PREM 19/1826

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Confidential filing.

The Law of Rape.

LEGAL

PROCEDURE

January 1982.

Referred to	Date	Referred to	Date	Referred to	Date	Referred to	Date
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29.10.86							
~~4.11.86~~							
11-11-86							

PREM 19/1826

TO BE RETAINED AS TOP ENCLOSURE

Cabinet / Cabinet Committee Documents

Reference	Date
CC(86) 10th Meeting, item 1	13/03/1986
L(82) 10th Meeting, Minute 2	21/4/1982
L(82) 54	14/4/1982
CC(82) 2nd Conclusions, Minute 1	21/1/1982

The documents listed above, which were enclosed on this file, have been removed and destroyed. Such documents are the responsibility of the Cabinet Office. When released they are available in the appropriate **CAB** (CABINET OFFICE) CLASSES

Signed [signature] Date 25/09/2014

PREM Records Team

Published Papers

The following published paper(s) enclosed on this file have been removed and destroyed. Copies may be found elsewhere in The National Archives.

House of Commons HANSARD, 21 January 1982, column 697 to 708: Glasgow Rape Case

Signed _____ Date 25/09/2014

PREM Records Team

FROM:

THE RT. HON. LORD HAILSHAM OF ST. MARYLEBONE, C.H., F.R.S., D.C.L.

LORD CHANCELLOR

HOUSE OF LORDS,
LONDON SW1A 0PW

11 November 1986

My dear Douglas,

Anonymity of Complainants in Rape Cases

Thank you for copying to me your letter of 4 November in reply to the letter from Michael Havers of 29 October. It appears to me that the issues of public policy are first, to ensure the detection and bringing to trial of alleged assailants and, secondly, to ensure that complainants are not deterred from reporting attacks to the police.

It is important, therefore, to ensure that the protection to be given to the anonymity of victims is not of such an extent as substantially to interfere with the process of detecting and apprehending the assailant. You also make the telling point that the police ought not to be put in the invidious position of choosing between muzzling the press and offending the victim. I therefore agree with you that it would not be right to relate the protection given by section 4 Sexual Offences (Amendment) Act 1976 back to the time when the offence is committed. I also agree that a more restricted form of protection is appropriate for the period between the commission of the offence and the time when the assailant is "accused".

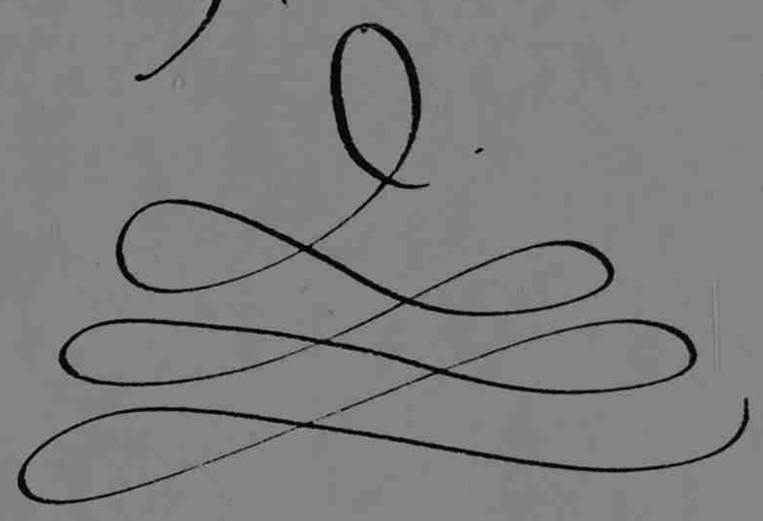
/...2

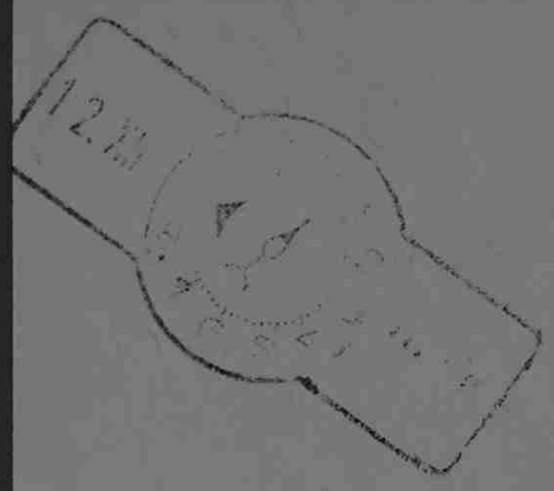
The Right Honourable
Douglas Hurd MP CBE
Secretary of State for
the Home Department
Home Office
Queen Anne's Gate
London SW1

Michael Havers is, of course, right to point to the difficulties of operating two separate standards of prohibition applying at different stages, but I would consider this to be a necessary evil if we are to balance the protection of anonymity (and, indeed, the restriction on the press and broadcasters) against the public interest in apprehending the assailant.

I am sending copies of this letter to the Prime Minister, members of H and L Committees, the Secretary of State for Defence and to Sir Robert Armstrong.

yrs:





LEGAL

PROCEDURE

KAPE

1/8/2

CCBC
nbpm

QUEEN ANNE'S GATE LONDON SWIH 9AT

4 November 1986

Dear Michael,

Thank you for your letter of 29 October about my proposal to enhance the protection presently offered to rape victims by the Sexual Offences (Amendment) Act 1976.

As you point out, I am proposing two separate standards of anonymity at different stages. I entirely agree with you that we should not narrow the scope of the victim's protection unless absolutely necessary. My proposal is, therefore, in addition to the existing prohibition on publishing any matter likely to identify the victim once a man had been accused and brought before the court, which will remain intact. What I propose is an additional prohibition on publishing name, address and photograph to protect the victim before a man is accused. I think that this two stage protection can be justified. While the police are investigating an offence there may be a need to publish some material which may identify the victim in the interests of apprehending the rapist. Once a man is charged this justification vanishes and the existing absolute prohibition can take effect. It is significant that in the Ealing vicarage case no complaint was made about the first report in the news media which enabled the place of the crime (and thereby the people affected) to be identified; this information helped to arouse public concern and was potentially of value in the police investigations. It was only the subsequent publication by the "Sun" of the victim's photograph which rightly aroused indignation.

I understand the reasons which have led you to suggest that we should build on the principle adopted in section 5 of the Contempt of Court Act 1981. But there are serious difficulties with the defences you propose. It seems to me that any newspaper report of a rape could always be claimed to be a warning to the public provided it is published before the rapist is apprehended. Thus a defence that material was published to warn the public would provide no protection at all to the victim.

We did discuss with the police your suggestion that it should be a defence that material was published in response to a police request. The police are strongly opposed to such a scheme. I take your point that the intention is that the courts, not the police, would be the arbiter. However, in practice the press would ask the police for permission to publish claiming that they are only trying to assist the enquiry. As I explained in my letter to Willie Whitelaw, this would place the police in the difficult position of choosing between muzzling the press and offending the victim. They have made it quite clear they could not operate such a proposal.

The Rt Hon Sir Michael Havers, QC., MP.

/over...

LEGAL PROCEDURE
RAPE
1/V2

For these reasons I still prefer my own proposal. But I think it is worth exploring further the possibility of constructing a defence if the victim wishes to publicise her case. As I explained in my letter of 2 October a consent provision may lead to harassment by the press. Something more restricted than consent simpliciter is clearly needed. My officials will consider this further with Counsel to see if a solution can be found.

I take your point that any change to the 1976 Act may give rise to comment on the scope of section 39 of the Children and Young Persons Act 1933. However, I think the two can be distinguished. The 1933 Act gives the court a discretion to prohibit publication of details identifying a child who appears before it in proceedings either as complainant, accused or witness. This is quite different from the 1976 Act scheme which imposes a prohibition on identifying the victim. Under the 1976 Act a court may only disapply this prohibition in certain carefully defined circumstances.

I agree with you that the prohibition on identifying a victim should end with her death. We shall ensure that this is clear. I am grateful to you for agreeing that the consent of the Attorney General should be required before a prosecution is brought alleging breach of the prohibition.

Time is now short before the Bill is to be introduced. I hope that you can agree with my proposal, so that it can be incorporated in the Bill on introduction.

I am sending copies of this letter to the Prime Minister, members of H and L, the Secretary of State for Defence and Sir Robert Armstrong.

Yours,

Douglas.

ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

01-936-6201

The Rt Hon Douglas Hurd MP CBE
Secretary of State for the Home
Department
Home Office
Queen Annes Gate
London SW1

29 October 1986

Dear Douglas

Thank you for copying to me your letter of 2nd October 1986 setting out your proposals for legislation to be incorporated in the Criminal Justice Bill with a view to enhancing the protection presently offered to rape victims by the Sexual Offences (Amendment) Act 1976.

I should like to start by reaffirming in principle the support for your objectives which was indicated in my letter to you of 30th April. However, I am not persuaded that a provision of the nature you now envisage would, taken overall, prove more effective than the present statute. As I understand the position, the point at which the victim would begin to enjoy statutory protection for her anonymity would be from the time of the offence itself rather than as now, the time at which the Court is seised of the issue of rape but the scope of that protection would be reduced because the prohibition would extend only to her name, address and photograph whereas the 1976 Act forbids publication of "any matter likely to lead to the identification of the victim".

