. She had bruising to her shoulders and her back. She had bruises on her wrist, hand and the inside of her thighs. She had a broken nose. Her lower pubic area was torn. Mrs D said that she had not even got over the death of her husband when these events happened. She also said she could never go back to the house, where she had been for 53 years, for as long as she lived. She was terrified and could not be left on her own.

The appellant is aged 29. He was unemployed. He has numerous convictions for burglary. He was sentenced for the seventh time to a total of four years' imprisonment on July 10, 1991 for burglary with intent and five offences of burglary. On October 26, 1993, he was released on parole. Four days later he committed this terrible offence. His parole was revoked.

There was a pre-sentence report and two psychiatric reports, which can be summarised by saying that those writing the reports could not find any problems in the appellant with regard to sexual relations or propensity for sexual offending. They could not explain the appellant's conduct, except in terms of needing to burgle and commit other criminal activities to finance his addiction to drugs.

The learned judge, in the course of his sentencing remarks, said: "It is difficult to imagine a worse case of rape than this one. It goes without saying that only a very long custodial sentence can be justified for such an offence as this, and indeed for this one."

He proceeded to impose a sentence of 15 years' imprisonment.

Mr Biddle, on his behalf, seeks to appeal that sentence. He relies on the pleas of guilty, the remorse that the appellant did finally show, and the fact that there is no previous history of sexual offending. He accepts that this was a terrible case. Most of the aggravating features set out in the guideline case of *Billam* (1986) 8 Cr.App.R.(S.) 48 are present here. First, violence was used over and above the force necessary to commit the rape, particularly during the rape. Secondly, a weapon was used; the appellant seized the bannister rail with which the lady was bravely attempting to hit him. Thirdly, although there was no repetition of rape, nevertheless there was repetition of sexual activity. Fourthly, although the rape had not been planned, the burglary had been planned, and the rape was committed in the course of the burglary. Fifthly, although there is no previous conviction for rape, nevertheless there are many previous convictions for offences of burglary. Sixthly, the victim was very old; she was aged 78. Seventhly, the effect on the victim has been horrendous.

All that Mr Biddle can say is that it does not show the very worst features of a campaign of rape. In the view of this Court, it is impossible to say that merely because

a rape of this kind is not part of a campaign that it does not deserve a sentence in the very highest bracket. Mr Biddle argues also that the sentence is out of line with previous authorities. We do not agree with that submission. He has referred us to two cases of *Guniam* (1993) 15 Cr.App.R.(S.) 91 and *Williams* (1992) 13 Cr.App.R.(S.) 562. In *Williams*, which was by no means a dissimilar case, a sentence of 18 years was reduced to 16 years.

The fact remains that this lady's life has been completely ruined. She cannot return to her home of 53 years. She is fearful of being alone. Her final years have been rendered completely desolate. In the view of this Court it is impossible to say that the sentence of 15 years' imprisonment is manifestly excessive. This appeal is dismissed.

**CASE 29 MICHAEL FOX**

COURT OF APPEAL (The Lord Chief Justice, Mr Justice Alliott and Mr Justice Rix): November 14, 1994

*Life imprisonment—repeated rapes of mentally ill or mentally deficient women—length of period specified under the Criminal Justice Act 1991, s.34.*

Twelve years' imprisonment specified under the Criminal Justice Act 1991, s.34 in conjunction with a sentence of life imprisonment imposed for repeated rapes of mentally ill or mentally deficient women reduced to 10 years.

The appellant pleaded guilty to five counts of kidnapping, one of attempted rape and three of rape. Over a period of three years the appellant committed offences against five mentally deficient women, some of whom were resident in a hospital where the appellant had been employed for many years as a nursing assistant. The appellant would offer the victim a lift in his car, and then have intercourse with her, before abandoning the victim. Sentenced to life imprisonment, with an order under the Criminal Justice Act 1991, s.34 specifying a period of 12 years.

**Held:** the appellant did not challenge the sentence of life imprisonment, but claimed that the period specified under section 34 was too long. The sentencer had indicated that he took a sentence of 18 years as the starting point, on the basis that that would have been the appropriate term for the purposes of punishment and deterrence if there had not been an element of risk which required him to pass an indeterminate sentence. The appellant argued that this starting point was too high, (considering *Billam* (1986) 8 Cr.App.R.(S.) 48 and *Henry* (1988) 10 Cr.App.R.(S.) 327). The offences were grave and despicable, involving preying on mentally ill, vulnerable women, sexually abusing them and leaving them helpless and lost. The Court considered that the sentencer's starting point of 18 years was somewhat too high; the starting point should have been 15 years, and therefore the appropriate period for the relevant part should have been 10 years. That period would be substituted for the period fixed by the trial judge. The life sentence would remain. The Court wished to emphasise that the period of 10 years fixed by the Court was not a finite sentence at the end of which the appellant would be released; it was the period before which he could not be considered for release by the Parole Board.

**Cases cited:** *Billam* (1986) 8 Cr.App.R.(S.) 48; *Henry* (1988) 10 Cr.App.R.(S.) 327.

**References:** life imprisonment—specified period, *Current Sentencing Practice* F3-4; *Archbold* 5-245a.

**LORD TAYLOR C.J.:** On April 5, 1993 in the Crown Court at Cardiff, the applicant pleaded guilty on re-arraignment to five offences of kidnapping (counts one, four, seven, 10 and 13), guilty to attempted rape (count two) and to three offences of rape (counts five, eight and 14). There were a number of adjournments and hearings in the Crown Court at Winchester. On February 10, 1994, at the Central Criminal Court, he was sentenced to life imprisonment on each count. The learned trial judge ordered that section 34 of the Criminal Justice Act 1991 should apply and that the applicant should serve 12 years' imprisonment before he could require his case to be referred to the Parole Board. Counts three, six and nine were alternative counts. Count 11 (rape) and count 12 (kidnapping) were ordered to lie on the file. Nine offences of a similar character were taken into consideration. The applicant applies for leave to appeal against sentence. The learned Registrar referred the application to this Court, and we grant leave.

The appellant is a retired assistant mental nurse. He committed the offences over a three-year period between 1988 and the beginning of 1992. They involved five mentally deficient women of varying ages. The women lived in Dorset, three in Weymouth and two in Herrison Hospital, Dorchester. They were each approached by the appellant in a motorcar in daylight. His technique was to offer a lift in his car in a caring manner so that no alarm was created. He would pose as an uncle, a friend or doctor. He showed knowledge on occasions of the victim's background. He would coax the victim to go for a drive with him and then commit, or try to commit, a sexual offence.

Counts one and two were offences of kidnapping and attempted rape. The victim, D.S. aged 43, was mentally ill. She was abducted and driven by the appellant for five miles from where she was living in Weymouth. The appellant then walked her out into the countryside from his car. He there pulled down her knickers and penetrated her, although he ejaculated, he said to the police later, before he actually had intercourse. He then left the woman on a roadside in the middle of nowhere, where she was later found.

Two of the further offences taken into consideration, attempts to kidnap, occurred when the appellant accosted the same woman in Weymouth in the latter half of 1988 or into 1989. She refused to go with him and he had driven off in a hurry. In February 1991, he had again tried unsuccessfully to pick her up.

Counts four, five, seven and eight were two pairs of counts, each involving kidnapping and a rape. The victim, A.S., was mentally ill and had an intelligence quotient of only 42. She lived in sheltered accommodation in Weymouth. The appellant admitted, in relation to two of the offences taken into consideration, a kidnapping and an indecent assault. But on June 17, 1990 he took the woman to a lake on the outskirts of Weymouth. There, he laid out top of her and ejaculated in his trousers. He then abandoned the woman on the furthest outskirts of the town. She was found later in a shopping centre, crying and worried. She was returned home by the police.

On June 24, 1990 the appellant took the same woman to Tincleton. There he had intercourse with her and dropped her in Bere Regis, knowing that she would be incapable of returning to Weymouth on her own. She walked four or five miles and was found by a woman who called the police. She appeared lost and anxious. They were counts four and five.

On September 23, 1990 the appellant again took the same woman in his car to Brinscombe Bunks on the way to Broadmayne. He got her out of the car, took her along a footpath and tried to have sexual intercourse. He ejaculated in his hand



before doing so, but nevertheless penetrated the woman. She was later found on the outskirts of Weymouth, again lost and distressed. That conduct related to counts seven and eight.

On January 1, 1991 the appellant took the same woman to Affpuddle, where he indulged in sexual activity with her and dropped her on the outskirts of Bere Regis. She was found miles from where she should have been. That matter was represented by two of the offences taken into consideration, a kidnapping and an attempted rape. Another offence taken into consideration occurred on February 14, 1991. It related to S.B., an architectural student who suffered from mental illness and resided at Herrison Hospital. She was sitting in the grounds of the hospital when the appellant tried to persuade her into his car, but was unsuccessful.

Count 10 was an offence of kidnapping only. The victim was S.J., a long-stay patient at the same hospital. She was known to the appellant. On March 13, 1991 the appellant called her by name while she was picking flowers. He asked her to go for a ride in his car. He took her to Tincton Woods and dropped her off at Affpuddle. She was discovered in the early evening, tired, lost and mud stained.

Counts 13 and 14 concerned D.S., who suffered from Down's syndrome. On December 8, 1991 the appellant picked her up in Weymouth and took her out. He indecently assaulted her and returned her to Weymouth. Those were two offences taken into consideration. But on December 15, about a week after the previous incident, the appellant took the same woman from the seafront at Weymouth, drove her to Ringstead Bay and there had sexual intercourse with her in the car. He then returned her to Weymouth.

He made one more attempt to get her to have sexual intercourse, but progressed no further than taking her into public gardens and kissing her.

On February 23, 1992 the same victim was under surveillance, when the police noticed the appellant go up to her. She appeared to react against his approach and to walk away sharply. The appellant then walked around Weymouth for an hour, until he was stopped by the police. He was interviewed, but denied being involved in the offences. He was released on bail, but rearrested on April 16, when he was interviewed again. Then, and in further interviews on succeeding days, he made admissions about what he had done.

The appellant is aged 51. He has been married twice. He divorced his first wife in 1982, there being two children from that marriage. He married his second wife in 1986, and they were divorced in 1993 after his arrest for these offences. There was one child of that marriage, born during the period of the offences. The appellant was employed for 25 years at Herrison Hospital, and for the better part of that period he was a psychiatric nursing assistant, until 1991 when he retired on grounds of ill health after an accident which befell him when he was restraining a patient. He had only one previous conviction: in 1985, for possessing an offensive weapon, in respect of which he was conditionally discharged.

The pre-sentence report indicated that he came from a family who were generally of dull or very dull intellect. He was sexually abused as a child. He was an unwanted child and eventually was made the subject of a care order on the grounds of neglect.

Despite that background and his unusual personality it was clear, according to the pre-sentence report, that the appellant understood the wrongfulness of his behaviour. There were a number of medical reports before the trial judge, who also heard oral evidence from a psychiatrist, Dr Gordon. In the end, there was no recommendation from any doctor for a disposal pursuant to the Mental Health Act. The main issue before the sentencing judge was whether he should pass a determinate or an indeterminate sentence. The life sentence which the judge passed is not now challenged, but in applying section 34 of the Criminal Justice Act 1991, the

judge fixed the relevant part of the sentence at 12 years. That is the result of this appeal.

The judge said in terms that the 12 years represented two-thirds of the deterrent sentence of 18 years, which he would have imposed for punishment and deterrence had there not been a risk element here which required him to pass an indeterminate sentence. The medical reports showed that the appellant was a man whose level of intelligence was in the range between borderline/mentally handicapped and low/average. But his level of insight was considerable. It has to be borne in mind that for a number of years he had held down employment in a hospital and had been entrusted for most of that time with the care of disturbed patients as a psychiatric nursing assistant.

The offences, as the trial judge rightly recognised, were grave and despicable: preying upon mentally ill, vulnerable women, sexually abusing them, and then leaving them helpless and lost, a course of conduct which was persisted in for about three years.

However, Mr Butterfield, who has appeared on behalf of the appellant on this appeal, submits that despite those aggravating features, and despite the fact that this was a "campaign of rape", the sentence of 18 years, which the learned judge had in mind as the starting point in considering what was the relevant part of the life sentence to order, was too high. The phrase "campaign of rape" is taken from well-known case of *William* (1986) 8 Cr.App.R.(S.) 48, in which Lord Lane C.J. laid down guidelines for sentencing in cases of rape. Having dealt with the general run of such cases, at p. 50 he said:

"At the top of the scale comes the defendant who has carried out what might be described as a campaign of rape, committing the crime upon a number of different women or girls. He represents a more than ordinary danger and a sentence of 15 years or more may be appropriate."

Mr Butterfield submits that the proper starting point towards determining the period to be ordered before the Parole Board should review the case was 15 years. He submits that in the present case there was no violence used to the women and no weapon was used. However, the women were so vulnerable and so incapable of resisting, that it was not necessary to use any violence or to have any weapon.

Mr Butterfield further points out that the offences of rape, where they occurred, were not repeated and that the appellant had no previous conviction for sexual offences. He suggested that there was no serious lasting effect on the victims. However, the effect in the short term was perhaps more grave on these victims than on victims able to look after themselves, because, as already pointed out, a number of them were left helplessly in a place which they did not know and from which they could not, without assistance, have returned to their residence.

Mr Butterfield submitted that, these further aggravating features not being the one case that he cited to us where a sentence of 18 years was imposed. That was *Henry* (1988) 10 Cr.App.R.(S.) 327, in which the trial judge had imposed a life sentence, but this Court quashed that and substituted the sentence of 18 years. Mr Butterfield points out that it was a very serious offence indeed, in which a number of young women were raped over a period of 14 months; a knife was used; in some of the instances the victim was raped on more than one occasion; and other sexual indignities were inflicted. Moreover, Mr Butterfield points out that, even in that case when 18 years was imposed, the offender would have been eligible at least for consideration for parole much earlier than the 12 years which the learned judge fixed in the present case.

Whilst in no way wishing to suggest that the trial judge was wrong in his view that

this was a particularly grave case, we do consider that the figure that we fixed as the relevant part of the sentence was somewhat too high. We consider that the starting point should have been 15 years and that, therefore, the appropriate period for the relevant part should have been 10 years. Accordingly, we substitute 10 years for the 12 years fixed by the trial judge. The life sentence remains.

It should be clearly understood by members of the public that the period of 10 years which we have fixed is not meant to be a finite sentence at the end of which the appellant will be released. It is only the period before which he should not even be considered for release by the Parole Board. When the matter comes before the Parole Board they will have to consider at that time whether, by reason of what was before the trial judge and all that can be revealed in reports during the period of imprisonment, it has become possible to consider the appellant for release or whether his detention must remain for longer. Accordingly, we substitute 10 years for 12 years on that basis.

## MUMTAZ ALI

COURT OF APPEAL (The Lord Chief Justice, Mr Justice Alliot and  
Mr Justice Rix): November 15, 1994

*Longer than normal sentence—whether appropriate in the absence of evidence of a tendency to commit violent offences.*

A longer than normal sentence for assault occasioning actual bodily harm varied to a commensurate sentence, where the appellant had no previous convictions for violent offences and there was no other evidence of a tendency to commit violent offences.

The appellant was convicted of assault occasioning actual bodily harm. He drove up alongside a young woman who was walking home shortly after midnight, and offered her a lift which she declined. He then got out of the car, seized her by the shoulder and neck and tried to drag her into a public convenience. The young woman resisted and managed to free herself; the appellant drove away at high speed. Another young woman to whom the appellant had offered a lift noted his number and he was subsequently arrested. Sentenced to three years' imprisonment, passed as a longer than normal sentence under the Criminal Justice Act 1991, section 2(2)(b).

**Held:** (considering *Bowler* (1993) 15 Cr.App.R.(S.) 78, *Fowler* (1993) 15 Cr.App.R.(S.) 456, *Williams* (1993) 15 Cr.App.R.(S.) 330, *Loyons* (1993) 15 Cr.App.R.(S.) 460, *L* (1993) 15 Cr.App.R.(S.) 501, *Nicholas* (1993) 15 Cr.App.R.(S.) 381 and *Crow and Pennington* (1995) 16 Cr.App.R.(S.) 409) there was no evidence in this case of dangerous and serious harm in the future. The appellant was a young man of essentially previous good character; there was nothing in his record or in the pre-sentence report which indicated that the offence was anything other than an aberration. The offence was serious, and must have had either a sexual motive or one of financial gain, but the Court could not say that in the circumstances of this case a single offence of this kind was in itself sufficient evidence to enable the statutory test to be satisfied. In determining the appropriate sentence under section 2(2)(a), the Court took into account that the offence took place at night and was a terrifying experience for the victim. The sentence of three years could not necessarily be

two years would be substituted.

**Cases cited:** *Bowler* (1993) 15 Cr.App.R.(S.) 78, *Fowler* (1993) 15 Cr.App.R.(S.) 456, *Williams* (1993) 15 Cr.App.R.(S.) 330, *Loyons* (1993) 15 Cr.App.R.(S.) 460, *L* (1993) 15 Cr.App.R.(S.) 501, *Nicholas* (1993) 15 Cr.App.R.(S.) 381 and *Crow and Pennington* (1994) 16 Cr.App.R.(S.) 409.

**References:** longer than normal sentence, *Current Sentencing Practice* 4-2; *Archbold* 5-151e.

*G. V. Vanstone* for the appellant.

**RIX J.:** On June 9, 1994, in the Crown Court at Nottingham, before Mr Milmo, Q.C. sitting as an assistant recorder, the appellant was convicted of assault occasioning actual bodily harm. Sentence was adjourned for reports. On July 15, 1994, he was sentenced to three years' imprisonment. He now appeals against sentence by leave of the single judge.

The facts of this matter are as follows. At about 12.30 a.m. on May 14, 1993, as the victim, a young woman aged 18, was walking home, the appellant drove up beside her in his car. He offered her a lift, which she declined. He alighted from the vehicle, seized her by the shoulder and by the neck. He tried to drag her into a nearby public convenience. She resisted vigorously, eventually managing to free herself from his grasp with the aid of a kick strongly delivered between her assailant's legs. He then desisted and drove off at speed. The victim was terrified by the experience and bruised by the assault, and the asthma from which she suffered got worse as a result. A witness of the incident, another young woman, P. M., who the appellant had moments earlier that night also tried to persuade to accept a lift in his car, noted its registration number. She was also able to render assistance to the victim of the attack and walk her home. The learned assistant recorder commended Miss M for her public spirited conduct and awarded her a reward out of public funds.

As a result of the information which Miss M was able to provide to the police, the appellant, who was the registered keeper of the vehicle, was arrested during the following morning. When interviewed he admitted speaking to the victim, but denied assaulting her. At his trial, the appellant accused the victim and Miss M, neither of whom had known each other before that night, of conspiring against him to get him into trouble because they were white and he Asian—a false and unpleasant accusation which the jury, by their verdict rejected.

The appellant is now aged 23 and single. At the time of the offence he had been engaged to be married in an arranged marriage. He lived with his mother and sisters. He was the proprietor of a takeaway food shop. Following the death of his father two years earlier, he was the breadwinner of the family. He had one spent conviction, which had been dealt with by a conditional discharge. Essentially, therefore, he was a man of previous good character.

The pre-sentence report referred to his forthcoming arranged marriage and the fact that were he to be imprisoned, that marriage would be lost, as would his business and the livelihood of its three employees. Probation was recommended.

In sentencing the appellant the learned assistant recorder was careful to warn counsel that he was minded, subject to counsel's submissions, to impose a term longer than the seriousness of the offence itself merited, on the ground that, in his opinion, such longer term was necessary to protect the public from serious harm. In doing so, he had in mind section 2(2) of the Criminal Justice Act 1991, which provides:

"The custodial sentence shall be—  
(a) for such term (not exceeding the permitted maximum) as in the opinion of

alcoholic drink, the high speed; the overtaking and cutting in; one persistently high speed driving; and driving intermittently on the wrong side of the road in overtaking manoeuvres over a period of two-and-a-half to three miles.

Mr Richards has made as admirable and full submissions as could possibly be made in this case. It is manifest that the events of that autumn night were a tragedy for this young man and they have had a profound effect upon him. They were, however, an even greater tragedy for the wholly innocent lady who was killed and whose own family have inevitably suffered even more profoundly.

Despite Mr Richards' submissions, we are quite unable to say that the sentence of four years' imprisonment passed by the learned judge was excessive and, accordingly, this appeal must be dismissed.

CASE 30  
**PAUL RICHARD M.**

COURT OF APPEAL (The Lord Chief Justice, Mr Justice Jowitt and Mr Justice Cresswell): December 15, 1994

*Rape—rape of wife—parties still cohabiting and sharing bed—length of sentence.*

Three years' imprisonment for the rape of his wife by a husband, while the parties were cohabiting and sharing a bed, reduced to 18 months.

The appellant pleaded guilty to rape. The appellant married the complainant in December 1992 after living with her for two years. From early in 1994 the relationship deteriorated, and in May 1994 the complainant decided not to have further physical contact with the appellant, but did not communicate that to him. The appellant on two occasions attempted to have intercourse with the complainant, but she rebuffed him and he did not persist. In June 1994 the complainant told the appellant that the marriage was over. The appellant went out drinking with his son by an earlier marriage, and later got into bed with his wife. When he asked for intercourse she broke away from him, but later he had intercourse against her wishes. The appellant did not use any other violence towards her. He expressed remorse about what he had done and immediately admitted the matter when it was raised by the police. Sentenced to three years' imprisonment.

**Held:** sentencing for rape committed by a man on his wife or a person with whom he had previously lived had been considered in *Berry* (1988) 10 Cr.App.R.(S.) 13, where it had been recognised that the previous settled relationship might make the offence less serious than it otherwise would have been; that had been approved in *Attorney-General's Reference No. 7 of 1989* (*Thornion*) (1990) 12 Cr.App.R.(S.) 1. The Court had considered the matter again in *W.* (1993) 14 Cr.App.R.(S.) 256, in which the Court had indicated that while the existence of such a relationship did not necessarily mean that a lower scale of sentences should be applied than in normal cases, in a case where the parties were cohabiting normally at the time and the husband insisted on intercourse against the wife's wishes but without threats or violence, the previous relationship would be an important factor in reducing the length of the sentence. There was a distinction between the husband who was estranged from his wife and who returned to the house as an intruder either by forcing his way in or worming his way in through some device before raping her, and a husband who was still living in the same house and with consent occupying the same

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used as his wife. This case is cited in *S. v. Taylor*, [1995] 1 Cr.App.R. 344. The Court took the view that the sentence was too long. There clearly had to be a custodial sentence; it must clearly be understood by husbands that they do not have an absolute right to use their wives for sexual purposes whatever the relationship between them and whether or not there was consent. A sentence of imprisonment was appropriate, and a sentence of 18 months' imprisonment would be substituted.

**Cases cited:** *Berry* (1988) 10 Cr.App.R.(S.) 13, *Attorney-General's Reference No. 7 of 1989* (*Thornion*) (1990) 12 Cr.App.R.(S.) 1; *W.* (1993) 14 Cr.App.R.(S.) 256.

**References:** rape, *Current Sentencing Practice* B4-1.3G.

**Commentary:** [1995] Crim.L.R. 344.

*S. Cadwallader* for the appellant.

**LORD TAYLOR C.J.:** On September 19, 1994, at Shrewsbury Crown Court, the appellant pleaded guilty to an offence of rape on his wife. He was sentenced to three years' imprisonment. He appeals against that sentence by leave of the single judge. The appellant's wife is 15 years younger than him. They were married in December 1992; it was his second marriage and her first. They had lived together for two years before the marriage took place.

For about five months before the offence in June 1994 the marriage had been going "downhill" for various reasons. The complainant had started seeing another man, although there was no suggestion that she was having a sexual relationship with him. In early May 1994 she formed a decision not to have any further physical contact with the appellant. She did not communicate that to him. In the following weeks he made two attempts to have sexual intercourse with her. Each time she rebuffed him, and he made no attempt to persist. The parties continued to share the same bed, to which the wife raised no objection.

On the evening of June 5, 1994, the complainant told the appellant of her interest in the other man and that she regarded their marriage as at an end. He took that badly and was crying. He contacted his son and went out drinking. He had a good deal to drink. He returned home and there was a somewhat acrimonious discussion between him and his wife about the situation. He asked his wife whether she wanted him to sleep on the sofa. She said it was up to him, but she wanted him to leave her alone. Having spent some time downstairs consuming brandy, the appellant returned to the bedroom, and got into bed with his wife. He did not immediately seek to have any relations with her, but in the course of the night he decided that he wanted to have intercourse. He asked her for "a last cuddle". She broke away from him and said that she wanted him to leave her alone. She later awoke to find her nightdress raised and him touching her bottom and pulling down her pants. She asked him not to persist but he pulled her over onto her back and had intercourse with her. He was physically stronger than she and she could not stop him. He did not use violence on her, beyond having intercourse against her will. On a number of occasions he said, "You can't deny me my rights as a husband". The intercourse did not last long, either because the appellant ejaculated or because, when the complainant asked him to, he got off her.

There was an exchange of words, in the course of which the appellant suggested to the complainant that she should contact the police. He was remorseful about what he had done. When the police raised the matter with him, he immediately admitted the offence. In the course of his interview he gave an account of the marriage and of the complainant seeing another man. He said he still loved her and that he had wanted her. He did not feel he had behaved as a criminal, although he accepted that rape by a husband on his wife was an offence.

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Mr Cadwallader, on behalf of the appellant, has raised three broad grounds of appeal. First, he relied on the circumstances of the case as making it less grave than many other cases of rape. He pointed out that the parties were sharing the same bed by consent; the force used was minimal; and the intercourse brief. Secondly, he relied on the behaviour of the appellant after the offence; he showed remorse; he accepted that the complainant would want to contact the police and, indeed, enjoined her to do so. Thirdly, Mr Cadwallader relied upon the personal circumstances of the appellant; he was of perfectly good character previously; he had been a good husband in the sense that he had supported his wife and had never shown her any violence. On two previous occasions in the six weeks referred to, he had desisted when his wife said she did not want intercourse. On the night in question he had had a great deal to drink; he had been upset by the thought that there was another man in his wife's affections. Most people who knew him regarded him generally as a considerate and gentle person.

The Court has considered the effect of sentencing for a rape by a man in relation to either his wife or a person with whom he has previously lived. In *Berry* (1988) 10 Cr.App.R.(S.) 13, Mustill L.J. referred to the possibility that that might be a matter of mitigation. He said:

"The relevance of a previous settled sexual relationship was made plain by the decision of this court in *Cox* (1985) 7 Cr.App.R.(S.) 104. The rape of a former wife or mistress may have exceptional features which make it a less serious offence than otherwise it would be... To our mind these cases show that in some instances the violation of the person and defilement that are inevitable features where a stranger rapes a woman are not always present to the same degree when the offender and the victim had previously had a long-standing sexual relationship."

That passage was quoted and approved by Lord Lane C.J. in the *Attorney-General's Reference No. 7 of 1989* (*Thornton*). This Court considered the issue again in *W* (1993) 14 Cr.App.R.(S.) 256, in the course of which the judgment reads:

"In our judgment, it should not be thought that a different and lower scale of sentencing attaches automatically to rape by a husband as against that set out in *Billam* (1986) 8 Cr.App.R.(S.) 48. All will depend on the circumstances of the individual case. Where the parties were cohabiting normally at the time and the husband insisted on intercourse against his wife's will, but without violence or threats, the consideration identified in *Berry* and approved in *Thornton* in the passage already cited, will no doubt be an important factor in reducing the level of sentencing. Where, however, the conduct is gross and does involve threats or violence, the facts of the marriage, of long cohabitation and that the defendant is no stranger will be of little significance. Clearly between those two extremes there will be many intermediate degrees of gravity which judges will have to consider case by case."

In the present case we would point out that there is a distinction between a husband who is estranged from his wife and is parted from her and returns to the house as an intruder either by forcing his way in or by worming his way in through some device and then rapes her, and a case where, as here, the husband's still living in the same house and, indeed, with consent occupying the same bed as his wife. We do not consider that this class of case is as grave as the former class.

Bearing in mind all the circumstances of the case which have been relied upon by Mr Cadwallader, we take the view that the sentence here is too long. That there had to be a custodial sentence, there can be no doubt. It must be clearly understood by husbands that they do not have an absolute right to use their wives for sexual purposes whatever the relationship may be between them and whether or not there is

consent. A sentence of imprisonment therefore is appropriate in this case, but, bearing in mind the circumstances to which we have referred, we consider that three years was excessive. We will reduce it to a sentence of 18 months' imprisonment. To that extent this appeal is allowed.

**PETER ELLIS**

COURT OF APPEAL (Lord Justice Rose, Mr Justice Tucker and Mrs Justice Smith): December 16, 1994

*Attempted murder—attempted murder of wife by electrocution—length of sentence.*

Fifteen years' imprisonment upheld for the attempted murder by a man of his wife by electrocution.

The appellant was convicted of attempted murder. The appellant married his wife in 1984. He was later sentenced to a term of imprisonment for fraud, and on his release formed a relationship with another woman. One evening his wife took a bath and suffered an electric shock. It was later discovered that the bath had been connected to the main electricity supply. The appellant also admitted a number of offences of forgery, theft and obtaining by deception. Sentenced to 15 years' imprisonment for attempted murder, with a total of three years' imprisonment consecutive for the other offences.

**Held:** (considering *Townsend* (1979) 1 Cr.App.R.(S.) 333, *Haynes* (1983) 5 Cr.App.R.(S.) 58, *Green* (1986) 8 Cr.App.R.(S.) 284, *Dearn* (1990) 12 Cr.App.R.(S.) 527, *Grant* (1992) 13 Cr.App.R.(S.) 54, *Beaumont* (1992) 13 Cr.App.R.(S.) 270, *Casseeram* (1992) 13 Cr.App.R.(S.) 384, *Bedford* (1992) 14 Cr.App.R.(S.) 336, *Thornton* (1994) 15 Cr.App.R.(S.) 51 and *Evans and Stroud* (1994) 16 Cr.App.R.(S.) 508) this was a particularly serious case of attempted murder. It was premeditated and carefully planned; it was cunning in execution and motivated by the appellant's wish to be free of his wife and to gain a substantial financial benefit. The fact that no actual injury resulted was of little benefit to the appellant in a case of electrocution. The sentence of 15 years was not a day too long. The other sentences were not excessive and were correctly ordered to run consecutively.

**Cases cited:** *Townsend* (1979) 1 Cr.App.R.(S.) 333, *Haynes* (1983) 5 Cr.App.R.(S.) 58, *Green* (1986) 8 Cr.App.R.(S.) 284, *Dearn* (1990) 12 Cr.App.R.(S.) 527, *Grant* (1992) 13 Cr.App.R.(S.) 54, *Beaumont* (1992) Cr.App.R.(S.) 270, *Casseeram* (1992) 13 Cr.App.R.(S.) 384, *Bedford* (1992) 14 Cr.App.R.(S.) 336, *Thornton* (1994) 15 Cr.App.R.(S.) 51, *Evans and Stroud* (1994) 16 Cr.App.R.(S.) 508.

**References:** attempted murder, *Current Sentencing Practice* B2-1.3A.

G. Taylor for the appellant.

**ROSE L.J.:** On November 15, 1993 at Cardiff Crown Court, this appellant was convicted after a trial before McKinnon J. of an offence of attempted murder. He pleaded guilty to a total of 11 offences in two other indictments: they were all offences of dishonesty. In relation to the offence of attempted murder, he was sentenced to 15 years' imprisonment. In relation to all the other offences of dishonesty, he was sentenced to three years' imprisonment concurrently with each

## JOSEPH KENNAN

CASE 31

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COURT OF APPEAL (The Lord Chief Justice, Mr Justice Laws and Mr Justice Keene): April 3, 1995

*Longer than normal sentence—rape—length of sentence.*

Fourteen years' imprisonment, passed as a longer than normal sentence under the Criminal Justice Act 1991, s.2(2)(b), upheld for rape.

The appellant was convicted of rape and assault occasioning actual bodily harm. The appellant encountered a 16-year-old girl who had been working as a prostitute. The girl went with the appellant to a flat, not for the purposes of prostitution, when they arrived, the appellant punched her in the face and threatened her with a penknife. He made her undress and have sexual intercourse, after which he punched her again and tried to strangle her. Police arrived and the appellant released her. The victim suffered bruising, abrasions and some loose hair. The appellant had many previous convictions, for offences including robbery, assault occasioning actual bodily harm and drug offences. The appellant's previous sexual offences included indecent assault on a male, buggery, rape, and two offences of buggery of females; he had received sentences from three to eight years for these offences. The present offences were committed less than seven months after his release from a sentence of eight years for buggery of a woman. Sentenced to 14 years' imprisonment, passed as a longer than normal sentence under the Criminal Justice Act 1991, s.2(2)(b), with an order under the Criminal Justice Act 1991, s.44, for rape, with four years' imprisonment concurrent for assault occasioning actual bodily harm.

**Held:** medical reports disclosed no symptoms of psychiatric or mental illness. Previous decisions of the Court (such as *Ely* (1994) 15 Cr.App.R.(S.) 881) confirmed that the offender's record could provide evidence of a danger of serious harm to the public from the offender. The Court was in no doubt that the sentence was entirely right to exercise the power under section 2(2)(b). The appellant's record of violent sexual crime was appalling and the present offences involved a combination of sex and violence. The appellant was a clear danger to the public and the use of section 2(2)(b) was entirely justified. It was argued that 14 years was too much. The Court accepted that the length of the sentence imposed for the protection of the public had to be balanced against the need to see that the sentence was not out of all proportion to the nature of the offending on the instant occasion. Taking into account the age of the victim, the use of a knife to threaten her, the use of additional force, the effect on the victim, who was put into a distressed and hysterical condition, and the fact that the appellant was on licence and on bail at the time of the offence, the sentence of 14 years was not out of all proportion to the offence. The appellant did not plead guilty and had shown no remorse; the fact that the victim was a prostitute did not mean that she was not entitled to the protection of the law. The sentence of 14 years and the order under section 44 were fully justified. The sentence of four years for assault occasioning actual bodily harm was imposed as a commensurate sentence, not under section 2(2)(b). There was no basis for upsetting that sentence.

**Case cited:** *Ely* (1994) 15 Cr.App.R.(S.) 881.

**References:** longer than normal sentence, *Current Sentencing Practice* A4-3B; *Archbold* 5-151e.

**Commentary:** [1995] Crim.L.R. 578.

*J. Gau* for the appellant.

**KEENE J.:** On March 4, 1993, following a trial at the Central Criminal Court, the appellant was convicted on two counts. For an offence of rape, he was sentenced to 14 years' imprisonment and for an offence of assault occasioning actual bodily harm, he was sentenced to four years' imprisonment concurrent. An order was also made under section 44 of the Criminal Justice Act 1991, extending his period on licence throughout the sentence. He was sentenced, therefore, to a total of 14 years' imprisonment. He now appeals against sentence by leave of the full court.

The sentence of 14 years was imposed as a longer sentence than one commensurate with the seriousness of the offence itself by virtue of section 2(2)(b) of the Criminal Justice Act 1991.

The rape and the assault occurred in the King's Cross area of London on the night of July 12/13, 1992. The victim "S" was a 16-year-old girl who had come to London from Liverpool a few weeks before. She had been working as a prostitute in the King's Cross area for between two and four weeks. On the night in question she was approached by the appellant in a cafe. He invited her to go for a pipe of crack cocaine and she agreed. According to her evidence at trial, while she would have agreed to go with him as a client, providing sex for money, that was not why she was asked to go, nor why she went.

They went to a flat where another man let them in. The victim heard the two men arguing and she decided to leave. Outside the appellant got in front of her and told her to return. When she refused he punched her more than once in the face and then opened up a penknife, put it near her neck and again told her to go inside. As a result she did so. Once inside he punched her again in the face. At his demand she undressed and he had intercourse with her. She was screaming, swearing and struggling. After the act of intercourse she dressed and tried to leave via the window. Again the appellant punched her, pulled her hair hard and tried to strangle her. She hit him on the head with the heel of her shoe and he bled from that. There was the noise of a police siren and she shouted down to one of the officers who shouted back. At that point the appellant let the victim "S" go.

Medical evidence at the trial indicated that the victim had bruises, abrasions and some loose hair. At one time it was thought that she had a possible fractured nose, but in the event that proved to be simply a swollen and bruised nose. The appellant ended up with a deep cut on his forehead which required stitches.

A neighbour testified at the trial to hearing screams and cries and to "S" being very distressed when she eventually appeared. The police officers also described her as being very shocked and hysterical.

The appellant is aged 52. He is married, but separated from his wife and two children. At the time of the offences he was unemployed. He has a long list of previous convictions, beginning with two counts of robbery with violence when aged 18. Since then his convictions have included a number of offences of assault occasioning actual bodily harm and a number of recent drugs offences. But it is the appellant's record of violent sexual crime that must give any court great concern. In 1969 he was sentenced to three years' imprisonment for indecent assault on a male. In 1972 he was sentenced to three years' imprisonment for buggery. In 1974 he was sentenced to five years' imprisonment for rape and six months' imprisonment for assault occasioning actual bodily harm. In 1979, for buggery of a female, he was sentenced to five years' imprisonment, plus concurrent sentences for attempted buggery of a female and assault. In 1987 he was sentenced to eight years'

imprisonment for the buggery of a woman and two years concurrent for assault occasioning actual bodily harm.

He was released from prison on the last occasion on December 19, 1991. It follows, therefore, that the offences of rape and assault occasioning actual bodily harm in the present matter, which occurred on July 12/13, 1992, occurred less than seven months after his release. He must also, as his counsel concedes today, still have been on licence at the time of these offences. In addition to that he was on bail at the time of these offences on a drugs charge.

His record, therefore, shows in broad terms that in the space of 20 years the appellant had committed two offences of rape, three offences of buggery and one offence of attempted buggery, with a clear pattern of violence associated with those sexual offences. It is also clear from the length of the sentences that the charges of buggery in the past must have been non-consensual.

His sentence of 14 years for the offence of rape was imposed under section 2(2)(b) of the 1991 Act. That paragraph enables the courts, when imposing a custodial sentence for a violent or sexual offence to make the sentence one "for such longer term . . . as in the opinion of the court is necessary to protect the public from serious harm from the offender". Serious harm is further defined in section 31(3) as being a reference to protecting members of the public "from death or serious injury, whether physical or psychological, occasioned by further such offences committed by him".

The learned Crown Court judge clearly had that passage in mind when sentencing the appellant because, in the course of his sentencing remarks, he said:

"I believe that while you are at liberty there is a danger, a real danger that you would cause serious physical or psychological harm to other people. That includes prostitutes. They are not outside the protection of the law. In reaching that conclusion, I have had read your record just as I understand I am entitled to do so in reaching that conclusion."

It is to be noted that medical reports on the appellant disclosed that no symptoms of psychiatric or mental illness could be discovered. Nonetheless, previous decisions of this Court confirm, as the Crown Court judge said, that an offender's record may provide evidence of a danger that serious harm to the public is likely from a defendant in the future (see, for example, *Ely* (1994) 15 Cr.App.R.(S.) 881).

The original grounds of appeal in this case contended that section 2(2)(b) was not appropriate. On behalf of the appellant today Mr Gau frankly and rightly concedes that the exercise of that power under that paragraph was appropriate. We, for our part, are in no doubt that the learned Crown Court judge was entirely right to exercise that power. The appellant's record of violent sexual crime was an appalling one. Here again, with the later offences, there was sex and violence combined, the appellant having only just been released from prison for an offence against a woman involving violence and sexual misbehaviour. On the evidence the appellant was a clear danger to the public and the invoking of section 2(2)(b) was entirely justified.

We turn to consider the length of the term of imprisonment imposed to protect the public. It is that which Mr Gau contends was excessive. It is said that 14 years in the circumstances was too much. We accept that the length of sentence imposed for the protection of the public has to be balanced against the need to see that the sentence is not out of all proportion to the nature of the offending on the instant occasion. Mr Gau emphasises that the victim in the present case was a prostitute who would have been prepared to have intercourse with the appellant if he had offered to pay. While recognising that that is not irrelevant, nonetheless, as the Crown Court judge said, prostitutes are just as entitled to the protection of the law as any other woman. We have to bear in mind that this victim, while a prostitute, was aged only 16, and, indeed, had only been a prostitute for a very short time.

Mr Gau also draws attention to the fact that only minor injuries were caused to the victim. Nonetheless, injuries were caused. The grounds of appeal also mention that the appellant himself received a deep cut. We do not regard the latter as being any mitigation, given that the cut was inflicted by the woman in an attempt to defend herself against the rape. There was no plea of guilty and, as the Crown Court judge emphasised, no sign whatsoever of remorse on the part of the appellant for the appalling crime which he had committed on his victim. There were also aggravating circumstances: the use of the knife to threaten, albeit outside the flat; there was additional force used in the rape with the repeated punching of the victim's face and the strangling, all of which, together with the rape itself, put the victim into an extremely distressed, hysterical condition; the youth of the victim; and the fact that the appellant was on licence and also on bail at the time of the offence. Nor can this Court ignore the appellant's very bad record for previous offences of this kind.

Taking all those factors into account, and setting those individual circumstances in the context of the need to protect the public, we have come to the conclusion that the 14-year sentence was not out of all proportion when set against the circumstances of the individual offence. It was a lengthy sentence which was fully justified in the circumstances. In addition, the section 44 order made by the learned judge was, in our view, undoubtedly justified.

Finally, Mr Gau submits that the four-year sentence on count 2 for assault occasioning actual bodily harm is excessive. He submits that it must have been imposed under section 2(2)(b), or, if it was not, it was, in the circumstances, too long. It is clear to us, having looked carefully at the transcript of the Crown Court judge's sentencing remarks, that that was not imposed under section 2(2)(b) but was imposed as a sentence in respect of the instant offence and intended to be commensurate with the circumstances of the offence itself. This was a case where the appellant punched his victim a number of times; he tried to strangle her; he has previous convictions of offences of violence, including offences of assault occasioning actual bodily harm; there was no plea of guilty and no remorse. The sentence of four years' imprisonment was imposed to run concurrently with the 14-year sentence for rape. In all the circumstances we can see no basis for upsetting that sentence either.

It follows that, for the reasons which have been set out, this appeal must fail and be dismissed.

**COLIN PIKE**

COURT OF APPEAL (Lord Justice McCowan, Mr Justice Blofeld and Judge Gower Q.C.): April 3, 1995

*Indecent assault—internal examination carried out under pretext of medical treatment—length of sentence.*

Four years' imprisonment upheld for indecent assaults on a woman in the form of internal examinations carried out under the pretext that they were necessary for medical treatment.

The appellant was convicted of two counts of indecent assault. The appellant, who had no medical qualifications, held himself out as a hypnotherapist. He was consulted on two occasions by a woman, and on each occasion he conducted an internal vaginal

examination. On the second occasion he videoed the examination. Sentenced to four years' imprisonment.

**Held:** the sentence was entirely appropriate.

**References:** indecent assault, *Current Sentencing Practice* B4-6.3.

*G. Arran* for the appellant.

**JUDGE GOWER Q.C.:** This is a renewed application for leave to appeal against concurrent sentences of four years' imprisonment passed upon this applicant for two offences of indecent assault. Originally he sought leave to appeal against both conviction and sentence, but by a letter of January 5, 1995 his solicitors notified the Court that that part of the application was abandoned.

On April 19, 1994 in the Crown Court at Snarresbrook, after a seven day trial, the applicant was convicted on two counts of indecently assaulting a woman named L. I. We are told that she was a woman in her twenties. The counts reflected separate incidents on different dates.

Put shortly, the facts are these. The applicant has no medical qualifications whatever. He hired himself as a hypnotherapist and indeed genuinely practised as such. Miss I. had met him in 1991 or 1992 when he had treated her mother for back trouble. The date of the first of these offences is somewhat uncertain; it is suggested it may well have been in the autumn of 1991 and this judgment proceeds upon that basis.

At that time Miss I. consulted the applicant about severe stomach pains from which she suffered. He visited her at her home. He examined her internally. He used a clamp to distend her vagina and a long instrument through which he appeared to look. He told her that she either had a bad infection or had miscarried; the latter she knew could not be so. He took samples of blood and urine.

On October 6, 1992, at the applicant's home, he carried out a second internal examination of Miss I. Unbeknown to her, although this he disputed, her evidence was he videoed the examination. The video was later found in his loft.

Professor Chapman, who is a consultant obstetrician and gynaecologist and was called as a witness by the prosecution, viewed that video. The judge and the jury saw it as well. In the opinion of the professor, which he gave in evidence, the method of examination which the applicant had employed and the instrument which he had used were wholly inappropriate; neither would have been used by a qualified doctor. The professor said that a doctor would not have conducted an examination of the kind described by Miss I. and the one videoed of a female patient complaining of stomach pains.

The defendant did not give evidence. The thrust of the defence was that the applicant was a bona fide healer, that Miss I. knew that he was not a qualified doctor, and that she had known that the examination was being videoed and had consented to it. It is also suggested that the videoing was for record and future treatment purposes. By their verdict it is clear that the jury accepted the evidence of Miss I. and that of the professor.

The applicant is 51 years old and of good character. Before the judge was a pre-sentence report in which the probation officer had expressed his opinion that the applicant had known that his behaviour towards the victim had been unprofessional, unethical and wrong. The probation officer had also formed the opinion that the applicant:

"... seeks to play down the seriousness of his offending and the extent of his practice in which he describes himself as a spiritual and hypnopsychic healer."

occasion Holland J., giving the decision of this Court said that the offence of attempting to pervert the course of justice was so serious as to call for the imposition of an immediate custodial sentence. The offence was at the lower end of the relevant spectrum and the sentence was excessive. Sentences of three months' imprisonment concurrent on each count were substituted.

Mr Challinor, in his helpful submissions to the Court, relied heavily upon that decision to suggest that this sentence was out of line with the general tariff in this type of case.

In *Tranter* (1992) 13 Cr.App.R.(S.) 515, the appellant pleaded guilty to attempting to pervert the course of justice. The appellant's brother, who was disqualified from driving, was found by police officers in a hired car. The brother gave the appellant's name instead of his own. He was required to produce his licence at a police station. The appellant subsequently made a statement to the police that he had hired the car and that he was driving it on the occasion in question. The appellant persisted with the false story during a number of subsequent interviews in the police station when it was pointed out the seriousness of maintaining a false story. He was sentenced to four months' imprisonment. On appeal it was held that the sentence was properly imposed and deserved. It was serious enough that the appellant had embarked on a course of deception intended to prevent the discovery of a crime, and the offence was made more serious by the fact that the appellant had persisted with the deception through two interviews despite being warned. The fact that he acted out of loyalty to his brother was little mitigation.

At the other end of the spectrum we were referred to *Wild* (1992) 13 Cr.App.R.(S.) 607, where the appellant was convicted of conspiracy to pervert the course of justice. His friend was charged with driving through a traffic light at red and the appellant agreed to give false evidence to the effect that he witnessed the incident and that the light was in his friend's favour at the time. The appellant duly gave evidence on oath but the friend was convicted of the road traffic offence. The appellant was sentenced to 18 months' imprisonment. On appeal the sentence was undisturbed and the appeal was dismissed.

Against that background we have to consider whether the sentence of two years' imprisonment can, in fact, be justified. We can well understand the learned judge regarding this as a serious offence, and quite properly he took account of the fact that the appellant had (when sentence was to be passed) derived a positive benefit from the deception that she practised upon the police. It had the effect that a serious conviction of driving with excess alcohol was recorded against somebody else and that she thereby, at that time, had escaped being punished in her own name.

The judge was also right to look at the previous record to see whether this was an offence which was committed on the spur of the moment in a situation where her standards of good conduct might have been affected by the amount of alcohol that she had consumed. We too are unable to gloss over that record which does disclose, as the judge said, a streak of dishonesty which undoubtedly she resorted to on the occasion in question. We must also take into account that on two subsequent occasions she answered to her bail in a false name. However, we consider that there is force in the argument that Miss James was never put in peril of criminal proceedings. The proceedings arising out of both incidents were answered by the appellant albeit in the false name.

We have come to the conclusion that this particular sentence when passed was out of line with the tariff which seems to emerge, somewhat unsatisfactorily, from the other decisions to which we have referred. The trial judge was not referred to the earlier decisions and, therefore, did not have the benefit of such guidelines as emerge from them.

Moreover, in the light of the events which have subsequently transpired which mitigate the benefit to the appellants we have come to the conclusion that the sentence of two years is now manifestly excessive, and to such an extent that this Court is justified in interfering with it. That sentence will be quashed and a sentence of 12 months' imprisonment will be substituted for it. To that extent the appeal is allowed.

CASE 32

### KIRK PAUL PEARSON

COURT OF APPEAL (Lord Justice Otton, Mr Justice McCullough  
and Mr Justice Newman): July 20, 1995

*Rape—rape by man of partner during cohabitation—length of sentence.*

Thirty months' imprisonment for the rape by a man of his partner, while they were still cohabiting but by the use of significant force, reduced to two years.

The appellant pleaded guilty to rape. The appellant had a relationship with the complainant who gave birth to their son. They subsequently lived together but the relationship deteriorated. One evening the complainant left their flat leaving the appellant in charge of the child. The appellant found her in a bar, handed the child over to her and went out. Later the appellant returned home, forced the complainant to go to the bedroom by pulling her hair, and had intercourse with her despite her attempts to prevent him from doing so. The complainant subsequently complained to social workers and was reluctant to give evidence at the Crown Court, although she agreed to do so. Sentenced to 30 months' imprisonment.

**Held:** (considering *M* (1994) 16 Cr.App.R.(S.) 770) in *M* the Court had indicated that a distinction could be drawn between cases where an estranged husband forced his way into the wife's home as an intruder and raped her, and those where the husband was still living in the same house and occupying the same bed with consent. The circumstances of the present offence were more serious than those of *M*, as the appellant used force to get the complainant to the bedroom. In the unusual circumstances of the case, the sentence would be reduced to two years.

**Cases cited:** *M* (1994) 16 Cr.App.R.(S.) 770.

**References:** rape, *Current Sentencing Practice* B4-1.

*R. Hunt* for the appellant.

**OTTON L.J.:** On February 16, 1995, in the Crown Court at Teesside before Holland J., Kirk Paul Pearson, the appellant, changed his plea to guilty on a count of rape. The learned judge then adjourned the matter until February 24, when he sentenced the appellant to 30 months' imprisonment. He now appeals against sentence by leave of the single judge.

This is an unusual case of rape and the details of it must be set out. The complainant was, at the time, aged 21. She and the appellant had met each other at school and started going out as a couple in 1989. In 1991 she gave birth to their son and initially they lived with their respective parents until in 1992 when they began to live together, first at a unit for the homeless in a hostel in Richmond and after they were allocated a flat in Colburn near Catterick Garrison.



Their relationship began to deteriorate after the complainant suffered a miscarriage in late 1993. They were talking of separation and she was at least considering an ouster injunction either from the magistrates' or the county court. On March 25 the complainant left the flat, leaving her son with the appellant. She met a girlfriend and they went for a drink in a local bar. About an hour later the appellant arrived and took exception to what he found. He had brought their son with him. He handed the child over to her and said that it was really her job to look after the child at home, and he wanted to go out with his sister. He left and did spend the rest of the evening with his sister.

At about 10.30 p.m. the complainant was at home and lying on the sofa with her son when the appellant arrived home. He was aggressive and was clearly the worse for drink.

What happened thereafter is a matter about which there is some doubt, but it is necessary to recite what she alleged happened. She told the police that some weeks earlier she had indicated that their relationship had come to an end, that she no longer wanted to have sexual relations with him and that they should sleep separate and apart. It was her habit by that stage to sleep on the sofa with her son, the appellant sleeping alone in the relationship bed.

When the appellant came in he was aggressive and demanded that she should go to the bedroom with him. She refused whereupon, according to her, he seized her by her hair very roughly and pulled her across the living room through the hallway and into the bedroom. He then, still pulling her hair, got her on to the bed and forcefully removed her clothes. He then took off his clothes and got under the bed covers with her. He took hold of her head again and tried to force her head down towards his erect penis. She said, "He was very forceful and pushed hard on the back of my head, and at one time my face touched his penis."

By this time she was crying and shouting for him to get off her and he persisted in his sexual demands to the extent, according to her, that he grabbed hold of her pubic hair and rolled her over on to the bed, dragging her with him. There was struggling but eventually, by reason of his superior strength, he penetrated her. She said that intercourse lasted about five minutes. He did not ejaculate but withdrew and made insulting remarks to her. There was then further minor violence and the incident ended.

There is evidence to suggest that after that event they resumed co-habitation together in the bed, but there was no resumption of sexual relations.

In the event, complaint was not made to the police. An account was first given to social workers in support of an application to oust the appellant from their home and to support her alternative application to be re-housed. It may be that there was an element of exaggeration in that account for that purpose. It is to be noted that when she made the complaint to others she did not allege that the full offence of rape had taken place. Her explanation subsequently was that she thought there had to be ejaculation for the full offence of rape to occur. Whether or not that explanation was true or genuine we have no means of establishing, but we discount it as heavily as we can, and no doubt the learned judge did also.

Suffice it to say that when the appellant was arrested and in the police station shortly afterwards, he was utterly candid. He said on arrest, "I shouldn't have forced her", and he told them that he had just turned nasty and that he had forced her into having sexual intercourse "and that was basically it". The only serious allegation which he denied was the grabbing of the pubic hair and the use of any violence other than that of the forceful penetration.

When the matter progressed towards the Crown Court, it became apparent that the complainant was reluctant to give evidence. Indeed, it was not until the very day

of the trial that the complainant apparently changed her mind and indicated to the Crown Prosecution Service that despite her reluctance she was willing to give evidence. Understandably, and there is no criticism of the appellant and still less of the representation that he had, it was only at that stage that a plea of guilty was tendered.

The learned judge had read the papers and had been kept fully informed of the progress of the proceedings, and we can deduce from what occurred that he was very concerned about the way in which the case had progressed.

In the event, having taken the change of plea, the matter was adjourned for eight days so that the learned judge could have a full opportunity to consider every aspect of the case before passing sentence. He imposed the sentence of two-and-a-half years which is now under appeal.

It is said on his behalf that given the plea of guilty and the fact that the complainant did not wish the case to be brought to court and the unique features of the background of the case, a shorter sentence would have sufficed. We have considered those submissions with the greatest of care.

On December 15, 1994, in this Court presided over by Lord Taylor C.J., consideration was given to the appropriate level of sentencing in a case such as this where there has been a long established relationship, either within or outside marriage, between the parties. He considered the particular circumstances of that case, and the sentence of three years' imprisonment which had been imposed by the trial judge was reduced to one of 18 months' imprisonment. That, of course, is an extremely low sentence within the tariff for rape.

It is essential to draw a distinction between the circumstances of that case (*M* (1994) 16 Cr.App.R.(S.) 770) and the one under review. In that case the parties continued to share the same bed after the breakdown of the marital relationship, and on the night in question were, in their normal fashion, in bed together. That appellant was aware that the relationship was at an end and he asked for "a last cuddle". She agreed. They fell asleep. She later awoke to find her nightdress raised and him touching her bottom and pulling down her pants. She asked him not to persist but he pulled her over onto her back and had intercourse with her. He was physically stronger than she; she could not stop him. He did not use violence on her beyond having intercourse against her will. On a number of occasions he said, "You can't deny me my rights as a husband". The intercourse did not last long, either because the appellant ejaculated or because, when the complainant asked him to, he got off her. He, too, was remorseful about what he had done and admitted the matter immediately to the police and professed that he was still in love with her.

Considering the particular circumstances of that case, the Lord Chief Justice said: "In the present case we would point out that there is a distinction between a husband who is estranged from his wife and is parted from her and returns to the house as an intruder either by forcing his way in or by worming his way in through some device and then rapes her, and a case where, as here, the husband is still living in the same house and, indeed, with consent occupying the same bed as his wife. We do not consider that this case is as grave as the former case.

Bearing in mind all the circumstances of the case which have been relied upon [by counsel], we take the view that the sentence was too long. That there had to be a custodial sentence, there can be no doubt. It must be clearly understood by husbands that they do not have an absolute right to use their wives for sexual purposes whatever the relationship may be between them and whether or not there is consent. A sentence of imprisonment therefore is appropriate in this case, but bearing in mind the circumstances to which we have referred, we

consider that three years was excessive. We will reduce it to a sentence of 18 months' imprisonment."

The trial judge in this case did not have the benefit of that important decision. We chose to strike a balance between the circumstances which are revealed in *M* and those which we can safely infer which occurred on this particular night. In short, we have come to the conclusion that the circumstances here of the actual offence were more serious. On his own admission, the appellant used force to get her from the sofa and into the bedroom.

However, we venture to think that had Holland J. had the benefit of the judgment of the Lord Chief Justice he would undoubtedly have taken it into account and that he would, or might have, tempered the sentence even more than he, in fact, did. It is quite clear that the sentence of two-and-a-half years with the tariff as it was then known to be was a lenient sentence even for this type of offence within this type of relationship.

However, we have come to the conclusion that in all the circumstances of the case, not least the unique features of the background to this case, the sentence of two-and-a-half years is marginally excessive.

Normally for this Court to interfere we would have to be persuaded that there was an error in principle or that the sentence itself was manifestly excessive. However, we consider that it is desirable to establish and maintain consistency between the sentences which are imposed in these circumstances. Accordingly, we take the exceptional course of reducing the sentence of two-and-a-half years by six months and substituting sentence of two years' imprisonment. To that extent, and in these exceptional circumstances—which I emphasise—the appeal is allowed.

## ANDREW ROBBINS

COURT OF APPEAL (Lord Justice Leggatt, Mr Justice Collins and Judge Capstick): July 20, 1995

*causing death by dangerous driving—killing pedestrian by driving at excessive speed in area restricted to 30 m.p.h.—length of sentence.*

Five years' detention in a young offender institution for causing death by dangerous driving by driving at an excessive speed in an area restricted to 30 m.p.h. reduced to three-and-a-half years.

The appellant pleaded guilty to causing death by dangerous driving. The appellant, who was disqualified from driving, was driving a borrowed car which was in poor condition. He drove in the dark at at least 60 m.p.h. in an area restricted to 30 m.p.h. and collided with a pedestrian. The appellant left the scene in a car driven by a friend, sentenced to five years' detention in a young offender institution and disqualified from driving for three years.

**Held:** this was a dreadful piece of driving which led to death. The sentence of five years' detention in a young offender institution was however excessive: a sentence of three-and-a-half years' detention would be substituted.

**References:** detention in a young offender institution—causing death by dangerous driving, *Current Sentencing Practice* E2-4C.  
*R. Egbuna* for the appellant.

**COLLINS J.:** This appellant, who is 18, appeals by leave of the single judge against the sentence of five years' detention in a young offender institution imposed by His Honour Judge Hopkin at Nottingham Crown Court for causing death by dangerous driving. At that time he was also convicted of, and sentenced for, driving whilst disqualified, but no separate penalty was imposed. In addition to the five years' detention, he was ordered to be disqualified from driving for three years and was ordered to take a re-test.

The circumstances of the offence were these. On August 24, 1994, this appellant was driving whilst disqualified a car which he had borrowed from a friend. The car itself was generally in poor condition; in particular none of the tyres had a proper tread, and there was a defect to the brakes in that one of the front brakes was not properly in order so that the front wheel continued to revolve even though the brake was on. This should have been apparent to the driver and, indeed, was, because the appellant accepted that the steering wheel shook when there was braking. But the real cause of the accident was grossly excessive speed. The victim was crossing a road which was part of the A611 road known as Hucknall Lane in Bulwell. It is a road subject to a 30 m.p.h. limit. The accident happened at night-time. The appellant was driving the car at a speed which, as the learned judge said in his sentencing remarks, was not less than 60 m.p.h. In fact the expert reconstruction evidence indicated that the speed before any braking commenced must have been somewhere between 68 and 86 m.p.h. As we have said, the speed was grossly excessive. It is fair to say that there was no indication that drink played any part at all in this matter.

Following the accident, the victim was tossed over the bonnet of the car and landed with his head through the windscreen. The car came to a halt and the victim's half brother, who had been with him, and other friends came up and assaulted the appellant whom they regarded as having been responsible for the accident that had occurred. It was fairly obvious that the victim had suffered very severe injuries and was not likely to survive. A friend of the appellant came past at about that time, stopped, and the appellant got into his car and was driven from the scene. It was a factor which the learned judge mentioned—that he did not stay at the scene—as being an aggravating factor. Mr Egbuna on his behalf has urged upon us, as he did upon the learned judge, that that should not have been taken into account as an aggravating factor because the appellant had a reason to leave the scene.

The mitigating factors that were pressed on his behalf were, first, of course, his plea of guilty; and secondly, his age, coupled with the remorse that he clearly had felt for what had happened. So far as his age is concerned, it is unfortunately the case that young men such as this are those who are likely to drive cars in this sort of way and they must appreciate that if they do drive cars in an irresponsible fashion and accidents occur, particularly if people are killed, then they are going to suffer a serious penalty as a result. This young man has a number of previous convictions (as indeed is obvious from the fact that he was driving whilst disqualified) for motoring offences, including one in February 1994 for dangerous driving. He had also driven from time to time whilst disqualified. He is one of those who apparently has an obsession with motorcars and could not stop himself (or would not stop himself) from driving them.

There is, however, an indication in the reports that are before us that he clearly suffered great remorse for what he had done. Indeed, there is reference in the report from the young offender institution that he needed support to overcome the nightmares he was experiencing in relation to his crime, but has responded well to counselling. There is an indication that he has settled down in prison and is making the best use of his time there. He is a young man who is not unintelligent, having achieved four GCSE passes. It is said also that he has at last realised, as a result of this

Court shall take into account the extent to which the offender has complied with the requirements of the relevant order."

The application of paragraph 8 is, therefore, not in terms confined to offences which were committed during the currency of the order. The paragraph applies where an offender in respect of whom a relevant order is in force is convicted of an offence, in other words irrespective of when it was committed before the Crown Court.

These provisions have been considered on various occasions by this Court. It is true they are by no means free from difficulty. Our attention has been particularly invited to the case of *Cawley* (1994) 15 Cr.App.R.(S.) 209. The relevant order in that case was a probation order. The chronology can be summarised very shortly. In 1991 the appellant committed a series of driving offences, the last of which was on January 19, 1992. On January 18 he had committed a burglary. In March 1992 he was placed on probation for the driving offences. That was for a period of two years. In December 1992 he was sentenced to two years' detention for the burglary and the probation order was revoked. For the driving offences he was sentenced to a consecutive period of detention. That and other aspects of the sentence were challenged on appeal. The judgment of the Court, presided over by the Lord Chief Justice, was delivered by Sedley J., who, having reviewed the legislative origins of the provisions contained in paragraph 8, said this at page 211:

"It can be seen that although what were formerly discrete provisions for dealing with offenders who were already subject to probation orders or to community service orders have been swept into a single compendious provision, a policy is still discernible from the statute. In particular the requirement of paragraph 8(4) that if revocation is to be coupled with resentencing the court must first take into account 'the extent to which the offender has complied with the requirements of the relevant order' keeps the new provision close to those of section 8(8).

In our judgment, it can seldom if ever be in the interests of justice to resentence an offender for offences for which he was placed on probation after the commission of the crime for which he now stands before the Crown Court, even if it is appropriate to revoke the probation order."

The relevant order in the case with which this Court is concerned is of course not a probation order but community service. Such an order is available in cases meriting a custodial sentence as an alternative to custody. Such an order contains a strong punitive element. We have no doubt this appellant was made the subject of this community service order because, although the custodial option was actually available, the non-custodial alternative was, in the circumstances, thought to be appropriate. There is, in our judgment, a very real and obvious difference between resulting situations when a probation order is revoked at an early stage in the currency of the order and when at the same stage a community service order is revoked. In this case the appellant had performed only some 52 hours of the 240 hours of unpaid work which under the order he had been required to perform.

The concluding consideration in *Cawley* is expressed in these terms by Sedley J.: "Conviction of a further offence during the currency of the relevant order is therefore a necessary but not a sufficient reason for resentencing under paragraph 8. It is quite true that the new conviction of itself—in the circumstances which have arisen since the order was made—is important, but what matters most in our judgment is whether the offender was on probation when he re-offended."

For the reasons we have endeavoured to state, which focus primarily on the character of the relevant order, in this case a community service order, we have come to the conclusion, notwithstanding the very clear and indeed concise arguments that

have been advanced this afternoon on behalf of this appellant, that the circumstances of this case can properly be distinguished from the circumstances in *Cawley*. In law, Judge Pyke had, in our judgment, the power to revoke and to re-sentence. The exercise of the power to re-sentence in the circumstances of this case was not, in our judgment, wrong in principle. The judge, in our judgment, had appropriate regard to the circumstances which had arisen since the order had been made. Furthermore, as paragraph 8(4) of the Schedule required of him, he expressly took into account the extent to which the offender had complied with the requirements of the order. In our judgment his approach cannot in law be faulted, though it by no means follows that the approach he chose to take was the only approach available to him.

Was the consecutive sentence of four months manifestly excessive? It has not been suggested, nor could it be, that it was. The totality of the overall sentence has not been, and could not be criticised having regard to the criminality involved. For those reasons, this appeal must therefore be dismissed.

— CASE 33

### ATTORNEY-GENERAL'S REFERENCE NO. 22 OF 1995 (SYLVESTER SEMPER)

COURT OF APPEAL (The Lord Chief Justice, Mr Justice Turner and Mr Justice Latham): October 3, 1995

*Life imprisonment—rape—rape at knife point committed by offender with previous convictions for rape committed at knife point—whether medical evidence of dangerousness necessary before sentence of life imprisonment can be imposed.*

A sentence of life imprisonment substituted for a sentence of eight years' imprisonment in the case of a man convicted of rape committed at knife point who had been convicted of four similar offences on a previous occasion. There was no need for medical evidence to be led in order to establish that the offender was of unstable character and likely to commit further offences of the same kind. It was sufficient if the previous offences showed in themselves a picture of continuing danger to the public such as to indicate the element of unstable character.

The offender was convicted of one count of rape and one of indecent assault. The offender attacked the victim in the street in the early hours of the morning. He threatened her with a knife, tried to force her to perform oral sex and then raped her twice. The appellant had been convicted in 1985 of four offences of rape committed with the use of a knife for which he was sentenced to 10 years' imprisonment. Sentenced to eight years' imprisonment. The Attorney-General asked the Court to review the sentence on the ground that it was unduly lenient.

**Held:** for the Attorney-General it was submitted that the sentencer should have imposed a discretionary life sentence, having regard to the circumstances of the offences and the danger that they indicated that the offender posed to female members of the community. It was not disputed that the Criminal Justice Act 1991, s.2(2)(b) applied to the case. The criteria for a discretionary life sentence had been laid down in *Hodgson* (1967) 52 Cr.App.R. 115, and applied in more recent cases. They were that the offence was grave enough to warrant a very long sentence; that the offender was shown to be of an unstable character and likely to commit further offences, and that if the further offences were committed, the consequences to the

public would be very grave. There was no doubt that the first and third of these criteria were satisfied: so far as the second was concerned, it was well established that there was no need for medical evidence to be led in order to establish that the offender was likely to commit further offences of the same kind. It might be sufficient if the previous offences showed in themselves a picture of continuing danger to the public such as to indicate the element of unstable character. In the present case it was highly significant that the previous offences, as well as the offence for which the offender was sentenced, were committed at knife point. Looking at the whole of the offender's history, the Court had come to the conclusion that he constituted a danger to female members of the public and would remain so for an indefinite period. The Court would accordingly substitute a sentence of life imprisonment for the sentence of eight years' imprisonment imposed for the rape. If an indeterminate sentence had not been passed, the appropriate determinate sentence would have been of the order of 12 years. The Court would accordingly fix a period of eight years for the purposes of the Criminal Justice Act 1991, s.34. The sentence for indecent assault would be concurrent.

**Case cited:** *Hodgson* (1967) 52 Cr.App.R. 115.

**References:** life imprisonment, *Current Sentencing Practice* F3-2; *Archbold* 5-237.

*M. Ellison* for the Attorney-General; *K. Millett* for the offender.

**LORD TAYLOR C.J.:** This is an application on behalf of Her Majesty's Attorney-General pursuant to section 36 of the Criminal Justice Act 1988. Thereby application is made for leave to refer to this Court a sentence which the Attorney-General considers was unduly lenient. We grant leave.

The offender's name is Sylvester Semper. He is now 34 years of age. On April 24, 1995, following a trial, he was convicted of one offence of rape and one of indecent assault. He was sentenced to eight years' imprisonment for the rape and 18 months' imprisonment concurrent for the indecent assault. The nature of the case, in a nutshell, was that he attacked the victim in the street in the early hours of the morning when she was alone. Using a knife to her throat he forced her up some stairs; he there tried to make her perform oral sex upon him and he raped her; all of that against a background of having been previously convicted in 1985 of four offences of rape involving the use of a knife.

In a little more detail the matter was revealed in evidence in this way. In the early hours of the morning of September 24, 1994 the victim, a woman aged 31, had been walking with her boyfriend in Clapham Road, London SW4. They had been arguing and it ended with the victim going away on her own. As she was walking by herself she was grabbed by the offender who was totally unknown to her and she to him. He put one arm around her throat and she felt a knife against the side of her neck. He demanded money from her. When she said she did not have any, he grabbed her by the hair and said "I've got a knife, I'll slit your throat. Don't say anything." He replaced his arm around her throat, pressed the knife there again and forced her up some communal stairs in a block of flats. Having got her away from the street, he tried to kiss her, bit her on the left ear and then held her down with his leg whilst he rolled a cannabis cigarette. He must have observed the quarrel between the victim and her boyfriend because he said to her sarcastically "So you've had an argument with your boyfriend." He took down his trousers, exposed his erect penis and tried to force the victim's mouth over it. She managed to extrude his penis. He became angry. He pulled off the victim's jacket and told her to take off her trousers and tights. When she did so he raped her. She tried to talk to him to gain his confidence and persuade him

to stop. A bicycle passed. At that point the offender put his hand firmly over the victim's mouth, saying "If you say anything, I'm going to fucking kill you. I've still got my knife." He withdrew from intercourse at that stage and stood up. The victim tried to persuade him to leave the scene with her so that she might have an opportunity of gaining help, but he pushed her to the floor and again raped her. She continued to talk and in order to bring the rape to an end offered to take him to a friend's house nearby. After some further disturbance in the street the offender agreed to do that. Surprisingly he followed the victim to her friend's house and waited outside against a wall while she tried to rouse her friend. As soon as the friend opened the door the victim was admitted. She explained to her friend what had happened and pointed to the offender. After he had gone the victim went with her friend by cab to her home. There she informed her boyfriend what had happened and the police were called.

The following day, Sunday September 25, the offender was spotted by the victim's friend walking up and down outside her house. The police were called and the offender was arrested. He advanced an alibi at first and then, in the course of interview, said that he knew the victim, knew her to be a drug addict, and that she had had an argument with her boyfriend. He and the victim had taken drugs together and then had consensual sex. He denied any attempt at oral sex had been made. At an identification parade both of the women, the victim and her friend, picked out the offender.

At trial he advanced a defence along the lines of what he had said to the police. He did not give evidence, but he was allowed to call psychiatric evidence to the effect that his intelligence was significantly impaired. The purpose of that was, under the recent provisions, to rebut any suggestion that an inference adverse to the offender ought to be drawn from his failure to give evidence.

As to the victim, she suffered a bite on her left temple, a small cut in her vagina, swelling and redness over the lower back due to ground friction, and tenderness over her neck due to rough handling. Apart from the physical injuries, she has been severely affected by the rape in a number of aspects of her life. She has had persistent difficulty in sleeping and eating; she had great fear of travelling in public; and she found it impossible to continue her relationship with her long-standing boyfriend. She has been unable, and continued to be unable, to work for more than a few days.

It is submitted on behalf of the Attorney-General that there are aggravating features: the use of the knife; the severe and lasting effects on the victim; and, most cogently, the previous convictions for offences, particularly offences of rape which, in the submission of the Attorney-General, rendered this a case to which section 2(2)(b) of the Criminal Justice Act 1991 applied. There were previous convictions in 1981 for a number of offences of robbery, but, more importantly, at the Central Criminal Court, on December 21, 1985, the offender was sentenced to 10 years' imprisonment concurrently for each of four rapes. The first was during the afternoon of February 28, 1985 when he broke into a flat, threatened a female with a knife and raped her. He also stole money from her purse. A matter of a month after that, on March 27, 1985, in the early hours of the morning, he broke into a flat occupied by two sisters aged 21 and 23. They were sharing a double bed. He raped each of them, threatening each with a knife and, having used his fingers to penetrate them first, he repeated the rape on the younger girl. He also stole cash and property. A few days later, in the early hours on April 1, 1985, he broke into a flat, stole cash and property, threatened the victim with a knife and raped her. He was released from the sentence of 10 years' imprisonment in December 1991.

It is submitted that the trial judge ought to have imposed a discretionary life sentence, having regard to the circumstances, not merely of these offences, but of the

previous offences and the danger they indicated was likely to continue so far as female members of the public are concerned.

In passing sentence the trial judge said: "Sylvester Semper, you are convicted of rape for the second time." A little later he said:

"I am satisfied that you were armed with a knife; you did have a previous conviction, and it is apparent from the statements that she has made that the effect upon the victim is a continuing one and a very serious one."

Thus it is submitted, on behalf of the offender, that this very experienced trial judge clearly had in mind those aggravating features upon which the Attorney-General relies. But although at one stage in his sentencing remarks he said that the present offence of rape was not as serious as *those* described in 1985, his reference to a conviction for a second time and to a previous conviction may suggest that he had not, on this occasion, given full effect to the total picture which emerged when these convictions are put together with the convictions which were recorded by the court in 1985. The approach of the trial judge seems to have been to compare the gravity of the present offence of rape with the gravity of the earlier offences and to conclude that the present offence was not so serious, as a result of which he imposed a sentence of eight years' imprisonment whereas earlier a sentence of 10 years' imprisonment had been imposed.

It is submitted on behalf of the Attorney-General that section 2(2)(b) applies. There is no dispute on behalf of the offender that that is so. We have to consider whether the proper course in this case was to impose an indeterminate sentence. The criteria for doing that, where it is a matter of discretion, are well known. They were set out first in *Hodgson* (1967) 52 Cr.App.R. 115, and they have been applied in a number of more recent cases. There are three factors set out in *Hodgson*: (1) that the offence is grave enough to merit a very long sentence; (2) that the circumstances before the trial court show that the offender is an unstable character and likely to commit further offences; and (3) that if further offences of that kind were to be committed the consequences to members of the public will be very grave. There can be no doubt whatsoever here about (1) and (3) of those criteria. So far as (2) is concerned, it is well-established that there is no need for medical evidence to be led in order to show an unstable character such that the offender is likely to commit further offences of the same kind. It may be sufficient if previous offences taken into consideration show in themselves a picture of continuing danger to the public such as to indicate that element of unstable character to which we have referred.

In the present case it is highly significant, in our view, that in each of the four instances which led to the imposition of the 10-year sentence in 1985 the rape was committed at knife-point. It is a feature also present in the rape for which the trial judge had to pass sentence.

Looking at the whole of the offender's history we have come to the conclusion that he constitutes a danger to female members of the public and is likely to remain so for an indefinite period. In those circumstances we have come to the conclusion that the proper sentence is of one of life imprisonment. We impose that sentence in respect of the offence of rape. So far as the offence of indecent assault is concerned, we leave the trial judge's concurrent sentence of 18 months standing.

It falls to us, having imposed a life sentence, to consider the order we ought to make pursuant to section 34 of the Criminal Justice Act 1991. We have come to the conclusion that if an indeterminate sentence were not passed the appropriate fixed term sentence would be of the order of 12 years. Accordingly we consider that two-thirds of that is the period which should be regarded as the relevant part pursuant to section 34, namely a period of eight years. In saying that we make it quite clear that we are not suggesting that the offender ought to be released at the end of

eight years; all we are saying is that eight years at least should pass before consideration is even given to the possibility of release. It follows from what we have said that we have come to the conclusion that on this occasion this experienced judge did not approach the case with due regard to all the relevant circumstances and that his sentence was unduly lenient. We have borne in mind that this is an Attorney-General's Reference and normally there would be a discount in respect of that factor when deciding the different sentence to impose. But for the reasons we have given the sentence we have substituted is primarily concerned with the protection of the public and therefore that factor does not avail the offender in the present case.

## BRIAN HAROLD VALE

COURT OF APPEAL (Lord Justice Hutchison, Mr Justice Mitchell  
and Judge Stroyan Q.C.): October 3, 1995

*Life imprisonment—specified period for purposes of the Criminal Justice Act 1991, s.34—manslaughter by reason of diminished responsibility—length of specified period.*

Ten years specified as the relevant period for the purposes of the Criminal Justice Act 1991, s.34 in conjunction with a sentence of life imprisonment imposed for manslaughter by reason of diminished responsibility varied to eight years.

The appellant pleaded guilty to manslaughter by reason of diminished responsibility. The appellant formed a relationship with a woman; when the relationship deteriorated, he attacked her and killed her by striking her head against a pavement or wall on a number of occasions. There was medical evidence that the appellant was liable to react violently to perceived rejection by women. Sentenced to life imprisonment with a period of 10 years specified for the purposes of the Criminal Justice Act 1991, s.34.

**Held:** (considering *O'Connor* (1993) 15 Cr.App.R.(S.) 263, *Sanderson* (1993) 15 Cr.App.R.(S.) 473, *Meek* (1995) 16 Cr.App.R.(S.) 1003, and *Hollies* (1994) 16 Cr.App.R.(S.) 463) the sentence of life imprisonment was not challenged. It was argued that the period of 10 years specified for the purposes of section 34 was too long, as the sentence had taken a sentence of 15 years as the determinate sentence which he would have imposed, and that in determining the notional determinate sentence, full weight should be given to the fact that the appellant's responsibility for his actions was substantially diminished. The period chosen by the sentence was out of step with the authorities. The case was very grave and the appellant's responsibility was by no means small, but 15 years would have been manifestly excessive as a determinate sentence. An appropriate starting point would have been 12 years. Section 34 allowed the sentence a discretion to fix a period of between one-half and two-thirds of the notional determinate sentence, and there was no ground to criticise the decision to fix two-thirds. The specified period would be reduced to eight years.

the appellant said he had acquired the saw-machine-gun as a de-activated gun and had re-activated it himself, designing a modification to enable it to fire ammunition of two calibres rather than one. This was a modification which he hoped would enable him to market the design as a military weapon. He said he would test fire this weapon at a range, and was intending to carry out further tests on the day of his arrest. The reason for the large number of cartridges was that they were necessary in order to carry out the tests.

As to the sawn-off shotgun, he said he had been approached by somebody who wanted the gun repaired. He kept it, saying it could not be repaired. The gun was capable of being fired, but it was damaged. The exact condition of a sawn-off shotgun which is suitable for its purpose is perhaps hard to decide.

As to the Berretta sawn-off shotgun, the stun gun and the cannabis, he said that they had all been inside boxes which he believed contained motorcar parts and personal bric-a-brac which he had been asked to store on behalf of a friend. He said he tested it and he knew that it was no good; indeed, he believed it was not genuine. He pleaded guilty to possessing the cannabis on the basis that he would return the box back to the person who had asked him to store it.

Those were the factors which the judge had to take into account when coming to sentence the appellant. The judge said that he had flouted orders of the court and that he had demonstrated an unrestrained temper. Each of those factors is relevant when considering offences of this nature. He had in the past had little regard for the limits on the consumption of alcohol whilst driving; he had three convictions for driving with excess alcohol. The excessive intake of alcohol is a factor which undoubtedly rightly is taken into account when considering certification for a firearm.