My own assessment, based on experience gained through the discharge of my responsibilities in relation to contempt of court and section 8 of the Magistrates Courts Act 1980 etc

is that - whatever degree of responsibility the majority of journalists may display - there will always be a maverick element whose sole concern is the revenue which may be derived from the production of salacious copy; if there is to be legislation, it must be directed at that element. Accordingly, it would be unwise to narrow the scope of the victim's protection unless absolutely necessary. I should also say that your present proposals would not have protected the victim in the Ealing rape case. Although public indignation centred on the photograph which was public, the name of the victim's father and the identity of his church were also published, facts which would easily have led to the identification of the victim within the local community and to some extent by the world beyond.

But I do not think we could justify two separate standards of prohibition applying at different stages - name, address and photograph up to the point of charge and thereafter any matter likely to lead to the identification of the victim. This points to an endeavour to find, if at all possible, a formula which would enable us to prohibit publication of any matter likely to lead to identification of the victim from the outset whilst enabling the police to seek assistance from the press in appropriate circumstances. Here, I am bound to say that I find it difficult to envisage circumstances in which your present proposals would impinge on a police investigation any less than the wider prohibition, remembering that that prohibition is aimed at matter <u>likely</u> to, rather than matter which <u>may</u>, lead to identification of the victim. One possibility might be to build on the principle adopted in section 5 of the Contempt of Court Act 1981 so that it would be a defence to a charge for an editor to show that publication of the particulars in question was

merely incidental to a report of the crime published with a view to warning the public of the danger of further attacks or in response to a police request for assistance from the press. The advantage of this approach would be that the court rather than the police would be the arbiter.

Two other points require special mention. First, it occurs to me that the present proposal will invite comparison with the protection presently afforded under section 39 of the Children and Young Persons Act 1933 to children who have been the subject of sexual assaults short of rape. Arguably, their protection ought to start from the same moment in time even though we have not in practice encountered any problems on this score. Secondly, it will be necessary to ensure that where a rape has been followed by a killing, the new provision does not prevent publication of the victim's name as section 6 of the 1976 Act at present does where a man is accused of rape together with murder or manslaughter. That is a highly anomalous situation which is of great irritation to journalists.

Finally, I should say that I am quite willing for the legislation to impose a requirement that the consent of the Attorney General be obtained prior to institution of proceedings.

Copies of this letter go to the Prime Minister, to Members of H Committee, to the Secretary of State for Defence and to Sir Robert Armstrong.

Yours ever. Michael

LEGAL PROCEDURE

RAPE

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ABB

sbpm

NORTHERN IRELAND OFFICE
WHITEHALL
LONDON SW1A 2AZ

SECRETARY OF STATE
FOR
NORTHERN IRELAND

The Rt Hon Viscount Whitelaw PC CH MC
Lord President of the Council
Privy Council Office
WHITEHALL
London
SW1

13 October 1986

Dear Lord President,

I have seen a copy of Douglas Hurd's letter of 2 October 1986 detailing his revised proposals to provide anonymity to rape victims from the time of a complaint.

I fully accept the strength of his argument in favour of introducing the offence of publishing names, photographs or addresses of rape victims at the earlier stage being proposed. However, he may wish to consider adding details of a person's employment to the prohibition as in certain circumstances this could equally lead to the identification of a victim. Even age, especially in associating with other information, might point to a particular person.

As I indicated previously, I would propose to consider the introduction of a corresponding provision for Northern Ireland by an amendment to the Sexual Offences (Northern Ireland) Order 1978 as soon as it would be practical to do so. I would of course also be seeking at that time agreement to the corresponding Attorney General's consent safeguard being introduced for the equivalent offence in Northern Ireland.

/ I am copying this letter to the Prime Minister, to members of H Committee, the Secretary of State for Defence and to Sir Robert Armstrong.

Yours sincerely
N Howard
(Private Secretary)
for TK
(Approved by the Secretary of State and signed in his absence in Northern Ireland)

LEGAL PROCEDURE

RAPE

1/82

nbpm CCBG

HOME SECRETARY

QUEEN ANNE'S GATE LONDON SWIH 9AT

2 October 1986

Dear Millie,

In my letter of 14 March I mentioned that I was considering ways in which we could provide anonymity to victims of rape from the moment a complaint was made. At present, you will recall, the Sexual Offences (Amendment) Act 1976 forbids publication of any matter likely to lead to the identification of the victim, but only from the moment the case is before a court.

The problem is that cases will arise where the investigation or the need to warn the public of the danger of further attacks requires publication of some details with a risk that these may identify the victim. Extending the full protection of the 1976 Act back to the moment of complaint would necessitate some provision permitting publication in exceptional cases. The obvious arbiters are the police. On consulting them, however, we find that they have no enthusiasm for this role. They would be put in the difficult position of choosing between muzzling the press and offending the victim. I do not feel able to press them to accept this responsibility. However, I believe that we can still offer a more limited form of protection to rape victims. If colleagues agree to this it could be included in next Session's Criminal Justice Bill.

I thus propose that it should be an offence to publish a woman's name, photograph or address if this may lead members of the public to identify her as having been raped or having complained of rape. There would be no provision permitting publication in exceptional circumstances before a man was charged with the offence, although, as with the present law, it would be a defence for the accused to show that he did not believe that publication was likely to enable the public to identify the woman as a victim. The police accept that a prohibition on the name and photograph will not interfere with their investigations. We will need to ensure that the police may show photographs to potentil witnesses who are stopped in the street or interviewed in a door-to-door enquiry but this need not cause difficulties.

If the rape occurs at the victim's home - we do not have statistics on how frequently this happens - it may be useful to the police for the address to be given publicity. I doubt if this is imperative and there will be nothing to stop newspapers saying that the attack occurred within a certain area. But a newspaper report that the victim lived at a vicarage in Ealing is tantamount to identifying her. On balance I think the address should be included in the new offence. Proceedings under the 1976 Act require the Attorney General's consent by virtue of section 5(5). I would be grateful for Michael's agreement to a similar safeguard in my proposal.

We have considered whether the publishing of the name, photograph or address of the victim should be permissible with her consent. To make no such provision means that women who wish to publicise their own cases, perhaps to help others, will be unable to do so except under a pseudonym or anonymously.

CRIME PROCEDURE

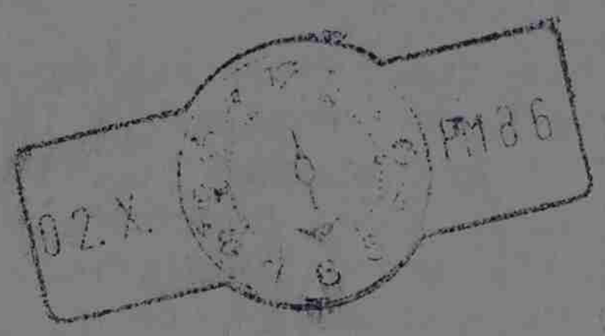
RAPE

1/12

But in my view a consent provision would bring with it the greater evil that the press would have an inducement to harrass the victim in order to receive her consent.

This proposal is not as wide-ranging as I had originally hoped but it would be a worthwhile improvement on the present law. It would prevent the type of behaviour that occurred after the Ealing rape. I would like to make an early announcement (but we would also write to the press and other interested bodies to seek their views).

I am copying this letter to the Prime Minister, to members of H, to the Secretary of State for Defence and to Sir Robert Armstrong.



Yours ever

Douglas.

ATTORNEY GENERAL

01-405 7641 Extn

ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

30 April 1986

The Rt Hon Douglas Hurd Esq MP
Secretary for the Home Department
The Home Office
50 Queen Annes Gate
London SW1

Dear Douglas,

I am sorry not to have replied sooner to your letter of the 14th March 1986 canvassing the views of colleagues on your proposals to amend the provisions in the Sexual Offences (Amendment) Act 1976 relating to the anonymity of persons accused of rape offences and of complainants in such cases. Unfortunately the original copy went astray and subsequently there has been some delay within my Department.

I should like to associate myself whole-heartedly with your proposal to repeal section 6 of the Act. I have long been conscious of the anomalies produced by that provision which was, as the history of it shows, ill-conceived and poorly thought out. I am equally certain that we should amend section 4 so that a complainant receives protection from the outset as was envisaged by the Heilbron Committee. Accordingly I shall await with interest the result of your further considerations as to how to avoid creating a provision which is so wide as to preclude the giving of information about an offence which ought properly to be given.

Copies of this letter go to the Prime Minister, other members of H Committee and George Younger and Sir Robert Armstrong.

Yours ever, Michael

Legal Procedure: Law of Rape Jan 82

SECRETARY OF STATE
FOR
NORTHERN IRELAND

NORTHERN IRELAND OFFICE
WHITEHALL
LONDON SW1A 2AZ

The Rt Hon Douglas Hurd CBE
Home Secretary
50 Queen Anne's Gate
LONDON
SW1H 9AT

24 March 1986

Dear Secretary of State,

Thank you for copying to me your letter of 14 March to Willie Whitelaw about your proposals for changes in the law concerning anonymity in rape cases.