The judge accepted that there must have been exceptional circumstances leading to the justices placing him on probation in respect of the first of the firearms offences. He referred to the 1993 offences. He described that sentence, as indeed it was, as a lenient sentence. He went on to say that he was not sentenced because of his previous record, but the court had to bear in mind his background because of the number of offences and the repetition of offences which are contained in the indictment. The court has to decide the sentence which is commensurate with the seriousness of the offence. When deciding the seriousness of the offence the court is entitled to take into account any previous convictions of the offender or any failure of his to respond to previous sentences. In our judgment there were here matters which the court was entitled to take into account. The judge said that he had to look at the totality of the period which was involved; he did not accept that the appellant was an innocent bailee of the drugs, but passed a sentence of two years' imprisonment.

It is now said that the total sentence is manifestly excessive, bearing in mind, firstly, that the appellant pleaded guilty. A plea of guilty is always an important matter, and it will be necessary to return to that in one moment. Secondly, it is said that there is no evidence to suggest that any offence had been committed with any one of these firearms when in the appellant's possession. That is true. Thirdly, it is said that he was not convicted of any offence such as he had been convicted of in 1993. There were other offences charged, for example possessing a firearm with intent to endanger life, but they were left on the file on the usual terms.

We at one time were of the opinion that there might be some substance in one of the submissions since the maximum sentence for possessing a prohibited weapon is 10 years' imprisonment. The appellant pleaded guilty, which would attract a discount. Sometimes that discount is a quarter and sometimes it is a third but there is no hard and fast rule. We have to look at the position as it was. Here was a man who had indeed flouted the law at every turn so far as these prohibited weapons were concerned. We consider that the judge was fully entitled to take his starting point of

10 years, especially as there were the various weapons which he could take into account when coming to his final sentence. He then gave a discount of two years for the plea of guilty to those offences.

In our judgment, bearing in mind the nature of the evidence against him, there was little chance of the appellant doing other than pleading guilty. We have come to the firm conclusion that the discount was sufficient. We look at the matter in the round: a total of 10 years' imprisonment. There is understandably and rightly great public concern about any possession of firearms. The appellant has shown himself temperamentally unsuited for lawful possession of firearms. Contemplation of him in unlawful possession is frightening.

We have considered all the matters persuasively put before us by his counsel, but we have come very firmly to the opinion that this appeal must be dismissed.

## CASE 34 ASIF MASOOD

COURT OF APPEAL (Lord Justice Potter, Mr Justice Owen and Judge Martin Tucker Q.C.): December 13, 1996

*Rape—rape of prostitute with false imprisonment and violence—length of sentence.*

Nine years' imprisonment upheld for the rape of a 16 year-old prostitute with false imprisonment and violence.

The applicant pleaded guilty to false imprisonment and rape. The applicant encountered a girl of 16 who was soliciting as a prostitute. She agreed to permit intercourse for £30. She entered the applicant's car and he drove to a car park, where he attacked the girl, placing his fingers on her throat and striking her face. The applicant punched her several times so that she lost consciousness, and then had intercourse against her will without using a condom. The girl was later forced to masturbate the applicant and perform oral sex on him. The girl was released after being detained in the car for about four hours. Sentenced to nine years' imprisonment for rape and four years' imprisonment concurrent for false imprisonment, with an order under the Criminal Justice Act 1991, s.44.

**Held:** (considering *Cole and Barik* (1993) 14 Cr.App.R.(S.) 764) it was for the courts to protect prostitutes. The sentence was not manifestly excessive.

**Case cited:** *Cole and Barik* (1993) 14 Cr.App.R.(S.) 764.

**References:** rape, *Current Sentencing Practice*, B4-1.

*M. Taylor* for the appellant.

**JUDGE TUCKER Q.C.:** On January 29, 1996, in the Crown Court at Nottingham, before His Honour Judge Matthewman Q.C., the applicant pleaded guilty to an offence of false imprisonment (count one) and to an offence of rape (count two). On April 18, he was sentenced to nine years' imprisonment on count two and to four years' imprisonment on count one. Other counts were left on the file on the usual terms and an order was made under s.44 of the Criminal Justice Act. He renews his application for leave to appeal against sentence after refusal by the single judge.

It is necessary for the decision of this Court properly to be understood for us unhappily to recite in some detail the facts upon which this sentence was based. They

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arose out of a terrible incident about 2.00 a.m. on October 29, 1994 when the victim, who was only 16 but sadly already a practising prostitute, was plying her trade in the streets of Nottingham. The applicant pulled up his car along side her, and asked if she was working. When she said "Yes", they agreed a price of £30 for intercourse in the car. She got into the car and the applicant drove off and pulled into a car park. After the car had stopped the applicant locked the doors, moved across to the passenger seat so that he was facing the victim who was sitting on that seat. He started to take off his shoes, but the victim asked for the money first. Curiously and quite inexplicably then things went terribly and horribly wrong. There is no real explanation why. The applicant became angry and aggressive. He placed his fingers on her throat and she started to scream, but the only effect of that was to make him more violent and more aggressive. He struck her across the face with his shoe and punched her on the head three or four times. She lost consciousness momentarily and when she came round he was pulling at her dress. He pulled her dress over her breasts, kissed her, had sexual intercourse against her will without using any form of contraceptive protection. After he had finished he forced her into the back of the car and drove off. During the course of the drive she tried to attract the attention of a policeman, but he was otherwise engaged and was unable to take any action to assist her. Eventually the car stopped. She was forced to masturbate the appellant and to perform oral sex upon him which, she said, she found extremely disgusting and distressing. He had throughout the journey threatened her and she was afraid that he would beat her if she did not comply with his demands. He drove her around the streets for a considerable time, occasionally stopping and forcing her to perform further sexual acts with him. She was crying and kept on pleading with him to be released. Eventually they arrived back at the car park where he had first raped her. He then ended the events by saying that he would shoot her if she told anyone about her ordeal and, for good measure, told her that he was HIV positive. That, as we understand it, is not in fact the case, but it must have been something which greatly added to her pain and distress. He then released her before driving off. It was by this time somewhere around 6.20 in the morning, so she had been imprisoned in his car for something of the order of four hours. She hailed a passing taxi and got it to take her straight to the police station where she made a complaint.

Because she had been wise and quick enough to get enough of the number of the car the applicant was arrested fairly soon afterwards. It is right to say that, from the time of his arrest, he did not seek to deny his responsibility and certainly by the time he came to be sentenced it was clear that he was showing considerable remorse—a feature which the learned judge bore in mind and a situation which Mr Taylor has urged forcefully on his behalf before us.

The applicant comes from a devout Muslim family as is reflected both from the pre-sentence report and in the psychiatric report, both of which were before the learned judge. We need not read much of them. In relation to the risk of re-offending the probation officer puts it curiously in this way:

"The court will recognise the lack of police antecedents negatively affect this analysis."

We think what he means is that because the applicant is a man of good character he cannot make any assessment as to the risk of re-offending. The probation officer goes on towards the end of the next paragraph:

"[The applicant's] view is that by adhering to his Muslim faith and family values then he will be able to avoid further offending. However, this view fails to take into account how he will be able to deal effectively in the future with the conflicting situation he found himself presented with in respect of his family's

devout Muslim faith and views in W. J. C. at C. Sc. re. J. is

further area in need of exploration and work during a prison sentence. ... Whilst [the applicant] refers to the effect of his consuming a mix of alcohol and cannabis upon what he views as behaviour that was out of character, he does show signs of accepting that it was 'his' behaviour and he presents as developing insight into the trauma he provided to his victim and in consequence he wished to express his regret and extend his apologies to her."

Likewise in the psychiatric report, as far as insight is concerned, it is clear that the applicant is in no way suffering from any form of mental illness. The psychiatrist says under a sub-paragraph headed "Insight":

"[The applicant] tended to blame the index offence on the cannabis and alcohol he has used on the night [in question]. However, he did take responsibility for the offence and is seeking an explanation for what has taken place. He seemed genuinely confused that he has committed this offence [and] ... specifically stated that he wanted to participate in a programme for sex offenders."

Under the paragraph headed "Opinion and Recommendations" the psychiatrist says:

"... I can find no evidence that the offence was planned with a history preceding the index offence of an escalation of violence towards women. I can find no other evidence to suggest that [the applicant] poses any greater risk to women than anyone convicted of such an offence."

When passing sentence upon him Judge Matthewman said:

"The fact that your victim was a prostitute is no mitigation and, to be fair to you, you have never tried to claim that it made any difference...."

Mr Taylor drew our attention in this connection to *Cole and Barik* (1993) 14 Cr.App.R.(S.) 764 at 765 where, in giving the judgment of the Court, Tucker J. said:

"It is of course true that a prostitute is entitled to refuse to have sexual intercourse. She can always say 'no' and the law will uphold that right. But, it is submitted—and with some effect, as we think, that a factor which the court can take into account is that the prostitute is, in the nature of her trade, prepared to have intercourse with any man who pays for it and that her situation and the hurt that she may suffer as a result of the rape is to some extent different from that of another woman who would only be prepared to have sexual intercourse with a man whom she knows and respects."

We do not disagree in the slightest with those observations, but we do not feel they are germane to the situation with which we are concerned. No doubt the actual act of intercourse is the more traumatic to a young inexperienced virgin than it would be to an older (and this complainant was in fact young) prostitute. The very act of intercourse to someone who has never experienced it before, if she is unwilling and is taken by surprise, can be in itself an inexpressibly appalling event. Intercourse by itself with a prostitute might be to some extent the less, but the catalogue of other indecencies, of gratuitous violence, of false imprisonment, of gratuitous additional insults and threats is something which is as painful to the complainant here as it would have been to anyone else.

There is another side to that particular point. It is only through the courts that prostitutes are going to get protection, which they do sometimes—indeed sadly all too often—need from the violent attentions of a man who to start with seeks and obtains, as the applicant did, a consensual encounter in a confined space and then resorts to violence. It is only if courts are astute to recognise the need for prostitutes to be protected that they can indeed get the protection which they require and which only the courts can give. Therefore we take no account of the fact that she was a prostitute. The one aspect is counterbalanced by the other.

Judge Matthewman continued:

"... what you did was to subject your victim to four hours of terror and violence and sexual degradation. You imprisoned her in this car, you raped her violently, you subjected her to various types of degrading sexual conduct and there was added to that gratuitous violence. It must have been unspeakably traumatic and terrifying for this young girl. She was quite unable to escape from you. A lot of what you did whilst you were there with her caused her physical pain [and] no doubt emotional pain. You made matters worse by saying that you were HIV positive and threatened her that violence would come to her by way of her being shot if she told what had happened."

He went on to deal with the suggestion that cannabis had played its part and observed that those who thought that cannabis should be legalised should pay attention to that. We do not add to that comment.

Mr Taylor in his forceful submissions, which were all the more forceful because of the moderation with which they are expressed, suggests that the sentence was too high both on the facts and on the matter in relation to personal mitigation. In a case as appalling as this mitigation has little part to play. If there had been significant previous tendency to behave in this fashion an even more serious course might have had to have been considered by the learned judge.

Mr Taylor drew our attention to the sentence imposed in *Cole and Barik* which, following a plea, was seven years' imprisonment. There were, it is true, on that occasion three prostitutes involved. However, the facts of that case are very different from the appalling four-hour endurance that this unfortunate 16-year-old had to deal with. We have given anxious consideration as to whether the learned judge's starting point was too high. His starting point, for a sentence of nine years following a plea of guilty, must have been 12 years' imprisonment. He did not express it as such, but it is plain that he gave credit for a plea and the appropriate credit would have been one quarter. In those circumstances his starting point was 12.

This was obviously a severe sentence on a young man who was not at that time quite 21, but it was a sentence in respect of a very horrifying and terrifying four hours in this girl's—this child's—life. In those circumstances, although we recognise that this was a severe sentence, we agree with the observations of the single judge who refused leave to appeal. We agree that this was a sentence that was not manifestly excessive. This application is therefore refused.

**LEIGH MARLOW SWATSON**

COURT OF APPEAL (Lord Justice Potter, Mr Justice Owen and Judge Martin Tucker Q.C.): December 13, 1996

*Detention in a young offender institution—manslaughter.*

Twelve years' detention in a young offender institution for manslaughter by shooting a man reduced to nine years.

The appellant pleaded guilty to manslaughter and possessing a firearm with intent to endanger life. The appellant was thought to have been involved in a robbery at a post office in the course of which a substantial sum was stolen. The deceased and another man went to see the appellant and demanded money from him. During the course of this incident the deceased or his companion threatened the appellant with a

gun and shortly afterwards the appellant shot him in the chest. The appellant claimed that he had acted in self defence when the deceased had entered a house where he was; he had not intended to kill him. Sentenced to 12 years' detention in a young offender institution for manslaughter, with six years' detention concurrent in a young offender institution for possessing a firearm.

**Held:** although the appellant was only 17, he had acquired the gun and a bullet proof vest before the incident. The use of firearms was a matter of great public concern in the locality. While the Court accepted the need to pass a deterrent sentence, the sentencer had given inadequate weight to the fact that the appellant had fired when he was followed to his house by men who had already been violent and who might have been armed. The sentence would be reduced to nine years' detention in a young offender institution.

**References:** detention in a young offender institution—manslaughter, *Current Sentencing Practice* E2-4A.

*I. Harris* for the appellant.

**POTTER L.J.:** On 2 July 1996, in the Crown Court at Liverpool before Steel J., the appellant pleaded guilty on re-arraignment to an offence of possessing a firearm with intent to endanger life (count one) and not guilty to murder but guilty to the lesser offence of manslaughter (count two). He also admitted being in breach of a conditional discharge order of six months imposed at Liverpool Youth Court on October 30, 1995 for failing to surrender to custody. He admitted being in breach of a conditional discharge order for one year for an offence of possessing a Class B controlled drug (cannabis) and for an offence of theft, both at Liverpool Youth Court on July 12, 1995. Sentence was postponed for reports. On July 22, 1996 he was sentenced on count one for possessing a firearm with intent to endanger life to six years' detention in a young offender institution, and on count two (manslaughter), to 12 years' detention in a young offender institution to run concurrently. The total sentence was 12 years' detention. There was no separate penalty in relation to the breach offences. He appeals against sentence by leave of the single judge.

The background is as follows. On November 20, 1995 there was an armed robbery at the post office in Lodge Lane, Liverpool, carried out by men wearing hoods and balaclavas. Some £12,000 was stolen. One of the robbers was armed with a handgun. It appears that people in the local community believed that the appellant, together with two men named Opumu and Sallery and another unnamed man, were responsible for the robbery.

The deceased man, who was the subject of the manslaughter charge, was named Paul Ogbuehi. He was previously a friend of the appellant. He was also convinced that the appellant had been involved in the robbery. On the evening of the robbery Ogbuehi had told his friend, Wayne Lewin, that his girlfriend was in the post office at the time of the robbery and was frightened by the experience. Ogbuehi ("the deceased") and Lewin agreed that they were going to demand some money from the appellant.

On November 20, Opumu was at the home of the deceased. He apparently "appeared paranoid" and was asking if there were men looking for him. He left with the deceased. On November 21, Opumu and Sallery left Liverpool altogether and stayed in Manchester and Leeds with a large amount of cash. On November 22, they met friends from Liverpool who included the appellant. The appellant produced a handgun and showed it to one of the group, a man named Dauphin. The appellant confirmed it was real, produced a round of ammunition, said it was a 9 millimetre



Board in *Reid (Junior) v. R.* (1990) 90 Cr.App.R. 121, 130, [1990] 1 A.C. 363, 384C. Their Lordships consider that exceptional circumstances include the fact that the evidence of the visual identification is of exceptionally good quality. Accordingly, the ultimate issue in this appeal is whether the evidence of the visual identifications of the defendant was qualitatively good to a degree which justified the application of the proviso."

In that case they found the evidence was exceptionally good and therefore an exceptional circumstance which justified the application of the proviso. Their Lordships were satisfied, at p. 6 and 1442, "that there was no miscarriage of justice because the jury (acting reasonably and properly) would inevitably have returned the same verdict of guilty of murder if they had received the requisite general warning and explanation from the trial judge".

Their Lordships consider that in the present case the evidence of identification also was "exceptionally good". The appellant accepted that he had known both witnesses for a long time (indeed as already pointed out he said that he knew Daley for much longer than Daley said that they had known each other). The identification took place in daylight and both witnesses saw the appellant at close quarters. Sonia Simmonds' reaction was immediate when she saw the gunman—"Duppy ah come". Daley left quickly no doubt because of past disputes fearing danger because it was the appellant with a gun. There is nothing to suggest that these witnesses who saw the appellant at different stages and independently and identified him without any doubt were mistaken or that they possibly could have been mistaken. The jury could only have understood the appellant's words at the prison as meaning what Sonia Simmonds understood them to mean.

In all the circumstances their Lordships are satisfied, as was the Board in *Frennittle*, that there was here no miscarriage of justice since the jury acting reasonably and properly would inevitably have returned the same verdict if they had received the appropriate warning and explanation from the trial judge.

Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed.

*Appeal dismissed.*

*Solicitors:* Herbert Smith, for the appellant. Charles Russell for the Crown.

## CASE 35

## ANTHONY VALENTINE

COURT OF APPEAL (Lord Justice Roch, Mr Justice Owen and Mr Justice Blofeld): November 16, 30, 1995

## EVIDENCE

## Rape

*Recent complaint—Admissible if made at first reasonable opportunity.*

At 11.30 p.m., the complainant was walking home when she met the appellant, who was a complete stranger to her. She was persuaded to join him for a meal at a nearby restaurant. They left the restaurant together at 12.30 a.m. and began to walk towards her home. The appellant suggested that they cut across a football ground and she agreed. When they reached the middle of the playing field the appellant threatened her with a table knife and forced her to have sexual intercourse with him against her will. The complainant arrived home at 2.30 a.m. Her parents and elder brother were at home but they were asleep. The next morning she went into her brother's bedroom and told him that she had been attacked with a knife. She told him that she did not want to tell her parents. She went to work during the afternoon and in the evening told a friend that she had been raped. It was contended, *inter alia*, on appeal that the complaint to her friend during the evening following the incident was inadmissible because it was not made at the first opportunity which reasonably offered itself after the alleged offence.

Held, dismissing the appeal, that (1) a complaint alleging rape can be recent and admissible even though it may not have been made at the first opportunity which presented itself. It is enough that it is the first reasonable opportunity. What is the first reasonable opportunity will depend on the circumstances including the character of the complainant, and the relationship between the complainant and the person to whom she complained and the persons to whom she might have complained but did not do so. (2) A complaint will not be inadmissible merely because there had been an earlier complaint, provided that the complaint was made as speedily as could reasonably be expected. It is not permissible for the prosecution to lead evidence that the complaint has been made by the complainant in substantially the same terms on several occasions soon after the alleged offence, where that would be prejudicial in that it might induce the jury to regard the reports of individual complaints as evidence of the truth of what they assert. The complaint must be made within a reasonable time of the alleged offence and on the first occasion that reasonably offers itself for the complainant concerned to make the

complaint that was made in the terms in which it was made. (3) In the instant case the judge had applied the principles correctly.

*Cummings* [1948] 1 All E.R. 551 applied.

[For recent complaint in sexual offences, see *Archbold* (1995) paras. 8-90 to 93.]

Appeal against conviction.

On April 7, 1993, at Winchester Crown Court (Judge Tucker Q.C.) the appellant was convicted of rape and sentenced to nine years' imprisonment. The facts appear in the judgment.

The appeal was argued on November 16, 1995.

*David Gibson-Lee* (not below) for the appellant.

*Geoffrey Still* for the Crown.

*Cur. adv. vult.*

November 30. ROCH L.J. read the judgment of the court. On April 7, 1993 at the Winchester Crown Court the appellant was convicted of rape and sentenced to nine years' imprisonment. He now appeals against conviction by leave of the single judge. The case came before another division of this Court presided over by Hirst L.J. on July 26, 1994. The hearing of the appeal was adjourned on that occasion and the matter referred back to the single judge to consider the grant of legal aid concerning further grounds which the appellant wished to put forward in addition to the two grounds of appeal drafted by counsel.

The single judge on October 27, 1994 gave certain directions concerning legal aid, in relation to allegations by the appellant of negligence and misconduct by his trial counsel and solicitors. The single judge invited the response of the appellant's trial lawyers to the criticisms that the appellant was making.

In due course trial counsel and trial solicitors responded to the appellant's criticism of their conduct and those responses were sent to the appellant. That occurred in May 1995. The appellant has not responded to those comments so the appeal before us proceeded on the two grounds raised in the grounds of appeal against conviction drafted by counsel and dated April 26, 1993.

At about 11.30 p.m. on May 22, 1992, the complainant, W was walking from Andover town centre to her home when she met the appellant, who was a complete stranger to her. He asked her if she knew of somewhere where he could get a drink. She told him that there was an Indian restaurant nearby. He insisted that she join him and she did so. They left the restaurant together at about 12.30 a.m. and began to walk towards her home. The appellant suggested that they cut across a football ground and W agreed. The prosecution's case was that when they reached the middle of the playing field, the appellant threatened W with a table knife and forced her to have sexual intercourse with him against her will.

The appellant's defence was that intercourse had taken place but with W's consent.

The appellant had hitched a lift to Andover in a car belonging to Paul Hopgood. With Paul Hopgood in his car was a friend of Hopgood's, Kevin Hicks. It was the evidence of Mr Hopgood and Mr Hicks that they had met the appellant in a public house and he had asked them for a lift to Andover. Neither Mr Hicks nor Mr Hopgood had met the appellant before that night. During the short journey to Andover, according to Mr Hicks's evidence, the appellant made suggestive remarks about girls whom they drove past and then said: "I am going to get a ride tonight one way or the other". Mr Hopgood's evidence to the jury was to the effect that he recalled the appellant saying he was going to get a ride that night. Before that evidence was led by the prosecution, counsel for the appellant at his trial, Mr Grey, submitted that the evidence was irrelevant and inadmissible or alternatively that the prejudicial effect of that evidence clearly outweighed its probative value and that the judge in the exercise of his discretion should refuse to allow the prosecution to lead it. It would, argued Mr Grey, adversely affect the appellant's chances of having a fair trial. The judge ruled the evidence admissible. The first ground of appeal briefly urged by the appellant's counsel at this appeal, Mr Gibson-Lee, was that the judge's ruling was wrong and constituted a material irregularity in the course of the appellant's trial.

A Mr Raghman, the owner of the Indian restaurant to which the appellant and W had gone, gave evidence. He recalled the appellant and the complainant visiting his restaurant very late in the evening on May 22, 1992. He was shown a knife by the police which was exactly the same as the knives in his restaurant. Later in the trial there was evidence that the knife shown to Mr Raghman had been found at the edge of the playing field.

Mr Chalisari, a waiter at the restaurant, gave a statement to the police which was read to the jury. In that statement he said that when he cleared the table at which the appellant and W had been sitting, no cutlery was missing.

The complainant's evidence was that she had begun to walk home, having spent the evening on May 22, 1992 in two public houses in Andover. She was walking home alone. She met the appellant. He asked her where he could get a drink and she pointed out a nightclub and also the Indian restaurant belonging to Mr Raghman. The appellant insisted that she should accompany him so they went to the restaurant together. She told the jury that whilst they were there the appellant left the table where they were sitting twice, once ostensibly to go to the lavatory and on the other occasion to buy some cigarettes. She told the jury that the appellant was friendly but she was not attracted to him.

When the time came to leave, the appellant asked her whether she wanted a taxi or whether she would walk home. She had said that she would like a taxi but he had decided that they should walk. Whilst walking

home he had suggested that they cut across the football pitch, although strictly that was not on her direct route home. She told the jury that she had agreed because he told her that there was another way out at the far end of the field.

When they reached the middle of the field the appellant had said to her: "I might be Jack the Ripper". She thought that was a weird thing for him to say and began to feel nervous. At that point he produced a table knife and she tried to run past him. He seized her by the right arm and pulled her towards some bushes. He then tripped her so that she fell on her back. He sat on top of her, holding the knife about 15 inches away from her stomach, with his other hand around her throat. She tried to grab the knife and the harder she tried the harder he gripped her neck. She tried to bend the knife out of his hand and then he put it beside him on the ground where he could reach it but she could not. He asked if she was going to consent to sexual intercourse to which she replied that she did not seem to have much choice. He then touched her breasts and undid her jeans pulling one of her legs out of her jeans. That was followed by sexual activity which included making her fellate him and which ended with sexual intercourse. After the intercourse was over they both stood up. The complainant told the jury that the appellant wiped the knife on his coat saying it was to get rid of his fingerprints. He then told her to throw the knife away which she did.

She went home reaching her home at about 2.30 a.m. Her parents and her elder brother were in the house but they were asleep.

Next morning she went to her brother's bedroom and told him that she had been attacked with a knife. She did not mention any details to him as she had wanted to forget the incident. She did show him the cuts on her hand which he had caused when she grabbed the knife. She told him that she did not want to tell her parents.

She went to work that afternoon and in the evening met two friends, Andrew Smith and Richard Gould. She told the jury that she spoke to Andrew Smith and at first told him what she had told her brother, namely that she had been attacked with a knife. Subsequently when speaking to Andrew Smith on his own she had told him that she had been raped. She had not gone into the details of the rape but had told him that it happened on the football field.

When she was cross-examined it was suggested to her that what the appellant had said to her on the football pitch was: "Don't worry, I'm not Jack the Ripper". It was also put to her that she had consented to sexual intercourse. She denied both suggestions. She was cross-examined as to what she had told Andrew Smith and said that she did not think she had told him that it was she who had wiped the knife. She was asked whether she had cut her thumb on a rusty orange car belonging to a friend of hers on which she had leant during the evening of May 22.

AW, the complainant's brother, said that his sister had come to his bedroom between 8.30 and 9.00 a.m. She seemed unhappy and nervous and had told him that she had been attacked by a man with a knife. He said

that she had told him that the man had said to her: "I'm Jack the Ripper" and that she had some cuts on her thumb. He told the jury that his sister appeared dazed and shocked and he had seen some cuts on her hand, but his memory was that it was the right hand.

Andrew Smith told the jury that he had spent the evening of May 23, with W. She had been very jumpy and nervous. She told him that she had been attacked with a knife the day before. He told the jury that she seemed to want to talk and then seemed not to want to talk. She told him that she had marks around her neck and she had pointed them out to him but he could not really see them because of the poor light. They had been talking together outside the public house where they had met, she wishing to talk to him on her own. She then told him that not only had she been attacked but she had also been raped. She told him that it happened on the football pitch. He told the jury that the complainant had told him that she had been made to clean the knife and throw it away. The knife had been at her throat when she was threatened with it. She had grabbed the knife and that was how she cut her hand. Andrew Smith said that they then met Richard Gould and the two of them advised W to go to the police. Initially she had not wished to do that but finally decided to go to the police and they had accompanied her. In cross-examination Mr Smith agreed that W had not mentioned rape when she first spoke about the incident to him. Her attitude was that she wanted to talk about the incident but he did not want to force her. He had not suggested to her that she had been raped. She had told him that the knife had come from an Indian restaurant and had described it to him as a normal table knife. It was suggested to Mr Smith that he had planted the knife at the football ground. He denied that suggestion. Richard Gould gave evidence that the complainant was visibly shaken when he had met her with Andrew Smith and he also told the jury how they had taken her to the police station.

The owner of the orange rusty car was called to give evidence that the roof of his car, the part that W had been in contact with, did not have any sharp edges which could have cut her thumb.

Evidence was given by a woman police constable as to the complainant's state when she arrived at the police station and that the woman police constable had seen a one inch cut on W's left thumb. Evidence was given by two doctors, one who had examined the complainant's genital and perineal regions in the early hours of May 24. The first doctor found no injury to the complainant's genitalia. The second doctor carried out a full examination of the complainant, also on May 24, and found slight swelling to her neck, two cuts to her thumb and bruising to her upper arm.

The appellant was arrested on May 26. In interview he admitted that sexual intercourse had taken place but said that it was with the complainant's consent. He denied that there had been a knife or that any force had been used.

The appellant did not give evidence. Two witnesses were called as part of his evidence. A Dr Roberts said that she would have expected there to

A have been more cuts if the complainant had seized the knife as suggested. However Dr Roberts conceded that the cuts which the complainant had could have been caused by the table knife. She went on to say that the sort of pressure the complainant alleged had been applied to her neck might result in no visible injury at all. A forensic scientist, Mr King, said that no marks were found on the knife. In cross-examination he agreed that the absence of fingerprints on the knife had no evidential value at all.

B Prior to Andrew Smith and Richard Gould giving evidence, counsel for the appellant, Mr Grey, had sought a ruling that that evidence be excluded as being inadmissible. Two grounds were relied upon: first, that the complaints to Andrew Smith had been made by W in answer to questions put to her by Smith; and secondly, that the complaints had not been made on the first reasonable opportunity W had had for making complaints. The judge ruled that evidence admissible.

C This forms the second ground of appeal. Mr Gibson-Lee did not place much reliance upon the point that these complaints were made in answer to questions by Mr Smith. The main thrust of Mr Gibson-Lee's submission on this ground was that these complaints had not been made at the first reasonable opportunity. The judge should have ruled these complaints inadmissible or alternatively he should have permitted the prosecution to prove the bare fact that W made a complaint of rape to Mr Smith but not the terms in which the complaint was made. Subsidiary to that submission Mr Gibson-Lee pointed out that nowhere in the summing-up did the judge expressly direct the jury that this part of the evidence was not evidence of the truth of the facts alleged in W's complaint but merely went to her consistency and credibility as a witness.

E The first ground of appeal is that the judge should have excluded the evidence of the remarks allegedly made to Hicks and Hoggood by the appellant and that his ruling that such evidence was admissible was wrong. The judge identified the issues in the case, namely those of consent and the appellant's knowledge that W was not consenting or alternatively the appellant being reckless as to whether she consented or not. The judge found, in our view correctly, that the evidence was germane to the issues in the case. The judge then considered defence counsel's submission, namely that the prejudicial effect of such evidence outweighed its probative value and that the admission of the evidence would deprive the appellant of a fair trial. The judge concluded that the prejudicial effect of the evidence did not outweigh its probative value and ruled that the evidence be admitted.

F The judge had a discretion. The judge took into consideration those factors which the law required him to consider. There is, in our judgment, no basis on which we could interfere with the judge's exercise of his discretion or say that he exercised his discretion wrongly.

G Turning to the second ground of appeal, the argument addressed to the trial judge was succinctly put at p. 5C of the short transcript by Mr Grey who was the appellant's counsel at his trial when Mr Grey said:

A "Now, I submit that that is inadmissible as a recent complaint. The terms of it are inadmissible. I say that for two reasons; firstly, it is not a complaint made on the first opportunity which reasonably offers itself after the alleged offence; and, secondly, it may, judging by what Mr Smith says in his statement, ... have been adduced as a result of leading or inducing questions."

B Mr Grey went on to cite a passage from *Archbold* (1995) para. 8-92:

"To be admissible the complaint must be made on the first opportunity which reasonably offers itself after the offence."

The first opportunity which had reasonably offered itself after the alleged offence, submits Mr Gibson-Lee, was the occasion when the complainant went to her brother's bedroom the following morning and made a complaint that she had been attacked by a man with a knife. The judge in making his ruling recognised that point saying:

C "Of course in one sense, her encounter with her brother on the following morning was a reasonable opportunity to make the complaint."

D The judge was clearly concerned that the jury should not have a distorted picture of how the complainant had conducted herself between the time of the alleged offence and her going to the police station the following evening. The judge in the course of his ruling said:

"It seems to me that, in order for the jury reasonably to be able to understand what has happened, it is necessary for them to see how the matter developed."

The judge then went on to say:

E "It seems to me that I can bear in mind the evident difficulty this young woman has had in getting her evidence out; the evidence, furthermore that I have read to show that she can be tensed and bottled up. In those circumstances, it seems to me that, if there is to be a point made, and it is a perfectly legitimate and valid point to be made, it must be made in all fairness and justice on the basis of the jury knowing what has happened."

F Later in his ruling the judge said:

G "I do not think that the law requires me to say that the evidence should be excluded in those circumstances [the circumstances being that the complainant had bottled up the matter for some 24 hours] if the first opportunity could be said to be that opportunity where she felt able to bring herself to say it. Not every woman can bring herself to say that a man has raped her, even if she has been most cruelly raped. I think we understand that in these courts these days, even if it was not appreciated by Victorian judges, who started laying down this principle towards the end of the last century."

19 J 2 CR APP R  
A The leading authority on complaints in cases of sexual offences is *Lillyman* [1896] 2 Q.B. 167, the judgment of the Court of Crown Cases Reserved being delivered by Hawkins J. At p. 170 of the report Hawkins J. stated that such evidence:

B "It clearly is not admissible as evidence of the facts complained of: those facts must therefore be established, if at all, upon oath by the prosecutrix or other credible witness, and, strictly speaking, evidence of them ought to be given before evidence of the complaint is admitted. The complaint can only be used as evidence of the consistency ... of the prosecutrix with the story told by her in the witness box, and as being inconsistent with her consent to that of which she complains."

C The court in its judgment then went on to trace the history of the use of complaints in rape cases, pointing out that historically the making of a complaint immediately after the alleged offence was:

"in order to prevent malicious accusations." (p. 171).

D In the later case of *Osborne* [1905] 1 K.B. 551 at p. 559 Ridley J., in giving the judgment of the Court of Crown Cases Reserved, referred to the fact that:

"... in early times it was incumbent on the woman who brought an appeal of rape to prove that while the offence was recent she raised 'hue and cry' in the neighbouring towns, she shewed her injuries and clothing to men, and that the appellee might raise as a defence the denial that she had raised the hue and cry."

E Returning to the case of *Lillyman*, Hawkins J. quoted from *Hawkins' Pleas of the Crown* this passage:

"It is a strong presumption, but not a conclusive presumption against a woman that she made no complaint in a reasonable time after the fact." (p. 170).

F In *Lillyman's* case the principal issue was whether the whole of the alleged complaint should be placed before the jury or whether the evidence should be limited to the bare fact that a complaint had been made. The court was not considering what amounted to a reasonable time after the fact. In that case the complainant, a girl under the age of 16, complained to her mistress, in the absence of the defendant very shortly after the commission of the acts charged against the defendant. The prosecution were permitted by the trial judge, Hawkins J., to lead evidence from the girl and from her mistress not merely of the fact of the complaint but the details of the complaints made. Further the decision in *Lillyman* established that evidence of recent complaint was admissible in cases of sexual offences other than rape.

G In *Osborne* it was decided that evidence of recent complaint could be given in a case where consent was not an issue by virtue of the complainant

A being under the age of consent. In *Osborne* Ridley J. cited a passage from *Hale's Pleas of the Crown*, namely:

B "For instance, if the witness be of good fame, if she presently discovered the offence, made pursuit after the offender, shewed circumstances and signs of the injury ... these and the like are concurring evidences to give greater probability to her testimony, when proved by others as well as herself. But on the other side, if she concealed the injury for any considerable time after she had opportunity to complain, ... and she made no outcry when the fact was supposed to be done, when and where it is probable she might be heard by others; these and the like circumstances carry a strong presumption, that her testimony is false or feigned."

C Ridley J. observed:

"We think these words may be adopted as stating the law accurately, and they indicate that these complaints are to be admitted, not only because they bear on the question of consent, but also because they bear on the probability of her testimony in a case in which, without such or other corroboration, reliance might not be placed on her testimony."

D It is to be observed that this passage from the judgment suggests that a late complaint could be given in evidence as being relevant to the complainant's credibility at the instigation of the defence, as being favourable to their case.

E At the end of the judgment in that case Ridley J. said:

"We are, at the same time, not insensible of the great importance of carefully observing the proper limits within which such evidence should be given. It is only to cases of this kind that the authorities on which our judgment rests apply; and our judgment also is restricted to them. It applies only where there is a complaint not elicited by questions of a leading and inducing or intimidating character, and only when it is made at the first opportunity after the offence which reasonably offers itself. Within such bounds, we think the evidence should be put before the jury, the judge being careful to inform the jury that the statement is not evidence of the facts complained of, and must not be regarded by them, if believed, as other than corroborative of the complainant's credibility, and, when consent is in issue, of the absence of consent."

F The decision in *Osborne* established the basic criteria for determining which complaints were admissible and which were not. Subsequent cases provide illustrations of the development of the law in this field, for it must be recognised that the trend has been to widen the scope of complaints which are to be admitted in evidence. The case of *Lee* (1912) 7 Cr.App.R. 31 was a case where the complainant claimed to have made an immediate

complaint to the mother of the defendant, who was not called by the prosecution. The complainant then went home and told her father about a cut upon her thumb which she alleged had been inflicted in the struggle with Lee but said nothing to her father about an indecent assault. Later the complainant spoke to a Mrs Mussett and told her the whole story. That was some hour and a half to two hours after the alleged indecent assault. Giving the judgment of the court, Hamilton J. said at p. 33:

"It is now contended that the evidence of Mrs Mussett is not within the proposition in the judgment of Ridley J. in *Osborne* ... that such evidence 'is admissible "only when" a complaint is made at the first opportunity after the offence which reasonably offers itself.' We think that no one could cavil at the lapse of time within which the complaint to Mrs Mussett was made—namely, within one and a half hours; clearly this was as early an opportunity as could reasonably be expected to offer itself, leaving out the complaint to Mrs Lee. It is contended that the second complaint was not admissible after the first complaint to Mrs Lee, or that, the fact of the complaint to Mrs Lee having been elicited, the prosecution could not fortify it by Mrs Mussett's evidence. It must depend on the circumstances of each case whether it can be said that the complaint was made on the first reasonable opportunity which offers itself. But here we think that both the first complaint was in fact put in evidence on the cross-examination, and the second complaint was available."

The headnote states the principle to be derived in these terms: "... an early complaint is not necessarily excluded because there has been a previous complaint."

A similar decision was reached by Lord Reading C.J. in the case of *Wilbourne* (1917) 12 Cr.App.R. 280. There the charge was one of rape against a medical practitioner, the rape taking place in a dispensary at about 5.30 p.m. The complainant met her sister shortly after leaving the dispensary and made a complaint to her in answer to a question put by her sister. The trial judge did not admit that evidence. Evidence was given by the complainant's mother that when her daughters returned home at about 7 p.m. she noticed that the complainant had been crying. The sister had then said to the complainant that she should tell her mother all about it and the mother asked what had been going on. The complainant then said: "Why that doctor has insulted me." The mother then asked: "What has he been doing to you?" And the complainant said: "It is not what he has said but what he has done," and then told her mother the story which she told the jury from the witness box. The trial judge rejected an argument that evidence of a complaint could only be given by the first person to whom the complaint was made. The judge's ruling that the complainant to whom mother was admissible was upheld on appeal.

A more recent authority is *Cummings* [1948] 1 All E.R. 551, where the

complainant alleged that she had been raped during an evening by Cummings. At the time she was living at a Landworker's camp. She did not complain to the camp warden that evening, although she saw him. She said she did not complain to the camp warden because he was a friend of Cummings. There was also a female welfare officer at the camp, who was known to the complainant, although there was no evidence that the complainant knew the Welfare Officer was available for her to speak to. The complainant made no complaint to other girls of her age living in the same hut at the camp. However, the next day, as early as she could, the complainant went from the camp to a much older woman who lived two miles away who was known to her and to whom she did make a complaint. The trial judge permitted evidence of that complaint to be given and the appeal was mounted on the basis that as the complainant had not made a complaint immediately the evidence of that complaint ought not to have been admitted. In the course of giving the judgment of the Court of Criminal Appeal Lord Goddard C.J. said at p. 552:

"Who is to decide whether the complaint is made as speedily as could reasonably be expected? Surely it must be the judge who tries the case. There is no one else who can decide it. The evidence is tendered, and he has to give a decision there and then whether it is admissible or not. It must, therefore, be a matter for him to decide and a matter for his discretion if he applies the right principle. There is no question here that Hallett J. did apply the right principle. He had clearly in mind the fact that there must be an early complaint. Whether it was reasonable to expect the prosecutrix to complain the moment she got back to the Camp to a man who she hardly knew, or whether it was more reasonable that she should wait till the morning and complain to Mrs Watson, her friend, were matters that the learned judge had to take into account. He did take them into account, and he came to the conclusion that in the circumstances the complaint next morning was in reasonable time. If a judge has such facts before him, applies the right principle, and directs his mind to the right question, which is whether or not the prosecutrix did what was reasonable, this Court cannot interfere."