I appreciate the points you have made and agree with them in principle, although I note that some refinement will inevitably be necessary.

As you of course are aware, it is the practice in Northern Ireland to keep in line with the rest of the United Kingdom, whenever possible, on matters dealing with serious crimes. I would certainly wish to consider what amendments should follow, in due course, to the Sexual Offences (Northern Ireland) Order 1978, when the provisions which you propose have been finalised. I note that the proposals will apply, with George Younger's agreement, to the Armed Forces, which will include those in Northern Ireland.

Copies of this letter go to the Prime Minister, other members of H Committee, George Younger and Sir Robert Armstrong.

Yours Sincerely
N D Wood
(Private Secretary)

for TK
(approved by the Secretary of State and signed in his absence in Northern Ireland).

JLD

Legal Procedure: Law of Rape Jan 82

DCABBD

PRIME MINISTER

ANONYMITY IN RAPE CASES

The Home Secretary's letter reports that he is pursuing a way of providing anonymity to the victim from the time of the offence, which would not at the same time make it harder to catch rapists. A note from Hartley is also attached.

He also believes that the anonymity afforded to defendants should be removed.

The Home Secretary's letter does not indicate what vehicle he proposes to use to secure these changes, if colleagues agree them. The Criminal Justice Bill in the next session is the obvious candidate.

I understand from the Home Office that, on the Fairbairn point about the timing of pleas, Mr. Fairbairn has now accepted that the whole question was more complicated than he thought. The Home Office are discussing this further with him and will let us know the outcome.

Mark Addison

(Mark Addison)

BF

14 March 1986

William Fittall will inform us after contact HO discuss with Mr. Fairbairn. I think the PM had also noted the points in the Home Sec's letter.

MBT 17/3

PRIME MINISTER

14 March 1986

RAPE VICTIMS AND DEFENDANTS - HOME SECRETARY'S PROPOSAL

In a letter from the Home Secretary to the Lord President, the former proposes to repeal Section 6 of the Sexual Offences (Amendment) Act 1976, which provides anonymity for defendants in rape cases. We agree. It is a nonsense that in rape cases alone the defendant is able to gain the privilege of anonymity.

The Home Secretary would also like to extend Section 4 of this Act so as to provide anonymity for the victims or complainants in rape cases. At the present, anonymity begins when a defendant is arrested. The reform would mean that anonymity would begin from when victims complain to the police. However, he is anxious not to provide a blanket of secrecy so that the police will be inhibited in catching a rapist.

This reform would ensure that the scandal surrounding the Fulham Vicar's daughter is not repeated. He is not sure how this proposal should be worded and is working on it.

HARTLEY BOOTH

CCBG

HOME SECRETARY

QUEEN ANNE'S GATE LONDON SWIH 9AT

14 March 1986

Dear Willie.

I am sorry, so soon after publication of the White Paper on matters to be included in next session's Criminal Justice Bill, to have to add further proposals, for the approval of the Committee, for inclusion in the Bill.

These proposals concern the provision made in the Sexual Offences (Amendment) Act 1976 for the anonymity of persons accused of rape offences and of complainants in such cases. We touched on the subject in Cabinet this morning.

The Sexual Offences (Amendment) Bill was introduced in 1975 by Robin Corbett, with the support of the then Labour Government, to give effect to some of the recommendations in the Report of the Advisory Group on the Law of Rape. The Bill as introduced made provision for anonymity of complainants but not of defendants. In Committee support developed for the idea that defendants should also benefit from anonymity. The arguments were not developed in much detail, but the prevalent idea was that rape was such an exceptional crime that complainants and defendants ought to receive equal treatment in respect of press reporting. An amendment to this effect was carried against the then Government by 9-2 (two of our supporters, Peter Bottomley and Billy Rees-Davies, voted for the amendment, and George Young abstained). Section 6 was then inserted on Report.

The Act does not quite give effect to the full recommendations of the Advisory Committee as regards anonymity for complainants because it applies only to the period after a person has been accused of the offence; the Committee had recommended that anonymity should be protected from the moment a complaint was made to the police.

Since then the Criminal Law Revision Committee has reviewed the law relating to sexual offences. In their 15th Report, published in April 1984, they recommended that section 6 (anonymity for defendants) should be repealed. The Committee also considered the point at which a complainant's anonymity under section 4 of the Act should commence, and concluded that in principle it ought to apply during the whole of the period after the complaint was made. Their Report records, however, that there might be practical difficulties in amending the 1976 Act to that effect.

The reason for giving anonymity to rape victims is to encourage women to come forward and report offences to the police. The fear of publicity can inhibit victims and the law rightly reduces this disincentive in the interest of ensuring that as many rapists as possible are brought before the courts. The question which arises in respect of this aspect of the Act - having regard to the current case of the vicar's daughter and previous similar cases in which sections of the press have not exercised the recommended self-restraint - is whether to bring forward the time at

The Rt Hon The Viscount Whitelaw, CH., MC.

/over...

which the provisions apply. In principle, I am sure it is right that this should be done. The difficulty is not so much the one which exercised the previous Government in 1975/76 - that of identifying accurately the moment at which the complaint was made to the police so as to deduce whether publication was lawful or unlawful. On this we could provide that no identification of a woman as having been the victim of a rape offence, or as having complained of one, should ever be permissible except in the exceptional circumstances set out in the Act. The difficulty is rather that the provisions of the Act are deliberately widely drawn so as to prohibit not only direct identification of the victim's name or other close personal details, but any "matter likely to lead members of the public to identify the woman as the complainant". Publication of information about where the offence occurred and the surrounding circumstances could fall foul of this provision since it might suffice to enable members of the public living close by, at least, to identify the woman; but that information of this kind may also be of public interest either generally or for the purpose of encouraging the public to give information about the offence to the police or to take preventive action against similar attacks. We do not want to give further shelter to the victim if by so doing we make it harder to catch the rapist or prevent him raping again.

I am exploring ways of getting round this difficulty and will write again. I hope to produce a formula which will usually provide anonymity to the victim from the moment of the offence without prejudicing the public interest.

The difficulty over victims does not apply to defendants. I agree with the Criminal Law Revision Committee that the "tit-for-tat" argument that victims and defendants should be treated alike in this respect is invalid. There may be a case of giving anonymity to all defendants in criminal proceedings, as in done in some other countries, but this is not a proposal which I would wish to advance. So long as the general rule is that defendants can be named, I do not think that those accused of a rape offence should be singled out for special protection. That is the negative argument for repealing section 6. The positive argument is that the present law gives rise to anomalies and confusion. The positive argument is that the present law gives rise to anomalies and confusion. For example, if a man is acquitted of rape but found guilty of murder he still benefits from the anonymity provisions and cannot be names. If a man escapes from custody after being charged but before conviction the police cannot say he is a suspected rapist (unless he has already been brought before the Crown Court and the judge exercises his power to lift anonymity on the grounds that it is imposing a substantial and unreasonable restriction on reporting proceedings and that removal of the restriction is in the public interest).

I believe that the repeal of section 6, while not entirely uncontroversial - especially, perhaps, if accompanied by extension of section 4 - would be welcome to the great majority of our supporters.

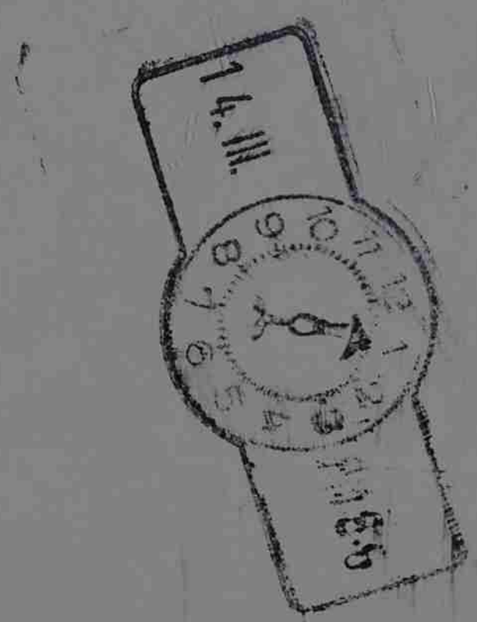
George Younger will note that the provisions of the 1976 Act apply, with modifications, to cases of rape dealt with under the Armed Forces Acts, including those in Northern Ireland. Provisions similar to those of the 1976 Act were also applied to Northern Ireland generally by the Sexual Offences (Northern Ireland) Order 1978 (S1 1978/460). I hope George Younger will agree that the arguments for removing the anonymity of defendants appearing before civilian courts apply equally to court martial cases; and I expect that, if my proposals are agreed, Tom King will wish to consider whether the Northern Ireland Order should also be amended in due course.

The proposed changes would have no financial or manpower implications.

I am copying this letter to the Prime Minister, other members of H, George Younger and Sir Robert Armstrong.

Yours,

Douglas.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cc. Home Affairs
Sentencing Policy
PEZ

PRIME MINISTER

11 March 1986

RAPE

1. Lord Lane's Rape Sentence Guidelines

As requested, here is the judgement giving guidelines for Judges in sentencing persons convicted of rape. Pages 2-6 are most relevant and are highlighted.

2. New Statistics

This week, the Home Office will publish a frightening rise in recorded rape in the period 1985-86. Nationally, the rise is 30% and in London 50%. This is not as bad as it appears, because formerly the police did not include a record of a rape where charges were not pressed. The police now count these incidents.

HARTLEY BOOTH

Nos. 7028/C/85, 4722/B/85, 5103/B/85,
3514/B/85, 5061/C/85, 2906/B/85,
4817/C/85, 35/F/86, 36/F/86
7487/C/85, 2570/B/85 and 2622/C/85

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice,

Friday, 21st February, 1986.

Before:

THE LORD CHIEF JUSTICE OF ENGLAND
(Lord Lane)

MR. JUSTICE MANN

and

SIR ROGER ORMROD

REGINA v. KEITH BILLAM

REGINA v. JOHN REVILL

REGINA v. KENNETH CRAIG

REGINA v. STEPHEN ANDREW STRONG

REGINA v. MARK BANNISTER

REGINA v. JIMMY ANTHONY TEMPLE

REGINA v. HENRY DONAGHEY

REGINA v. GURMOHAN SINGH and JASWANT SINGH

REGINA v. MOHAMMED RAFIQ

and

REGINA v. PETER YOUNG and RODNEY JACKSON

(Transcript of the Shorthand Notes of Marten Walsh Cherer Ltd.,
Pemberton House, East Harding Street, London, EC4A 3AS.
Telephone Number: 01-583 7635. Shorthand Writers to the Court.)

MR. J. HALL appeared on behalf of the Appellant Billam.

MR. G. LOCKE appeared on behalf of the Appellant Revill.

MR. P. CORRIGAN appeared on behalf of the Appellant Craig.

MR. P. SMITH appeared on behalf of the Appellant Strong.

MR. P. HARRIS appeared on behalf of the Appellant Bannister.

MR. P. SWANIKER appeared on behalf of the Appellant Temple.

MR. J. COLLINS appeared on behalf of the Applicant Donaghey.

MR. S. ASHURST appeared on behalf of the Applicants Gurmohan Singh and Jaswant Singh.

MR. A. McCALLUM appeared on behalf of the Applicant Rafiq.

MR. L. SCOTT appeared on behalf of the Applicant Young.

THE APPLICANT JACKSON was not present and was not represented.

J U D G M E N T

(As approved by Judge)

THE LORD CHIEF JUSTICE: We have had listed before us today a number of cases where there has been a conviction for rape or attempted rape, in order to give us an opportunity to restate principles which in our judgment should guide Judges on sentencing in this difficult and sensitive area of the criminal law.

In the unhappy experience of this Court, whether or not the number of convictions for rape has increased over the years, the nastiness of the cases has certainly increased, and what would ten years ago have been considered incredible perversions have now become commonplace. This is no occasion to explore the reasons for that phenomenon, however obvious they may be.

We would like, if we may, to cite a passage from the Criminal Law Revision Committee's 15th Report on Sexual Offences, Command Paper 9213 of 1984, which reflects accurately the views of this Court. It is

as follows: "Rape is generally regarded as the most grave of all the sexual offences. In a paper put before us for our consideration by the Policy Advisory Committee on Sexual Offences the reason for this are set out as follows -- 'Rape involves a severe degree of emotional and psychological trauma; it may be described as a violation which in effect obliterates the personality of the victim. Its physical consequences equally are severe: the actual physical harm occasioned by the act of intercourse; associated violence or force and in some cases degradation; after the event, quite apart from the woman's continuing insecurity, the fear of veneral disease or pregnancy. We do not believe this latter fear should be underestimated because abortion would usually be available. This is not a choice open to all women and it is not a welcome consequence for any. Rape is also particularly unpleasant because it involves such intimate proximity between the offender and victim. We also attach importance to the point that the crime of rape involves abuse of an act which can be a fundamental means of expressing love for another; and to which as a society we attach considerable value.' "

This Court emphasised in Roberts (1982) 4 Cr. App. R. (S) 8, that rape is always a serious crime which calls for an immediate custodial sentence other than in wholly exceptional circumstances. The sort of exceptional circumstances in which a non-custodial sentence may be appropriate are illustrated by the decision in Taylor (1983) 5 Cr. App. R. (S) 241. Although on the facts that offence amounted to rape in the legal sense, the Court observed that it did not do so in ordinary understanding.

Judges of the Crown Court need no reminder of the necessity for custodial sentences in cases of rape. The criminal statistics for 1984 show that 95 per cent of all defendants who were sentenced in the Crown Court for offences of rape received immediate custodial sentences in one form or another. But the same statistics also suggest that Judges may need reminding about what length of sentence is appropriate.

Of the 95 per cent who received custodial sentences in 1984, 28 per cent received sentences of two years or less; 23 per cent over two and up to three years; 18 per cent over three and up to four years; 18 per cent over four and up to five years and 8 per cent over five years (including 2 per cent life). These included partly suspended sentences and sentences to detention centre or detention under section 53(2) of the Children and Young Persons Act 1933, as well as imprisonment or youth custody. Although it is important to preserve a sense of proportion in relation to other grave offences such as some forms of manslaughter, these statistics show an approach to sentences for rape which in the judgment of this Court are too low.

The variable factors in cases of rape are so numerous that it is difficult to lay down guidelines as to the proper length of sentence in terms of years. That aspect of the problem was not considered in Roberts (cited above). There are however many reported decisions of the Court which give an indication of what current practice ought to be and it may be useful to summarise their general effect.

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. Where a rape is committed by two or more men acting together, or by a man who has broken into or otherwise gained access to a place where the victim is living, or by a person who is in a position of responsibility towards the victim, or by a person who abducts the victim and holds her captive, the starting point should be eight years.

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 fifteen years or more may be appropriate.

Where the defendant's behaviour has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large,

to remain a danger to women for an indefinite time, a life sentence will not be inappropriate.

A 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; (3) the rape is repeated; (4) the rape has been carefully planned;

B (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

C of special seriousness. 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.

D The extra distress which giving evidence can cause to a victim means that a plea of guilty, perhaps more so than in other cases, should normally result in some reduction from what would otherwise be the appropriate sentence. The amount of such reduction will of course depend on all the circumstances,

E including the likelihood of a finding of not guilty had the matter been contested.

F The fact that the victim may be considered to have exposed herself to danger by acting imprudently (as for instance by accepting a lift in a car from a stranger) is not a mitigating factor; and the victim's previous sexual experience is equally irrelevant. But if the victim has behaved in a manner which was calculated to lead the defendant to believe that she would consent to sexual intercourse, then there should be some

G mitigation of the sentence. Previous good character is of only minor relevance.

H The starting point for attempted rape should normally be less than for the completed offence, especially if it is desisted at a comparatively early stage. But, as is illustrated by one of the cases now before the Court, attempted rape may be made by aggravating features into an offence even more serious than some examples of the full offence.

About one-third of those convicted of rape are under the age of 21 and thus fall within the scope of the Criminal Justice Act 1982, section 1. Although the criteria to which the Court is required to have regard by section 1(4) of that Act must be interpreted in relation to the facts of the individual case rather than simply by reference to the legal category of the offence, most offences of rape are "so serious that a non-custodial sentence cannot be justified" for the purposes of that provision. In the ordinary case the appropriate sentence would be one of youth custody, following the term suggested as terms of imprisonment for adults, but making some reduction to reflect the youth of the offender. A man of 20 will accordingly not receive much less than a man of 22, but a youth of 17 or 18 may well receive less.

In the case of a juvenile, the Court will in most cases exercise the 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.

Keith Billam on 31st October 1985 in the Crown Court at Sheffield before Mr. Justice Jupp pleaded guilty to two counts of kidnapping, one count of rape, one count of wounding with intent and two counts of robbery. The sentences imposed upon him were ten years' imprisonment in respect of each kidnapping, life imprisonment in respect of the rape and seven years' imprisonment each for wounding and robbery. All those sentences were to run concurrently.

He now appeals by leave of the single Judge.

The facts were lengthy but put as briefly as possible, they were as follows. On 2nd July last year posing as an official in a car park in Barnsley, he insinuated himself into the motor car of his victim

in order to direct her, so he said, to the Council offices. He produced a pair of scissors, stabbed her hand and threatened to kill her. She was kept captive for a considerable length of time: something like 4 or 5 hours. During that time he drove her to various secluded places. He tied her wrists and ankles, cut off her bra and knickers with the pair of scissors, he stole her watch, and stole her purse. Eventually he ordered her into the back of the car where he raped her. He then drove her to another secluded spot, pushed her out of the car, threatened to kill her, stabbed her in the neck and finally kicked her about the head before leaving her there.