We accept that passage as a correct statement of the law and of the approach of this Court to a trial judge's ruling on the admissibility of complaints in cases of sexual offences.

The authorities establish that a complaint can be recent and admissible, although it may not have been made at the first opportunity which presented itself. What is the first reasonable opportunity will depend on the circumstances including the character of the complainant and the relationship between the complainant and the person to whom she complained and the persons to whom she might have complained but did not do so. It is enough if it is the first reasonable opportunity. Further, a complaint will not be inadmissible merely because there has been an

A earlier complaint, provided that the complaint can fairly be said to have been made as speedily as could reasonably be expected. This is not to say that it is permissible to allow the Crown to lead evidence that the same complaint has been made by the complainant in substantially the same terms on several occasions soon after the alleged offence, where that would be prejudicial in that it might incline the jury to regard the contents of individual complaints as evidence of the truth of what they assert. The complaint has to be made within a reasonable time of the alleged offence and on the first occasion that reasonably offers itself for the complainant concerned to make the complaint that was made in the terms in which it was made.

B We now have greater understanding that those who are the victims of sexual offences, be they male or female, often need time before they can bring themselves to tell what has been done to them; that some victims will find it impossible to complain to anyone other than a parent or member of their family whereas others may feel it quite impossible to tell their parents or members of their family.

C Turning to the present case, we consider that the judge applied the principles applicable correctly and adopted the approach laid down by Lord Goddard in *Cummings*. We are content that we should follow Lord Goddard's approach and say that this Court cannot interfere in a case such as the present where the judge has such facts before him, applied the right principle and directed his mind to the right questions.

D The judge saw and heard the complainant. He assessed her as a person who was tense and who would bottle up this matter until she found a friend of her own age to confide in. We would echo the further words of Lord Goddard:

E "In the circumstances, we think that there was nothing which could oblige this court to say that the complaint was not made as speedily as could reasonably be expected."

F The subsidiary point raised by Mr Gibson-Lee is that in his summing-up the judge did not in terms tell the jury that the complaints made by W were not evidence of the facts complained of and related only to her credibility. It is correct that the judge did not use those words in directing the jury. On the other hand, at p. 17A of the summing-up the judge said to the jury:

G "You have to ask yourselves whether the course of the complaint which is why you have heard it as far as W is concerned here is so out of the norm as to make you think she cannot be telling you the truth when she says, 'This was rape and not an act of intercourse which I subsequently regretted.' That is the crucial question you have to ask yourselves."

When at the end of the summing-up, at p. 60G of the transcript, the judge said:

A "Note the course of her complaints, members of the jury. She does not complain of rape at first, she complains of sexual intercourse having certainly happened. She does not complain of rape and then later on adds a knife for good measure, thinking out how she is going to concoct a story.

B What she complains of was the knife. That is what she said to A. 'There was a knife that was held at me.' Only much later, hours later, to Andrew Smith does she bring herself to say anything about sex, and as I said to you to Dr Weaver she does not even mention oral sex. Does that help as to the way things came out? Is the prosecution right in saying this is a young woman reluctant to mention the sexual element but content to mention the knife? Or is it as the defence suggest a young woman inventing her story and improving it as it goes along?"

C From those passages it must have been clear to the jury that the relevance of the evidence of complaints was to enable the jury to decide whether the complainant was inventing her story and adding to it as it went along, as the defence claimed, or whether she was someone who could only bring herself to complain of the sexual element of the attack on her when she had the opportunity to speak to a trusted friend of her own age alone, as the Crown claimed. We are confident that the jury would have understood that this evidence went to the credibility of the complainant, both the prosecution and the defence having used the evidence of complaints for its proper purpose and the judge having reminded the jury that the prosecution and defence were relying on that evidence in that way. We conclude that there was no material misdirection in this case and this appeal is dismissed.

Appeal dismissed.

Solicitors: Crown Prosecution Service.

sentence in respect of any of the other offences. It would be inappropriate so to do having regard to the fact that the orders of detention are made pursuant to the 1933 Act. Accordingly the sentence will be one of 30 months' detention for each of the offences of attempted robbery and burglary with intent on January 29, 1995 and 18 months' detention for the attempted robbery on September 6, 1994. Those sentences will be served consecutively, making four years' detention in all. We take into account the 25 other offences.

CASE 36

**ATTORNEY-GENERAL'S REFERENCE NO. 10 OF 1995  
(BRIAN DENVIR)**

COURT OF APPEAL (The Lord Chief Justice, Mr Justice Waterhouse  
and Mr Justice Hidden): December 12, 1995

*Rape—rape with aggravating features by offender gaining access to victim's flat—adequacy of sentence.*

Nine years' imprisonment for rape of a victim aged 17 at knife-point by a man who gained access to her flat increased to 13 years.

The offender was convicted of rape and attempted buggery. The offender obtained entry to a flat occupied by the victim, aged 17, in the early hours and threatened her with a knife before raping her twice and attempting to bugger her, and performing other sexual acts. Sentenced to nine years' imprisonment for rape and four years' imprisonment concurrent for attempted buggery. The Attorney-General asked the Court to review the sentence on the ground that it was unduly lenient.

**Held:** (considering *Billam* (1986) 8 Cr.App.R.(S.) 48) the offences were aggravated by all the factors identified in *Billam*. The appellant had a record for violent and sexual offences. Even without reference to the Criminal Justice Act 1991, s.2(2)(b), the sentence was unduly lenient: a sentence of 13 years would be substituted.

**References:** rape. *Current Sentencing Practice* B4-1.3B.

*R. Horwell* for the Attorney-General; *J. Fisher* for the offender.

**LORD TAYLOR C.J.:** On February 17, 1995, following a four-day trial at the Central Criminal Court, the applicant was convicted by a majority verdict of 11 to 1 of rape (count 1) and of attempted buggery (count 2). He was sentenced to nine years' imprisonment on count 1 and to four years' imprisonment concurrently on count 2, thus making a total sentence of nine years' imprisonment. He renews his application for leave to appeal against conviction after refusal by the single judge.

The prosecution case was that on the night of April 17, 1993 a man raped and attempted to bugger the victim, aged 17. She identified the applicant as the man who had assaulted her. Shortly after the event the applicant went to Ireland and he has throughout denied that he was the assailant.

The evidence of the complainant was that she knew the applicant, having met him on three or four occasions and been introduced to him by her flat mate. On April 16, 1993 she went to bed early. At about 1.30 a.m. she was woken by knocking at the door. She opened it and saw the applicant outside. He misled her by telling her that

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her flat mate was on his way up. Because of that she let the applicant into the flat and herself went back to bed. There was then a knock on her bedroom door. Wearing only her dressing gown, she opened it. The applicant said he wanted to talk to her and then pushed her into the bedroom. She told him to go away, but he held a knife to her neck. She began to cry and he slapped her, telling her to be quiet. He took off some of his clothes and raped her without ejaculating. He then undressed completely and raped her again. That was count 1. At one stage he drew the knife across the side of her face. He tried to insert his penis into her anus but did not succeed. That was count 2. There were a number of other sexual acts which he performed upon her. Afterwards he said he was sorry, handed her a telephone and suggested she call the police. However, he also told her to have a shower so as to get rid of any evidence of his contact with her. He was in her room for about an hour. Most of the time he was naked. When he left, the victim got dressed and went to a friend's house where she made a complaint. She was taken to the police station.

In her statement she described her attacker. She said that he spoke with an accent which she could not easily understand. She made no mention of rings on the attacker's fingers, nor of tattoos on his arms, legs and trunk. However, at an identification parade on May 26 she picked out the applicant and said she was sure he was her assailant. (The application for leave to appeal against conviction was refused).

However, the case is in our list not only in respect of that application but because there is an application by Her Majesty's Attorney-General in relation to the sentence of nine years' imprisonment which was imposed upon the applicant. It is submitted on the Attorney-General's behalf that that was an unduly lenient sentence in the circumstances of this case and accordingly he applies for leave to refer the sentence to this Court for review pursuant to section 36 of the Criminal Justice Act 1988. We grant leave for that to be done.

The victim herself was gravely affected by the attack upon her. Before that attack she had led an ordinary, happy life. After it she lost contact with her friends; she has been unable to have any physical contact with her boyfriend whom she sees only on an occasional basis; she cries a great deal; she has a feeling of being dirty; she tried to commit suicide within the first month after the attack and she describes her present life as a miserable, lonely existence.

It is submitted on behalf of the Attorney-General that there are a number of aggravating features. We were referred to *R. v. Billam* (1986) 8 Cr.App.R.(S.) 48, the leading case in which guidance was given. At page 50, Lord Lane C.J. described the considerations which ought to motivate the trial judge in deciding the appropriate sentence. He indicated that where a rape is committed by a man who has broken into a home or otherwise gained access to a place where the victim is living, the starting point should be eight years' imprisonment. That is this case. He went on to indicate eight matters which might be regarded as aggravating features. It is pointed out that in this case all eight were present. They are as follows: (1) if violence is used over and above the force necessary to commit the rape; (2) a weapon is used to frighten or wound the victim; (3) the rape is repeated; (4) the rape has been carefully planned; (5) the offender has previous offences for rape or other serious offences of a violent or sexual kind; (6) the victim was subjected to further sexual indignities or perversions; (7) the victim is either very old or very young; (8) the effect upon the victim, whether physical or mental, is of special seriousness. Lord Lane went on to say:

"Where any one or more of these aggravating features are present the sentence should be considerably higher than the figure suggested as the starting point." The offender had a bad record of previous convictions both for violence and sexual offending. In October 1977 he was sentenced to seven years' imprisonment for



robbery and the use of firearms. On October 11, 1983, for common assault, he received three months' imprisonment and for assault occasioning actual bodily harm, six months' imprisonment. On November 29, 1984, for two offences of robbery, he received concurrent sentences of five years' imprisonment; there were also offences of assault with intent to rape and indecent assault, for which sentences of three years and two years' imprisonment respectively were imposed, both to be concurrent with the sentence of five years' imprisonment. The particulars of that offence were that the offender, together with others, wearing masks entered a dwelling and robbed the female occupier at knife point and also assaulted her with intent to rape. Whilst serving that sentence the offender appeared in a court in Ireland on February 22, 1985 where, for assault with intent to rape, he was sentenced to five years' imprisonment and for indecent assault, one year's imprisonment concurrent. The circumstances were that the offender had entered a tent and at knife point had stripped and assaulted the female occupant. Finally, in March 1985, for two offences of criminal damage, one of common assault and one of assault on the police, there was a total sentence of six months' imprisonment. That case arose from the offender being refused a lift by a woman and in response kicking the car, assaulting the woman and police officers who came on the scene.

In the present case it is submitted that there were no mitigating features. Certainly none was put forward to the trial judge before sentence was passed. In all those circumstances it is submitted that the sentence of nine years' imprisonment was inappropriate and, indeed, unduly lenient. It is further suggested that it was a case, having regard to the previous convictions and the nature of the instant case where section 2(2)(b) of the Criminal Justice Act 1991 ought to have been brought into operation by the trial judge so as to impose a longer sentence than was justified simply by the seriousness of the instant offence in order to protect the public in the future from serious harm from the offender.

We take the view that this sentence was unduly lenient. Looking at the criteria laid down in *Billam*, taking a starting point of eight years by reason of the way in which the offender gained entry to the complainant's premises, we have to have regard to the fact that he contested the case and that all of the aggravating features we have mentioned were present. The victim was a young girl of 17; she was clearly badly affected by the rape; and the offences occurred against a background of sexual offending in the past. It may well be that the trial judge decided against bringing section 2(2)(b) into operation because of the period of time which had elapsed between the previous sexual offences for which the offender had been imprisoned and the instant offence. But even leaving that section out of account we consider that the appropriate sentence here had to be well into double figures on the criteria to which we have referred.

We bear in mind that this is a Reference and therefore there is the element of double jeopardy, but the least sentence that we think it appropriate to substitute for the nine years imposed by the judge is one of 13 years' imprisonment. That will be on the conviction for rape. We will leave the four-year sentence imposed by the trial judge for attempted buggery to run concurrently with that 13-year sentence.

## ATTORNEY-GENERAL'S REFERENCE NO. 39 OF 1995 (KENNETH GREY)

COURT OF APPEAL (The Lord Chief Justice, Mr Justice Waterhouse,  
and Mr Justice Hidden): December 12, 1995

*Life imprisonment—offender guilty of manslaughter by reason of diminished responsibility—offence committed while in drug-induced psychotic state—no longer psychotic at time of trial, but liable to become psychotic in the event of resuming drug use.*

Where an offender guilty of manslaughter by reason of diminished responsibility, having strangled his mother while in a drug-induced psychotic state, was no longer psychotic at time of this trial, was but liable to become psychotic in the event of resuming drug use, it was not appropriate to substitute a sentence of life imprisonment for a sentence of seven years' imprisonment. The offender pleaded guilty to manslaughter by reason of diminished responsibility. The appellant strangled his mother while suffering from manic depressive psychosis induced by drugs. By the time he appeared before the Crown Court the psychosis had disappeared, in the view of two psychiatrists, but there was a risk that it would recur if the offender resumed the use of drugs. Sentenced to seven years' imprisonment. The Attorney-General asked the Court to review the sentence on the ground that it was unduly lenient.

**Held:** (considering *Chambers* (1985) 5 Cr.App.R.(S.) 190 and *Wilkinson* (1983) 5 Cr.App.R.(S.) 105) there was evidence that the appellant had abused drugs from the age of 12, and there was no indication that he was able to stop doing so. It was submitted that a life sentence was appropriate. In the view of the Court, the trial judge was in the best position to judge the element of risk. He was entitled to form the view that he did. The sentence of seven years was reasonably open to him. It would be an extension of existing principles to regard a life sentence as appropriate where an offender was not presently in an unstable state but might become so if he resumed a course of drug abuse which he had followed in the past.

**Cases cited:** *Chambers* (1983) 5 Cr.App.R.(S.) 190, *Wilkinson* (1983) 5 Cr.App.R.(S.) 105.

**References:** life imprisonment, *Current Sentencing Practice* F3-2; *Archbold* 5-237. *R. Horwell* for the Attorney-General; *O. Davies* for the offender.

**LORD TAYLOR C.J.:** This is a reference by Her Majesty's Attorney-General pursuant to section 36 of the Criminal Justice Act 1988 whereby he seeks the leave of the Court to have reviewed a sentence which he regards as unduly lenient. We have granted leave.

The offender is Kenneth Grey, aged 25. On July 25, 1995, at the Central Criminal Court, he pleaded not guilty to murder but guilty to manslaughter on the grounds of diminished responsibility. That plea was accepted by the prosecution. The trial judge, H.H. Judge Grigson, sentenced the offender to a period of seven years' imprisonment.

The victim of the killing was the offender's mother. On January 1, 1995 he strangled her, causing her death. On the evening the victim became concerned and sought help from her neighbours. She complained that her son was on drugs and was acting strangely, and she was frightened of what was going to happen. She went to a

COURT OF APPEAL (Lord Justice Hobhouse, Mr Justice Laws and Mr Justice Butterfield): January 22, 1996

*Rape—rape of former partner with violence—length of sentence.*

Six years' imprisonment upheld for the rape with violence of the appellant's former partner.

The appellant pleaded guilty to rape. The appellant lived with the complainant for five or six years in a jointly-owned flat. The relationship broke down and the appellant ceased to live in the flat, although he retained a key to the flat and kept his belongings there. The appellant came to the flat late at night and was admitted by the complainant. Following a conversation in which the complainant indicated that the relationship had no future, the appellant threatened the complainant with a knife, prevented her from leaving the flat, punched her around the face, dragged her to the bedroom, removed her clothing by cutting it with broken glass and raped her. Sentenced to six years' imprisonment.

**Held:** the sentencer was fully entitled to have regard to the totality of the appellant's conduct. The rape was the culmination of a sequence of conduct which was intended to humiliate, terrify and punish the victim. The sentence was not too long.

**References:** *Current Sentencing Practice* B4-1.3G.

*J. Rose* for the appellant.

**HOBHOUSE LJ.:** This is an appeal against sentence, brought with the leave of the Full Court. On January 23, 1995 in the Crown Court at Leeds, on his re-arraignment on an indictment alleging rape, this appellant changed his plea from not guilty to guilty. The complainant had come to the court and a trial was about to start. He was put back in custody for a report and on February 20, 1995, before the same court, he was sentenced to six years' imprisonment. The appellant submits that the judge approached the question of sentencing in a wrong way and that the sentence was, in any event, too long.

The complainant and the appellant had had a previous relationship which had gone on for something like five to six years. They shared a flat which was in their joint ownership, but a time came where the relationship was breaking down and they had, in effect separated. It seems that the appellant was not, at that stage, regularly living in the flat although he still had his belongings there and he still had a key to the flat—indeed, he was a joint owner of it. Both he and the complainant were young, in their early or mid-twenties.

On the occasion in question the complainant was about to go to bed, it was close to midnight, and she then heard a knock at the door. She went to see who it was and it was the appellant, who asked to come in. He was let in. They had apparently arranged to meet the next day to discuss their relationship but nevertheless he had come to the flat that night.

After a relatively short discussion she told him that their relationship was not working and that there was no future in it for them. Then, as he seemed to be preparing to go to bed in the flat, in a further conversation she said to him that she did not love him anymore. They were both somewhat upset about that and it clearly was an emotional occasion, but at this stage the appellant began to behave in a violent fashion. It started with him taking a black and yellow strap, which was used for

securing luggage to a roof rack. He tied it in a noose and he suggested to her that he was going to hang himself. This naturally frightened the complainant, who began to show signs of distress. He then carried on by suggesting that he was going to kill her. At some stage he went to the kitchen, got a large kitchen knife and began to threaten her with it. She, by this stage, was showing signs of being terrified. She was crouching against a wall by a piece of furniture. He apparently then started to throw the knife at her feet so it stuck through the carpet into the floorboards. This reduced her to a state of hysteria. She was apparently screaming. At some stage she ran out of the flat, even though she was only partly clothed, and attempted to escape, but he pulled her back in again. The conduct continued. She was punched around the face. He apparently dragged her, at some stage, to the bedroom. There he sat on top of her and held the knife to her neck and pressed it hard against her neck. She was very frightened indeed. She was "screaming her head off", as she put it, and she believed she was going to die. It was under these circumstances that he then started to rape her. He removed her remaining clothing with broken glass. At some stage he had punched the mirror in the bedroom and caused the glass to break into sharp splinters. Sitting on top of her he used these glass splinters to cut her pyjama bottoms and knickers off her lower parts. He cut them to shreds, and she thought, quite understandably, that he was going to lacerate her as well. The intercourse then took place. There was nothing exceptional about the intercourse. By that stage she had been reduced to a state of complete submission. It is right to point out that he did not subject her to any further indignity beyond the intercourse. Having raped her, he then got off her and said to her: "Get the fuck out." She gathered some clothes together and ran out of the flat into the road and to a phone box, where she called the police. She was then rescued by the police and the appellant was arrested. She said she was really frightened and she thought he was going to kill her.

It is suggested on his behalf that this should be treated as a straightforward case of rape, without aggravating features, between a man and a woman who had a previous relationship, and he therefore fell to be sentenced at the lower end of the scale for such rapes. The guidelines in the case of *Billam* were referred to. We do not view the case in that light and we consider that the sentencing judge was fully entitled to have regard to the totality of the conduct of the appellant on this occasion. The rape was the culmination of a sequence of conduct which was intended to humiliate, terrify and punish the victim for refusing to resume the relationship between them.

After conviction the appellant discussed the offence with the reporting officer for his pre-sentence report and it is fair to say that by this stage he was feeling remorse and shame for what he had done. The officer recorded:

"When Mr Thorpe went to the house on the evening of the offence he told [the victim] that he had 'come home'. It seems he strongly sensed her ambivalence and says the lack of clarity increased his anxiety and anger. He tells me he raped her in order to 'overpower' her and also to hurt her emotionally, rather than physically. He used the knife to frighten her. He says he wanted her to suffer as he had, to feel the pain he had felt and to punish her for this. Whilst he described his emotions as being 'out of control' he now accepts that his actions indicate a high degree of calculation and a conscious abuse of physical power."

This rape was an offence of violence and it was part of a course of conduct of the character that we have described. It contained aggravating circumstances which justified reflection in the sentence that was passed. The judge adopted the right approach to sentencing.

The other ground of appeal is that the sentence was, in any event, too long. It is quite right, and the sentencing judge recognised, that this was a case where there had been a previous relationship and therefore the sense of violation is not as strong as

where the rape takes place on a stranger. However, the relationship had been broken off and the victim had declined to resume it. It is also right that there was no extra perversion in the act of rape and no further indignity. It is also right that the appellant had entered the victim's home lawfully and with her consent. It is also correct that the physical injuries which she suffered were minor. She was bruised, she suffered abrasions and, of course, she was very severely shocked and traumatised. As regards the guilty plea, some discount had to be given for that and the judge did give a discount. This was a case where the plea was entered at the last moment and, it may be thought, in a somewhat calculated fashion. The appellant was a man of good character and, as we have said earlier, he had, subsequent to conviction, shown some remorse for the offence that he had committed. Under these circumstances it has to be considered whether the sentence of six years is too long and is of such a length as to justify reduction by this Court. We do not consider that it is. In the circumstances of serious and prolonged violence and the rape forming part of that sequence of behaviour, this sentence of six years was not too long and it follows that this appeal must be dismissed.

### JEFFREY WILLIAM BOWLES

COURT OF APPEAL (Lord Justice Hutchison, Mr Justice Sachs and  
Mr Justice Moore-Bick): January 23, 1996

#### *Disparity of sentence.*

**Editor's note:** there is no unjustifiable disparity of sentence where one defendant is sentenced to a term of imprisonment and another defendant who is motivated to change his ways is put on probation.

The appellant pleaded guilty to one count of burglary and one of handling stolen goods, and other summary offences. Sentenced to 18 months' imprisonment for burglary and six months' imprisonment consecutive for handling (total, two years' imprisonment). His co-defendant, who admitted additional offences, was put on probation for two years.

**Held:** the sentence for the burglary was appropriate to the offence, but the sentence for handling should have been concurrent. Although the appellant might have expected a less severe sentence than his co-defendant, whose culpability was greater, and whose record was worse, the sentence had been persuaded that the co-defendant was motivated to change his ways and had taken the exceptional course of putting him on probation. It had been recognised that it might be appropriate to take this course with a persistent offender who otherwise faced a significant term of imprisonment if there was any reason to think that it might be possible to break the cycle of offending once and for all. There were grounds for thinking that the co-defendant might be able to change if given the chance, but there were no grounds for believing that the appellant was similarly motivated. The sentence could not be criticised for taking the course he did having regard to the differences in the personal circumstances of the appellant and his co-defendant.

**References:** disparity of sentence. *Current Sentencing Practice* A8; Archbold 5-170.

*R. Christie* for the appellant.

**MOORE-BICK J.:** On July 3, 1995, in the Crown Court at Snaresbrook, before His Honour Judge Platt, the appellant was arraigned on an indictment which charged him and two co-defendants, Paul Anthony Dean and Ian Thomas King, with a number of offences of burglary and handling stolen goods. The appellant pleaded guilty to one count of burglary (count 1) and one count of handling stolen goods (count 4). He also pleaded guilty to a charge of using a vehicle without insurance and one offence of driving whilst disqualified which had been committed to the Crown Court for trial under section 41 of the Criminal Justice Act 1988.

On July 28, at the same court, before His Honour Judge Reynolds, he was sentenced to 18 months' imprisonment in respect of the burglary, six months' imprisonment consecutive in respect of the handling, three months' imprisonment concurrent in respect of driving whilst disqualified, making two years' imprisonment in all. He received no separate penalty in relation to the offence of using a vehicle without insurance, save for having his licence endorsed with eight penalty points.

Dean pleaded guilty to a separate count of handling stolen goods (count 7) in respect of which he was sentenced to three months' imprisonment consecutive to a sentence of two years' imprisonment to which he was sentenced on another indictment for offences of assault occasioning actual bodily harm, criminal damage, affray and using threatening words and behaviour.

King pleaded guilty to two counts of burglary, including count 1, and two counts of handling stolen goods, including count 4. He also pleaded guilty to a charge of using a vehicle without insurance, also committed for trial under section 41 of the Criminal Justice Act 1988. In his case the learned judge imposed a two-year probation order with a condition that he participate in a residential project for 17 days. The appellant now appeals against sentence by leave of the single judge.

The facts which gave rise to the offences are as follows. During the evening of October 19, 1994 the appellant and King were seen in a stolen Ford Mondeo motorcar. The registration number of the car had been changed and it formed the subject of count 4 in the indictment.

The grounds of appeal are two: first that the learned judge was wrong to impose a consecutive sentence in respect of the handling of the car, which he accepted was incidental to the burglary; secondly, that there was unacceptable disparity between the sentence imposed on the appellant and that imposed on King.

The learned judge described this as a highly professional burglary; it was carefully planned and the value of the property involved was quite substantial. We accept, as he did, that King was the active force behind it, but even though the appellant played a lesser role, he was fully involved in the offence and an immediate custodial sentence was appropriate in principle. This was not the appellant's first offence of dishonesty and we do not think that a sentence of 18 months' imprisonment for this offence was in itself excessive. Indeed, Mr Christie, who appeared for the appellant, does not contend otherwise. Similarly, taking it in isolation, no criticism can in our view be made of the sentence of six months' imprisonment passed in respect of the dishonest handling of the stolen Mondeo car. However, although there is evidence that King had been in possession of the car for some time before the burglary, there is nothing to suggest that this appellant was involved in the original handling of the car or change of registration number. In his case it does appear that his involvement with the car was limited to his involvement in the burglary and it would have been appropriate therefore to order that the sentence imposed for the offence of handling be served concurrently with that imposed in respect of the burglary.

This brings us to the question of disparity. On the face of it, the appellant could

elderly person in question was returning from shopping. That is certainly consistent with knowledge that there were elderly people living in that particular block of flats. He then uses violence, although we accept that there was no physical injury caused to the victim. Nonetheless, the distress and psychological injury is obvious. There had been no plea of guilty, and so there was no mitigation on that score. Added to that, this appellant has the most appalling criminal record, including offences of very great seriousness.

Miss Baird has drawn attention to the case of *Tams* (1990) 12 Cr.App.R.(S.) 591. That was a case where this Court reduced a sentence of three years to two years in the case of a burglary of a dwelling-house during the day, the owner of the house being an elderly person. In that case she was not in the premises. Similarly, in the case of *Mincher* (1990) 12 Cr.App.R.(S.) 592, the court reduced to two-and-a-half years a sentence on a burglar where an accomplice had lured an old lady out of her home whilst the defendant slipped in and stole her handbag and contents. Again, that was a case where there was no violence of any sort, and there was a plea of guilty. On a contested case, one can assume a sentence of something in the order of three-and-a-half or four years would have been appropriate.

In *Finnell* (1986) 8 Cr.App.R.(S.) 144, the appellant was sentenced to nine years, together with another man, for burglary of the premises of an old man. They frightened him with an imitation firearm and tied him up. The Court reduced the sentence of nine years to six years. That again was a case where there had been a plea of guilty and neither of the appellants had any substantial previous convictions; one had none and the other had relatively minor, certainly none of burglary or robbery, or anything approaching the sort of record of this appellant.

The point was made by the Court that a very serious view would be taken of the increasing tendency of burglars to select as their victims old people living alone, and it was the duty of the court to take such steps as they could to protect old people. That was said in 1986. Sadly the increasing tendency has continued and, as is well-known, there seem to be more and more of these sort of despicable offences committed against elderly people, who are, no doubt, considered to be easy targets because they are unable to resist. It is fair to say in *Finnell* the circumstances were somewhat worse than these, although in that case the old man in question did not suffer any physical damage.

Finally, *Attorney-General's Reference Nos. 19 and 20 of 1990* (1990) 12 Cr.App.R.(S.) 490, where the Court did not increase sentences of three and five years passed upon burglars. This was an aggravated burglary, in circumstances where there had been threats with what the householder believed to be a knife, and very unpleasant threats to do physical injury unless she showed where the valuables were. The Court in that case clearly took the view that the sentences were too lenient, but were not prepared to say that the leniency was undue, and took the view that they did not fall outside the permissible range of sentencing, although it was perfectly plain that the Court took the view that it would have imposed a more severe sentence if it had been sentencing at trial. That case was certainly, on the face of it, somewhat worse than this, but, again, there were pleas of guilty, and it does not appear from the report that the records were as bad as that of the appellant.

In all the circumstances, and taking into account the authorities to which we have been referred, it is our view that this sentence was indeed a severe one, and falls at the top end of the bracket that is, in our view, appropriate for this sort of offence. We have to consider whether we can take the view that it is manifestly excessive. We do not. There was no mitigation to speak of, save such as could be applied to the appellant's personal circumstances, and that really did not exist. He chose to contest the matter, and so there was not the mitigation provided by a plea of guilty. In all the

circumstances, severe though the sentence is, in our view it was justified by the facts of the case, and this appeal is accordingly dismissed.

## WAYNE B

COURT OF APPEAL (Lord Justice Henry, Mr Justice Owen and Judge Coles): February 9, 1996

*Indecent assault—indecent assault by husband on estranged wife—length of sentence.*

Two-and-a-half years' imprisonment for an indecent assault by a husband on his estranged wife reduced to two years.

The appellant pleaded guilty to indecent assault. The appellant had lived with the complainant for some years and later married her: they had two children. The relationship deteriorated and the appellant left the matrimonial home. Difficulties arose over access to the children of the family, including the wife's children from an earlier relationship, and the appellant was seen by a psychiatrist who found him very depressed. On two occasions the appellant assaulted the complainant. On the occasion of the offence, the appellant came to the matrimonial home to discuss difficulties relating to access to the children and was admitted to the house. He then forced the complainant onto a settee, removed part of her clothing, and thrust his fingers into her vagina. Eventually he stood up and released the complainant and apologised. After denying the offence to the police he pleaded guilty on the day of the trial. Sentenced to 30 months' imprisonment.

**Held:** (considering *Kawalski* (1987) 9 Cr.App.R.(S.) 375) courts are now far more aware of the sort of cruelty that can be inflicted by a man on his wife. The Court had come to the conclusion that some reduction in the sentence was appropriate, and would substitute a sentence of two years for the original sentence.

**Case cited:** *Kawalski* (1987) 9 Cr.App.R.(S.) 375.

**References:** indecent assault, *Current Sentencing Practice* B4-6.3D.

*Miss H. Lloyd* for the appellant.

**OWEN J.:** On July 26, 1995 this appellant pleaded guilty, on re-arraignment, to a single count of indecent assault on a female. He was put back on bail for a pre-sentence report. We are told that the reason, in so far as there was reason, for the late plea of guilty may have been that the appellant hoped that his wife would not pursue her perfectly legitimate complaint. It is worthwhile indicating at this stage that the maximum sentence for this particular offence had been increased, before that time, to 10 years. On September 4, in the same court, that is Liverpool, this appellant was sentenced to 30 months' imprisonment. He appeals against that sentence by leave of the single judge.

The background to the offence was this. The appellant was 38 years of age and a man of exemplary character. He had been in the army and had received glowing reports from the army when he left. The fact, of course, that a man is a good soldier does not indicate that he will be a good husband. He lived with the lady who was the complainant for some three years and then they married. At the time of the offence

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bra. She was resisting and telling him to stop. He stood up and suddenly he thrust two or three fingers into her vagina, in a forceful way, and hurt her. He moved his fingers about for a few minutes and then took them out. What he proposed or intended to achieve by this is, of course, difficult to know. It would seem that the most likely intention was to humiliate her or to hurt her; it certainly was not likely to help any relationship with her as the mother of his children. Taking as charitable a view on the matter as is possible, one could say that he was not thinking clearly but was nevertheless prepared to behave in a way which one can only describe as having been quite utterly disgraceful.

Having done that, he got on top of her again. It was at this stage that she appreciated that he had a smell of drink about him. Perhaps, again, one can say he might not have done this had he not been drinking. The fact that he had some anxiety and the fact that he had been drinking can have been of precious little solace to the victim of his actions. He again began to rub his body and pelvis against her and then, presumably thinking better of what he was doing, he stood up. His wife was sobbing at this time. She tried to pull her clothing up, but she was shaking and was at first unable to do so. Pausing there, there is nothing to suggest that that was not a wholly honest reaction to what he had done and he had caused this. He then produced a small penknife. He pushed her to the floor and he rubbed his pelvis against her, holding the knife in his hands as he did so. He stood up. His wife tried to get to her that he loved her. It was, of course, a little late to say that he was sorry. This Court hears time and time again of accused people who have become criminal saying: "If only I hadn't done it". It is too late then; he did. If he did, in fact, love her it was an odd way to be showing it. He went to the kitchen to get her some water. She shouted for the eldest child, her daughter. He grabbed her from behind. He put a hand over her mouth and nose, which made her breathing difficult. He was still holding the knife. He put it to her neck and told her to calm down and that he loved her. At this point, fortunately, her brother knocked at the front door and he ran out of the back door. The police arrived shortly. She was so upset she was unable to give a proper account of the events until the following day. It is fortunate for him that he did not, in fact, attempt to force sexual intercourse upon her and there is nothing to suggest that that is what he had in mind—if he had had it in mind no doubt he would have gone further than he did.

The victim did suffer from some swelling to her right hand, which she had bent back, and she suffered from the panic attack which she had suffered and no doubt she would have been recommended for some form of counselling.

On October 25, the appellant appeared at the Ormskirk Magistrates' Court, where he was placed on probation for 12 months in respect of the August and September assaults to which he had pleaded guilty. He was interviewed on that day by the police about the October incident. He admitted visiting the house but he denied his wife's allegations of a struggle, suggesting that she had made these allegations because she was trying to get an injunction to stop him seeing the children. On November 25, he persisted in his denials.

As has been related, on the day fixed for the trial he pleaded guilty. No doubt, so far as the victim was concerned, until that date she had to face up to the fact, as she would have seen it, that it would have been necessary for her to give evidence on that day. The fact that he pleaded guilty at that late stage does not mean that he should not receive any discount. Even a plea of guilty at a late stage can assist a victim by ensuring that the victim does not have to relive the whole episode all over again in public and be subjected to what would have been a wholly unmeritorious cross-examination. So some discount must be given so that those who have in mind

with which we are concerned there were four children in the family; two of those children were the children of the wife, the other two being the children of the marriage. The relationship, in any event, deteriorated. It is not desirable for us to inquire as to why that was. Certain it is that the victim asked the appellant to leave the matrimonial home and he did, on August 16, 1994. At that time, as she was entitled, she had another man friend. We are told that either at that stage or a little after this the appellant had another woman friend. As to why that had come about we do not know and cannot say.

It seems that there were difficulties between the appellant and his wife and that they arose, in the main, out of the difficulties which were caused by the appellant wishing to see his children, that is the four children of the family, and the wife not wishing him to have as much access as he wished. She complains that there were a number of assaults upon her. Again, so far as the earlier complaints are concerned, we cannot say whether that is true or not and certainly do not count those against this man. However, on August 20, 1994 there was an assault on the wife outside a chip shop. He, at this time, had been or was about the see a psychiatrist; whether he was referred to this person through his general practitioner is not wholly clear but it seems likely. On August 31, the psychiatrist found the appellant to have been very depressed and weepy when recounting the problems he was having with his wife. He was described as "a very dependent type of personality". It appears that he had depended heavily on his wife. He found it difficult to ward off intruding, distressing thoughts and this had affected his sleep, his appetite and his social life. The report says that he was diagnosed as suffering from a reactive depression with associated anxiety symptoms, secondary to his wife leaving him. That, as we understand, means that he was depressed by the situation which had developed and that situation had caused him anxiety. He was advised that he should receive counselling so that he might come to terms with the loss of his family. It was suggested to him that he should start treatment by taking a small dose of Melleril for a short period to help his anxiety. As to the instant offence the report was not definite in its terms. It was possible that he was still in a depressed state of mind when the incident occurred. When depressed, anxious people can act in an irrational way due to their confused state of mind. When he was seen in December he was talking and behaving in an irrational way. Human experience, we suppose, leads one to accept readily that people who are depressed may act in an irrational way. Certainly the way in which this man treated his wife, the mother of his children, was an irrational way, however it was caused.

There were two specific incidents which had been reported by the wife before the instant offence, the first of which has already been recorded. The second was on September 11, and that was an assault in the matrimonial home. He was on bail for those offences on October 3, the date of this offence. We are told that he was on an emotional roller coaster, a descriptive phrase although it is difficult to know of what it is descriptive. It would seem that what is suggested is that he was concerned because in his confused state he found it difficult to accept that sometimes the wife would apparently be ready to grant the access to the children which he desired and on other occasions she would not.

In any event, what happened on the evening of that day is that he called at the matrimonial home. He asked to speak with his wife about the possible difficulties relating to access and she allowed him into the house. There came a time when she pushed him away as he moved towards her, but he forced her onto the settee and sat astride her. He undid her jeans; he pulled those down; he pulled her knickers down; he forced her legs apart; he got between her legs and placed his full weight on her body, pushing against her stomach. He pulled up her T-shirt and he tried to grab her

denying true offences can know that the door is never wholly shut, particularly in this kind of case, but that the discount will be less must, in fact, be so. There was, in addition to the psychiatrist's report, a report which had been prepared as a pre-sentence report by a probation officer. That probation officer had been dealing with the accused as a result of the order and of course on the basis that this man was not guilty of the October offence. In due course that likely, intended plea of guilty was communicated to the probation officer and the final recommendation is:

"I do of course recognise that this is a serious offence and one that will have been deemed to have crossed the custody threshold. I am at a loss though to see how a term of imprisonment is going to change this man's behaviour."

That may be so, but the object of the sentencing exercise in circumstances such as this cannot be seen as being wholly reformative. Any man who behaves in this way to his wife, his wife whom he knows to be weaker than himself, deserves and will receive punishment and it is quite wrong that anybody should think to the contrary. This was the situation with which the sentencing judge was faced. Of course he had to give credit for the exemplary army record and for the fact that he had lived not just a life free of convictions but an exemplary life until the age of 37, when things had gone wrong. It was therefore a sad situation and of course any sentencing judge is going to try to see what caused this change in this man's behaviour. Accordingly he said he was satisfied that the man had been gravely distressed both by the separation and the fact that his wife had a new man in her life but, he said, it was a grave offence and wholly unacceptable in any civilised society, and so it is. He went on to indicate another aggravating feature, namely that he was on bail, the knife had been produced and the wife had been terrified.

It is in those circumstances that it is said that this sentence was too long. We have been referred to *Kawalski* (1987) 9 Cr.App.R.(S.) 375—the report of which appears in Dr Thomas's Encyclopaedia. There, it would seem, that on the facts which would appear to have been more serious than those which were the facts of this case, a sentence of four years' imprisonment was reduced to two years' imprisonment as being the appropriate sentence. There are two comments that must be made at this stage. It is, of course, necessary that a sentencing court should not be inflamed by emotional aspects of a case such as this. It is difficult not to be so inflamed when one tries to analyse what must have been in the mind of the offender and what must have been the effect on the victim. Nevertheless, that must be put out of mind and clearly the judge did put that out of mind. The second comment is this. Whilst *Kawalski* may be said to give some slight indication as to what a sentence should be, that was an appeal which was heard in greatly different days. Happily, courts are far more aware now of the sort of cruelty which can be inflicted by a man on his wife than was the case in those days and, in our judgment, that case is really of very little help to any sentencing court at this time. Such help as it is able to give we have tried to take into account as we try to approach this difficult sentencing exercise, and we have the benefit of being three whereas the trial judge was but one. It is very easy for those who do not have to sentence to criticise the sentences. When the judge sits alone it is difficult. We have come to the conclusion that some reduction in this sentence was appropriate, but we do not do so in any way which is critical of the trial judge. We believe that we are not in any way tinkering with the sentence but have come to the conclusion that it is right to quash the original sentence of two-and-a-half years and substitute for it a sentence of two years' imprisonment. To that extent, but that extent only, this appeal is successful.