A

B

He made two telephone calls to police officers who were acquaintances saying that he had done something terrible which he did not want to do again, the inference being that he was frightened that he might do it again. Indeed that is exactly what he did, because early next morning a woman sitting in a car in the car park of the Victoria Hospital at Blackpool, waiting for a friend to come out of hospital, found the appellant getting into the car posing as a car park attendant and saying the car had to be moved. He got in and drove off to some wasteland. When the woman protested he punched her in the face and threatened to kill her. He prodded her in the stomach with a vegetable knife and said, "I'm going to fuck you. I've been watching you", and he also threatened to cut out her insides with the vegetable knife. He stole her money and drove away. It does not take very much imagination to guess what would have happened next had everything gone according to plan. But during the course of the journey, whilst the car was in motion, the woman managed to open the door and throw herself out of the motor car. Mercifully, apart from bruising and grazing and having dirt engrained underneath the skin, she suffered no serious injury.

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The appellant kept the motor car. He changed the number plates. He was eventually arrested shortly afterwards after a chase at speeds of 100 miles an hour by the police.

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When he was interviewed he said that he had merely been interested in

stealing the car to use it in burglaries. When he was asked about the first victim he said, "She either did something or said something and I flipped my lid and raped the girl... if it wasn't for that bloke coming she might have been dead now".

He is in his forties. He has 16 previous court appearances including convictions for robbery, assault with intent to rob and assault occasioning actual bodily harm.

We have seen a number of reports, amongst which is a psychiatric report of 3rd October, which says, amongst other things, this: "The problem is essentially one of a personality disturbance, rather than mental illness, and this disturbance is characterised by poor control over tension, frustration and aggression, with a diminised concern for the feelings of other people."

The social enquiry report said, "Billam is possessed of a powerful personality and seems to hold a peculiar power to dominate vulnerable and inadequate women." As we can see for ourselves, he is a very large man, we are told 6 ft. 4 ins. tall and said to weigh something like 15 stones.

There is a further report about him which contains this remark: "So far as Billam is concerned, this problem may lead to further offending on his release from what he expects to be a rather lengthy custodial sentence. Such personality disturbances are notoriously resistent to any form of psychiatric intervention."

Counsel on his behalf, Mr. Hall, if we may say so in a hlepful address before us, has drawn our attention to the material authorities in which this Court has examined the circumstances under which life imprisonment is proper in a case such as this. He points out to us that this was the sole offence of rape, though he concedes that had the second woman not thrown herself out of the car very likely the same thing might have happened to her. He suggests that this does not warrant an indeterminate sentence and that a determinate sentence would be appropriate.

We disagree. We think this is par excellence a case where this man's mental condition is such that if he is released into the community he is likely to present a danger to women for the foreseeable future. It is not possible to predict when that situation may come to an end. In those circumstances we think the learned Judge was correct in what he did, namely to impose a life term, and that appeal is dismissed.

John Revill,who is now aged 18, on 19th July last year in the Crown Court at Liverpool before Judge Wickham and a jury was convicted of rape and sentenced to eight years' imprisonment. He received concurrent sentences of five years' and one year's youth custody for offences of robbery and possessing an offensive weapon.

The victim was a 21-year old student at the University of Liverpool. Just before midnight on a night in February 1985 she was walking back to her Hall of Residence, when the appellant armed with a knife confronted her and forced her to give him her purse. He then forced her at knifepoint to go to a nearby tennis court, threatening to kill her if she told anyone, saying that he would stab her. He then further forced her to kneel on all fours, in which position he raped her.

When arrested subsequently he was found to be in possession of a serrated kitchen knife. He later confessed to the rape and the robbery. However at the trial he put forward an alibi, which necessitated the victim giving evidence. Such were the psychological effects of the happenings of that night upon her that she had to abandon her university career shortly afterwards.

At the time of the offence the appellant was 17. He had eleven previous convictions, the most recent of which was for armed robbery. On that occasion he committed the offence once again whilst in possession of a knife.

The Prison Medical Officer says of him that he at all costs, through primitive means, will gain his own way. He is also described as a

potentially dangerous young man who requires a custodial establishment geared to cope with a chronic difficult inmate.

Mr. Locke appearing on his behalf today urged before us only one point, and that is the youth of the appellant. As I say, he was aged 17 at the time of the offence and is 18 now.

The starting point in such a case as this must be one of five years. The rape was aggravated by the use of a knife, by the threats to kill and by the serious psychological injury to the victim. The recent conviction for robbery whilst armed with a knife puts point to the opinions which have been expressed about him, namely that he is a very dangerous young man. Had he been older, a sentence of nine years' or ten years' imprisonment would have been perfectly proper. The sentence of eight years' imprisonment makes sufficient allowance for his age, which is indeed the only mitigating feature in the case.

Accordingly his appeal is dismissed.

Kenneth Craig on 5th August last year before Judge West Russell at the Central Criminal Court pleaded guilty to offences in three indictments. On the first indictment he was sentenced to four years' youth custody for robbery, with concurrent sentences for having a firearm or imitation firearm with intent and assault occasioning actual bodily harm of three years and eighteen months respectively.

On the second indictment, which charged him with rape, he was sentenced to five years' youth custody consecutive to the sentence on the first indictment, but with concurrent sentences for burglary, robbery and theft.

On the third indictment he was sentenced to eighteen months' youth custody concurrent for burglary.

The total sentence was therefore one of nine years' youth custody.

The facts put as briefly as possible are these. In the early hours of 22nd February last year with two other youths the appellant Craig, who was then aged 16, rang the bell of a house in Clapham. When the elderly lady

who lived inside answered the door,he pushed his way inside the house. He carried a gun. He slapped the woman across the face and attempted to pull the rings off her fingers. He swore at her, kicked her, pulled off her bracelet and he then searched the house for jewellery, pausing from time to time to hit the unfortunate woman about the face causing her mouth to bleed and eventually causing her to fall to the ground.

Her husband arrived on the scene, whereupon there was a fierce struggle before all the youths ran away, having helped themselves to jewellery, cufflinks and so on.

The offences charged in the second indictment had taken place about ten days earlier, on 10th February last year, when the appellant snatched the handbag of a young woman in the street at Clapham. She fell to the ground when she struggled to retain it. The next day he broke into a house in Tootingstealing jewellery, goods and cash.

On 19th February he broke into another house in the same road and stole £1,000 in cash, fur coats and a video recorder.

The charge of rape arose out of incidents which took place on 27th February. On that occasion the appellant let himself into a flat by means of a key which the victim had unfortunately through oversight left in the front door of the flat. He armed himself with a Hoover extension tube, went round the flat stealing property and ordering the victim to do as she was told. Once again he tried to take the rings off her fingers and slapped her as he had done with the original victim. He then pushed her into the bedroom, undressed her and raped her. He disconnected the telephone and left, having helped himself to easily portable valuables as he could lay his hands on.

The burglary, which was the subject of the third indictment, took place in November 1984 when the appellant broke into a house and took a video recorder and some money.

He had two previous findings of guilt in 1984. They included three

offences of robbery with six others taken into consideration.

Counsel on his behalf, Mr. Corrigan, now makes before us the following submissions. First of all in regard to the four years' youth custody in respect of the robbery, he points out that this was a plea of guilty, the appellant was only 16 years old at the time and he points out, correctly, that when questioned the appellant immediately volunteered an admission and gave information to the police which enabled the co-defendants to be arrested. He points to an apparent disparity between the sentences imposed upon this appellant and the co-defendants with regard to the robbery, but it is plain that that apparent disparity is not a real one and is accounted for by the fact that this man was in possession of the firearm. The suggestion is that his frankness should earn him something by way of a lesser sentence so far as the robbery was concerned.

So far as the rape is concerned, it is suggested that that was so to speak a chance rape: the real intention was burglary and the rape only took place as an unforeseen incident, committed by this young man.

The only ground which we consider to have validity in this case is the question whether the overall, global sentence was perhaps too long. Nine years' youth custody for a 16 or 17-year old is of course a very long time. Not without some hesitation, we have come to the conclusion that although both sentences, five years for the rape and four years for the robbery, were richly deserved, when viewed overall the sentence is somewhat too long. Therefore we propose to remedy that by quashing the sentence of four years' youth custody for the robbery and substituting therefor a sentence of two years' youth custody, which will run consecutively to the five years' youth custody for the rape. We also quash the sentence of three years' youth custody for the offence of having a firearm in the first indictment and substitute for it a sentence of two years' youth custody, which will run concurrently with the two years for robbery. The total sentence in the case of Craig will be seven years' youth custody. To that

extent his appeal is allowed.

Stephen Andrew Strong appeals by leave of the single Judge.

It arises in this way. At Carlisle Crown Court before Mr. Justice Rose the appellant pleaded guilty to rape and was sentenced to six years' imprisonment.

The facts of the case were these. On 29th April 1985 the appellant forced his way into the victim's house, having called previously to inquire if her husband was at home or not. He pushed her to the floor, made her hold his penis, forced himself upon her and raped her. She was aged 24 and recently married.

He was arrested later that day. He admitted the offence immediately and admitted also that he had forced the woman to take off her jeans.

He is 23 years of age, a farm labourer. He has only one previous conviction and that was for making offensive telephone calls.

This case has caused us some considerable difficulty. Let me try to explain why. On the face of it a man who behaves as this man did, and as we have described, can expect to receive a sentence of something like six years' imprisonment, allowing for his plea of guilty. The fact that he raped the woman in her own home would justify such a sentence.

This man is by way of being something exceptional. He is obviously of good character, apart from the telephone calls. He is a farm labourer. He is on all accounts, and we have no reason to doubt it, extremely naive, childish, immature and in fact the opposite of callous. It seems to us that he does not fit the picture of the ordinary rapist, if there is such a thing.

He is at the moment, we understand, at Grendon Underwood, and we very much hope that he will continue there, because he is exactly the type of person who may be enabled by the doctors at Grendon Underwood in the future to live a normal life without this offence or any other offence being committed.

Consequently, not without very great hesitation, in view of those facts

and in view particularly of the fact that within almost an hour or so of the offence he was admitting his guilt and thereby sparing the girl the indignity and fear of giving evidence, we feel we tan take an exceptional course. We quash the sentence of six years' imprisonment and substitute for it one of four and a half years' imprisonment. To that extent this appeal in the exceptional circumstances is allowed.

On 19th July 1985 at St. Albans Crown Court before Judge Blofeld, the appellant Mark Bannister pleaded guilty to rape and was sentenced to five years' detention under section 53(2) of the Children and Young Persons Act 1933. His co-defendant who was at the time aged 20 was sentenced to eight years' youth custody.

The facts of this distressing case are these. On 6th March 1985, shortly before midnight, the victim, a 16-year old girl, was on her way home in Watford. As she walked from the bus she was seized from behind by the appellant and his co-defendant. Both were wearing balaclava helmets, with holes cut in the helmet so they could see. She was pushed to a carefully selected secluded spot. She was ordered to undress. When she refused the appellant threatened to use on her a knife which he brandished. She then undressed at knifepoint, while the appellant acted as lookout. Her wrists and ankle were tied to some scaffolding by rope or cord which had been brought specially for the purpose. It should be added that some of the electric light bulbs on the scaffolding had been removed in order to make it more difficult for these young men to be seen.

The co-accused then pushed cloth into the victim's mouth and secured it with sticky tape. He then raped her while the appellant kept watch. Eventually the co-accused cut the girl free and both the men ran off.

The appellant was interviewed some little time afterwards by the police. He admitted that the rape had been carefully planned. A rope had been taken there to tie up the victim, the light bulbs had been removed from the scaffolding for the purposes already indicated. He said that

when the time came he was too scared to carry out his part of the plan, which was also of course to rape the girl.

This appellant has three findings of guilt, none of them for offences of a sexual nature.

The submissions made by counsel, Mr. Harris, on his behalf are these: first of all that he was not given sufficient credit for his pleas and admissions to the police; secondly, that insufficient distinction was drawn between the co-defendant and himself so far as sentence was concerned; thirdly that he had volunteered information, which he need not have volunteered; fourthly that he played no actual part in the initial attack on the girl -- the tying up was all done by the co-defendant, not by him; next, that he stood in awe or fear of his co-defendant and was easily led; and this is his first custodial sentence and was therefore too long.

In the view of this Court the description given by the learned Judge at the Court below of this crime as brutal, calculated, planned and vicious, was accurate. He took sufficient account of the appellant's youth, he took sufficient account of the matters which are urged before us today and which I have described and he took sufficient account of the absence of actual physical injury to the victim. But he regarded a substantial sentence was necessary. So do we. The sentence of five years' detention is in no way too severe. The appeal is dismissed.

On 23rd April 1985 in the Crown Court at Winchester before Mr. Justice Stuart Smith and a jury, the appellant Jimmy Anthony Temple was convicted and sentenced as follows: causing grievous bodily harm with intent, twelve years' imprisonment, attempted rape, seven years' imprisonment concurrent, and robbery, four years' imprisonment concurrent, that is to say a total of twelve years' imprisonment.

He now appeals against that sentence by leave of the single Judge.

The facts of the case were these. The victim was a German woman on holiday in England, aged 58. On the 9th August 1984 that unfortunate lady

was walking in the New Forest, near Brockenhurst, when the appellant ran past her. He then returned and affected to show interest in the map that she was carrying and a short conversation took place between them. She then walked away, whereupon the appellant grabbed her from behind, forcing her to the ground. Over the course of the next 15 minutes or so she was subjected to the most appalling treatment. She was repeatedly hit about the face, her clothing was ripped, the appellant attempted to rape her many times, saying "I want a fuck", but was unable to achieve penetration. The reason for that was, the medical evidence at the trial indicated quite clearly,so far as this particular woman was concerned, penetration was a physical impossibility. The victim thought she was going to be killed and eventually gave up struggling because she was in too much pain

She said the appellant was extremely angry and before parting hit her a final blow upon her face. He rifled her handbag and stole its contents. He took about £10 and a pen and as a parting gesture, for good measure, he kicked her in the back. She managed to struggle back to the roadside, where she received help. She was taken to hospital. She had to be detained in hospital for fifteen days.

These were the injuries she suffered: a broken nose, and possible fracture of the sternum; extensive swelling and bruising about the head; closed and swollen left eyelid; cut inside lip; contusions and bruising inside the mouth; bruising and swelling about the shoulder and chest; bruising to the upper thigh and forearm; bruising to the back; bruising and bleeding above the vagina and a tear at the back of the vagina.

The appellant put forward an alibi at the trial and contested the case.

He is aged 27. He lives with a woman by whom he has one child. He was employed as a van driver. He had one finding of guilt and six previous convictions, mainly for dishonesty, but including one offence of rape and aiding and abetting rape in 1979, which resulted in imprisonment for

four years.

It is said that he is not mentally ill and not likely to be dangerous. The medical report contains this somewhat cryptic passage: "With regard to his state of mind on the afternoon of the present offence, there is no doubt that he was experiencing disturbed emotions as a result of having taken his girlfriend to a clinic that very morning for a termination of pregnancy. Caring, resentment and sexuality were confused in a way he could not clearly have formulated then and has only since then, in his writings, now formulated, ...", and the doctor gives three examples.

Counsel's submissions on his behalf are these: first of all, the appellant is remorseful, and secondly he submits that the sentences on each of the three counts is excessive.

So far as the seven years' imprisonment for attempted rape is concerned, at that time that was the maximum sentence: it has since been raised to imprisonment for life. Quite plainly, if ever there was a case where the maximum sentence of seven years should have been imposed, this was it. The learned Judge felt that his hands were tied by that maximum sentence for attempted rape. He wished to pass a condign sentence, which seven years was not.

However we do not think, understandable though his feelings are, that twelve years' imprisonment for the offence of wounding under section 18 was appropriate. It is plain that he was correct in thinking that the sentence for the section 18 offence should be ordered to run concurrently with the sentence for the attempted rape. We feel that a sentence of four years' imprisonment for causing grievous bodily harm with intent was sufficient in the present case. We substitute that sentence for the sentence of twelve years' imprisonment, and that will run concurrently with the sentence of seven years for the attempted rape, which we leave standing.

However, robbery was no part of the rape and a sentence to run consecutively in respect of the robbery is perfectly correct in principle. What we propose

therefore to do is this. We quash the sentence of four years' imprisonment concurrent in respect of the robbery, and substitute therefor a sentence of three years' imprisonment to run consecutively. The result will be a total imprisonment of ten years as opposed to twelve years imposed by the learned Judge. To that extent this appeal is allowed.

In the case of Henry Donaghey, learned counsel, Mr.Collins, has wisely withdrawn his application: wisely because the Court was minded to order loss of time had the application continued as was originally intended.

In the case of Gurmohan Singh and Jaswant Singh the circumstances were these. On 22nd November 1985 in the Crown Court at Leeds before Mr. Justice Kennedy and a jury, the applicants were convicted of rape and sentenced as far as Gurmohan was concerned to ten years' imprisonment and so far as Jaswant was concerned to seven years' imprisonment.

They now apply for leave to appeal against sentence.

They were jointly charged with another man called Javed Mashih, who was convicted of rape and sentenced to eighteen months' imprisonment, six months to be served and the balance suspended. His application for leave to appeal against conviction and sentence was refused by this Court on 27th January last.

The facts of the case were these. On 22nd March last the complainant, a married girl of 22 years, went out for an evening to a disco. She was with three girls friends and the four of them met a number of young men, amongst whom were the two applicants and their co-accused. The events of the evening were somewhat confused, but,to cut a long story short, the complainant became separated from her girl friends and eventually, in the early hours of the morning, found herself in a motor car with the two applicants and Javed, who was the driver.

The car was driven, plainly on the orders, so the Judge found, of Gurmohan, by Javed to a remote part of the countryside. By the time they got there midnight had passed and they were in the early hours of Sunday

morning. The girl was put in the back of the car and there she was raped first of all by Gurmohan, as well as being subjected to various indignities including having his penis put in her mouth. He was followed into the back of the car by Jaswant who also acted in a precisely similar manner amd also raped her. By this time she was in a speechless state lying in the back of the car unable to act, naked, legs apart. It was in those circumstances that Javed also raped her. She was later found to be suffering from venereal disease and to be pregnant, but the Judge dismissed those matters from his mind.

The burden of Javed's appeal both against conviction and sentence was his very limited Intelligence Quotient. He was badly sub-normal.