## R. v. CLERKENWELL MAGISTRATES' COURT, EX P. FEELY

DIVISIONAL COURT (Lord Justice Kennedy and Mr Justice Forbes):  
February 12, 1996

*Early release of offenders sentenced to custodial sentences—return to prison under Criminal Justice Act 1991 section 40—order of sentences.*

**Editor's note:** where a court orders an offender under the Criminal Justice Act 1991 s.40 to return to prison to serve the outstanding balance of a custodial sentence from which he has been released under the Criminal Justice Act 1991 Part 2, and imposes a further custodial sentence in respect of the new offence, the period of return under section 40 must not be ordered to be served consecutively to the new sentence.

The applicant was sentenced to three months' imprisonment for theft, and ordered to return to prison to serve, consecutively, three months of a sentence of two years' imprisonment, from which he had been released shortly before the commission of the theft. It was argued that the order under section 40 was unlawful.

**Held:** Criminal Justice Act 1991 s.40 provided that where a prisoner was released from prison under the Act, he might be ordered to return to prison for the whole or part of the remainder of the term if he committed a further imprisonable offence during that period. Section 40(4)(b) provided that the period:

"shall, as the court may direct, either be served before and be followed by, or be served concurrently with, the sentence imposed for the new offence . . ."

The terms of the section were perfectly clear; when exercising its powers under section 40, the Court had no power to order the period for which the offender is returned under section 40 to be served consecutively to the sentence imposed for the new offence. The sentence was illegal and the order under section 40 would be quashed.

**References:** early release, *Current Sentencing Practice* A7; Archbold 5-136.

*S. Walsh* for the applicant.

**FORBES J.:** On November 27, 1995 this applicant was sentenced to a total of six months' imprisonment by the Clerkenwell Magistrates' Court, having pleaded guilty to an offence of theft which he had committed during the currency of a sentence of two years' imprisonment imposed upon him for various offences by the Snaresbrook Crown Court on July 27, 1994 and from which he had been recently released on licence.

The magistrate's sentence was made up as follows: (i) three months' imprisonment for an offence of theft, to which he had pleaded guilty ("the new offence"); (ii) three months' imprisonment, that is to say ordering his return to prison under section 40 of the Criminal Justice Act 1991, to be served consecutively to the sentence of imprisonment passed in respect of the new offence.

In these proceedings for judicial review the applicant seeks to challenge the latter sentence on the basis that the court did not have the power to direct that that sentence was to take effect consecutively to the sentence passed in respect of the new offence.

Section 40 of the 1991 Act provides, *inter alia*, that where a prisoner is released from a term of imprisonment before the expiry of the full term he may be ordered to

13 years, is one of 11 years and that we do in each case. To that extent only these appeals are allowed.

CASE 39

### LEON D

COURT OF APPEAL (Lord Justice Simon Brown, Mr Justice Alliot J  
and Mr Justice Ognall): February 26, 1996

*Rape—rape by husband of wife—length of sentence.*

Four years' imprisonment for the rape by a man of his wife after the breakdown of their marriage reduced to three years.

The appellant pleaded guilty to rape. The appellant had been living with the complainant for 16 years and they had been married for eight years. The complainant had left the matrimonial home in 1995 but returned after several months, although the complainant and the appellant lived separately. One evening the appellant insisted that the complainant should speak to him, and she went into the bedroom to avoid arguing in front of their children. The appellant indicated that he wanted sexual intercourse and the complainant pushed him away. There was a struggle and the two sons intervened, but the appellant told them to leave. Later the appellant made an unsuccessful attempt to force the complainant to have intercourse, and eventually succeeded in forcing her to do so. Sentenced to four years' imprisonment.

**Held:** (considering *Maskell* (1991) 12 Cr.App.R.(S.) 638 and *Collier* (1992) 13 Cr.App.R.(S.) 33) in the light of the authorities cited the sentence was too severe; a sentence of three years' imprisonment would be substituted.

**Cases cited:** *Maskell* (1991) 12 Cr.App.R.(S.) 638; *Collier* (1992) 13 Cr.App.R.(S.) 33.

**References:** rape. *Current Sentencing Practice* B4-1.3G.

*Miss J. Newman* for the appellant.

**ALLIOTT J.:** On September 22, 1995, in the Crown Court at Birmingham, before His Honour Judge Astill, the appellant pleaded guilty to one count of rape and was sentenced to four years' imprisonment. He appeals against sentence by leave of the single judge.

At the material time the complainant and the appellant had been living together for some 16 years and had been married for some eight years. They have two sons aged 14 and 15. According to the complainant her relationship with the appellant had been deteriorating since November 1994; it had culminated in her leaving the matrimonial home in April 1995. She had, in fact, returned but they had been living separately in the house from about May 1995. At nine p.m. on May 10, she was watching television in their son's room when the appellant insisted he speak to her. They went into her bedroom to avoid the children seeing them argue. The appellant

got into bed, whilst she put on some extra clothes and sat on a chair. He then got out of bed, shut the door and told her he had waited long enough and he now wanted what was rightfully his. She understood that to mean that he wanted sex, as he started to rub his hand along her thighs. She immediately pushed him away but he pulled her onto the bed and got on top of her. She fought back in an effort to get him off her. The two sons heard her screams and ran into the room and tried to separate their parents. They left on the appellant's instructions but telephoned a female friend of the complainant who lived nearby. The friend came to the house but left after a confrontation with the appellant. The appellant then sent the two boys to bed and joined the complainant in the living room where, after turning off the lights, he proceeded to remove all his clothing and then to take the leggings and knickers off his wife. He tried to force her legs apart, at which point she kicked him, got up and switched the light back on. After trying to reason with him she put her clothes back on made herself a cup of coffee and sat down in another part of the room. The appellant, who was still naked, approached her once again, causing her to have a panic attack. She eventually managed to get to her bedroom and sit on a chair whereupon the appellant came into the room and tried to lift her onto the bed. He then blocked the door with a suitcase, dragged her onto the bed and forcibly pinned her down whilst pulling off her leggings and knickers. She kept saying "Don't touch me", and she scratched and bit him in an attempt to escape. The appellant, however, continued to hold her down and, after forcing her legs apart, had intercourse with her against her will.

The police, who had been summoned to the house by one of the sons, arrived shortly thereafter—at 00.17 hours. When interviewed the appellant declined to make any comment as to involvement in the offence and refused to provide any intimate samples. He further declined to explain injuries to his body.

When the learned judge came to sentence he said:

"... no man should think that a wife or former partner is a possession to be used as and when and how desired. You used violence. It is true that it was violence that you required to use for the purposes of the rape and no more. Nevertheless you left your wife frightened and injured. In the same house and hearing her cries, which clearly indicated that she was being raped, were your two young sons at the impressionable ages of 14 and 15 years. You did not think of her and you did not think of them. You thought only of yourself.

On the other hand, you spared her the considerable indignity of having to come to this court and speak of these matters, which would be a horrifying memory for her. You have gained credit for having pleaded guilty. The sentence would otherwise have been longer..."

And he then went on to pass the sentence of four years.

Before us this morning Miss Newman has urged that an insufficient discount was made from the starting point for rape, committed by those in domestic circumstances such as these. She has referred us, in particular, to two cases: *Maskell* (1991) 12 Cr.App.R.(S.) 638 and *Collier* (1992) 13 Cr.App.R.(S.) 33. Those cases, and particularly the second one, bear a resemblance to this case. The learned judge in the instant case correctly identified the presence of the adolescent boys in the house as being an aggravating feature. In the case of *Collier* younger children were actually present and witnessed the rape. We have come to the conclusion that in the light of those two authorities this sentence was too severe. We propose, therefore, to quash the sentence of four years' imprisonment and to substitute therefor a sentence of three years' imprisonment. To that extent this appeal is allowed.

one single patient. The indecency was more gross than the circumstances of any of these four offences. After a plea of not guilty the court imposed a sentence of four years, which was upheld on appeal.

We were also referred to *Pike* [1996] 1 Cr.App.R.(S.) 4, where four years' imprisonment was upheld for indecent assaults on a woman, in the form of internal examinations carried out under the pretext that they were necessary for medical treatment. This again was a case of breach of trust. The appellant was convicted of two counts of indecent assault, after having pleaded not guilty. He was, likewise, sentenced to a term of four years' imprisonment.

We were also referred to the much older case of *Cubitt* (1989) 11 Cr.App.R.(S.) 380, where a school teacher pleaded guilty to five counts of indecent assault on girls aged between 9 and 18 years and where the acts of indecency were more serious than those which are now under consideration. *Cubitt* may have set a standard which has now been superseded by the more serious view which Parliament and the courts take in the case of indecent assaults perpetrated by a person who is placed in a position of trust but we are grateful to Mr. Fitzgibbon for bringing those cases to our attention.

When sentencing, this experienced judge had an option. He could have identified each individual case, assessed the seriousness of the assault, and taken the mitigating features into account—for example, the plea of guilty and the good character—and then imposed an appropriate sentence and done likewise for each of other offences consecutively. We have no doubt that if he had adopted this course then the totality of the sentence would have exceeded the total sentence of four years which the learned judge arrived at. He chose to take a different route. He assessed the seriousness of the offence and imposed a sentence of four years in respect of each of the offences, which, it must be said, is at the upper range for an individual offence of this character. However, in order to ensure that he did not fall into the totality trap, he then made each of the sentences concurrent and mitigated the sentence by virtue of the circumstances already referred to. Namely the plea of guilty, the limited indecency and the fact that no violence was used.

In the event, we are satisfied that, looking at this sentence as a whole, in the light of the degree of breach of trust and the fact that there were four separate females involved on three separate occasions, the sentence of four years' imprisonment cannot be faulted. In those circumstances the appeal is dismissed.

CASE 40

PAUL BRANDY

COURT OF APPEAL (Lord Justice Otton, Mr Justice Latham and Mr Justice Toulson): April 18, 1996

*Life imprisonment—rape—specified period.*

A period of 15 years specified under the Criminal Justice Act 1991, s.34 in the case of a man sentenced to life imprisonment for three rapes reduced to 10 years.

The appellant pleaded guilty to three counts of rape and one of unlawful wounding. The appellant attacked a woman with whom he had had a relationship. On three subsequent occasions he gained access to flats occupied by women, and raped them, using violence and threats to kill. Sentenced to life imprisonment on each count of rape, with a term of 15 years specified for the purposes of the Criminal Justice Act 1991, s.34.

**Held:** (considering *Fox* (1995) 16 Cr.App.R.(S.) 688, *D.* (1995) 16 Cr.App.R.(S.) 564, and *Meak* (1995) 16 Cr.App.R.(S.) 1003) the imposition of a sentence of life imprisonment was not challenged, but the appellant argued that the period of 15 years specified for the purposes of section 34 was too long. The sentencer did not appear to have followed the recommended procedure of identifying the appropriate determinate sentence and reducing it by the appropriate proportion. An appropriate starting point would have been 18 years; allowing one third deduction would result in a specified period of 12 years. However in three previous cases the Court of Appeal had reduced specified periods in cases of rape to 10 years and the Court would reduce the specified period to the same level, on the basis that the notional determinate sentence would have been 15 years.

**Cases cited:** *Fox* (1995) 16 Cr.App.R.(S.) 688, *D.* (1995) 16 Cr.App.R.(S.) 564, *Meak* (1995) 16 Cr.App.R.(S.) 1003.

**References:** life imprisonment—specified period, *Current Sentencing Practice* F3-4, *Archbold* 5-204.

*B. Kogan* for the appellant.

**OTTON L.J.:** On November 27, 1995, at the Central Criminal Court before His Honour Judge Rogers O.C., the appellant, Paul Brandy, changed his pleas to guilty and was subsequently sentenced to five years' imprisonment for unlawful wounding and life imprisonment in respect of three separate rape offences. The sentence in total was therefore life imprisonment, with a recommendation, under section 34 of the Criminal Justice Act 1991, that a minimum of 15 years be served before release. He now appeals against sentence by leave of the single judge.

It is not necessary to recite the details of the offences. Suffice it to say that so far as the first count of rape was concerned, the victim was a person with whom the appellant had had a sexual relationship. He gave her a severe beating. She was admitted to hospital. He visited her and threatened to kill her if she told the police that he had caused the injuries. The victim told the police that she did not know who had assaulted her. She was assaulted again a few weeks after her discharge from hospital and he threatened to kill her.

So far as the first count of rape was concerned, in the summer of 1994 the appellant became friendly with another man whose brother had a girlfriend with whom he lived. The appellant arrived after midnight on September 10, 1994 and cajoled his way into her flat. Thereafter he threw her on to the bed and raped her, using violence.

The second offence occurred on March 9, 1995 when he arrived at a young woman's flat and claimed he had a parcel delivery. He managed to persuade her to open the door but she said that she did not wish him to do so. When in the flat, he threw her on to the bed and took of all his clothes. She reached for the telephone only to find that the appellant had unplugged it. At one point he picked up the telephone flex and put it round her neck like a noose, saying that if she did not do as he said, she would be killed. He then raped her.

The third victim was a person whom he visited at her flat. He pushed his way in, saying that if she did not stop screaming he would kill her. He used force on her, to the extent that he pulled hair from her head and then raped her. The matter did not end there. He again raped her on two further occasions during this visit.

There was medical evidence before the trial judge which indicated that all the criteria were fulfilled for the imposition of a discretionary life sentence. Realistically, Mr Kogan accepts that to be the position but the thrust of his argument is directed at the period of 15 years which the judge identified as the appropriate period under

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section 34(1) of the Act as being the minimum period which the appellant should serve before release.

The trial judge does not appear to have gone through the procedure which has been recommended, namely, identifying the period of a fixed sentence and then applying to it the notional period for remission for good behaviour. Mr Kogan submits that if that procedure had been followed, the starting point would have been in excess of 22 years, reduced to a 15 year section 34 period. He submits that that is far too long, even for these horrendous rapes, and that the judge, therefore, started at too high a level when considering the appropriate period under section 34.

In principle we accept that submission. The question is to what figure should the figure of 15 years be reduced? At the beginning of argument we indicated to counsel that we were sympathetic to his argument in principle and that we had in mind a period of 18 years as the starting point which, after allowing one-third remission, would have produced a figure of 12 years under section 34(1). However, due to his diligence and careful preparation, counsel placed before us three decisions reported in (1995) 16 Cr.App.R.(S.). He took us to each of those and submitted that the appropriate figure was one of 10 years. It is not necessary to refer to the previous decisions in detail. In *Fox* at 688, 12 years' imprisonment, specified under section 34, in conjunction with a sentence of life imprisonment imposed for repeated rapes of mentally ill or mentally defective women, was reduced to 10 years. There were three victims of rape and in those circumstances the Court, over which the Lord Chief Justice presided, came to the conclusion that the period of 12 years which had been imposed by the trial judge was too high and that 10 years was the appropriate figure. In that case the appellant had no previous convictions of that character.

The second case to which we were referred was *D.* at 564, where a person was made the subject of a discretionary life sentence, was convicted for raping his own mother in most vicious and merciless circumstances. He had also a previous conviction for indecent assault on his mother, for which he had served a sentence of six years. In that case too the figure of 12 years under section 34 was reduced to 10 years in a court again presided over by the Lord Chief Justice.

Finally we were referred to *Meak* at 1,003, where three women were involved in offences of rape. The level of violence exceeded that which was perpetrated on the victims in the current case. Again, the Court of Appeal on that occasion considered that a 15 year period was excessive and decided that 10 years was the appropriate sentence.

We are persuaded that we should bring this case in line with those three previous decisions. In spite of the terrifying nature of the rapes which were committed by this appellant, we consider that the period under section 34 should be reduced. We do so by assessing what the appropriate sentence would have been if a finite sentence had been appropriate. We consider that that would have been a period of 15 years' imprisonment. Applying the one-third reduction for remission, that is reduced to a figure of 10 years for the purposes of section 34. To that extent this appeal is allowed.

## TOMOS LLOYD-WILLIAMS

COURT OF APPEAL (Lord Justice Hobhouse, Mrs Justice Ebsworth and Mr Justice Sachs): April 22, 1996.

*Manslaughter—death caused by punching deceased so as to project him down staircase from landing of house—length of sentence.*

Four years' imprisonment upheld for manslaughter where death was caused by punching the deceased in the course of a fight on the landing of a house so as to project him down the staircase.

The appellant was convicted of manslaughter. The appellant and his co-defendant lived in a house which was shared by others including the deceased. The deceased returned to the house one evening drunk, and was unable to open the front door. The appellant and his co-defendant went to the front door to let him in and an altercation developed. The deceased then threatened to "sort out" the co-defendant, the appellant intervened, and a fight started on the landing. Eventually the appellant struck the deceased a blow which projected him through the air so that he fell to the floor of the hall below, suffering fatal injuries. The appellant claimed that he had acted throughout in self-defence. Sentenced to four years' imprisonment.

**Held:** (considering *Coleman* (1991) 13 Cr.App.R.(S.) 508) the offence of manslaughter covered a wide range of offences, and a wide range of sentences was possible. This was not a case of an accidental injury resulting in death; it was a case of grave violence being inflicted in circumstances which were grossly reckless. Notwithstanding the appellant's previous good character, the sentence was appropriate.

**Case cited:** *Coleman* (1991) 13 Cr.App.R.(S.) 508; *Ruby* (1987) 9 Cr.App.R.(S.) 305.

**References:** manslaughter, *Current Sentencing Practice* B1-3.3A.

*R. Anelay Q.C.* for the appellant.

**HOBHOUSE L.J.:** This is an appeal against the sentence of four years passed upon this appellant after he had been convicted of manslaughter in the Crown Court at Cardiff on July 13, 1995, having been tried before a jury and Jowitt J., and found guilty.

On November 29, 1994, shortly before midnight, the defendant and his co-defendant, Mr Hopkins, were two of the people in a house in Pontypridd where they lived. They had been living there for some time. They were friends. The appellant was the younger; he was aged about 23 at the time. His friend was older. Another of those who was living in that house at the time was the deceased, Gerald Williams, who was about 43 years old. Gerald Williams had a drink problem, and he had been out that evening and had come back drunk. When he attempted to get into the house he found that the chain had been put across the door and he started making a scene and a lot of noise until the appellant and his friend, Mr Hopkins, went down to remove the chain and let him in. Mr Williams was still upset at having been locked out and an altercation ensued in the hall between him and Mr Hopkins. There was some violence used by Mr Williams, but the matter came to an end there as between those two men.

They then all went upstairs in order to go to their respective rooms. On the landing the deceased said to Mr Hopkins words to the effect that he would sort out Mr Hopkins the following day. That led to an intervention by the appellant, and he said:

COURT OF APPEAL (Lord Justice Rose, Mr Justice Dyson and Mr Justice Gage): May 3, 1996.

*Life imprisonment—rape—whether life imprisonment appropriate in the absence of medical evidence that the offender represented a risk to the public.*

Life imprisonment substituted for a sentence of nine years' imprisonment in the case of a man convicted of rape, who had previously been convicted of rape but in respect of whom there was no medical evidence of dangerousness.

The offender was convicted of rape and false imprisonment. The offender met a young woman aged 21 at a nightclub. They spent some time together and she went back with him to his room in a hostel for ex-offenders at 2.30 a.m., where they engaged in consensual sexual intercourse. The following morning the woman woke up and said she was going home. The offender tried to persuade her to stay, locked the door and became aggressive. He threatened her with violence if she did not remove her dress, and detained her for two hours during which time he raped her six or seven times and made her perform oral sex on him ten times. Eventually the victim was able to get out of the room and attract attention. The offender eventually admitted that there had been sexual intercourse but claimed that it had all been consensual. The offender had five previous convictions for assault occasioning actual bodily harm, and one for rape for which he had been sentenced to seven years' imprisonment. Sentenced to nine years' imprisonment for rape, passed as a longer than normal sentence under the Criminal Justice Act 1991 s.2(2)(b), and four years' concurrent for false imprisonment. The Attorney-General asked the Court to review the sentence on the ground that it was unduly lenient.

**Held:** the Attorney-General submitted that the criteria justifying the imposition of an indeterminate sentence were met, or that a much longer determinate sentence should have been passed under section 2(2)(b). The criteria for a life sentence were set out in *Hodgson* (1967) 52 Cr.App.R. 113 and *Wilkinson* (1983) 5 Cr.App.R.(S.) 105; it was established in *De Havilland* (1983) 5 Cr.App.R.(S.) 109 that the purpose of a life sentence was to ensure that a person was not released on a determinate date irrespective of whether he remained a continuing danger. For the offender it was argued that the previous convictions were the most aggravating feature of the case. In the Court's view there were in the case a considerable number of the aggravating factors identified in *Billam* (1986) 8 Cr.App.R.(S.) 48. There was false imprisonment, threats, repeated rapes and forced oral sex. The Court was satisfied that the sentence of nine years was unduly lenient. There was no medical evidence in relation to the extent of risk that the offender posed to the public, but this was not itself a reason for not passing a life sentence if that was otherwise appropriate. The criteria in *Hodgson* were fulfilled. In the Court's judgment the offender was, and in the past had clearly demonstrated himself to be, a danger to women. There was no means of knowing how long that would continue. The Court would substitute a sentence of life imprisonment for the sentence passed by the trial judge, and specify a period of 10 years for the purpose of the Criminal Justice Act 1991 s.34.

**Cases cited:** *Hodgson* (1967) 52 Cr.App.R. 113, *Wilkinson* (1983) 5 Cr.App.R.(S.) 105, *De Havilland* (1983) 5 Cr.App.R.(S.) 109, *Billam* (1986) 8 Cr.App.R.(S.) 48.

**References:** life imprisonment, *Current Sentencing Practice* F3; *Archbold* 5-189.

*M. Dennis* for the Attorney-General; *S. Solly* Q.C. for the offender.

between 60 and 70 m.p.h., whereas a defence expert from whom a report had been obtained regarded 45 to 55 m.p.h. as possible.

Having, as we have said, failed to stop at the scene, the following day at 2 o'clock in the afternoon the offender went to the police and enquired about the condition of his victim. He said in interview that he had left home a short time before this accident following a row with his girlfriend because she told him that she was pregnant and intended to terminate the pregnancy. He said that he knew that he had hit one of the people in the road but thought he had just clipped him with the wing mirror, although the windows at the side of the driver's window had come in by virtue of the impact. He accepted that he was angry and that approaching the crossing even at 45 miles an hour was dangerous. He said: "I should have been concentrating on my driving rather than swallowing my own self pity."

Mr Loraine-Smith for the Attorney-General submits that the aggravating features in the case are a speed far in excess of the prescribed limit and the failure to stop. It is apparent that there was a want of look-out for a substantial stretch of the road which we have earlier identified. The Crown accept that there are mitigating features in that the offender surrendered himself to the police and pleaded guilty and is of good character, but it is submitted that the sentence of nine months failed adequately to reflect the gravity of the offence, the need to deter others and public concern over cases of this nature.

On the offender's behalf Mr Ford submits that the sentence imposed by the learned judge fell within the appropriate range of cases of this kind and he referred the Court to a number of authorities, all but one of which were decided before the maximum sentence was increased from five to 10 years. He submits that even if the sentence were unduly lenient it is not one with which this Court should interfere. The judge considered the aggravating and mitigating features identified in the case of *Boswell* (1984) 6 Cr.App.R.(S.) 257 and the plea was tendered on the basis of a speed of 45 miles an hour. The only aggravating feature, mitigated, submits Mr Ford, by the offender's attendance the following day at the police station, was the failure to stop at the scene. Mr Ford stresses the genuine remorse of this offender, the shock which he experienced, the plea of guilty which he entered, the reason for him driving as he was, the fact that the lights on the pelican crossing were green in his favour and the fact that he has a good driving record and good character. He submits that the criminality involved in this offence of causing death by dangerous driving was at the bottom end of the scale.

The court takes all of those submissions into account. The court also takes into account, as it always does in Attorney-General's reference cases, the double jeopardy in that the offender appears to be sentenced by this Court following his original sentencing by the judge. Taking all these factors into account, we are of the view that the sentence of nine months passed by the learned judge was unduly lenient and it was a sentence with which this Court should interfere. Public disquiet about offences of this kind is considerable. We have to balance against that understandable public disquiet at the needless loss of young life, the circumstances of this offence and this offender. Taking all of those considerations into account we quash the sentence of nine months which was imposed by the learned judge and we substitute for it a sentence of 21 months' imprisonment. The period of disqualification remains unchanged.

**ROSE L.J.:** The Attorney-General seeks leave of the court under section 36 of the Criminal Justice Act 1988 to refer this case to this Court for review on the basis that the sentence passed was unduly lenient. We grant leave.

The offender is now 30 years of age having been born in March 1966. At the Central Criminal Court on November 24, 1995 he was convicted by the jury on one count of rape and one of false imprisonment. He was sentenced by H.H. Judge Coombe to nine years' imprisonment for the rape and a concurrent term of four years' imprisonment for false imprisonment. The judge expressly referred to section 2(2)(b) of the Criminal Justice Act 1991 on the basis that a longer term was necessary to protect the public from serious harm from the offender. The learned judge also made an order under section 44 of the same Act rendering the offender liable to recall if released on licence during the whole of the period of the sentence passed. The facts were these. On May 27, 1995 the 21-year-old victim went out with friends to celebrate a birthday. She consumed a substantial quantity of alcohol and became drunk. As the evening progressed she was in a nightclub where she was approached by the offender and danced with him. They remained together until closing time when he offered to walk her home and she agreed. They left the nightclub at about 2.30 a.m. The offender was particularly charming and he invited the victim back to his flat. She went with him. He was in fact staying in a hostel for male ex-offenders. They went to his room and remained there for the rest of the night during the course of which they engaged in consensual sexual intercourse and oral sexual activity by him on her. At the victim's request he at that stage wore a condom.

The following morning at about 9 o'clock the victim awoke and said she was going home. The offender sought to persuade her to stay. He locked the door. He became aggressive. He put his hand around her throat, pushed her back towards the bed and said "I will throw you out of that window if you do not take your dress off and lie down with me." That threat he repeated and added that she was not to scream, he had nothing to lose and he said "It will take ten policemen to get me off you." The victim was terrified. Over the course of the next two hours she was there detained by the offender who raped her six or seven times and forced her to perform oral sex upon him on some ten occasions. He did not wear a condom. It appears that the ordeal of the victim was prolonged because the offender was unable to ejaculate. She suggested, in order to get out of the room, that they went downstairs for breakfast and then perhaps they could return for him to try again later. He made her wash her face and brush her teeth. Downstairs they went. The victim attracted the attention of two supervisors near the kitchen. She was seen to be distressed. She asked for their help. One of them walked her home and on returning the supervisor was approached by the offender who said he needed help. The matter was not immediately reported to the police by the complainant, but they acted upon information from the hostel. On June 6, the offender was arrested. He denied that there had been sexual intercourse. But, on June 21, when re-interviewed he admitted that there had been intercourse both during the night and the following morning, but he said that, throughout, it had been consensual.

The prosecution submit through Mr Dennis that there were six aggravating features: the victim was subjected to repeated acts of rape, she was forced to perform oral sexual acts, she was detained for some two hours, threats were made to throw her out of the window, this offence was committed very shortly after the offender's last release from prison, and the offender had a substantial number of significant previous convictions which we now identify. In 1981, at the age of fifteen, for an offence of assault occasioning actual bodily harm when he struck his victim on the head with an iron rod, a supervision order was made for two years. In 1983, when he was 16, for two offences of assault occasioning actual bodily harm on his mother and

father, whom he punched, he was ordered to attend an attendance centre. In 1987, when 21, for two offences of false imprisonment and two of assault occasioning actual bodily harm, the victims being two girls whom he had invited to a squat where he beat them up with his fists and would not allow them to leave, he was sentenced to a total of two years' imprisonment. In 1989, when 23, he was fined £300 for an assault on a fellow traveller causing actual bodily harm. In 1990, when 24, he was convicted of rape and a section 47 assault. The circumstances were that in April 1989 he befriended a 21-year-old woman in a nightclub, and, having been invited back to her flat, he ordered her to remove her clothes. He raped her about six times and threatened to kill her and he also punched her in the face. He was sentenced to seven years' imprisonment for rape and twelve months concurrently for the assault. From that sentence he was released on December 31, 1993. Very soon afterwards, in February 1994, he committed two more offences, one of assault occasioning actual bodily harm and the other of attempting to pervert the course of justice. The circumstances were that he attacked a young woman in her flat, following a short acquaintance and earlier consensual sexual activity, and threatened her with a knife when she sought to leave. Subsequently he wrote a letter to her friend trying to persuade the victim to drop the case. He was sentenced to 18 months' imprisonment for the assault with six months consecutively for the attempted perversion of the course of justice. He was, on that occasion, acquitted of rape and false imprisonment, the defence being consent. He was released from prison on March 17, 1995, that is to say, some two months or so before the commission of the present offences.

The learned judge in passing sentence referred to the offender as "a very dangerous man" and the pattern of his behaviour showed that women were in grave danger from him. With those observations we agree.

There was before the learned judge, as there is before this Court, a very brief medical report which indicates that the offender is not mentally ill.

The submission on behalf of the Attorney-General is, first, that the criteria justifying the imposition of an indeterminate sentence were met in this case. Alternatively, if recourse was to be had to section 2(2)(b) of the 1991 Act the judge should have passed a very much longer sentence than he did. The Court's attention was drawn to a number of authorities, to some of which we shall refer. In *Hodgson* (1968) 52 Cr.App.R. 113 at 114 MacKenna J. giving the judgment of the Court of Appeal (Criminal Division) said this:

"When the following conditions are satisfied, a sentence of life imprisonment is in our opinion justified: (1) where the offence or offences are in themselves grave enough to require a very long sentence; (2) where it appears from the nature of the offences or from the defendant's history that he is a person of unstable character likely to commit such offences in the future; and (3) where if the offences are committed the consequences to others may be specially injurious, as in the case of sexual offences or crimes of violence."

In *Wilkinson* (1983) 5 Cr.App.R.(S.) 105 at 108, Lord Lane C.J., giving the judgment of the Court said this:

"It seems to us that the sentence of life imprisonment, other than for an offence where the sentence is obligatory, is really appropriate and must only be passed in the most exceptional circumstances. With a few exceptions, of which this case is not one, it is reserved, broadly speaking, as Lawton L.J. pointed out, for offenders who for one reason or another cannot be dealt with under the provisions of the Mental Health Act, yet who are in a mental state which makes them dangerous to the life or limb of members of the public. It is sometimes impossible to say when that danger will subside, and therefore an indeterminate sentence is required, so that the prisoner's progress may be monitored by those

who have him under their supervision in prison, and so that he will be kept in custody only so long as public safety may be jeopardised by his being let loose at large."

It is to be noted that that was a case of robbery and burglary rather than of the sort of offences with which this Court is presently concerned.

In *De-Havilland* (1983) 5 Cr.App.R.(S.) 109 at 116, Dunn L.J. giving the judgment of the Court said this, quoting a passage from the then current edition of Archbold: "The fundamental objective in imposing life imprisonment (assuming a hospital order with or without a restriction order is inappropriate) as opposed to a long fixed term sentence is to ensure that a person is not released upon a determinate date irrespective of whether he remains a continuing danger."

The Court was also referred to the well-known case of *Billam* (1986) 8 Cr.App.R.(S.) 48 where Lord Lane C.J., referred at page 50 to the starting point for an offence of rape by a person who abducted the victim and held her captive as being eight years and at page 51 he identified eight particular factors which should be regarded as aggravating an offence of rape.

On behalf of the offender Mr Solly Q.C. submits that the previous convictions of this offender constitute the single most aggravating feature in this case. The sentence here passed was imposed by an experienced judge who had the opportunity of seeing both the victim and the offender in the course of the trial. Mr Solly submits that such threats as were made were purely oral, there was no injury caused to the victim's neck and a finite prison term would be preferable in the interests of this offender in that it would give him a particular date to work towards and might assist the treatment which he would, in the intervening period, receive.

In our judgment there were plainly in this case a considerable number of the aggravating features identified in *Billam*. There was false imprisonment of this young woman for some two hours. There were the threats to throw her out of the window. There were the repeated offences of rape. There were the other sexual indignities contained in the forced oral sexual activity, and there were, as we have already said, highly significant and numerous previous convictions.

Having regard to all these matters, we are of the clear view that the sentence of nine years passed by the learned judge was unduly lenient. We bear in mind that there was and is before this Court no medical evidence in relation to the extent of risk which this offender poses to the public. That of course is not of itself a reason for not passing a life sentence if that is otherwise appropriate, because the determination of the appropriate sentence is a matter for the Court and not for a doctor. In the present case, we take the view that the criteria identified in *Hodgson* are fulfilled. In the judgment of this Court this offender is, and has clearly demonstrated himself in the past to be, a danger to women. There is no means of knowing how long that state of affairs will continue. In the circumstances the sentence of nine years passed by the learned judge is quashed. We substitute for it a sentence of life imprisonment. We also, for the purpose of section 34(3) of the Criminal Justice Act 1991 identify as the relevant part of that sentence, for the purposes of retribution and deterrence, a period of 10 years.

## ASHIQ MOHEUDDIN

COURT OF APPEAL (Lord Justice Russell, Mr Justice Garland and Judge Demison): May 7, 1996

*Kidnapping—kidnapping resulting from drug transaction—length of sentence.*

Ten years' imprisonment imposed on a man who played a relatively minor role in a kidnapping resulting from a drug transaction reduced to eight years.

The appellant was convicted of conspiracy to kidnap and false imprisonment. The appellant was one of a number of men who were concerned in kidnapping the victim, who was taken from his home by an armed gang, forced into a van and detained for 36 hours. He was threatened with death if a sum of money allegedly owed by a cousin in connection with a drugs deal was not paid. The victim was then put into a van which was intercepted by police officers. The appellant was the driver of the van. It was not alleged that the appellant was directly involved in the kidnapping or the subsequent detention. Sentenced to 10 years' imprisonment for conspiracy to kidnap and seven years' imprisonment concurrent for false imprisonment.

**Held:** (considering *Spence* (1983) 5 Cr.App.R.(S.) 413 and *Berry* (1984) 6 Cr.App.R.(S.) 350) this was a serious case in the course of which a firearm was produced, but the appellant had entered at a late stage and the sentence of 10 years was excessive; a sentence of eight years would be substituted.

**Cases cited:** *Spence* (1983) 5 Cr.App.R.(S.) 413; *Berry* (1984) 6 Cr.App.R.(S.) 350.  
**References:** references: kidnapping, *Current Sentencing Practice* B3-4.3B.

*D. Lederman Q.C.* for the appellant; *M Wood* for the Crown.

**GARLAND J.:** On September 20, 1995, in the Crown Court at Woolwich, after a trial lasting 23 days and involving five co-accused who were acquitted, this appellant was convicted on count 1 of the indictment of conspiracy to kidnap and sentenced to 10 years' imprisonment, and on count 2, of false imprisonment, to seven years concurrent.

He applied for leave to appeal against conviction and sentence. After refusal by the single judge he renewed his applications to the Full Court which, on April 3, refused leave to appeal against conviction but gave leave to appeal against sentence, directing that the Crown be represented.

The background was one of drugs and violence. The victim, Bevin Bushay, was kidnapped from his home in High Wycombe during the night of November 2, 1994. A group of men, one of whom was carrying a shotgun, rushed into the house when he answered the door. He was threatened with the gun and asked about his cousin, Paul, who was involved in the drugs underworld. Bevin Bushay said he did not know where Paul was, whereupon he was forced into a van and driven to a flat, over a kebab house, in Stoke-on-Trent and kept prisoner there for some 36 hours.

There were a number of young men present in the flat; one had a gun. That man interrogated him and told him that if they did not get £60,000 due on a drugs deal he would be killed and dumped on Paul's doorstep.

What had apparently happened was that a man going by the nickname of "Chris" but whose real name was Sagi Ozmen (a Turk) had supplied a large quantity of heroin to a man called Nadeem Hussain, of whom Paul Bushay was an associate. The drugs had not been paid for.

On November 1, Hussain and Paul Bushay had gone to the police. Nadeem claiming that there was a contract out to kill him. On the following day Paul Bushay

Parcell is now 27. At the time of arrest he was single and unemployed. As Mr Williams said on his behalf, his record was a bad one but there was nothing in it concerning any sort of offence in relation to children. His most recent conviction was for affray in January 1995, for which he was fined.

Mr Roberts, on behalf of Rowlands, says today that the learned recorder failed to give sufficient credit for Rowlands' immediate admissions and guilty plea at the earliest opportunity; that he failed to give sufficient weight to the personal mitigation of Rowlands and the welfare of his family; that the sentence failed to reflect that this was an unusual example of the offence of abduction of a child. It was a spontaneous offence, committed in anger, provoked by the theft of Rowlands' car and was done without any pre-planning of any kind. The victim was not assaulted or molested in any way but simply placed in the boot of the car. Mr Rowlands had called the police to inform them of the whereabouts of the victim and had given his own name and address, which resulted in his prompt arrest; indeed he was breathalysed, as we have said.

Mr Williams, on behalf of Parcell, also submits that the learned recorder failed sufficiently to take into account Parcell's guilty plea; that there was no pre-planning here; that the boy was driven a distance of only some three miles; and that there was no violence to the child. He submits that the sentence was manifestly excessive. He referred to the well-written letter by Parcell, which we have read and which certainly tells in his favour.

We have reached the firm conclusion that three years' imprisonment for the abduction of this child was manifestly excessive. In our judgment the learned recorder put this case into the wrong bracket of seriousness. He failed, in our judgment, to take sufficient account of the particular circumstances of this case, where there was none of the sinister overtones usually found in such cases. This was a spontaneous offence, committed in anger, without any sort of pre-planning and, in our judgment, it falls very much at the lower end of seriousness for this type of offence.

A sentence of three years' imprisonment would mean that, on a contested trial, the starting point would be some four-and-a-half to five years' imprisonment, which, in our judgment, would be obviously excessive for what these two men did. It seems to us that the true justice of this case would be met if we reduced the sentences of three years' imprisonment to one of 12 months in respect of each defendant. We therefore quash the three-year sentences and substitute sentences of 12 months' imprisonment in respect of each appellant on count 1, taking a child without lawful authority. To that extent these appeals are allowed.

## DAVID MILNE RAZZAQUE

COURT OF APPEAL (Lord Justice Hutchison and Mr Justice  
McKinnon): June 13, 1996

*Life imprisonment—rape—length of specified period.*

A term of 17 years specified under the Criminal Justice Act 1991 in conjunction with a sentence of life imprisonment on a man convicted of a number of rapes reduced to 10 years.

The appellant was convicted of one count of rape, and pleaded guilty to a second

count of rape, and to abducting a woman by force, assault occasioning actual bodily harm, and two counts of false imprisonment. The appellant formed a relationship with a woman which deteriorated and the woman indicated that she wanted it to end. The woman agreed to see the appellant, and allowed him into her home. He subsequently refused to leave when asked, threatened her with a knife, forced her to take part in various sexual acts, and had sexual intercourse with her three times. On a later occasion, the appellant accosted the woman in the street, attacked her and threatened her with a knife, and forced her to go with him to a car park before allowing her to go. On another occasion the appellant attacked a young couple in their home, holding them captive for a day and raping the young woman. The appellant had various previous convictions, including one for rape, and others involving the use of knives. Sentenced to life imprisonment with a period of 17 years specified for the purpose of the Criminal Justice Act 1991, s.34.

**Held:** (considering *Birch* (1987) 9 Cr.App.R.(S.) 509) the sentencer had no medical evidence about the appellant, but deduced from the number and gravity of the offences committed by the appellant that he was a danger to the public at large. The conditions for a sentence of life imprisonment were fulfilled and it was an appropriate case for a life sentence. The specified period of 17 years indicated that the sentencer had in mind as an appropriate determinate sentence a term of 25 years. This would not have been appropriate, in the absence of a life sentence; a determinate sentence would have been in the order of about 16 years, and the appropriate specified period was 10 years.

**Case cited:** *Birch* (1987) 9 Cr.App.R.(S.) 509.

**Reference:** life imprisonment—specified period, *Current Sentencing Practice* F3-5D.

*A. Hamilton* for the appellant.