So far as these two applicants are concerned, the suggestion made by learned counsel on their behalf, Mr. Ashurst, is this. First of all they are not dangerous people. Secondly, they had no previous convictions recorded against them, and the Judge failed to give them credit for their good character. Next it is said that the disparity between the sentences imposed on these two men and that imposed upon Javed was such as to leave them with a justifiable sense of grievance: or, put the other way, indeed would have led any responsible member of the public who knew all the facts to think that some injustice had been done.

In view of the way in which Javed behaved and in view of his very limited intelligence, the apparent disparity between his sentence and that imposed on these two is completely explained. The Judge took the view, which was quite justified on the facts, that the only reason that Javed had been invited by the other two to rape the girl after they had done so was in order to prevent him from giving evidence against them if they were discovered. Secondly, his limited mental intelligence also came to his help so far as the length of sentence was concerned. There is nothing in the disparity point so far as Javed and the other two are concerned.

Next it is said that the disparity between the ten years and seven years was not justified. The Judge over something like a week of the trial had been in a position to judge the respective responsibilities of Gurmohan

and Jaswant. We have no reason to think that he was wrong in coming to the conclusion that Gurmohan was the organiser and Jaswant was merely a lieutenant. The difference in the sentence between the two was accordingly justified.

Next it is suggested that the sentences of ten years and seven years were in any event too long. This was a case where rape was committed by two or three men acting together -- a gang rape as it is called. The three men had in effect abducted this girl in their motor car, taken her to the countryside and there held her captive so that they could rape her. Consequently, as already indicated, the starting point of sentencing was something like eight years. The incident was the brainchild of Gurmohan. There were no mitigating features: indeed all the features, apart from their lack of previous convictions, tended to aggravate the crime. Ten years was not out of the way so far as Gurmohan was concerned nor was the seven years imposed on Jaswant in any way too long.

Those applications likewise are refused.

Turning to the case of Rafiq, which is an application for leave to appeal against sentence referred to this Court by the Registrar, Rafiq is 26, and on 20th November 1985 he pleaded guilty to attempted rape and was sentenced to four years' imprisonment. His plea of not guilty to the full offence was accepted.

He now applies for leave to appeal against that sentence and, as I say, his application has been referred to this Court by the Registrar.

The complainant was only 14 years of age. Rafiq was a friend of her family and a regular visitor to the house. On 26th February last year the girl's mother went out for the evening with her sister, the girl's aunt, leaving the victim alone with a 6-year old cousin in the house. The applicant at about 1 o'clock in the morning, having made certain that the coast was clear and that the mother was out, walked into the house without knocking and started making advances to the girl. Mr. McCallum

on his behalf describes the approaches as bizarre. We do not find them so much bizarre as deplorable.

In short, she told him to stop it and to "get lost". He pushed her against the wall, touched her breasts over her clothing, pulled down her trousers and pants and pushed his erect penis against her private parts. She thought that he had penetrated her, but in the light of the plea and the acceptance of the plea of not guilty to the full offence, we of course take it that penetration did not take place. In any event he ejaculated. The girl was telling him to stop throughout. The applicant then left the house telling the girl not to tell her mother, "or else".

The matter was reported to the police eventually, although the girl was very reluctant to admit what had happened to her mother. He said to the police that his penis had only just entered into her vagina. The girl's hymen was still intact.

It is said that the girl was sexually well developed. We accept that there were no scratches or injuries upon her. We accept that he was remorseful and that he was of good character, that the incident was short and isolated. But this was as near to the full offence as one could get without actually committing the full offence. The victim was a young virgin. The applicant took advantage of his position of trust as a neighbour, and had it not been for the plea of guilty and his good character, the sentence might very well have been considerably longer. No proper complaint can be made of four years' imprisonment for attempted rape in these circumstamces. The application is refused.

The case of Young and Jackson are two applications for leave to appeal against sentence: in the case of Young presented by counsel and in the case of Jackson a non-counsel application.

They arise in the following circumstances. On 2nd April 1984 at the Crown Court at Leeds the two men were convicted and sentenced as follows: Young, aged 20, on count 1, aiding and abetting rape, five years' youth

custody; on count 2, rape, seven years' youth custody concurrent; Jackson, who is aged 29, on count 1, rape, eight years' imprisonment; and on count 2, aiding and abetting rape, five years' imprisonment concurrent. Both renew their application for leave to appeal against sentence after refusal by the single Judge.

During the summer of 1984 these two men were part of a team of workmen repairing drains near Pontefract. They met and talked to two 15-year old school girls from the adjacent High School. On 14th July of that year these two with another workman called Monkman took the two girls to a public house in Pontefract with the intention and effect of getting the girls drunk. When they had achieved that particular part of their aim, they took the girls back to the works cabin which had been erected to house the workmen carrying out the drainage operation. Monkman stayed outside with one of the girls. He indecently assaulted her, and duly pleaded guilty and was sentenced for that indecent assault. But these two applicants took the other girl into one of the cabins. Such was her state of intoxication that she was promptly sick on the floor. Despite that both men took turns to rape her, pinning her arms above her head on the bench. When they had thus entertained themselves she was allowed to dress herself and go home.

Young was seen. He denied any rape. Indeed he said no one had sexual intercourse with the girl at all. Eventually however he admitted that sexual intercourse had taken place, adding these words, ".... so what? She's just another cabin slag". He admitted the plan to get the girls drunk and to have sexual intercourse with them. Jackson admitted sexual intercourse but denied it was without the girl's consent.

As I have said, Monkman was convicted of indecent assault and was sentenced to five years' imprisonment in total.

Now it is submitted on behalf of Young by Mr. Scott that the sentence imposed upon him of seven years' imprisonment in all was too long. The reasons he puts forward are these: first of all that Young is of significantly

limited intelligence, although he appears to be normal, and that the low intelligence made him more susceptible to persuasion by the other two men. In any event he found it difficult to refuse to go along with their plans, because he was depending upon them for a lift back home after the day's work was done. Then it is said that there was no physical violence. Of course no physical violence was necessary, because the girl was incapable by reason of alcohol of offering any resistence. Next it is said that he has supportive parents to go back to when he comes out of prison. Next it is said that the girl had previous sexual experience. That is a matter which is of no moment in circumstances such as these.

It seems to us once again that this is á case of two men raping a girl in turn, each assisting the other to do so, with the added unpleasant feature of making their objective more easy to obtain by plying the girl aged 15 with drink first. We see no reason to think that the sentence of seven years' youth custody, even allowing for his age of 20, is in any way too long.

So far as Jackson is concerned, for reasons already indicated, this was a bad type of rape by two men. It had a number of significantly aggravating features and eight years' imprisonment was by no means out of the way.

These applications are both refused.

Legal Procedure

SCOTTISH OFFICE
WHITEHALL, LONDON SW1A 2AU

18/3

A R Rawsthorne Esq
Private Secretary to the
Secretary of State for the Home Department
Home Office
Queen Anne's Gate
LONDON
SW1H 9AT

18 March 1983

Dear Mr Rawsthorne

Thank you for your copy letter of 9 March with the text of the Home Secretary's proposed Parliamentary announcement about the issue of guidance to chief officers of police in England and Wales on the investigation of rape. My Secretary of State is content with what is proposed.

As you may know, a research study is presently under way in Scotland into the processing of sexual assault cases, covering both the police and court stages. The first part, dealing with the police aspects, has recently been completed and will be published shortly. My Secretary of State has therefore decided to defer a decision on what further guidance might be issued to chief constables in Scotland until there has been an opportunity to give detailed consideration to the study's findings.

Mr Younger wishes to make the Scottish position clear by way of arranged Parliamentary Question. I enclose for information a draft of the Question which will be tabled for answer on the day following the Home Secretary's announcement.

Copies of this letter go to the recipients of yours.

Yours sincerely

M Stewart (miss)

for A MUIR RUSSELL
Private Secretary

ANNEX A

HOUSE OF COMMONS

: To ask the Secretary of State for Scotland, what action he proposes in the light of the decision by the Secretary of State for the Home Department to issue guidance to chief police officers in England and Wales on the investigation of offences of rape.

MR GEORGE YOUNGER:

My hon friend, the Member for Edinburgh, Pentlands, explained in his reply to the hon Member for Dundee, West on 9 February 1982 [Vol 17, Col 364] that a research study into the processing of sexual assault cases, including investigation by the police, medical procedures and court experiences, was being conducted by my Department and that we preferred to await the outcome of that study before considering whether major changes in present arrangements in Scotland were needed. The first part of the study, which deals with investigation by the police, is now complete and will be published shortly. I shall arrange for copies to be placed in the Library. We shall be considering, in the light of the findings in the first part of the study, whether further guidance should be issued to chief constables in Scotland in relation to the investigation of rape.

SCOTTISH OFFICE

Legal Procedure
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LEGAL PROCEDURE

10 DOWNING STREET

From the Private Secretary

14 March 1983

The Investigation of Offences of Rape

Thank you for your letter of 9 March. The Prime Minister is content for the circular attached to your letter to be issued soon, and for the Home Secretary to announce this on 21 March by means of a Written Parliamentary Answer. She is also content with the draft Answer attached to your letter.