**HUTCHISON L.J.:** On December 18, 1995, in the Crown Court at Derby, this appellant pleaded not guilty to count 1, rape; guilty to abducting a woman by force, count 2; guilty to assault occasioning actual bodily harm, count 3; and guilty to rape, count 4; and to two counts of false imprisonment, counts 5 and 6. On December 20, 1995, in the same court, he was convicted following a trial on count 1 of rape and he was sentenced as follows that day: on the rape counts, counts 1 and 4, life imprisonment, with a recommendation under section 34 of the 1991 Act that he should serve a minimum of 17 years before being considered for release on parole; count 2, abducting a woman by force, nine years' imprisonment concurrent; count 3, assault occasioning actual bodily harm, no separate penalty, likewise counts 5 and 6, the false imprisonment counts. An order was made for forfeiture of the knives involved in these offences. He therefore fell to serve a total term of life imprisonment, with a recommendation of 17 years before he was considered for release. He appeals against sentence by leave of the single judge who, in granting leave, expressed the view that the challenge to the propriety of a life sentence was, in his judgment, misplaced but that there was an argument which led him to grant leave on the period under section 34.

The facts are as follows, dealing first with count 1. In May 1993 the victim of the offence met the appellant. They were introduced by friends. They formed a sexual relationship quite quickly in their acquaintance but that relationship deteriorated in July 1993 when he became violent and possessive and resented her relationship with the father of a child she had. He would hit her, kick her and punch her. He abused her and threatened to kill her. She refused to have intercourse with him and that

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exacerbated matters. She decided that she wanted to finish with him and made that clear.

On July 18, 1994 he telephoned her and said that he wanted to see her and would not take no for an answer. She therefore agreed to see him between 9.00 p.m. and 10.00 p.m. that day. In fact she was woken at 11.00 p.m. by a knocking at the front door. He was there. He had been drinking. She let him in, saying that he could have a cup of coffee and stay for half an hour. He began to question her about another man friend. At about 12.30 a.m. she asked him to leave and he refused. He put a knife to her throat and cut her. She thought that he was going to kill her. He pressed the blade to her chest. He said that he had come to kill her and that he had planned it. He pinched her breasts. He followed her into the kitchen while she made a cup of coffee, still holding the knife. He then threatened that he was going to have intercourse anyway and there was nothing she could do to stop him. He forced her to indulge in oral sex. He put his fingers into her vagina. There was kissing but she was too frightened to resist. He then said he wanted sexual intercourse with her and she suggested they went upstairs. She said that because she was scared that he might kill or injure her. She told him that she loved him in order to calm him down. He then had sexual intercourse with her. He refused to leave her alone. She was shaking. He asked her if she was scared. He said he wanted to have sexual intercourse again. There were various other sexual familiarities. He then had intercourse with her and ejaculated on to her stomach. He had intercourse with her a third time.

The following morning she got up and dressed and telephoned for a taxi for him and he left. That was the last that she had seen of him. Her account, hardly surprisingly in the circumstances, was that she did not resist because she was frightened that he would hurt her. She reported the incident to the police and also told the appellant's sister what had happened by telephone.

Count 2 related to an occurrence on December 2, 1994. At about 8.00 p.m. the victim went with her next-door neighbour to a public house in Alvaston. They stayed until about midnight. As the victim was walking home she saw the appellant running up the road. He turned towards her and headed in her direction. He had what she described as an evil look on his face. He walked straight up to her and said, "I'm going to rape you". She was frightened and screamed very loudly. He slapped her on the side of the face three times, grabbed hold of her jumper and tried to put his hand over her mouth. He told her to calm down and to shut up, and his fingers went inside her mouth and scratched her. She was, naturally, very distressed and frightened. The appellant said, "If you don't shut up I'll cut you and leave you for dead". He produced a knife. She was very frightened and stopped screaming at that juncture. He dragged her towards a building. He told her to lie down and said he was going to rape her. He told her to stop crying. He lay on top of her and rubbed his lower body against hers. He then pulled her up, apparently not having an erection at that stage. She walked with him because she was frightened that he might hurt her. He said that they should go into a car park where he had a big posh car. As they walked into the car park she saw a man on a bicycle. He told her not to say anything or he would stab her. They continued walking. He told her that he would hurt her if he had to and that he had done nine years for robbery and had been done twice for rape. He said he wanted to rape her, and put his arms around her waist and pulled her towards him and tried to kiss her. She kept talking to him to try to distract him. He walked around the corner of a building twice and appeared to sniff something. He had then returned and tried to kiss her. She turned away on each occasion. Eventually she asked if she could go home and he said yes. She started to walk off and he followed her, saying that he did not know if he could trust her. She asked again if she could go and he said that he

trusted her and made her swear that she would not tell anyone. Eventually she left and was able to go home and she told her friend what had happened.

Counts 3, 4, 5 and 6 relate to a victim, a young woman who lived with her boyfriend and a baby in a house which they rented from the father of the victim in count 1. At about 7.00 a.m. on June 22 they were awoken by a loud bang. The boyfriend got up and walked out of the bedroom. A few seconds later he came running back and hid in the room. The appellant followed him into the room. His fingers were cut and bleeding heavily and he was holding a knife and a hammer. He said, "You're not S." (S. was the victim of count 1) "who are you?" The appellant kept saying that they must know where S. was and they continued to say they did not know. He then punched and slapped the boyfriend. He threatened to kill him. After a while he appeared to calm down. He said he would put them in the attic but they persuaded him not to because of the baby.

The victim went downstairs to prepare the baby's bottle with his consent. The appellant asked what they were going to do that day and she told him they were going to see their relatives and that they were expected. The appellant said that she and the boyfriend had to go in turn to the telephone box nearby and telephone their relatives and make excuses. He kept, as it were, a hostage while that happened. He threatened to cut the throats of the boyfriend and her child if she told anyone. When she returned the boyfriend had to do the same.

By the middle of the day he was told by the victim that they had no food in the house. He allowed her to go out to buy some food but would not let her take the baby with her. She did that. He continued to talk about his girlfriend S. He said that he had come to the house to hurt her and to torture her boyfriend. He wanted to kill them both.

At about 5.30 p.m. the victim's sister knocked on the door. The appellant told them to keep quiet. He continued to say that he would kill the baby if they "messed up". He said he would come back and kill the baby no matter how long into the future it was. Other people came to the door but were not admitted.

At 9.30 p.m. the appellant said that one of them would have to go to the telephone box and telephone his friend in Leicester to pick him up. He said he had a number in his pocket. At first he could not find it. He said he was going to tie them both up and they gave him some washing line to do that. The appellant tied the victim's legs together and her hands behind her back. He said he was leaving. He said he would gag them first. He tied a T-shirt over the boyfriend's head and put a plaster over the victim's mouth. He then turned out the lights.

At about 2.30 a.m. he said he had changed his plans and that he was going to untie her. He threatened them both with the knife. He untied the young woman and told her to go downstairs and put the settee cushions on the floor. He told her to take off her clothes, which she did. He told her to get on the cushions on all fours. He inserted his fingers into her vagina and put his penis in her mouth. He then had sexual intercourse with her. He stopped and talked to her about her family. He had sexual intercourse again and ejaculated in her body. The appellant then talked about killing himself and mentioned electrocuting himself, taking an overdose of tablets, stabbing himself in the neck, and he finally decided he would hang himself. He sent the young woman out to buy some cigarettes from a supermarket. He asked the boyfriend to make a noose for him and he put the noose round his neck and prepared to hang himself.

The victims then left the house, posted the keys through the letter box and went to the young woman's mother's house and the police were contacted.

The appellant was arrested on June 23, 1995 when he was recognised by a police

officer in the street. He was interviewed and he made some admissions, including the latest rape. He admitted also the abduction, count 2.

He is aged 27. He has four findings of guilt and seven previous convictions dating back to 1982. He had been convicted of rape in 1988 and served a total of five years' imprisonment. It is necessary to refer to the circumstances of some of his previous offences. On April 26, 1983 he was convicted of an offence committed in December 1982. During a game with a young woman he became annoyed and kicked her in the face. She received treatment in hospital for a cut to the inside of her month which required two stitches. On May 11, 1988 he was convicted in respect of an offence in December 1987 when, wearing tights over his face and carrying a knife, he gained entry to a house by breaking a window with a stone. Once inside, he stole property and made two trips to the house to carry the property out. He returned a third time and entered the bedroom of a young woman of 28. He raped her at knife point, forced her to have oral sex and ejaculated over her. In July 1991 he was convicted in respect of an offence committed in April 1991, when, at Derby, police officers were called to the home of his mother after a dispute between the two of them. The appellant approached the officers with a knife in each hand. He launched an attack on them, making several attempts to stab one of them. He head-butted an officer, causing cuts and bruising. Once overpowered and handcuffed a total of six knives were taken from him.

Upon his conviction the learned judge said this:

"David Razaque, you are a dangerous man. You are dangerous in particular to [the victim of count 1], but you are also a danger to the public generally. You are a danger to women in that you have a sexual appetite, that you will stop at nothing to satisfy. You are a danger to all others because of your propensity to carry and make use of knives. The public need to be protected from you and protected from you for a very long time."

He then passed the sentences we have indicated.

It is an unusual feature of the case, in the experience of this Court, that the learned judge did not have before him any medical evidence about this man, nor, as it happens, do we, because none was ordered when leave was granted. There may be cases in which it is appropriate to proceed to a life sentence without such a report, but we venture to suggest that they must be rare indeed and that it would ordinarily be appropriate for a sentencing judge who is considering imposing such a sentence to obtain such a report. Having said that, we wish to make it clear that the learned judge plainly, from what he said, was not in this case relying upon perceived medical or mental problems as a justification for imposing the sentence but was simply deducing from the number, gravity and awfulness of the offences that he had committed that he was and would remain for an indefinite period a danger to the public at large and particularly to women. Mr Hamilton, in his most helpful and persuasive arguments on this appellant's behalf, began by submitting that this was not an appropriate case in which to impose a sentence of life imprisonment. He referred us to the case of *Hodgson* (1987) 9 Cr.App.R.(S.) 509 where Watkins L.J. referred to the case of *Hodgson* (1968) 52 Cr.App.R. 113. Watkins L.J. said:

"The criteria were laid down many years ago. They have been repeated in this Court time and again. They were referred to in *Hodgson* in this way: 'When the following conditions are satisfied, a sentence of life imprisonment is in our opinion justified: (1) where the offence or offences are in themselves grave enough to require a very long sentence'—that undoubtedly is the case here; (2) where it appears from the nature of the offences or from the defendant's history that he is a person of unstable character likely to commit such offences in the future'—that, in our judgment, is indubitably the case here. His record and what

I have already explained about it and the two offences with which we are concerned to be persuasive of that; (3) where if the offences are committed the consequences to others may be specially injurious, as in the case of sexual offences or crimes of violence."

We have considered Mr Hamilton's submissions. The main thrust of his argument is to this effect. He points to the fact that the rape in respect of which the appellant was convicted (count 1) was a rape of his former girlfriend with whom plainly he was obsessed; he points out that, in respect of the abduction, the young woman concerned, though terrified and told that she was going to be raped, was in fact not raped; and as the last incident with the young woman and her boyfriend, who were imprisoned in her house, he emphasises that though she was raped, the occasion of the appellant going to the house appears to have been his desire to find his former girlfriend and her new boyfriend. He then, without wishing to trivialise either of the rapes, seeks to describe them as, in the circumstances, having a quasi-domestic element and being different from rapes of strangers committed, as it were, in the street or in the course of burglary.

We are not impressed by those submissions, persuasively though they were made. First, it is to be remembered, as we have said, that the abduction of the young woman who was not raped was with the avowed intention, according to the appellant, of raping her. Secondly, the fact that he went to the house in the first instance to find his former girlfriend hardly detracts from the fact that he took the opportunity to rape the occupant, who was unknown to him, before leaving. We consider that the conditions summarised in *Hodgson* are amply fulfilled in this case and that the judge was entirely justified in concluding that it was an appropriate case for a life sentence. We reject the appeal on that ground.

However, when it comes to the specified period of 17 years, Mr Hamilton is on much sounder ground. A specified period under section 34 of 17 years imports that the judge must have had in mind, as the appropriate determinate sentence, something of the order of 25 years and, grave though these offences taken together were, we do not consider that a sentence of that order would, absent a life sentence, have been appropriate. We say no more than that we accept the general thrust of the arguments advanced by Mr Hamilton. We conclude that, had the learned judge been imposing a determinate sentence, looking at these offences globally and the criminality involved, bearing in mind the fact that to all but one the appellant had pleaded guilty, he would probably have had in mind a total sentence in the order of 16 years or thereabouts. In those circumstances the appropriate specified period under section 34 is, in our judgment, 10 years. To that extent the appeal is allowed, namely the specified period of 17 years is quashed and there is substituted a period of 10 years.

## IAN PAUL SHEARER AND KARL PHILLIP LYNCH

COURT OF APPEAL (Lord Justice Hutchison and Mr Justice  
McKinnon): June 13, 1996

*Handling stolen goods—handling proceeds of robbery of security van—length of sentence*

Seven years' imprisonment upheld for handling the proceeds of a robbery of a security van.

distinction would be made between him and Morrish, and that he would not be sent to prison. ~~It may~~ very well be, given the unwillingness of the Crown to accept a plea to a lesser charge, that he would have chosen to contest the issue of intent to cause really serious bodily harm, with what result one knows not. The inescapable fact is that if this Court thought it right that a custodial sentence should now be imposed on the offender, he would be bearing the whole burden of the punishment for this disgraceful incident. It might be said that he would be receiving no more than his just deserts, whether or not Morrish received his, but the Court is unable to regard that as a fair outcome on the facts here; the more so since, as we have indicated, there might never have been a conviction under section 18 such as would have called for a substantially more severe sentence on the offender.

Accordingly, we conclude that the sentence imposed on the offender was unduly lenient, but we think it right in all the circumstances to exercise our discretion against quashing the order which the learned Recorder made and substituting any alternative penalty. We shall therefore allow this sentence to stand. We reach that conclusion with less misgiving than we otherwise might have in the knowledge that the offender has shown genuine signs of remorse and has shown every sign of co-operating to the full with his probation officer since the probation order was made, and appears to have recognised in unqualified terms the wrongness of what he did. He will, we feel sure, appreciate the jeopardy in which he will stand should he offend again.

CASE 43

LESLIE DAVID T.

COURT OF APPEAL (Mr Justice Ian Kennedy and Judge Crane):  
June 24, 1996

*Rape—rape by buggery of woman—length of sentence.*

Sentences of nine years' imprisonment for rape by buggery by a man of a woman with whom he had gone through a ceremony of marriage reduced to six years, consecutive to a term of 12 months' imprisonment for making a false declaration.

The appellant was convicted of two counts of rape, and pleaded guilty to making a false declaration with reference to marriage. The appellant met the complainant in a club and they were married a few weeks later. The complainant alleged that during their wedding night the appellant tied her up and buggered her against her will on five occasions. The complainant made allegations that the appellant had also buggered her before the marriage, and that he continued to do so after the first night, but the appellant was found not guilty on counts alleging rape in the form of buggery without consent on these other occasions. Sentenced to nine years' imprisonment on each count of rape, concurrent, with 12 months' imprisonment consecutive for making a false declaration with reference to marriage.

**Held:** the sentences for rape by buggery were excessive; they would be reduced to six years, and the total sentence to seven years.

**Reference:** rape, *Current Sentencing Practice* B4-1.

A. Pitts for the appellant.

**IAN KENNEDY J.:** On December 20, 1995, in the Central Criminal Court, the

appellant was convicted by a jury on two counts of rape. He was acquitted by the same jury on two other counts. He also pleaded guilty on another indictment on re-arraignment to making a false oath or declaration with reference to marriage. Another indictment again was left on the file on the usual terms. For making a false oath or declaration with reference to marriage he received 12 months' imprisonment, and on the two counts of rape he received nine years' imprisonment on each, concurrent between themselves but consecutive to the 12 months, thus his total sentence was 10 years' imprisonment. He now appeals against sentence by leave of the single judge. We say at once that we have been greatly assisted in the course of this appeal by Mr Pitts's helpful and well-thought out submissions. The problem which faced the learned sentencing judge was the interpretation of the jury's verdict, very frequently not an easy matter.

The background to the case was this. The appellant met the complainant on February 3, 1995 in a club. He told her a number of stories showing himself in a good light, and succeeded in winning her affections. He moved into her home about a week later, ostensibly to be available to help in her garden. On March 24, they married at Greenwich Register Office. She was to say that she had married him because he was blackmailing her, that she could see no way out of her position and she felt that she was totally dominated by him.

They spent their wedding night at the Clarendon Hotel in Blackheath. The appellant had drunk a great deal, and according to his now wife he told her that as his wife he could do with her what he liked. She said that he kept her awake by giving her amphetamine sulphate and had said, that he wanted to hurt and humiliate her. She said he made her go on all fours, tied her wrists and her leg with his tie, and forcibly and against her will buggered her. She said that happened on some five occasions that night. Those incidents were reflected by Counts 2 and 3 upon which he was convicted, but it was her case (and this was reflected by Count 1) that he had also committed forcible buggery upon her from the time that they began to live in the same house until the marriage.

Similarly, it was her case that after the marriage, and until her complaints were made, he continued forcibly to buggery her. She gave a highly coloured account of their relationship, an account which would be fully justified if the basic fact of continual forcible buggery had been established, but it had not. Therefore, the problem for the learned judge was to try to interpret the jury's verdict.

Two points, as Mr Pitt has shown, tended to explain the view that they had taken of the case. The first was that the appellant himself admitted to having, though with consent, committed buggery on that night, although he said that the procedure was unsatisfactory to both of them and that it was not persisted in. Secondly, and perhaps more significantly, in an affidavit which she swore in proceedings which she took out against the appellant, the complainant swore only to buggery upon that one night. The learned judge, in his sentencing remarks, said:

... you wheedled yourself into Mrs C.'s life and affections by deceit. Having succeeded, your treatment of her on your wedding night was outrageous and it is not surprising that she felt powerless and terrified by your temper and violence. You protest your love for her but I cannot help feeling that what is uppermost in your mind is your own interests and your own sexual gratification and sadly, this is yet another example, and a particularly dreadful one, of you turning your family and girlfriends into victims."

We pause there to say that this was the first occasion when there was any suggestion of his having turned his family or girlfriends into victims in any sexual connotation, though there was evidence that he had cheated an earlier girlfriend by using a credit card. Returning to the sentencing remarks:



"You have seen to it that she has had to relive in front of us all the humiliation you put her through. In my view there is no real mitigation at all."  
Mr Pitts points out that to say that the appellant had seen to it that she had had to relive the events is perhaps putting it a little strongly bearing in mind that on two of the counts, and perhaps in one sense the most significant of the counts, he had been acquitted.

The learned judge's remark that there is no real mitigation at all seems to us to be justified. What, then, is the proper approach?

The judge had to deal with this man for certainly two offences of rape by buggery committed on the person of his wife, a lady not in her first youth, on their wedding night. There is no doubt that the offences were violent, and there is no doubt that there was a background of violence and unseemly behaviour from him to her during the time of the marriage and surrounding it. Equally, there is no doubt that the learned judge was right in saying that he had "wheedled" himself into her affections by his lies. We can see nothing to fault in the learned judge's sentence for the false declaration. This was not one of those cases towards the bottom of the scale where someone in love overlooks an earlier marriage. This was a man who told a lie to obtain advantages for himself.

So far as the major part of the indictment is concerned (the two counts of rape by buggery) in our judgment the sentence here was excessive. We therefore quash that sentence and substitute for it concurrent sentences of six years' imprisonment, consecutive to the 12 months, and thus the final sentence is seven years in the place of 10, to which extent this appeal is allowed.

## ATTORNEY-GENERAL'S REFERENCE NO. 75 OF 1995 (PHILLIP HENRY WILLEY)

COURT OF APPEAL (The Lord Chief Justice, Mr Justice Ognall and  
Mr Justice Astell): June 24, 1996.

*Attempted rape—attempted rape by buggery of girl aged 10 years—adequacy of sentence.*

Two years' imprisonment for attempted rape by buggery of a girl aged 10 years by a man who lived with her mother increased to five years.

The offender was convicted of four counts of attempted rape and two of indecent assault. The offender lived with a woman who had a daughter aged 10. The child eventually complained that the offender had attempted to bugger her on four occasions and had inserted his finger into her anus on one occasion. The offender denied all the allegations. The child indicated that she forgave the offender. Sentenced to a total of two years' imprisonment. The Attorney-General asked the Court to review the sentence on the ground that it was unduly lenient.

**Held:** (considering *Roberts* (1982) 4 Cr.App.R.(S.) 8, *Billam* (1986) 8 Cr.App.R.(S.) 48, *Attorney-General's Reference No. 25 of 1994* (1994) 16 Cr.App.R.(S.) 562 and *Robinson* (1990) 12 Cr.App.R.(S.) 542) it was an error to treat the child's attitude as a decisive matter in the question of sentence; a 10 year old child was not in a position to make a reliable judgment on the seriousness of the offences. It was important to indicate to the public at large the total unacceptability of such conduct towards a

child. The sentence was unduly lenient, and the sentence should be substituted.

**Cases cited:** *Roberts* (1982) 4 Cr.App.R.(S.) 8, *Billam* (1986) 8 Cr.App.R.(S.) 48, *Attorney-General's Reference No. 25 of 1994* (1994) 16 Cr.App.R.(S.) 562, *Robinson* (1990) 12 Cr.App.R.(S.) 542.

**Reference:** rape, *Current Sentencing Practice* B4-1.

*John Bevan* for the Attorney-General; *Miss M. Parry-Evans* for the offender.

**LORD BINGHAM C.J.:** On October 13, 1995, in the Crown Court at Cardiff, Phillip Henry Willey was convicted by the jury of four counts of attempted rape and two counts of indecent assault. Sentence was adjourned. On November 17, 1995 he was sentenced to concurrent terms of two years' imprisonment on each of the four counts of attempted rape and to concurrent terms of 12 months on the two counts of indecent assault. Those sentences were ordered to run concurrently with each other, making a total sentence of two years' imprisonment.

The Attorney-General seeks leave to refer these sentences to the Court for review under section 36 of the Criminal Justice Act 1988 on the ground that they were unduly lenient. The Court grants leave.

The offender was born on January 30, 1969, and is now aged 27. He lived for some time with the mother of a child "G" who was born on October 30, 1984 and who was aged 10 at the time relevant to the offences. The child's mother and the offender lived together and the child treated the offender as her father. Another child of the association was born in February 1994. The mother described "G" as well behaved and bright. The offender described her as an outgoing girl who got on with everyone and was not liable to tell lies.

Following the birth of a son to the offender and the child's mother, the offender became critical of "G". Their relationship deteriorated. He began to pick on her. Further, it appeared that he developed a preference for anal intercourse with the mother and for placing his fingers in her anus whilst having vaginal intercourse. He would also bite her bottom and on occasion leave marks.

It became apparent during the Easter holidays in 1995 that "G" was disinclined to spend time at home and preferred to spend her days and her nights in the company of friends. There came an occasion on April 26, when the offender again criticised her. The child said, in her mother's hearing, that if the offender kept on picking on her she would "tell mummy what you do to me when you get into my bed and put your willy in me". Having heard this, the mother took advice and reported the allegations.

That led to the child being interviewed on video. She stated that the offender's conduct had begun in March after she had returned from a skiing holiday. She said that the offender got into her bed wearing pyjamas and a T-shirt and stuck his finger up her bottom. It felt horrible and really hurt. He also stuck his "willy" up her bottom, but that was less painful; it did not go inside her. He kissed her bottom and touched her breasts, but not her vagina because she brought up her legs to prevent him. The evidence was that attempted buggery took place about four times and digital interference and kissing twice on the first occasion. She adopted a protective habit by pretending to be asleep. She tried to put the offender off by putting a notice on her bedroom door, telling him to knock before he entered. The child stated that she thought the world of the offender, but she wanted him to live apart from her and her mother for a period of some months so that "we can forget all about it and just start again". She did not want to upset the offender because he was "really a nice person underneath".

The offender, in interview, consistently denied any indecency and offered no

and expressing his heartfelt wish to return to his normal life with his partner and family. Mr Scobie rightly did not seek to challenge the judge's description of this conduct as "barbaric" and "appalling", but emphasised the relatively minor role of Stefan Dixon who did not subject the victim to serious sexual indignities beyond the mere commission of rape. He suggested that Stefan Dixon, although the oldest of the three, was in many ways the youngest. He relied on events since sentence was passed as showing that the sentence was a just one and that it would be unfair to increase it. He accepted, in realistic submissions, that the sentence was lenient, but contended that it was not in the circumstances unduly lenient.

We feel that it is appropriate to give full weight to all the matters that have been urged in mitigation, although differing weights inevitably attach to different submissions. The matters which weigh most heavily with us are the youth of the offenders, their good characters, and the element of double jeopardy to which we have already referred. We also think it right to bear in mind that this was indeed a very experienced judge whose assessment of matters such as these is not to be lightly displaced.

However, despite giving full weight to those considerations, we feel bound to conclude that these sentences so far as the aiding and abetting, the rape and the attempted rape are concerned, were not only lenient, but unduly so. This was, as the trial judge rightly said, a barbaric tale of bestial behaviour. "Appalling" was in no way too strong an expression to use to describe it. The sentences passed did not measure up, even with all allowances made, to the seriousness of the criminal conduct involved. It is, in our judgment, right that the final sentence served by Nicola Wilson should be greater than that imposed on the other two offenders. On counts 2 and 3, we shall quash the sentences of three-and-a-half years' detention and substitute on each of those two counts a sentence of six years' detention. So far as the two male offenders are concerned, we consider the sentences on counts 2 and 3 to be inadequate. On each of those we shall quash the sentence of three years' detention and substitute a sentence of five years' detention. The other sentences will stand undisturbed. The net result is that Nicola Wilson will serve a sentence of six years' detention and the other two offenders five years' detention.

CASE 44

**ATTORNEY-GENERAL'S REFERENCE NO. 29 OF 1996  
(CARL JUNIOR FRIDYE)**

COURT OF APPEAL (The Lord Chief Justice, Mr Justice Ognall and Mr Justice Astill): July 4, 1996

*Rape—rape by offender gaining access to victim's home by night—adequacy of sentence.*

Sentences totalling seven-and-a-half years imposed for the rape of a woman after the offender had gained access to her home, and indecent assaults on three other women, considered unduly lenient but not increased as the difference between the sentence imposed and the sentence which would have been substituted, allowing for the element of double jeopardy, was insufficient to justify interfering with the sentence.

The offender pleaded guilty to one count of rape and three counts of indecent

assault. Each count related to a different victim. The offender gained access to the flat occupied by the victim of the rape by a stratagem, and subsequently threatened her with a knife before raping her twice. On a later occasion the offender attacked two women who were walking in the street in the early hours, grabbing one of them by the buttock and grabbing the other by the breasts. A few minutes later the offender entered a battered woman's refuge by climbing through a window and attacked a woman who was asleep in her bedroom with two of her children. He pulled her night shirt open, squeezed her throat, punched her face and bit her arm. Sentenced to five years' imprisonment for rape and a total of two-and-a-half years consecutive for indecent assault (total sentence, seven-and-a-half years' imprisonment). The Attorney-General asked the Court to review the sentence on the ground that it was unduly lenient.

**Held:** (considering *Billam* (1986) 8 Cr.App.R.(S.) 48, *Higgins* (1988) 10 Cr.App.R.(S.) 262 and *Furlong* (1993) 14 Cr.App.R.(S.) 222) the sentence had indicated that he had reduced the individual sentences in order to ensure that the total sentence was not excessive, and that he gave credit for the offender's pleas. In the view of the Court, the sentences were unduly lenient. An appropriate total sentence would have been 10 years' imprisonment. In view of the element of double jeopardy, the Court would have been forced to substitute a sentence of less than 10 years on a reference by the Attorney-General, and the difference between the sentence which would have been substituted and the sentence of seven-and-a-half years was not sufficient to cause the Court in the exercise of its discretion to interfere.

**Cases cited:** *Billam* (1986) 8 Cr.App.R.(S.) 48, *Higgins* (1988) 10 Cr.App.R.(S.) 262 and *Furlong* (1993) 14 Cr.App.R.(S.) 222.

**Reference:** rape. *Current Sentencing Practice* B4-1.

*W. Boyce* for the Attorney-General; *P. Higham* for the offender.

**LORD BINGHAM C.J.:** The Attorney-General seeks leave, pursuant to section 36 of the Criminal Justice Act 1988, to refer to this Court for review a sentence which he regards as unduly lenient. We grant leave.

The offender is Carl Junior Fridye, aged 24. On March 4, 1996 he appeared in the Crown Court at Derby to face an indictment which contained five counts. Count 1 alleged the rape of W.C.; count 2 alleged an offence of indecent assault upon S.P.; count 3 alleged an offence of indecent assault upon N.F.; count 5 alleged an offence of indecent assault upon J.H. Count 4 was ordered to remain on the file on the usual terms. Following legal arguments the offender pleaded guilty to counts 1, 2, 3 and 5. That had the result that no evidence was offered in respect of count 4.

On March 15, the offender was sentenced as follows: on count 1 (rape), five years' imprisonment; on count 2 (indecent assault), 18 months' imprisonment; on count 3 (indecent assault), 18 months' imprisonment; and on count 5 (indecent assault) two-and-a-half years' imprisonment. The three sentences for indecent assault were offered to run concurrently with each other but consecutively to the sentence for the rape, so that the total sentence was one of seven-and-a-half years' imprisonment.

The victim of the rape shared a flat with two flat mates, one of whom was called R., who was known to the offender. They had exchanged addresses and seen each other on occasion. On April 7, 1995 W.C. was in the flat on her own. Just after 5.00 a.m. she was asleep, but the offender attracted her attention by rapping the letter box on the front door; throwing stones at the window and calling for R. She looked out of the window and saw the offender whom she did not recognise as she had never seen him before. She told him R. was not in, but at the offender's request she opened the front

door a little to speak to him. She told him to go away. However, when she tried to close the door he jammed his foot in the gap, preventing her from doing so. She screamed. He shoved the door open and pushed her back. He asked why she was screaming and said he could not understand it. She pleaded with him to leave, but in the end gave him some water for which he asked. He followed her upstairs where all the rooms of the flat were situated. At the top of the stairs he said "Let's go to R.'s room", and guided her there. At this stage W.C., not surprisingly, was becoming very frightened. She said that she had to get up early. He told her to go to bed and he would stay in R.'s room. She was uneasy, but left him, telling him to find himself tea and coffee in the kitchen.

She went to her own bedroom. She pushed a chair and a drawing board against the door in order to prevent anyone entering. She heard the offender moving around in the kitchen. Shortly afterwards he entered her room and pushed the furniture out of the way. He held a bread knife which he had obtained from the kitchen. He told her to remove her clothes. She thought he was going to rape her and then perhaps kill her. She described his eyes as "staring and piercing". She was very frightened. She removed her clothes and told him that she had a period. He thereupon told her to remove her tampon, which she did. He told her that she was beautiful and ordered her to lie on the bed. He asked if she was going to scream again. When she indicated that she would not, he said that he would put the knife down. He took off his clothes. The victim asked if he had condoms to prevent HIV infection. He told her that he did not have AIDS. There was a search for condoms, but that proved unsuccessful. The offender pointed the knife at the victim to indicate that she should lie on her own bed. He put the knife down and pushed his erect penis into her vagina which she found painful. He said that he wanted to give her pleasure and that she should live out one of her fantasies. She told him that she was satisfied with her boyfriend. He then withdrew. He said that he wanted her to help him guide his penis into her vagina. He said that it would give him "great pleasure if [she] could come", and so she simulated an orgasm in the hope that he would leave. He withdrew his penis and said "well, you've shot your load, what about me? Don't you want me to enjoy myself?" Shortly afterwards he masturbated to obtain an erection and entered her again. His penis caused her intense pain and she asked him to withdraw. However, he continued to have sexual intercourse until he eventually ejaculated. When this episode was concluded Miss C. got up and made tea in order to get rid of him. He sat on the bed and discussed the events in terms of extreme self-pity. She eventually managed to get rid of him. When her friend R. returned, she told her what had happened. At that stage the police were not informed since the victim was unwilling for proceedings to be taken. She did, however, see her general practitioner, complaining of injuries to her genital area. It was after the offender was arrested for the matters in the other counts on the indictment that W.C. came forward and indicated her willingness to give evidence.

The counts of indecent assault against S.P. and N.F. involved an incident at 2.35 a.m. on Saturday June 24, 1995. The two women were walking along the street when the offender approached them and began following them. They walked faster in order to try to get away. He grabbed the buttock of one of them and she pushed him down. He then grabbed the buttock of the other and reached over, thrust his hand away the front of her dress and grabbed one of her breasts. She pulled herself free and ran over the road for help. Meanwhile he grabbed the other woman from behind, causing her to lose her balance and fall over. He again grabbed her breasts over her clothing, squeezed them and then tried to grab her vaginal area. However, she thwarted him. The opinion of one of the victims on that occasion was that, because of the size and appearance of his eyes, the offender seemed to be high on drugs.

The third count of indecent assault was even more serious. It took place 15 minutes later. The offender climbed through a window with a broken safety lock into a refuge for battered women. He knew the premises since he had visited a girlfriend there in the past. The room he entered was one of two bedrooms in the flat occupied by J.H. She was asleep in bed with her three-year-old daughter and her four-month-old son was in a cot nearby. She had three other children elsewhere in the flat. She awoke to find the offender sitting on her bed. She asked what he was doing, but he made no reply. He pulled her night shirt open and over her shoulders. She asked "What are you doing?" He told her to shut up and threatened to strangle her. The victim called for her eldest daughter. The offender grabbed her by the throat and squeezed tightly, forcing her back across the bed with him on top. She thought that she was going to become unconscious or even die. He again told her to shut up, and twice punched her hard on the bridge of the nose and on the eye. He then twice bit her arm so hard as to leave impressions of his teeth in the skin. The victim lashed out, pushed his face away and screamed for help. However, the offender got up, stood on the baby's carrycot and climbed out of the window. The victim on this occasion took urgent steps to call the police and the offender was in due course apprehended. The victim was examined by a doctor who found her to be understandably upset and also found that her face, nose and neck were bruised and swollen and she had teeth marks on her arm.

The Attorney-General submits that there are a number of aggravating features in this case. The rape (count 1) was committed during the night after the offender had tricked and forced his way into being allowed to stay in the victim's home; he pushed his way into the complainant's bedroom and threatened her with a bread knife in order to frighten her into submission; there was more than one penetration of the victim; and the whole ordeal lasted approximately three hours. So far as the assault on J.H. is concerned, the offender entered the ground-floor bedroom through an open window in the early hours of the morning where the complainant was asleep alone with her two young children; he knew he was entering a room in a woman's refuge; the offender assaulted the victim by strangling her, punching her and biting her at least twice when she resisted his unwelcome advances.

The Attorney-General acknowledges that there are some mitigating features: first, the pleas of guilty which the offender entered, though their effect is qualified by the late stage at which they were tendered, after three of the victims had had to give evidence at a trial-within-a-trial, although before they were cross-examined; secondly, the offender was under the influence of drugs at the time of the commission of the offences, although by the time of sentence the offender appeared to have made some effort to overcome his drug addiction; and finally, although the offender had previous convictions for burglary and theft, he had no previous convictions for violence or sexual offences.

On behalf of the Attorney-General it is submitted that the total of seven-and-a-half years' imprisonment for these offences was inadequate. Reference was particularly made to the well-known case of *Billam* (1986) 8 Cr.App.R.(S.) 48, where guidance is given on the appropriate level of sentencing for offences of rape. Reference was also made to *Higgins* (1988) 10 Cr.App.R.(S.) 262 and *Furlong* (1993) 14 Cr.App.R.(S.) 222 for the proposition that indecent assault may, on appropriate facts, be as serious an offence as rape itself.

In passing sentence the learned judge pointed out that these were serious offences upon a series of young women. He referred to the offender's plea of guilty, pointed out that it had come at a late stage, but acknowledged that it had spared certain of the victims the ordeal of cross-examination. He indicated that he would give credit for the pleas of guilty which enabled him to reduce the sentence below what he would otherwise feel bound to impose. He continued:

"I do, however, have this difficulty: All of these offences deserve substantial sentences, yet you are a young man and one of the principles that I have to observe, as has been frequently and, indeed, recently laid down by the Court of Appeal, is that I have to look at the totality of the sentence and not apportion a period to each crime, and just add them up without regard to how long it comes to in the end. That I must do in this case, and the net result of that is that these are lesser sentences than otherwise would be deserved because I need, and do, observe that principle, which I am obliged to do by the Court of Appeal, to look at the total of the sentence.

Thus the sentences that I pass are not... to be looked at as being those that are appropriate to the particular offence but the totality of the sentence as regards the totality of the crimes combined with your age and all the other matters."

In his submissions on behalf of the offender, Mr Higham relied on those observations of the trial judge. He submitted that the sentence imposed for the count of rape was lenient, but not unduly lenient. He described the sentence of two-and-a-half years' imprisonment for the most serious of the indecent assaults as "lenient in the extreme, but not unduly lenient". He did, however, rely on the learned judge's view that regard had to be taken of the principle of totality and attention paid to the overall length of the sentence. Counsel submitted that, having regard to that principle, the total of seven-and-a-half years' imprisonment is one with which the Court should not interfere. He reminded us that the trial judge gave credit for the offender's plea of guilty, albeit tendered at a late stage, and urged that credit should be given for the fact that the offender was under the influence of drugs when committing these offences, but has made a serious effort to overcome his addiction.

Having considered these matters, we conclude that the appropriate sentence for these offences would have been a total of 10 years' imprisonment. Accordingly, we conclude that the sentences which were imposed were unduly lenient. However, we are obliged to recognise the principle of double jeopardy, that some deduction from the appropriate sentence should be made when an offender, who has been duly convicted and sentenced, is obliged to face further consideration of his sentence. Therefore we would have to make an appropriate discount from the sentence of 10 years' imprisonment if we were to take that as our starting point. After anxious consideration, we have concluded that the difference between the correct sentence, once it is discounted for double jeopardy, and the sentence which the learned judge imposed, is not so great as to cause this Court in the exercise of its discretion to interfere. Our view, as we have endeavoured to make clear, is that the sentence was unduly lenient and that the judge should have taken a higher figure. However, in all the circumstances we do not consider it right on the peculiar facts of this case to quash the sentences and substitute others in their place.

## ANTHONY COLE

COURT OF APPEAL (Lord Justice Staughton, Mr Justice Maurice Kay and Judge Crane): July 5, 1996

*Contempt of court—witness refusing to give evidence—length of sentence.*

Four months' imprisonment upheld for contempt of court by refusing to give evidence for the prosecution.

The appellant admitted contempt of court. While serving a sentence of imprisonment for an unrelated matter, he was called as a prosecution witness at the trial of three men charged with affray and in one case intimidation of a witness. The appellant went into the witness box but declined to give any evidence, saying that threats had been made against his life and his family. The jury was discharged, and eventually the three men pleaded guilty to using threatening words and behaviour. Sentenced to four months' imprisonment, consecutive to the sentence he was then serving.

**Held**, (considering *Montgomery* (1995) 16 Cr.App.R.(S.) 274) although there was other evidence available in the case, the appellant's evidence was important on one critical issue. The starting point was the gravity of the offence that was being tried, which was a serious and potentially dangerous incident involving the use of a firearm. The appellant's failure to give evidence resulted in the discharge of the jury. The appellant was in a vulnerable position as he was in prison, but this was a serious contempt in the course of an important trial on a serious matter, and it had a terminal effect on the trial. The sentence of four months' imprisonment was entirely appropriate.

**Case cited:** *Montgomery* (1995) 16 Cr.App.R.(S.) 274.

**Reference:** contempt of court, *Current Sentencing Practice* B8-3.3E.

*B.C. Forster* for the appellant.

**MAURICE KAY J.:** On January 17, 1996, in the Crown Court at Newcastle before H.H. Judge Lowden, the appellant was called as a witness during the prosecution case in the trial of three men called Fairbairn, Cardill and Cardill. They were being tried for affray, and in the case of one of the Cardills for intimidation of a witness, not this appellant. Upon entering the witness box the appellant declined to give any evidence. The following day, January 18, before the same court he admitted his contempt of court and was sentenced to four months' imprisonment to be served consecutively to a sentence of two-and-a-half years that he was serving for an unrelated offence. He now appeals against the sentence of four months' imprisonment as of right pursuant to the provisions of section 13 of the Administration of Justice Act 1960.

The trial in which the appellant was called as a witness arose out of events on September 12, 1994. The prosecution case against the three defendants in that trial was that they had gone to the appellant's home first when he was out. On that occasion it was said they had intimidated his wife by saying, in her hearing, "He's going to fucking get it. He's going to die tonight... we're going to sort him out once and for all this time". They returned later, when the appellant was in the house. They had banged on the door, sounded a car horn and three gunshots were fired at the house from an imitation handgun using blanks. The shells from the handgun were found near the house, although the gun itself was never found.

The events were the subject of evidence from a number of sources, including the appellant's wife, who, contrary to his wishes, did give evidence, and there was also evidence from some neighbours. Nevertheless, it was the defence case that it was the appellant who had fired the gun.

The appellant made a statement to the police on September 13, 1994, as did his wife and some neighbours. There were, in all, some five other independent witnesses to the incident from outside the house who gave statements about the incident to the effect that they saw the gun being fired not by the appellant but by one of the defendants in the trial.

COURT OF APPEAL (Lord Justice Phillips, Mr Justice Jowitt and Mr Justice Keene): July 8, 1996

*Longer than normal sentence—rape—length of sentence.*

Eighteen years' imprisonment for rape, imposed on a man with previous convictions for indecent assault, reduced to 15 years.

The appellant was convicted of rape. The appellant rang the doorbell of a flat in the early afternoon and forced his way in when the door was opened. The appellant threatened the occupant, a woman aged 38, with a knife, removed her clothes and raped her. The appellant left the flat, but returned twice, once to collect his knife and once to ask whether the victim had complained to the police. On the second occasion he was detained by the victim's father. The appellant, aged 39, had been convicted on four occasions of a total of seven indecent assaults. Sentenced to 18 years' imprisonment, passed as a longer than normal sentence under the Criminal Justice Act 1991, s.2(2)(b).

**Held:** it was accepted that this was a case to which section 2(2)(b) applied. In a case of this nature, the Court had to consider what sentence would have been appropriate but for the previous convictions and also taking account of the previous convictions. The Court had then to decide what additional element there should be in order to provide for the protection of the public. The application of section 2(2)(b) should not result in a sentence which was out of all proportion to the sentence which would have been imposed but for that provision. The Court was persuaded that a sentence of 18 years was too long because it was out of proportion to the sentence which would have been imposed but for the statutory provision. A sentence of 15 years would be substituted.

**Reference:** longer than normal sentence, *Current Sentencing Practice* A4-3B.

*M. Wyatt* for the appellant.

**JOWITT J.:** On November 3, 1995, in the Crown Court at Leicester, before H.H. Judge Young, this appellant was convicted of rape and sentenced to 18 years' imprisonment. He appeals against sentence by leave of the single judge.

The facts of the case were these. In the early afternoon of November 24, 1994, with his face covered by a scarf, the appellant rang the door bell of the flat of the 38-year-old victim. When she opened the door he barged his way in. She screamed and the appellant produced a knife, threatening to kill her unless she stopped. He pushed her backwards and she fell on to a table which collapsed under her weight. The appellant told her he would not hurt her. He made her remove her jumper, which she did in fear, and he wrapped it round her head. Then the appellant undressed his victim. He took her after that into a bedroom and there he raped her. Before leaving the flat the appellant ordered his victim to wait for 15 minutes before she called the police and again, in fear, she agreed. Shortly after, the appellant returned to the flat to retrieve his knife. When the victim refused to allow him to enter, he threatened to kick open the door and so, in fear, she let him in. The appellant returned again on the following day to enquire whether the victim had spoken to the police. Fortunately, her father was at the flat at the time and after a vigorous resistance by the appellant he was able to restrain him until the police were called. The appellant was then arrested. This was an appalling attack. It is true it did not have some of the other sexual indignities which all too often accompany and aggravate an offence of rape, but there

were other serious aspects of it, not least the fact that this rape occurred in what should have been the security of the victim's own home. The offence was also aggravated by the production of a knife and the threat to use it. A year after the event she was still under psychiatric treatment.

The pre-sentence report shows that the appellant's offending and lack of remorse appear to be linked to his sexual fantasies and in the view of the probation officer the appellant represents a very high risk of reoffending.

The appellant is 39 years old and has a number of previous convictions which are relevant to the assessment of sentence in this case. His history of sexual offending began in 1978, when he was about 20 years old and was put on probation for two offences of indecent assault. In 1987, for an indecent assault on a girl walking along the pavement, the appellant was again placed on probation. This was not of the most serious kind but it was, nonetheless, a very frightening indecent assault. There were two further offences of indecent assault for which the appellant was sent to prison for a brief period in 1990. Those were separate incidents. In 1991, for two offences of indecent assault, separate incidents again and a separate incident of indecent exposure, once more the appellant was put on probation. The indecent assaults were not dissimilar to the one for which the appellant had been put on probation in 1987. It is apparent from the facts of the present offence, therefore, that the appellant's sexual offending has escalated dramatically in its seriousness.

Mr Wyatt, in his realistic submissions, accepts that the starting point for an offence of this nature, before one considers aggravating features, would be eight years' imprisonment on a plea of not guilty, as this was. Then one has to take into account the aggravating features, to which we have referred already, and the aggravating fact also of the previous convictions for sexual offending.

In our view, the appropriate sentence but for the effect of section 2(2)(b) of the Criminal Justice Act 1991, would have been 11-12 years' imprisonment. Section 2(2)(b) of the Act requires that where the Court passes a custodial sentence other than one fixed by law, and where the offence is a violent or sexual offence, the sentence shall be for such longer term, not exceeding the maximum, as in the opinion of the court is necessary to protect the public from serious harm from the offender. It is to be noted that the Court has no discretion in the matter. The requirement of section 2(2)(b) is mandatory. Mr Wyatt properly concedes this was a case for the application of that statutory provision. What he argues, though, is that the addition to the sentence, for the purpose of protecting the public, produced an overall sentence which was disproportionate to the sentence which would have been appropriate but for the application of that statutory provision. In our judgment, in a case of this nature the Court has to consider both what sentence would have been appropriate but for the previous convictions and what sentence would have been appropriate taking account also of the relevant previous convictions, but in both cases ignoring the impact of the statutory provision. The Court has then to decide what additional element there should be to the sentence in order to provide for the protection of the public, bearing in mind that the aggravating features of the previous convictions by lengthening the sentence, will of itself have added an element of protection. The application of section 2(2)(b) should not result in a sentence which is out of all proportion to the sentence which would have been imposed but for the application of that provision. That is well established.

The Court has to bear in mind also, where the determinate sentence is, on any view, going to be a very substantial one once section 2(2)(b) comes into play, that the case was not in the end one calling for an indeterminate sentence.

Bearing all those matters in mind, we are persuaded that a sentence of 18 years' imprisonment was too long because it produced a sentence which was

disproportionate to the sentence which would have been imposed but for the application of the statutory provision. We think that the appropriate sentence would have been one of 15 years' imprisonment. To that extent, this appeal is allowed. We quash the sentence of 18 years and substitute for it a sentence of 15 years' imprisonment.

**BARRIE IAN GOFORTH**

COURT OF APPEAL (Lord Justice Phillips, Mr Justice Jowitt and Mr Justice Keene): July 8, 1996

*Facilitating illegal entry—facilitating illegal entry of refugee for humanitarian reasons—whether custodial sentence appropriate—length of sentence.*

Nine months' imprisonment upheld for facilitating the illegal entry of a refugee for humanitarian reasons.

The appellant pleaded guilty to facilitating illegal entry. The appellant was stopped at Dover driving a car with a female passenger and her child. It became apparent that the woman and child were refugees from Bosnia. The woman was the wife of a male refugee who had been brought into the United Kingdom legally. She had become separated from him and their sons. When she was traced, an application was made for her to be brought into the United Kingdom, but it was not approved. The appellant then arranged to collect her and her daughter by car. Sentenced to nine months' imprisonment.

**Held:** it was accepted that the appellant had acted for humanitarian reasons and not for financial gain. The offence of facilitating illegal entry was serious and would often merit custodial sentences running into years. The appellant knew that his passengers had been refused permission to enter the country. He set out deliberately to break the law. A custodial sentence was justified. The sentence of nine months allowed for the mitigation and was not manifestly excessive.

**Reference:** facilitating illegal entry, *Current Sentencing Practice* B9-5.

*P. Forbes* for the appellant.

**KEENE J.:** On May 7, 1996, at Canterbury Crown Court, Barrie Ian Goforth pleaded guilty to one count of facilitating illegal entry to the United Kingdom, contrary to the Immigration Act 1971. He was sentenced to nine months' imprisonment and now appeals against that sentence by leave of the single judge.

The appellant had been stopped at Dover docks on November 12, 1995 by customs officers. In his car with him were a woman and a 12-year old child. When asked where they had been, the appellant replied: "Normandy, France." The car was searched and the female passenger was spoken to. It immediately became clear to the customs officer that she did not speak or understand English and the immigration officers at the port were informed. The appellant then admitted to the immigration officers that they were not his wife and child, under whose passports they had been travelling, and he had been smuggling them in. He said, and it is not in dispute, that he had done so for humanitarian reasons.

The woman and child were, in fact, refugees from Bosnia. The appellant had been an aid worker in the former Yugoslavia and had been concerned at the plight of refugees uprooted by the conflict in that country. He had previously organised, and

travelled with, an expedition from Hull to Bosnia and had successfully, and legally, brought back 79 refugees to this country. Amongst those refugees were Mr Kradic and his sons. Mrs Kradic and their daughter had become separated from the other members of the family and ended up in a refugee camp in Dresden. There they were eventually traced. Applications were made to obtain official approval for them to be brought to this country. No approval was forthcoming. It was in those circumstances that the appellant hired a car and went and collected Mrs Kradic and her daughter and brought them back to Dover. The appellant maintained that he had always intended to declare them to the authorities in Hull.

The appellant himself is aged 49. He has a number of spent convictions. He has only one conviction in the last 10 years, that being one for common assault, for which he was given a conditional discharge in 1993. He is unemployed but works as a voluntary worker.

On his behalf today, Mr Forbes has emphasised what he describes as the unusual circumstances of this case, where the offence occurred for humanitarian reasons out of motives of concern for refugees. He stresses that no financial gain was involved in this case. He accepts that a custodial sentence was appropriate but submits that because of the particular circumstances either such a sentence should be suspended or that the sentence was manifestly excessive.

The offence of facilitating illegal entry to this country in breach of immigration control is a serious one. It will often merit custodial sentences running into years rather than months, even where no profit motive is involved. This court has imposed sentences of two years' imprisonment in some cases of that kind. The present case was one where the appellant knew full well that his two passengers had been refused permission to enter this country. In that knowledge, he set out quite deliberately to break the law. This was not a spur of the moment offence but one carefully planned. In those circumstances, a custodial sentence was, in our view, quite justified.

As for the length of sentence, one recognises that the appellant acted out of humanitarian concern and he does have an impressive record of humanitarian activity in the past, which we take into account. Nonetheless, taking those mitigating factors fully into account, as well as his plea of guilty, we find it impossible to say that nine months' imprisonment was manifestly excessive. Had it not been for that mitigation, the sentence in such a case would no doubt have been considerably longer. In our view, the sentence which was imposed by the learned assistant recorder properly reflects the unusual circumstances of this case and in those circumstances the appeal must be dismissed.

**PAUL ANTHONY SAPHIER AND BENJAMIN PAUL PEARSALL**

COURT OF APPEAL (The Lord Chief Justice, Mr Justice Owen and Mr Justice Connell): July 9, 1996

*Community order—offence committed prior to making of order, resulting in conviction and custodial sentence during currency of community order—power of Crown Court to revoke community order—whether appropriate to impose further sentence for original offences.*

**Editor's note:** where an offender is convicted of an offence during the currency of a community order, but the offence was committed before the community order was

No. 38 of 1994 (*Archer*) (1995) 16 Cr.App.R.(S.) 714, *Shaw* (1995) 16 Cr.App.R.(S.) 960, *Gooch* (1994) 15 Cr.App.R.(S.) 390, and *Attorney-General's Reference No. 69 of 1995 (Jackson)* [1996] 2 Cr.App.R.(S.) 360. Those cases, to which it is unnecessary to make reference in detail, set out guidance on the level of sentence which is appropriate, in particular where there are aggravating features such as the consumption of alcohol or the indulgence in dangerous racing activities on the road. In the submission of the Attorney-General the authorities point towards a sentence in current circumstances of five years' imprisonment in cases where aggravating features are to be found. Accordingly, it is submitted that the sentences of 12 months' and nine months' imprisonment imposed by the learned judge were unduly lenient and should be increased.

On behalf of both offenders it is submitted that the driving cannot fairly be regarded as racing, competitive driving or showing off. It is submitted that the case was not put before the trial judge on that basis and that the plea of guilty on behalf of Wardle was not tendered on that basis. Moreover, it is suggested that that was not the way in which the contested trial of Iseton was put, and it is certainly the case that in his sentencing remarks the learned trial judge did not apparently view the case as one of racing or competitive driving or showing off. The complaint against Iseton was that he saw the pedestrian much too late and braked much too hard, leaving the car on his tail with little opportunity to react. The case against Wardle, to which he pleaded guilty, was that he was driving much too fast and much too close to the car in front.

On behalf of the offenders it is submitted that in the absence of aggravating features the appropriate sentences would have been of the order of 18 months' imprisonment or less. Our attention has been drawn to the decisions of this court in particular in *Bevan* [1996] 1 Cr.App.R.(S.) 14 and *Severn* (1995) 16 Cr.App.R.(S.) 989.

It appears to this Court, reviewing the matter, that the learned trial judge faced an acute sentencing dilemma. On the one hand, he was obliged to be mindful of widespread public concern regarding the offence of causing death by dangerous driving. This has led Parliament to double the maximum penalty which can be imposed on conviction for such an offence. It has led this Court to give guidance on sentencing which has indicated much higher sentences than had previously been imposed. The learned judge was not free to ignore either the public concern or the guidance of the Court and would have been well aware of the need for some consistency when approaching the imposition of sentence. On the other hand, he had two young men before him whose personal circumstances told strongly in their favour. Both of them for all practical purposes had good characters; they had worked hard at school and had done well. Iseton had joined the Army and had established a good reputation as a trooper in the Light Dragoons. Wardle was doing an apprenticeship. There was everything to suggest that the two offenders were full of remorse and had learned their lesson. One of them, indeed, was suffering from repeated nightmares. There was no lack of appreciation of the grief caused to the family of the deceased. So far as the offence itself was concerned, at an early stage Wardle had pleaded guilty and had then had the anxiety, through no fault of his own, of waiting six months before he knew the sentence passed upon him. Iseton did not plead guilty but he is not, in the judgment of this Court, to be in any way criticised for that. He genuinely felt that his driving had not caused the death of Mrs Johnson. That issue was very properly left to the jury. They decided it against him and it is not suggested they were wrong to do so.

This was undoubtedly dangerous driving both because of the speed and because the cars were travelling too close together, and it was dangerous driving for which both men were responsible. On the other hand, the Court accepts the submission

made on behalf of the offenders that the case lacks the aggravating features which are often found. There is no suggestion of any consumption of alcohol. The Court accepts that the two offenders, who were unknown to each other, were not racing, showing off or indulging in any obvious way in competitive driving, but they were going much too fast and driving much too close together, and Iseton cannot escape responsibility for having failed to see the pedestrian and having braked and swerved at a very late stage.

We are left in no doubt that the judge had no choice but to impose a custodial sentence and one of some length. Any other course would have been a plain dereliction of the judge's unpleasant duty. However, it is right to acknowledge that in tragic cases of this kind nothing can bring back the deceased whose family is bound to endure an irreparable loss. Nor is it possible to attempt any equation between the value of a human life and the number of months spent in custody. It appears to us, giving the best consideration that we can do to all the features of this case, that the lowest appropriate sentence for the offence, making full allowance for all the mitigating features, including the absence of aggravating features, but taking account of the seriousness with which the courts, Parliament and society at large view these cases, would have been in the case of Wardle, 21 months' imprisonment and in the case of Iseton, 15 months' imprisonment. To that extent we accept the Attorney-General's submission that the sentences were unduly lenient.

There is, however, a further issue which we have to address: whether on the present facts we should impose those sentences now. We have to take account of the element of double jeopardy which is a very real consideration in these cases. Iseton has served his sentence and been released. He is not therefore now in custody. To impose what we consider to be the proper appropriate sentence at the trial would have the result of his being returned to prison. Wardle has not been released, but is due to be released within a matter of a week or two. He also, as we have pointed out, had the additional anxiety of a six-month wait before he knew the outcome in his case. In all the circumstances we conclude that it would not be right to substitute the sentences which we consider should have been passed at the time. To do so would, in our judgment, punish these two young men excessively in the circumstances. The upshot therefore is that we accept the Attorney-General's submission that the sentences were unduly lenient: We indicate the minimum appropriate sentences on all the facts. But we do not substitute those sentences, with the result that the existing sentences will stand.

CASE 46

**EDWARD JAMES K.**

COURT OF APPEAL (Lord Justice Simon Brown, Mr Justice Cresswell and Judge Allen): July 16, 1996

*Rape—rape by husband of estranged wife—length of sentence.*

Eight years' imprisonment upheld for the rape by a husband of his estranged wife. The appellant was convicted of rape. The appellant raped his estranged wife. The victim had left the appellant as a result of violence and eventually found a new home. She obtained an injunction restraining the appellant from visiting her or communicating with her. The appellant entered the house while she was out, and when she went to bed he confronted her, threatened her with a knife, and wrapped a

scarf around her neck. Some time later he removed her jeans and raped her. Sentenced to eight years' imprisonment.

**Held:** (considering *W. (1993) 14 Cr.App.R.(S.) 256*) the offence involved a number of aggravating features, including the breach of an injunction, the use of a weapon, and the use of physical violence over and above the force necessary to commit the rape. It was planned and the appellant had previous convictions for other violent offences. The sentence was plainly justified.

**Case cited** *W. (1993) 14 Cr.App.R.(S.) 256*.

**Reference:** rape. *Current Sentencing Practice* B4-1.3G.

*G. Napthine* for the appellant.

**CRESSWELL J.:** On February 28, 1996, the Crown Court at Derby, before H.H. Judge Appleby Q.C., the appellant was convicted of rape and was sentenced to 8 years' imprisonment.

He appeals against sentence by leave of the single judge. He also has, by Mr Napthine, renewed his application for leave to appeal against conviction after refusal by the single judge. We dealt with that at the outset of this hearing. There is no substance in the ground sought to be advanced in relation to the conviction. The ground sought to be advanced was the judge's alleged failure to direct the jury as to the evidential standing of Dr Freeman's evidence. For the reasons given by the single judge this Court considers that the judge dealt with the matter appropriately at 26A of the transcript of the summing-up.

As to the facts of this offence, it was the prosecution case that the appellant raped his estranged wife, Mrs K, on the night of March 8/9, 1995. On December 28, 1994 she left him because of his constant violence and sought refuge in a battered women's shelter. She was found a home in Derby. She obtained an injunction which prohibited the appellant from visiting or communicating with her.

On March 8, she left Kerry, their child of 3, with her mother and went out with a friend, Rosanne, arriving home at about 4.30 p.m. The back door gate was open and a plate had been moved from a plate stand. This caused her some anxiety. She collected Kerry and returned home at 6.00 p.m. Rosanne left at about 10.30 p.m. Mrs K went upstairs and got into bed, wearing a T-shirt. In fact the side of the bed had been cut, in order to enable the appellant to hide. She was suddenly confronted by the appellant, who had a knife in his hand. He said that he was going to kill her and she had "done his head in". She put her jeans on. The appellant got on top of her, with his knees on her arms. He put a screwdriver or a knife against her cheek and again said he was going to kill her. He also threatened to stab her in the ear. He wrapped a scarf around her neck and pulled it tight but then said: "I can't kill you because I love you." She told him to get off her stomach because it was hurting, which he did. They went downstairs and had a drink.

At about 01.00 he followed her upstairs, told her to take her jeans off, and get into bed. When she did not do so he took her jeans off himself. She saw a screwdriver in his back pocket. He took his jeans and jumper off, got onto the bed and started kissing her. He then pulled her legs apart and raped her. She was too frightened to resist.

Kerry woke up and he shouted at her to get back to sleep. Mrs K brought Kerry into her room and told the appellant that he would have to go because Kerry would not settle when he was there. He said: "If you're going to leave me again, no one else can have you, I will kill you." He pulled Mrs K onto the floor, knelt on top of her arms and slapped her about the face. He wrapped something around her neck and tightened it until she became unconscious. When she came around the appellant said:

"Fucking get up." She got up and went over to the bed. She had difficulty in breathing.

In the morning she said she wanted to go to hospital because she could not see properly. When he was not with her she told the receptionist how she was injured and the police were informed.

It took five weeks for the injury to her eye to clear up and her neck to heal. She had petechial haemorrhages around her neck and face and bruises on her body, legs, shoulder, buttocks and anal cleft. There was an abrasion at the center of her anus. With regard to the appellant's allegation that she had slept with her brother, she said: "That is the sort of sick man he is."

When arrested the appellant denied raping his wife. His case was that consensual sex had taken place. The jury took little time in rejecting that account.

The appellant is 37. He has some 22 previous court appearances. On March 3, 1986 he was sentenced to 27 months' imprisonment for an offence of section 20 wounding against his previous wife. There had been an argument, he produced a five-and-a-half inch bladed lock-knife, and lunged at his previous wife, causing a stab wound to her chest and lacerations to both her hands. On November 5, 1990 he was sentenced to 18 months' imprisonment, suspended for 1 year, for criminal damage, in respect of an incident on April 12, 1990, at Derby. On that occasion he went to the home of Mrs K's mother to speak to Mrs K. When he was refused admission he kicked the front and back doors, breaking their locks.

As to sentence, Mr Napthine submits that the aggravating features were not of a magnitude to merit a sentence of eight years' imprisonment. In *W. (1993) 14 Cr.App.R.(S.) 256*, Lord Taylor C.J. said:

"... it should not be thought that a different and lower scale of sentencing attaches automatically to rape by husband as against that set out in *Billam*. All will depend on the circumstances of the individual case. Where the parties were cohabiting normally at the time and the husband insisted on intercourse against this wife's will, but without violence or threats, the consideration identified in *Berry* and approved in *Thornton* ... will no doubt be an important factor in reducing the level of sentencing. Where, however, the conduct is gross and does involve threats or violence, the facts of the marriage, of long cohabitation and that the defendant is no stronger will be of little significance. Clearly between those two extremes there will be many intermediate degrees of gravity which judges will have to consider case by case."

The present case falls at the most serious end of the scale. The aggravating features of the present case include the following:

- (1) the flagrant breach of the injunction;
- (2) the use of a knife and a screwdriver;
- (3) the physical violence used against Mrs K., with resultant injuries. The appellant nearly strangled her. Such violence was plainly over and above the force necessary to commit the rape;
- (4) the rape was planned;
- (5) the appellant had previous convictions for other serious offences of a violent kind.

The appellant did not admit the offence and spare his wife the ordeal of giving evidence or show any remorse.

The sentence imposed was, in the view of this Court, plainly justified. This appeal is dismissed.



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deceased, having turned into the road on the nearside, Oakes Lane, did a U-turn in the mouth of that road and pulled out again, broadside across both lanes, towards the gap in the central reservation, giving the offender no chance to avoid a collision. At the trial, both the experts agreed that the deceased could not have turned into the mouth of Oakes Lane and then moved out towards the gap in the central reservation in the way the offender had said.

On behalf of the Attorney-General Mr Jafferjee submits that there were, as identified in the well-known case of *Boswell* (1984) 6 Cr.App.R.(S.) 257, two aggravating features. First, persistent and grossly excessive speed and, secondly, more than one consequential death. Mr Jafferjee draws attention, by way of mitigation, to the fact that the offender is a man of no previous convictions with a clean driving record and an impressive variety of character references.

Mr Jafferjee, in addition to the case of *Boswell*, drew the Court's attention to *Pritchard* (1995) 16 Cr.App.R.(S.) 666, where a sentence of two-and-a-half years was upheld in relation to a defendant who had been driving a motorcycle at a very considerable speed and who had pleaded guilty. He had lost control and gone into the path of a lorry which was travelling in the opposite direction.

On behalf of the offender Mr Gordon accepts, as inevitably he must, that the offender was travelling at a speech at which he could not control his car so as to avoid a collision. On the other hand, there was, in this case, he submits, no question of racing or crossing to the wrong side of the road or going through a traffic light or seeking to evade arrest by some following vehicle and, although he was travelling very fast, the earlier overtaking manoeuvre to which we have referred, demonstrates, submits Mr Gordon, a relatively low level of culpability. He invited the Court's attention to the *Attorney-General's Reference No. 1 of 1994 (Ian Campbell Kenneth Day)* (1995) 16 Cr.App.R.(S.) 193, where, on an Attorney-General's reference prior to the increase in the maximum sentence for this offence, this Court did not increase a sentence of community service and five years' disqualification which had been imposed in that case. Mr Gordon also drew our attention to *Carr* [1996] 1 Cr.App.R.(S.) 107, where a sentence of six months was upheld in relation to a driver who claimed that he had fallen asleep, but was convicted of this offence by the jury.

Mr Gordon stresses the features of outstanding personal mitigation in this case—the offender's good character and record, the very impressive series of references which were before the judge and are before this Court (the offender is apparently one of the best shots in the world for clay pigeon shooting)—and Mr Gordon says, and we accept, that when giving his evidence before the jury the offender was plainly distressed, not for himself but, in particular, for the child whose death he had caused.

Mr Gordon stresses a feature of all Attorney-General's reference cases, the element of double jeopardy. He also says that, in this particular case, the offender had to wait a considerable period before knowing whether he would be prosecuted at all.

In summary, Mr Gordon submits that this was not a lenient sentence, still less an unduly lenient sentence.

We are unable to accept that submission. Clearly this was a tragedy for the offender. It was an even greater tragedy for the family who lost two of its members, one of them a child. The speed was very great. The car had been driven at a considerable speed over a significant stretch of the highway.

Having regard to all the circumstances of this matter, as we have endeavoured to set them out, we take the view that this sentence was unduly lenient to an extent to which this Court should interfere. Accordingly, in substitution for the sentence of 12

months' imprisonment imposed by the learned judge, we impose a sentence of two years' imprisonment.

CASE 97

MICHAEL H.

COURT OF APPEAL (Lord Justice Swinton Thomas, Mrs Justice Ebsworth and Judge Colston Q.C.): March 14, 1997

Rape of wife—length of sentence.

Five years' imprisonment upheld for the rape by a man of his wife in circumstances involving threats of violence.

The appellant pleaded guilty to rape. The appellant's wife told him that she wished to separate from him. Some time later, the appellant grabbed her by the throat, pushed her face into a cushion, took off her clothing and made her put on a pair of stockings which he had bought. The appellant then forced her to have intercourse against her will several times and forced his penis into her mouth twice. The incident lasted an hour-and-a-half. Sentenced to five years' imprisonment.

**Held:** (considering *W.* (1993) 14 Cr.App.R.(S.) 256, *Thornton* (1989) 12 Cr.App.R.(S.) 1, *Hutchinson* (1994) 15 Cr.App.R.(S.) 134, *Maskell* (1990) 12 Cr.App.R.(S.) 638, *M.* (1994) 16 Cr.App.R.(S.) 770) the appellant's conduct was gross and involved threats of violence. Without the mitigating factors of the appellant's plea and good character, the sentence would have been well in excess of five years. The sentence was not manifestly excessive.

**Cases cited:** *W.* (1993) 14 Cr.App.R.(S.) 256, *Thornton* (1989) 12 Cr.App.R.(S.) 1, *Hutchinson* (1994) 15 Cr.App.R.(S.) 134, *Maskell* (1990) 12 Cr.App.R.(S.) 638, *M.* (1994) 16 Cr.App.R.(S.) 770.

**References:** rape, *Current Sentencing Practice*, B4-1.3G.

*R. Platts* for the appellant.

**SWINTON THOMAS L.J.:** On June 21, 1996, at the Crown Court at Mold, before His Honour Judge Morgan Hughes, this appellant pleaded guilty to rape and was sentenced to serve five years' imprisonment. He now appeals against his sentence by leave of the single judge.

The facts giving rise to this conviction were these. In the early part of 1996, following difficulties in the marriage between the appellant and his wife, questions of separation arose and the wife said that she wanted the marriage to come to an end. There is no doubt that that, and what preceded it, caused this appellant considerable distress.

On March 7, 1996 he went to see his doctor to discuss a referral to the marriage guidance organisation known as Relate. The complainant came home shortly after he did and saw him come into the house with a carrier bag. When she came into the house, he grabbed her by the throat and he pushed her down on to a sofa. He pushed her face into a cushion, so that she was frightened that she was going to suffocate. He held her down with a tea towel across the back of her neck. She asked him not to kill her or to hurt her. He then said that he would not hurt her so long as she kept quiet and did not struggle. He said that he wanted to "fuck her" and that it was going to last

... He then took out most of his wife's clothing. She removed her own necklace and she hid her broken glasses down the back of the sofa for fear that he would strangle or cut her. He then took stockings which he had purchased out of the carrier bag and made his wife put them on. He ripped the remainder of her clothes. He then penetrated her against her will. He forced her to go into the kitchen with him to fetch some wine from the refrigerator. He placed cushions on the floor, forced her to kneel on all fours and then penetrated her again. He forced her to perform oral sex, holding the back of her head and threatening to hurt her. He told her that he was thinking of tying her up. He hit her with a tea towel. He then took her upstairs, saying that he was going to "defile her little nest". He then attempted to penetrate her whilst holding her against the bathroom door. He took her into the bedroom, forced her to put the stocking on with a suspender belt and forced his penis into her mouth. He then penetrated her again. She was crying whilst these events were going on and told him to stop. When she needed to go to the toilet, he accompanied her and went to shut the bathroom door. She said that she thought that he was going to kill her and she begged him not to do so. He said that he was leaving and she would not see him again. The appellant then left. His wife made contact with the school and with her doctor. The ordeal had lasted something of the order of one-and-a-half hours.

There can be no doubt at all that this was the most dreadful ordeal for this woman and, equally, there can be no doubt that she has suffered very considerably as a result of it. This Court must never overlook what has happened so far as the victim of a sexual crime such as this is concerned.

The appellant's wife suffered soreness and stiffness of her jaw, neck, shoulders and arms, her rib and back and soreness in her vagina. The medical examination showed redness, soreness and bruising consistent with her description of the attack.

The following day the appellant surrendered to the police. He expressed his remorse for what had occurred. In his address to us, Mr Platts, on behalf of the appellant, rightly lays stress on that, indicating that it was shown at a very early stage that the appellant intended to plead guilty and also that he did express remorse. Accordingly, the complainant was spared the additional trauma of thinking that she might have to give evidence in a court about what had happened.

When the appellant was interviewed, he admitted planning this attack, admitted that he had purchased the stockings for that very purpose and admitted turning the music in the house up loud so that she could not be heard whilst he was carrying out the rape and other sexual indignities that were inflicted upon her. He admitted that he knew that she was terrified and that he wanted revenge on her for ending the relationship. After this incident, he said, he had attempted to commit suicide.

The appellant is aged 43 now. He has no previous convictions. He was a trainee teacher. His wife had one child by a previous marriage, and the appellant and his wife had one child in their marriage. The judge had a pre-sentence report in which his remorse was stressed and also a psychiatric report prepared whilst he was in prison.

Mr Platts, on his behalf, has stressed the mitigating factors that exist in this case, most particularly his remorse. This was, it is right to say, an offence of rape committed by a husband on his wife. That does not in any way make it more excusable. Its only relevance, so far as mitigation is concerned, is that the consequences of rape, grave indeed though they are likely to be, and are in this case, may not be as grave as when a woman is raped by a stranger.

In *W.* (1993) 14 Cr.App.R.(S.) 256, to which Mr Platts referred us, Lord Taylor C.J. said this:

"It should not be thought that a different and lower scale of sentencing attaches automatically to rape by a husband as against that set out in *Billam*. All will

depend on the circumstances of the individual case. Where the parties were cohabiting normally at the time and the husband insisted on intercourse against his wife's will, but without violence or threats, the consideration, identified in *Berry* and approved in *Thornton* ... will no doubt be an important factor in reducing the level of sentencing. Where, however, the conduct is gross and does involve threats of violence, the fact of the marriage, of long cohabitation and that the defendant is no stranger will be of little significance. Clearly between those two extremes there will be many intermediate degrees of gravity which judges will have to consider case by case."

There can be little doubt that in the instant case the conduct was gross, and it certainly did involve threats of violence.

Mr Platts invited our attention to a number of other cases in addition to *W.*; *Thornton* (1989) 12 Cr.App.R.(S.) 1; *Hutchinson* (1994) 15 Cr.App.R.(S.) 134; *Muskell* (1990) 12 Cr.App.R.(S.) 638; and *M.* (1994) 16 Cr.App.R.(S.) 770. Those cases have some use and relevance, but each of those cases was decided upon its own special facts.

As we have said, the plea of guilty is an important consideration in a case such as this, so also is the appellant's previous good character. We take into account all those matters of mitigation which were urged on us by Mr Platts. However, in our judgment, without those mitigating factors, the sentence the judge would have been compelled to impose in this case on the facts of it would have been well in excess of five years. It was a very grave case indeed. The appellant raped his wife on three occasions and subjected her to other very unpleasant sexual indignities. It was a planned attack. She suffered injuries and very considerable emotional and psychological disturbance. Those are all aggravating factors in this case. In our judgment it is impossible to say that this sentence of five years' imprisonment was manifestly excessive. Accordingly, the appeal against sentence must be dismissed.

## MATTHEW MABEN

COURT OF APPEAL (Lord Justice Henry, Mrs Justice Steel and Judge Grigson): March 18, 1997

*Assault occasioning actual bodily harm—"road rage" incident—length of sentence.*

Nine months' imprisonment for assault occasioning actual bodily harm by punching another driver in a road rage incident reduced to six months.

The appellant was convicted of assault occasioning actual bodily harm. The appellant was involved in an incident while driving his car. He drove closely behind the other car involved, flashing his lights. When both cars stopped at traffic lights, the appellant got out of his car and punched the driver of the other car three times. The other driver suffered corneal bleeding and lacerations to the eye. Sentenced to nine months' imprisonment.

**Held:** (considering *Hassan* (1989) 11 Cr.App.R.(S.) 8, *Smith* (1989) 11 Cr.App.R.(S.) 353, *Ord* (1990) 12 Cr.App.R.(S.) 12, *Emmin* (1994) 16 Cr.App.R.(S.) 63 and *Arnold* [1996] 1 Cr.App.R.(S.) 115) this was a road rage case. The appellant's conduct passed through the custody threshold. It had been said in *Arnold* that there was no reason to treat offences of violence arising out of the use of vehicles any more

At that time the appellant handed to the police a prepared note in which she stated that the gun did not belong to her. She said she was simply trying to hand it in and had gone to the probation office in order to do so.

The learned judge had the full details of the appellant's life before him in a pre-sentence report, a psychiatric report and her antecedents. It showed a large number of convictions, particularly for drunkenness, over the years from 1983 onwards which had been dealt with by non-custodial penalties involving fines, conditional discharges, absolute discharges, bindovers and probation orders.

The learned judge acknowledged that the appellant had had a sad and difficult life. He recognised her drug and alcohol abuse and that she was prone to disruptive antisocial behaviour. He pointed out that there had been many disposals in the past avoiding the use of a custodial sentence in order to assist the appellant, but said that her conduct had escalated to an unprecedented level. He said that where firearm offences were concerned, factors other than her personal circumstances had to be taken into account and a custodial sentence commensurate with the seriousness of the offence should be imposed.

This Court entirely agrees that a custodial sentence was necessary, but taking into consideration all the circumstances of the case we think that the sentence imposed by the learned judge was excessive. There was here no claim for money; there was no actual violence other than the pointing of the gun at Mrs Ward; it was known to the appellant (though not to the complainant) that it was an imitation gun; there was no violence offered to the police officers who attended shortly afterwards; and there was no attempt made by the appellant, once Mrs Ward started to move off from her presence, to detain her in any way.

The submissions of Mr Benson have been helpful and succinct. We are grateful to him for them. He draws our attention to *Masih* set out in the Criminal Appeal Office Index at page 228 where, in those circumstances and following a plea of guilty, *Masih* was sentenced to four months' imprisonment. The Court said that on the facts in that case 12 months was too long.

This Court, looking at this case which was contested and which involved an incident at the probation office, considers that 12 months' imprisonment was not too long but was in fact the correct sentence. It follows that the Court quashes the sentence of five years' imprisonment and substitutes therefor a sentence of 12 months' imprisonment. To that extent this appeal is allowed.

CASE 48  
**ATTORNEY-GENERAL'S REFERENCE NO. 28 OF 1996**  
**(GRENVILLE CHARLES SHAW)**

COURT OF APPEAL (The Lord Chief Justice, Mr Justice Hidden and  
Mr Justice Holland): January 21, 1997

*Rape—rape of prostitutes on five separate occasions—length of sentence.*

Four years' imprisonment for the rape of five prostitutes on separate occasions increased to six years.

The offender was convicted of five counts of rape. Over a period of six years the offender raped five prostitutes. On each occasion the victim agreed to have intercourse with the offender provided that he wore a condom. In each case the

offender removed the condom at the last minute, or refused to put a condom on, and forced the victim to have intercourse without a condom. On two occasions the victims were threatened. Sentenced to four years' imprisonment on each count concurrent. The Attorney-General asked the Court to review the sentence on the ground that it was unduly lenient.

**Held:** (considering *Roberts* (1982) 4 Cr.App.R.(S.) 8, *Billam* (1986) 8 Cr.App.R.(S.) 48, *Attorney-General's Reference No. 12 of 1992 (Khaliq)* (1993) 14 Cr.App.R.(S.) 233, and *Cole and Barik* (1993) 14 Cr.App.R.(S.) 764) the Court accepted that intercourse was not as traumatic to the complainants as to most victims raped by strangers, but prostitutes were as much entitled to the protection of the law as anyone else, and were entitled to insist that they were not willing to permit intercourse unless the sexual partner was protected. Women such as the complainants were in particular need of the law's protection as they were vulnerable to infection. The sentences were unduly lenient; having regard to the number of offences committed over a period of years, the threat of force, and the absence of a plea, the shortest sentence which could properly have been passed at trial would have been eight years on each count concurrent. As the offender had had to face being sentenced a second time, the Court would substitute a sentence of six years' imprisonment concurrent on each count.

**Cases cited:** *Roberts* (1982) 4 Cr.App.R.(S.) 8, *Billam* (1986) 8 Cr.App.R.(S.) 48, *Attorney-General's Reference No. 12 of 1992 (Khaliq)* (1993) 14 Cr.App.R.(S.) 233, *Cole and Barik* (1993) 14 Cr.App.R.(S.) 764.

**References:** rape, *Current Sentencing Practice* B4-1.

**LORD BINGHAM C.J.:** In the course of giving judgment on the offender's application for leave to appeal against conviction, reference has already been made to his conviction on five counts of rape and to the sentence of four years' imprisonment concurrently imposed on each count in the Crown Court at Nottingham on March 19, 1996. The Attorney-General seeks leave to refer those sentences to this Court for review under section 36 of the Criminal Justice Act 1988 on the ground that they were in all the circumstances unduly lenient. We grant leave.

As indicated in the previous judgment, the indictment against the offender charged him with committing a series of five rapes on prostitutes over a six-year period from about 1984 to 1990. As explained in that previous judgment, there was some delay before the complaints were made and before charges were preferred. A common feature of the five cases was that the complainant was in all instances willing to have sexual intercourse with the offender, but only if he wore a condom. In each case he, at the last moment, insisted on intercourse without wearing a condom, using force to achieve his ends against the wishes of the complainant. As already recounted, the complainants worked in Sheffield and Nottingham. The facts are sufficiently illustrated if we summarise the detailed facts relating to two of the five counts.

We begin with the facts of count 1, which was of rape against JW, to whom reference has been made in the earlier judgment. She began working as a prostitute in Sheffield when she was about 17 years of age. Shortly after that, in about 1984, she was approached for business by the offender at about 9.00 p.m. one winter evening. He asked her whether she minded driving with him to somewhere out of the city as he was concerned about being seen by the police if they stayed in the area of the town. She agreed. He drove her out of Sheffield to a remote spot by the Lower Rivelin Valley. He asked how much it was for sexual intercourse without the use of a condom. She replied that she would not have sexual intercourse without using a condom. He gave her £10 and she placed a condom onto his penis. When the offender

got on top of her in order to have sexual intercourse he suddenly removed the condom and, ignoring her protests, penetrated her by force. He placed his arm over her chest in order to counter her struggling. He punched her on the right side of her head, causing a lump and soreness. Before the offender was able to ejaculate she managed to break free of his hold and, fearing for her safety, got out of the car. The offender chased her, but she was able to run into the woods and eventually made her way to a public house where she was able to telephone for a taxi to take her back to Sheffield. She made a witness statement concerning this matter in May 1994 in which she stated, as already indicated, that she had seen the offender on a number of occasions after this event.

We pass over the facts of counts 2 and 3 which, as already indicated, reflect a similar pattern. Count 4 involved FM, who was born in August 1970. She worked as a prostitute in Nottingham between 1987 and 1989. One September evening she was approached for business by the offender who offered her £60 to travel with him for 20 minutes out of the city or £100 for a longer journey of 30–45 minutes. She agreed to the shorter trip. They set off and, after about five minutes' driving, the offender locked the car doors using the central-locking system. He drove her for much longer than indicated. After one-and-a-half to two hours he stopped in the countryside near to a caravan on a remote track. He told her that there were two men in the caravan and, after he had done what he was going to do to her, they were going to do the same and then kill her. The offender got on top of FM in order to have sexual intercourse. He refused to put on a condom, notwithstanding her continued protests that he should do so. He penetrated her by force and ejaculated inside her. She believed that she was going to be killed. The offender then drove her back to Nottingham. On the return journey the offender telephoned a woman, using his car telephone, and encouraged the woman to talk to the complainant and reassure her that the offender was not going to hurt her. The offender gave the complainant £100 before leaving her in Nottingham. She reported the matter to the police on the same evening but no charges were pursued by the police at that stage.

Count 5 was to somewhat the same effect. It was another case in which the complainant was threatened that if she did not keep quiet, two of his friends from a caravan would impose their will upon her.

Throughout this period the offender was living in Skegness. As already mentioned, he was interviewed on a number of occasions between May and October 1994. He admitted regular resort to prostitutes, but denied that any intercourse which he had enjoyed had been other than consensual.

The Attorney-General submits that there are a number of aggravating features in this case: the offender committed these rapes over a six-year period; he set out deliberately to have sexual intercourse with prostitutes, disregarding their insistence that a condom should be used, and where necessary using force to achieve his ends; he deliberately exposed his victims to the fear of infection as a result of unprotected sexual intercourse; and he made threats, particularly against the complainant in count 4 that she would be raped by two other men and then killed. The Attorney-General submits that there are no mitigating features.

That was not the view of the very experienced trial judge, Latham J. He began his sentencing remarks by summarising the nature of the offence and indicated that to insist on having sexual intercourse in a manner which the other party was not prepared to accept was as much rape as if the offender had had sexual intercourse with any other woman against the woman's consent. He then continued:

"The matters, however, from my point of view, are complicated in this sense: that clearly these were all old cases. They are now, as far as the charges are concerned, probably—because we do not know the exact dates—at least six

years old, and some significantly more than six years old. That is obviously a feature that I have to take into account. Secondly, I take into account the fact that although there is undoubted trauma to any girl—prostitute or otherwise—who has intercourse forced on her in a way that she does not wish, the element of trauma varies from case to case, and I have to make an assessment of the effect of the trauma in the particular cases before me."

The Attorney-General submits that those two matters relied on by the judge are not, in truth, matters which go to mitigate the seriousness of this offence.

Mr Gledhill, however, who represents the offender on this application, submits that they are matters on which the judge was entitled to rely and which this Court should respect. He points out that the experienced trial judge who imposed these sentences had a unique opportunity to judge the seriousness of these offences and their effect on the victims. He urges, as is the case, that these were victims who were not unwilling to have sexual intercourse, but whose objection related to the lack of protection. He submits that the factor of delay was one of significance in this case, both because for a number of years the offender had been entitled to feel that no charges would be laid and also because during the intervening period he had on occasion been questioned and indications had been given that no charges would be preferred. He also relies on the period of two years which the offender had spent on bail awaiting trial. So far as the offences themselves are concerned, counsel urges that the traumatic effect on these particular victims was not as great as on many others and suggests that the victims returned to their occupation within a very short period of time. We would observe that to some extent that is a double-edged point. These were very young victims, ranging in age between 14 (the youngest) and 21 (the oldest). They were vulnerable and they were in the usual difficulty for those pursuing their occupation of making complaints and procuring redress.

Counsel also draws attention to various personal factors relating to the offender: to his precarious state of health; to the age and dependence of his mother who lives in Skegness; to the fact that he has now served some 10 months or so of his present sentence; and to the fact that the consequence of an increase in his sentence would be to jeopardise the category in which he is currently placed. In opposition to the submission made on behalf of the Attorney-General, counsel submits that this is not a case in which any deterrent sentence is called for.

We have been reminded of the authoritative observations of this Court with regard to the level of sentence in rape cases, both in *Roberts* (1982) 4 Cr.App.R.(S) 8 and in *Billam* (1986) 8 Cr.App.R.(S) 48. We have also, of our own motion, paid attention to *Attorney-General's Reference No. 12 of 1992 (Khaliq)* (1993) 14 Cr.App.R.(S) 233 and *Cole and Barik* (1993) 14 Cr.App.R.(S) 764.

It appears to us that the factor of delay is one that the learned judge was entitled to take into account, but one which would not on the facts of this case carry very great weight. It is in the nature of allegations of this kind that they may not surface for some years after the date of commission of the offence. It is not a case in which the offender is able to claim that he himself brought these matters to the notice of the authorities, let alone that he made any admission of the offence or expressed contrition. Indeed, he continues to deny the commission of any offence. It appears to us that the factor of delay is of relatively insubstantial weight in this case.

The learned judge took the view that the trauma to these particular complainants was less than in some other cases. We accept that the fact of sexual intercourse is not in itself as traumatic to complainants in this position as to most victims raped by strange men. These were women who were accustomed to the act of sexual intercourse, and indeed invited it. But prostitutes are as much entitled to the protection of the law as anyone else; they are entitled to insist that they are not willing

to permit sexual intercourse unless their sexual partner is protected...It is undoubtedly rape for any defendant to insist upon sexual intercourse without protection when the woman does not consent, and even more so if he imposes his sexual demands by force. Those in the position of these victims are in particular need of the law's protection because they are vulnerable to infection; it is plainly not a fanciful risk with a man, on his own account, as promiscuous as the offender. We take the view that the learned judge was not only entitled, but bound to apply his mind to the particular facts of this case. However, this factor to which he plainly paid attention is not one which by any means removes the extreme seriousness of this series of offences. The offences were characterised by the aggravating features to which the Attorney-General has drawn attention. In addition, we draw attention to the fact that this was a series of offences committed against particularly vulnerable women.

The question which accordingly we have to ask is whether these sentences were unduly lenient: were they outside the range of sentences which fall within the discretion of a sentencing judge in a case such as this? Having, as we hope, done our best to appreciate the factors which influenced the mind of the judge in the course of his extremely difficult and anxious sentencing exercise, we are bound to conclude that the sentences were indeed unduly lenient. We consider, having regard to the aggravating features that we have mentioned, the number of offences, the consistent course of conduct involving a number of women over a period of years, the threat of force and the absence of any plea of guilty, that the shortest sentence the judge could properly have passed at trial would have been one of eight years' imprisonment on each count. We of course are not in the position of the trial judge. We have to make allowance for the fact that, since March 1996, the offender has lived in the belief that the sentence imposed upon him was that which he had to serve. Furthermore, we must make allowance for the inevitable trauma of facing all over again the sentencing exercise. Taking account of those factors we conclude that the sentence we should now substitute is one of six years' imprisonment concurrent on each count.

**TRACEY WALSH AND OTHERS**

COURT OF APPEAL (Lord Justice Stuart-Smith, Mr Justice Forbes and Mr Justice Smedley): January 21, 1997

*Detention under the Children and Young Persons Act 1933, s.53(2) and (3)—offenders admitting two offences, one for which detention was available, the other not—whether permissible to pass sentence of detention under the Children and Young Persons Act 1933, s.53(2) and (3).*

**Editor's note:** where offenders under the age of 18 admit two offences, for one of which they may be ordered to be detained under the Children and Young Persons Act 1933, s.53(2) and (3), but not for the other, the sentencer may order them to be detained under section 53(2) and (3) where the offence for which that such detention was not available formed "part and parcel" of the events giving rise to the offence for which detention under section 53(2) and (3) was available.

The appellants, all girls aged 14 or 15, pleaded guilty to false imprisonment and unlawful wounding. They attacked another girl aged 14, who was playing truant from school. This girl was pushed into a stream, her jewellery was snatched from her, she

was forced to bite a dead bird and struck about the head and body with wooden sticks. When she tried to escape she was caught and forced to take her clothes off and run around in circles. She was allowed to put some clothes back on and then made to sit in a ditch where she was forced to drink muddy water and suck a baby's dummy. Her arm was cut with a piece of broken glass. The appellants then ran off. The episode lasted for several hours. The victim was found and taken to hospital, but made a good recovery. Sentenced to three years' and 11 months' detention under the Children and Young Persons Act 1933, s.53(2) in the case of three of the appellants, three years and seven months and three years and six months respectively in the case of the two others, who had spent time in secure accommodation on remand although technically on bail. It was argued that it was wrong to impose a sentence of detention under the Children and Young Persons Act 1933, s.53(2), when the real gravity of the offence lay in the offence of unlawful wounding, for which that sentence was not available.

**Held:** all the appellants had pleaded guilty to a charge of unlawful wounding, which was subject to a maximum sentence in the case of an adult of five years' imprisonment, and accordingly the maximum sentence in the case of those appellants aged 15 was two years' detention in a young offender institution, and in the case of those under 15 no custodial sentence was available. The reality of the situation was that the victim had been subjected, in addition to her injuries, to an appalling and humiliating experience in which she was degraded and abused for a period of several hours. The Court had said in *Fairhurst* (1986) 8 Cr.App.R.(S.) 346 that it was wrong to pass a sentence under section 53(2) for an offence which did not warrant such a sentence, to compensate for the inability to pass such a sentence for an offence which did justify a longer term of detention, but for which no such term was available. *Fairhurst* did permit the use of section 53(2) where the offence for which that type of detention was not available formed "part and parcel" of the events giving rise to the offence for which detention under section 53(2) was available. That was the situation in the present case. The two offences were so inextricably bound up together that it was perfectly right for the sentencer to resort to section 53(2). The sentencer was wrong to refer to the long term effects of the offence on the victim, as there was no evidence of the likely long term effects. This was not a case for a deterrent sentence. The Court accepted that a custodial sentence was necessary, but taking into account all the relevant material, including the reports on the appellants, took the view that an appropriate starting point would have been two years' detention in a young offender institution for those aged 15 and two years' detention under Children and Young Persons Act 1933, s.53(2) for those under fifteen. As there were no appropriate young offender institutions for girls of this age, the Court would pass sentences of detention under Children and Young Persons Act 1933, s.53(2) in respect of all of the appellants; the term would be two years in the case of three appellants, and the terms on the other appellants would be reduced to allow for the time spent in secure accommodation while on remand.

**Case cited:** *Fairhurst* (1986) 8 Cr.App.R.(S.) 346.

**References:** detention under Children and Young Persons Act 1933 section 53(2), *Current Sentencing Practice E4; Archbold 5-249.*

**Commentary:** [1997] Crim.L.R. 362.

*A. Lockhart, P. Carr and M. Duck* for the respective appellants.

**SMEDLEY J.:** On June 21, 1996, in the Crown Court at Birmingham, these appellants were each sentenced, following an adjournment for reports, by H.H.

The pre-sentence report for Travis Warden referred to his disruptive behaviour at home, the fact that he had been put into local authority care and placed in a remand foster home, where he had been fully co-operative. His risk of re-offending was assessed as medium to high but considerably lessened by intensive social work support.

It is submitted to this Court on behalf of both appellants that the sentences were wrong in principle having regard to the approach of the judge to the sentencing of the co-accused; alternatively, the sentences were manifestly excessive because insufficient weight was given in each case to their guilty pleas, their age, the fact that this would be their first custodial sentence and to the signs of improvement in their behaviour.

It may well be that the learned judge's decision to defer sentence on two of the four offenders before him was a merciful one; it may well be that Ayres and Tomlinson were extremely fortunate to be given a chance to show the judge that the signs of improvement that he detected in the material about them that he considered before sentence are sustained over a period of deferment; it may well be that the appellants and their families feel a sense of grievance considering the different treatment meted out to their co-accused; however, this Court is not persuaded that that differential amounts to a reason for saying that the sentences passed on these appellants were wrong in principle. This was a very serious offence, which caused huge damage and doubtless great distress. The learned judge, in the judgment of this Court, was right to say that the only appropriate sentence for it was a custodial one, the appellants' ages notwithstanding. The fact that he felt able to defer passing the sentence, for the reasons he advanced, on two of the offenders responsible for committing it does not detract from that finding.

The Court turns from there to consider whether the sentences passed, in terms of their length, were manifestly excessive. Here, in the judgment of the Court, the appellants are on firmer ground. With, in particular, an eye to their ages, this Court is able to take the view that two years was too long and seeks to redress that by quashing that period of detention and substituting a term of 12 months in each instance. To that extent, and that extent alone, these appeals succeed.

CASE 49

ROY LOW

COURT OF APPEAL (Lord Justice Judge, Mr Justice Longmore and Mr Justice Smedley): May 2, 1997

*Custody for life—attempted rape—specified period for purposes of Criminal Justice Act 1991, s.34.*

A period of 10 years specified for the purposes of Criminal Justice Act 1991, s.34 in conjunction with a sentence of custody for life imposed for attempted rape reduced to seven years.

The appellant was convicted of attempted rape, robbery and indecent assault. The appellant attacked a young woman who was six months pregnant as she walked home from a friend's flat. The appellant threatened her with a knife, made her remove her clothes and attempted to rape her and then indecently assaulted her. He then left her, taking some of her property with him. Sentenced to custody for life with a period of

10 years specified for the purposes of Criminal Justice Act 1991, s.34, with concurrent sentences of five years' detention for robbery and 10 years' detention for indecent assault.

**Held:** the appellant had previous convictions for indecent assault and there was evidence that he was at a high risk of further offending. The sentence was justified in taking the view that an indeterminate sentence should be passed. The application of Criminal Justice Act 1991, s.34 had been considered in *O'Connor* (1994) 15 Cr.App.R.(S.) 473, where it was said that in specifying a period under section 34, the sentencer should decide what the appropriate determinate sentence would have been and specify a period of between half- and two-thirds of that term. A term of 10 years indicated that an appropriate determinate sentence would have been between 15 and 20 years; this would have been excessive. The period specified for the purposes of section 34 would be reduced to seven years. The sentence for indecent assault would be reduced to eight years' detention in a young offender institution, concurrent; 10 years had been passed by using s.2(2)(b) of the Criminal Justice Act 1991 which was unnecessary in a case where custody for life had been passed. A tariff sentence was sufficient.

Cases cited: *O'Connor* (1994) 15 Cr.App.R.(S.) 473.

References: custody for life, *Current Sentencing Practice* E3.

*P. King* for the appellant.

**SMEDLEY J.:** This appellant is now aged 20. On October 3, 1996, in the Crown Court at Isleworth after a trial, he was convicted by the jury on three counts of a four count indictment. The sentence was adjourned for reports. On November he was sentenced as follows. On count 1, which was an offence of attempted rape, he was sentenced to detention for life in a young offender institution with a recommendation made under section 34 of the Criminal Justice Act 1991 of 10 years; for the offence of robbery he was sentenced to five years detention; and for the indecent assault he was sentenced to 10 years' detention to be served concurrently. He now appeals against those sentences with the leave of a single judge.

The facts can be briefly stated. The victim in this case was aged 19. She lived in a one-bedroomed flat owned by the Chiswick Council. On the day when the incident occurred she was approximately six months' pregnant with her first child. On April 15, she had spent the evening with friends. At about 10.55 p.m. she left the flat of a female friend of hers to walk home. As she walked in the direction of the main road she was aware of footsteps behind her. As she passed the cemetery the appellant approached her, mumbled something and pushed a knife close to her neck. She thought the knife had a blade about seven inches long. She described the appellant then as snarling at her and saying "Get on your fucking front". So she did. He then went through her pockets, shouted to her to get up, to turn over and to lie on her back. She said she thought he was going to kill her and she was very scared. He asked her to undo her blouse. When she had done that he slid the knife underneath her bra, sawing away at it until it had split down the middle. He then fondled and licked her breast. At his direction she had to take off her clothes. He bent over her, took out his erect penis and was clearly going to have intercourse with her. She said to him, "Don't do that, I'm pregnant. I'm not allowed to have sex when I'm pregnant". So he then started to fondle her vagina and lick her vagina. Then he made her take his penis in her mouth and perform oral sex upon him. Whilst this was being done he held the knife at the left side of her vagina. She said she was terrified that he would try to insert it into her and damage the baby in consequence. He said he was taking her back to his place but she refused to go. He then took her necklace, went through her bag and

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decided to leave. For most of the time he had covered her face up with his baseball hat. And on leaving he threatened her that if she told the police he would kill her. He said he knew where she lived. He left taking with him her necklace, some cash and personal stereo. She noticed that on the opposite side of the road there was a house with the light on. She went there and was taken in by the occupants who rang the police. Shortly after the appellant was arrested. He was in possession of the knife with the seven-inch blade. Her necklace and personal stereo were found in the wardrobe of his home. He told the police he had found them the previous night when walking home.

This was undoubtedly a very serious attack on a total stranger at night, who was simply wending her way to her home. The appellant at the time was living in a flat owned by the Thames Valley Housing Trust and was unemployed. He has been convicted on three previous occasions of offences involving indecent assault. In July 1993 before the Dundee Sheriff's Court he was sentenced to 14 days in a young offender institution for indecent assault, sentence having been deferred from April 27. In September of that year, before the Sheriff's court in Perth, he was sentenced to three months in a young offender institution for indecent assault. And in August 1994, before the Sheriff's Court in Dundee, he was sentenced to nine months in a young offender institution, to be served consecutively to a sentence to six months in a young offender institution passed in respect of offences for causing a breach of the peace. Those also had sexual connotations.

He had moved to London in the early part of 1996 and initially lived with his grandparents in Barnes before being provided with the accommodation, to which we have referred, by the Thames Valley Housing Association, in which he had been living for three weeks prior to his arrest.

There was before the sentencing court a pre-sentence report which set out the development problems which the appellant had as a child and a young man, which resulted in him being transferred for part of his youth to a special school. The probation officer who prepared that report felt that he was completely out of control and that the risk of his re-offending was very substantial. The total denial of guilt by the appellant would, of course, make any ongoing therapy during his sentence difficult to achieve.

There was also before the court a medical report from Dr Brown, the visiting consultant forensic psychiatrist to Her Majesty's Young Offender Institution at Feltham. Dr Browne indicated that the appellant was more or less illiterate and innumerate and his general knowledge was poor. He had not worked since leaving school. He had no skills and no special training. He was severely intellectually handicapped. His IQ was assessed as being in the subnormal range although no full psychometric testing was done, and he had exacerbated his problems over the years through the use of drugs, mainly tenazepam. Despite this he is not considered to be mentally ill in any clinical sense, and his mental state does not warrant a transfer to a psychiatric unit. He was fit to receive any punishment which the court awarded.

In passing sentence the learned judge said this:

"The details of the present offences and those of the recent past offences forced me to the conclusion that you pose a serious threat to safety and welfare of young women. Because of the gravity of these offences and the serious risk which you pose in the future, the sentence of the court on count 1 is a sentence of custody for life, with a specified period under section 34 being ten years."

When granting leave the single judge asked for an up-to-date psychiatric report in which the psychiatrist address the question as to the danger which this appellant represented to women. The reason for that was that this Court has said, time and time again, that an indeterminate sentence for an offence where it is discretionary can only

be justified if three criteria are satisfied. First, that the offence itself is grave enough to require a long sentence; secondly, where it appears from the nature of the offences or from the defendant's history that he is a person of unstable character likely to commit such offences in the future; and, thirdly, where if further offences are committed the harm to others may be especially injurious, as in the case of sexual offences or crimes of violence. There is no doubt that the offence committed that night was one which justified a very long sentence. In the light of the appellant's history, it would appear that, although he may not be mentally ill and therefore susceptible to an order under the Mental Health Act, he nonetheless is a young man of unstable character likely to commit offences in the future.

Following the request of the single judge there has now been supplied to this Court a further report from a psychiatrist in which the conclusion was reached that as a result of the testing conducted by the senior psychologist at Swinfen Hall, the appellant scored at a level which constituted a high risk of further offending. The psychiatrist concluded his report by saying this:

"Mr Low must be considered at high risk of further offending behaviour in the light of that which is stated above. As such he forms a high priority candidate for treatment of sex offenders in prison. Mr Low recognises the need to address his offending behaviour. At the present time he could be considered only to be at a very early stage in this process of recognition."

The offences which the appellant has committed in the past for indecent assault, culminating in the attempted rape on April 15, last year, did in our view justify the court in taking the view that an indeterminate sentence should be passed. In those circumstances the learned judge had then to consider the effect of section 34. As Lord Taylor C.J. said in *O'Connor* (1994) 15 Cr.App.R.(S.) 473:

"Thus, section 34 contemplates that in deciding what is the relevant part of the life sentence, the learned judge must bear in mind the seriousness of the offence, and also that the offender will have to serve something between one-half and two-thirds of such sentence as the seriousness would have required had a life sentence not been imposed. The exercise the judge must perform, therefore, is to decide, first of all, what would be the determinate sentence that he would have passed in the case if the need to protect the public, and the potential danger from the offender had not required him to impose a life sentence. Having decided what the determinate sentence should be, he then has to take into account sections 33(2) and section 35(1), and decide on such proportion of that determinate sentence as falls between a half and two-thirds of it."

In this case, therefore, as the single judge pointed out, if 10 years is the appropriate period under section 34, it would follow that the determinate sentence, had a life sentence not been appropriate, would have fallen somewhere between 15 and 20 years. This was an offence of attempted rape. It was a bad case, but at least the appellant desisted when his victim asked him to do so because of her pregnancy, and, as Mr King put it in the course of his advice on appeal, and indeed repeated today, it can be argued that some residual restraint remained and therefore perhaps he is less dangerous than the sentence might suggest. It is fair to take into account, as Mr King asks us to do today, that his previous convictions were not of the most serious kind. In our judgment a sentence in excess of 15 years could not be justified for this offence, and in those circumstances therefore we have reconsidered the appropriate period to be recommended under section 34. In our view the appropriate period is seven years. We would emphasise, lest there be any misunderstanding as to the effect of an order under section 34, that the period we have specified is the period before which no application shall be made to the Parole Board for consideration of the appellant's release. It does not mean that at the end of seven years he will be released.

In the light of the alteration to the sentence on count 1, the allegation of attempted rape, we have thought it right also to consider afresh the sentence passed for the indecent assault. The learned judge for that offence passed a maximum period of 10 years, relying on the provisions of section 2(2)(b) of the Criminal Justice Act 1991. In our view, since on count 1 the sentence is detention for life it is unnecessary to rely on section 2(2)(b) to justify the sentence on count 4, and in our view a sentence of eight years is the appropriate tariff sentence for that offence. To that extent this appeal is allowed.

## BEN ROBINSON AND SAMUEL KEITH McMANUS

COURT OF APPEAL (Lord Justice Judge, Mr Justice Longmore and Mr Justice Smedley): May 2, 1997

*Long term detention of juvenile—causing grievous bodily harm with intent by kicking victim on the head and stamping on the head—length of term of detention.*

Five years' detention under Children and Young Persons Act 1933, s.53(2) imposed on a boy aged 16 for causing grievous bodily harm with intent by kicking the victim on the head and stamping on his head reduced to four years.

The first appellant pleaded guilty to inflicting grievous bodily harm and the second appellant pleaded guilty to causing grievous bodily harm with intent. The appellants, aged respectively 18 and 16 at the time of the offence, attacked a man who was walking home in the evening. The victim fell to the ground where he was kicked by the second appellant, who jumped on his head. The first appellant threatened another person who attempted to intervene. The victim was found to have extensive facial lacerations, a fractured wrist, and possible damage to the eye. Sentenced to three years' detention in a young offender institution and five years' detention under Children and Young Persons Act 1933, s.53(2) respectively.

**Held:** this was a serious attack, but in view of the remorse demonstrated by both appellants the sentences would be reduced to two years' detention in a young offender institution and four years' detention under Children and Young Persons Act 1933, s.53(2) respectively.

**References:** long term detention—causing grievous bodily harm with intent, *Current Sentencing Practice* E4.

*D. Aaronberg* for the appellant Robinson; *A. Agbariu* for the appellant McManus.

**LONGMORE J.:** The events with which this appeal is concerned occurred as long ago as November 16, 1995. Thereafter on May 10, 1996 the appellant, Samuel Keith McManus, pleaded guilty to a count of causing grievous bodily harm with intent to do grievous bodily harm contrary to section 18 of the Offences Against the Person Act 1861 at the Crown Court at Luton. A further count of affray was left on the file in the usual terms and sentence was postponed because McManus's co-defendant, Ben Robinson, himself pleaded not guilty to a charge under section 18. On September 24, 1996 however, in circumstances which we will elaborate in a moment, he did plead guilty to inflicting grievous bodily harm contrary to section 20 of the 1861 Act. They were then sentenced at the Luton Crown Court on October 18. McManus was given a sentence of five years' detention pursuant to section 53(2) of the Children and Young

Persons Act and Robinson was given a sentence of three years' detention in a young offender institution.

It is necessary to state that the victim of the attack in this case was black and his assailants are white. He, the victim, worked as an insurance broker with Christchurch Life and Pensions Limited in the City of London and lived in Harpenden. On the date that I have mentioned, November 16, 1995 he had a drink with his colleagues before driving home. He arrived at Harpenden at about 9.50 in the evening. He started to walk home. He came across the appellants, then aged 16 and 18, who were both drunk and pulling at some garden fencing. Ahead of the appellants were two young women who were with him. The appellant, McManus, ran toward the victim, barged into him and knocked him out of the way. McManus was raving and shouting and saying he was not afraid of anyone. The victim walked away. The appellant, Robinson, approached the victim and asked for a light. The victim said he did not have one and Robinson persisted, becoming aggressive and pushing the victim with both hands in the chest. The victim said: "Look don't touch me, I just want to go home". The victim then put his briefcase down and took off his raincoat. He told Robinson that McManus should have been more careful and should not have pushed him out of the way. McManus then came up and said: "Do you want to make something of this?" Robinson grabbed the victim's suit lapels and said: "Have you got a spliff?" The victim said he did not, to which Robinson replied: "You are a disgrace to the black race, a black man not having a spliff." The victim repeatedly told Robinson to calm down but he did not. He could not get Robinson to stop hanging on to the lapels of his suit, and so the victim took a swing at Robinson to get him away. Robinson only held on tighter. A fight then ensued and punches were exchanged. Robinson eventually let go, and all the victim then remembered was falling to the ground and being punched until he was numb. He was knocked out and came to feeling blood on his face, his head was pounding and he had pain in his left shoulder.

The incident was witnessed by one of the local householders, a Mr Cocks. He saw one of the girls trying to stop the fight. He also saw McManus punch the victim to the head causing him to fall to the ground, and then he saw further that McManus continued to kick the victim in the head and the victim made no response. Mr Cocks moved between the victim and Robinson as he was frightened that Robinson was going to join in the assault and he told the assailants to leave the victim alone. Robinson then asked him if he wanted a fight and began to throw punches in Mr Cocks's direction. Mr Cocks was not, unnaturally, panic-stricken. While Robinson was challenging Mr Cocks to a fight in that manner McManus continued kicking the victim, who was still apparently unconscious on the ground. Mr Cocks then ran back to his house. He was chased by Robinson. Mr Cocks saw McManus go back to the victim and then jump on the victim's head and walk away. He saw the victim attempt to crawl to the pavement. He was able to call the police who attended the scene. Robinson was found there and identified by Mr Cocks and then McManus was found a short distance away.

When McManus was questioned about the incident, he said "You can't arrest me for something I haven't done." The victim was taken to hospital. He had bruising and swelling on his head and face, multiple lacerations around the right eye and cheek bone consistent with a crush injury, a laceration about the right eye, and a deep laceration to the upper lip. He required 22 stitches to his head and face and was admitted to hospital. He was found to have a fractured wrist. He was seen by a consultant ophthalmic surgeon who said that there was injury to the left eye which might result in a detached retina and there was a risk of secondary glaucoma, but that the victim had not suffered long-lasting loss of vision. A consultant neurologist said that the victim's symptoms of headache and vertigo were a direct result of the assault



and then, after that, half her earnings went to the appellant. There were wall safes in the flats where the so-called "rent" money was posted in a slot, but those safes were stolen in August 1995 and the appellant then gave instructions for the moneys to be paid into a bank account.

The evidence was that the appellant would ring a flat a couple of times a day to see how business was, and he himself had a flat in Rayner Court.

So far as the escort agency was concerned, the women were told by the appellant to charge £150, of which £50 went to him. The telephone number given for advertisements for that escort agency was that at Rayner Court. There were about 20 women on the books of the escort agency.

Police surveillance started in July 1995 and the appellant was seen to visit all of the properties on a frequent basis. Police officers posing as clients were offered, at all three addresses, "a full personal service", and a woman police officer, who posed as an applicant for a job as a maid, was instructed by the appellant as to what she was to say on the telephone in response to inquiries. In particular, she should say that services started at £30 but if they wanted to discuss sex that was a discussion which they should have with the lady when they arrived.

The appellant was arrested on September 27 at his home, and at the flats and in his car were found a quantity of micro audiocassettes used in the answerphone machines, which had recorded messages on them giving details of the services which were provided. There was also a five-hour video cassette which came from a camera installed at Rayner Court and which showed upon it the comings and goings of many clients and prostitutes in various stages of undress, and the appellant visiting the flat.

The appellant was interviewed, in the presence of his solicitor, on September 28. He said that the premises were let to women responding to advertisements placed in newspapers for masseuses. He denied they were prostitutes. He claimed that he had told them that there was to be no prostitution and no drugs on the premises, and if he found out that there was to be no prostitution he turned them out, but he said it was impossible to monitor the whole time. The escort agency had finished because there was no demand for it. There were, he thought, 40 girls in total on the books of the agency and the massage business. The accounts which he kept disclosed some £17,000 received in "rent" from the three massage flats over a three-month period prior to June 1995.

In passing sentence, the learned recorder referred to the fact that the appellant had been convicted of living on immoral earnings over a period of some 21 months, and that the offence was aggravated, to some extent, by the recruitment of women, two of whom in particular had given evidence, who had not previously worked in prostitution, but the women involved worked voluntarily and he had not used violence towards them nor coerced them. The learned recorder described the business as "on a medium scale", but expanding and the gross receipts appeared to be some £89,000 over the 21-month period to which we have referred.

On behalf of the appellant Mr Pearce submits that the sentence of two years imposed by the learned recorder could not be criticised as being wrong in principle, but it was, he submits, excessive. He referred the Court to the well-known case of *Farrugia* (1979) 69 Cr.App.R. 108, where, in the judgment of the Court given by Lawton L.J., it was said, at page 113:

"In the absence of any evidence of coercion, whether physical or mental, or of corruption, the old maximum of two years' imprisonment is probably adequate. Anything exceeding two years should be reserved for a case where there is an element of coercion or there is some strong evidence of corruption." There are, in Dr Thomas's book on sentencing, many cases summarily reported displaying a variety of sentences according to the facts of the particular case.

Mr Pearce specifically invited our attention to the case of *Smith* (1994) 14 Cr.App.R. (S.) 708, where, on a plea of guilty, a sentence of two years was upheld. It is a case with points of similarity to the present in relation to the number of girls who were involved, where the business, it may be, was producing somewhat more money, but where there was only one premises involved compared with the four premises in the present case.

Mr Pearce stresses the absence of violence and coercion in the present case. He stresses that the appellant came into this matter as a consequence of the collapse of his previously successful legitimate business, that there were no young women involved in the prostitution and no sign of the use of drugs. Mr Pearce stresses that, having regard in particular to the presence of the video camera, to which we have referred, the appellant took measures to protect the women who were engaged in this trade. He also stresses the somewhat unusual feature that records were kept and account was made to the Inland Revenue. It is, of course, to be noted, as is apparent from that which the appellant said to the police in interview, that it was throughout his contention that this was a legitimate business.

Mr Pearce also refers to the fact that the learned recorder, in passing sentence, suggested that, were prostitution legal, it would no doubt be conducted in a manner not dissimilar from that in which the appellant conducted his business.

The Court has regard to all these matters. In particular it has regard to the authorities of *Farrugia* and *Smith* and, in the light of those authorities, we are quite unable to say that the sentence of two years passed by the learned recorder, following a trial, was excessive. Accordingly this appeal must be dismissed.

CASE 50

## MICHAEL SELLARS

COURT OF APPEAL (Lord Justice Rose (Vice-President, Court of Appeal, Criminal Division), Mr Justice Keene and Judge Hyam):

May 19, 1997

*Rape—rape of sleeping woman—length of sentence.*

Eight years' imprisonment for the rape of a girl aged 16 while she was asleep reduced to six years.

The appellant pleaded guilty to rape. The appellant was visited by a girl aged 16 who he had known since she was 10 and who treated him as a family friend. The girl drank some wine and fell asleep. While she was asleep, the appellant had intercourse with her. Sentenced to eight years' imprisonment with an order under Criminal Justice Act 1991, s.44.

**Field:** (considering *Billam* (1986) 8 Cr.App.R. (S.) 48) the appellant was sentenced on the basis that he had taken advantage of the girl's condition but had not deliberately got her drunk. The appellant was entitled to some discount for his plea, even though it was not entered until the beginning of the trial. The sentence had either started from too high a starting point or had failed to make sufficient allowance for the plea. A sentence of six years' imprisonment would be substituted.

**Cases cited:** *Billam* (1986) 8 Cr.App.R. (S.) 48.

*M. Byrne* for the appellant.

**KEENE J.:** On November 5, 1996, at Liverpool Crown Court, this appellant, on re-arrest at the beginning of his trial, pleaded guilty to rape. He was then put back for reports. On November 8, he was sentenced to eight years' imprisonment, and an order was made under section 44 of the Criminal Justice Act 1991. He now appeals against sentence by leave of the single judge.

The offence arose in this way. At about 7.00 p.m. on Saturday, September 9, 1995 the complainant, who was then aged 16, went to visit the appellant whom she had known for about six years. He produced some wine and she drank quite a lot of it. She became drunk. Eventually she was sick and lay on the couch in order to get some sleep before meeting her boyfriend later. The appellant helped her and brought her a quilt. She fell asleep, and awoke to find the appellant with his head by her vagina and she felt his mouth on her vagina. Her blouse was undone and her knickers and tights has been pulled down. As soon as she awoke the appellant jumped up and pulled up his trousers. He said to her that he had not done anything and that she was just drunk. She was not seriously injured, but she was very distressed. She was examined by a police surgeon that same night. Although she was tearful she was calm, and the surgeon found no physical injuries other than a small abrasion to the posterior touchette.

The appellant was arrested at his home that evening. In interview he said that he knew the family and considered himself to be like an uncle to the complainant. He said that when she woke up he was trying to sort out her clothing, and he denied having had intercourse with her.

Forensic tests taken revealed that there was semen in the vaginal swabs and that there was saliva present.

The complainant, in due course, found herself pregnant and on May 29, 1996 she gave birth to a baby girl. Tests showed that in fact the father was the complainant's boyfriend and not this appellant.

The appellant is aged 29. He has a large number of previous convictions, principally for burglary, theft and other offences of dishonesty, but also including one for unlawful sexual intercourse with a 15-year-old girl, that having been an act of consensual intercourse with his then girlfriend. For that offence he was put on probation for 12 months.

The learned trial judge dealt with the present offence on the basis that the appellant had not deliberately got the complainant drunk, but had taken advantage of her drunken condition. On his behalf today Mr Byrne acknowledges that there were a number of aggravating features in this case which took it beyond the five-year starting point referred to in the well-known case of *Billam* (1986) 8 Cr. App. R. (S.) 48. First of all, the victim was young, being only 16 at the time. She was subsequently very troubled when she discovered she was pregnant, believing, mistakenly, that it was the result of the rape. The appellant was in a position of trust towards the complainant in that he had known her family for a long time and was treated as if he were her uncle.

However, Mr Byrne emphasises the absence of any violence in this case and of any premeditation on the part of the appellant, and he also notes that the victim slept throughout the act of intercourse. He submits that in the circumstances insufficient credit was given for the plea of guilty.

There clearly were aggravating features in this case. We do not propose to repeat what Mr Byrne has conceded. Those features are clear enough.

The appellant's plea of guilty was somewhat belated, being entered only at the

beginning of the trial. That had the disadvantage that the complainant would have had all the stress of expecting to give evidence at trial and of coming to court that day. Nonetheless, the appellant did plead guilty and, in the event, the complainant did not have to go into the witness box. He was entitled to a discount on the sentence which he would have received and he contested the trial, because saving the complainant from that additional trauma was something to be recognised in the sentence passed.

The previous sexual offence by the appellant did not realistically come into the category of a serious previous sexual offence.

We accept that there was no violence in this case and, despite the youth of the victim, we have concluded that the learned judge either began from too high a starting point or did make insufficient allowance for the plea of guilty by the appellant, belated though it was.

In consequence we propose to quash the sentence of eight years' imprisonment which was imposed here and to put in its place a sentence of six years' imprisonment. The order under section 44 of the Criminal Justice Act 1991 will stand. To that limited extent this appeal succeeds.

## ROBERT ADDISON

COURT OF APPEAL (Lord Justice Rose (Vice-President, Court of Appeal, Criminal Division), Mr Justice Keene and Judge Hyam):  
May 20, 1997

*Firearms offences—collection of firearms kept for sake of interest without any criminal purpose—length of sentence.*

Five years' imprisonment imposed on a man with previous convictions for possessing six firearms in working order and ammunition, without a certificate, reduced to three years on the basis that he kept them out of interest and without the intent to use them for a criminal purpose.

The appellant pleaded guilty to four counts of possessing a firearm without a certificate, two counts of possessing a shortened firearm without a certificate, and one count of possessing ammunition without a certificate. Searches of the appellant's home and place of work resulted in the discovery of six firearms in working order and ammunition. It was accepted that the appellant had not used and did not intend to use the firearms, which he kept out of mechanical and historical interest. The appellant had previously been convicted of possessing a firearm without a certificate on two occasions. Sentenced to a total of five years' imprisonment.

**Held:** the sentencer had rightly referred to the danger of the firearms being stolen. The fact that the firearms were not being kept with a view to crime was an important mitigation. The sentence of five years was manifestly too long; the sentences would be reduced to a total of three years' imprisonment.

**References:** firearms offences, *Current Sentencing Practice* B3-3.

*R. Terry* for the appellant.

**KEENE J.:** On November 29, 1996 the appellant pleaded guilty at Bradford