I am copying this to David Staff (Lord Chancellor's Office), Muir Russell (Scottish Office), David Clark (DHSS) and Henry Steel (Law Officers' Department).

W.F.S. RICKETT

C.J. Walters, Esq.,
Home Office.

From: THE PRIVATE SECRETARY

4

HOME OFFICE
QUEEN ANNE'S GATE
LONDON SWIH 9AT

9 March 1983

Prime Minister

Content that the attached circular giving guidance on the investigation of rape cases should be issued, and that the Home Secretary should announce this by means of the written answer at A?

LM
9/3

THE INVESTIGATION OF OFFENCES OF RAPE

The Prime Minister will recall that the Home Secretary announced last year that he had under consideration the issue to the police in England and Wales of revised guidance on the investigation of rape. His announcement followed expressions of public concern, particularly in the wake of a television programme showing a police interview with a rape complainant.

... The enclosed circular, which the Home Secretary proposes should be issued soon, subject to the Prime Minister's views, has been drawn up with the police and in consultation with the Lord Chancellor and the judiciary (including Mrs Justice Heilbron). The Home Secretary proposes to announce the issue of the guidance by way of arranged
... Parliamentary Answer (draft enclosed) on Monday 21 March.

I am sending copies of this letter and enclosures to David Staff (Lord Chancellor's Office), Muir Russell (Scottish Office), David Clark (DHSS), and Henry Steel (Law Officers' Department).

C J WALTERS

W F S Rickett, Esq

HOME OFFICE
Queen Anne's Gate, LONDON, SW1H 9AT
Direct line: 01-213
Switchboard: 01-213 3000

Our reference:
Your reference:

The Chief Officer of Police

Dear Sir

HOME OFFICE CIRCULAR 25/1983
INVESTIGATION OF OFFENCES OF RAPE

Chief officers will be aware of recent controversy about the investigation of rape cases. It is appreciated that the great majority of these cases are dealt with sensitively, with due attention to the advice offered in Home Office Circulars 104 and 194 of 1976 on the treatment of complainants* but in view of the public concern which has been aroused, the Home Secretary considers that it would be helpful to draw attention to this advice and to bring it up to date. This Circular therefore consolidates the earlier advice and expands on one or two matters which have emerged in recent discussions as being particularly important.

The initial stage

2. As soon as a woman complains to the police that she has been raped it is important to ensure from the outset that she is treated with tact and understanding. Although in some cases it may subsequently be established that a complaint is without foundation the need for tact and understanding remains at all stages of the investigation. Before any questioning takes place - invariably, of course, in privacy - it is desirable to ensure that a medical examination is conducted, although it is recognised that any immediate questioning which is necessary, eg with a view to identifying an alleged offender who is at large, may have to take place before the medical examination. Not only will an early medical examination furnish important information on which to base further interviews, but chief officers should bear in mind that many victims of rape are anxious to wash themselves and change their clothes as soon as possible: an earlier rather than a later examination would permit this consistently with the preservation of evidence of the alleged offence. Where a child or young person under 17 is involved it will be necessary to explain to the parent or guardian the need for such examination or medical attention.

Medical examination

3. It is important that medical examinations take place in a proper clinical environment so as to reduce stress and produce an atmosphere of care and concern. Whether the best location will be a hospital, health centre, surgery or police station medical room will depend on whether immediate treatment is required but otherwise on the facilities available in a particular locality.

/Senior ...

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* These circulars drew attention to the recommendations made in the Report of the Advisory Group on the Law of Rape (Cmnd 6352) and to the provisions of the Sexual Offences (Amendment) Act 1976.

Senior officers are invited therefore to draw up or review appropriate local arrangements in consultation with local police surgeons. Amongst other things, local arrangements should be made with reference to two points. First, it is important to ensure that victims and suspected assailants are examined in different rooms, if possible by different doctors (so as to avoid the risk of cross-contamination of trace evidence). Secondly, it should be noted that some complainants may prefer to be examined by a female doctor.

Further interviews

4. Care should be taken to ensure that detailed questioning is conducted by an experienced officer who may be designated or trained for this purpose. Interviews by a number or series of different officers are likely to unsettle the complainant, who may be in an emotional and shocked condition, and should be avoided. While sympathy in the interviewing officer is more important than his or her sex, consideration should always be given to the participation or presence, where practicable, of a woman police officer.

5. The complainant should normally be asked whether or not she would like a friend or other third party present during the interview; but the interviewing officer remains responsible for deciding whether there is a risk of this prejudicing the conduct of his enquiries. Interviewing officers should bear in mind the possible application of paragraphs 4 and 4A of the Administrative Directions to the Police appended to the Judges' Rules.

6. It should be explained to the complainant that Section 2 of the Sexual Offences (Amendment) Act 1976 (reproduced at Annex A) places strict limitations on the opportunity for the defence to cross-examine or produce evidence in court about any sexual experience with a person other than the defendant. Such matters can be raised only with the leave of the judge, who must withhold leave unless he is satisfied that it would be unfair on the defendant to do so. It should not in general be necessary to ask a complainant questions about her previous sexual experience. It may, however, be necessary to ask questions which could be directly relevant to the offence under investigation, for example, whether the complainant has had sexual intercourse with anyone in the period immediately before the offence is alleged to have taken place, or about any relationship with the alleged offender. Particular care should be exercised in deciding whether to ask a complainant questions about any previous sexual experience with a third party. Before asking such questions the limitations on the admissibility of such evidence in court should be carefully considered (if appropriate after taking legal advice). If questions about a complainant's previous sexual history do have to be asked, it should be explained to the complainant why they are necessary and that she does not have to answer them. Since such questions may be of a highly personal nature tact and sympathy are, of course, essential. The complainant should also be made aware that her statement will have to be disclosed to the defendant and his legal advisers.

/Welfare .....

Welfare

7. Throughout the period a complainant spends with the police, consideration should be given to her comfort and refreshment. Before leaving the police station she should be told of and, unless she has already contacted them, be given the opportunity to be referred to any appropriate local services, whether medical, social or voluntary. Similarly, how to apply for compensation to the Criminal Injuries Compensation Board should be explained in the normal way.

Anonymity

8. Section 4 of the Sexual Offences (Amendment) Act 1976 (subsections 1-4 of which are reproduced at Annex A) prohibits the publication, after a person has been accused of a rape offence, of matter likely to lead to the identification of the complainant by members of the public, other than by direction of the judge in the special circumstances provided for in section 4(2) of the Act. Complainants should be made aware of this provision at the earliest possible stage. In the spirit of this provision, it continues to be important that the anonymity of complainants should be protected from the moment that an allegation of rape is first made.

Follow-up action

9. The police should bear in mind the desirability of maintaining contact with the complainant pending the apprehension or trial of the alleged offender. This could be achieved through a designated officer who should also be responsible for informing the complainant of the outcome.

Training

10. Finally, it will be helpful to mention training, even though it is readily recognised that chief officers keep training needs under constant review. This is a practice of which, of course, the Home Secretary strongly approves and which he imagines will take the matter of this circular in its stride. This circular does not prescribe, and its contents do not indicate the need, for the general introduction of specially trained squads, to deal with allegations of rape. It remains open, however, to individual chief officers to consider establishing such squads if the local circumstances justify it.

R M MORRIS

E.R.

THE SEXUAL OFFENCES (AMENDMENT) ACT 1976: SECTION 2

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.

(3) In subsection (1) of this section "complainant" means a woman upon whom, in a charge for a rape offence to which the trial in question relates, it is alleged that rape was committed, attempted or proposed.

(4) Nothing in this section authorises evidence to be adduced or a question to be asked which cannot be adduced or asked apart from this section.

THE SEXUAL OFFENCES (AMENDMENT) ACT 1976: SECTION 4: SUBSECTIONS 1-4

4. (1) Subject to subsection (7)(a) of this section, after a person is accused of a rape offence no matter likely to lead members of the public to identify a woman as the complainant in relation to that accusation shall either be published in England and Wales in a written publication available to the public or be broadcast in England and Wales except as authorised by a direction given in pursuance of this section.

(2) If, before the commencement of a trial at which a person is charged with a rape offence, he or another person against whom the complainant may be expected to give evidence at the trial applies to a judge of the Crown Court for a direction in pursuance of this subsection and satisfies the judge-

(a) that the direction is required for the purpose of inducing persons to come forward who are likely to be needed as witnesses at the trial; and

/(b) that ....

(b) that the conduct of the applicant's defence at the trial is likely to be substantially prejudiced if the direction is not given,

the judge shall direct that the preceding subsection shall not, by virtue of the accusation alleging the offence aforesaid, apply in relation to the complainant.

(3) If at a trial before the Crown Court at which a person is charged with a rape offence the judge is satisfied that the effect of subsection (1) of this section is to impose a substantial and unreasonable restriction upon the reporting of proceedings at the trial and that it is in the public interest to remove or relax the restriction, he shall direct that that subsection shall not apply to such matter relating to the complainant as is specified in the direction; but a direction shall not be given in pursuance of this subsection by reason only of an acquittal of a defendant at the trial.

(4) If a person who has been convicted of an offence and given notice of appeal to the Court of Appeal against the conviction, or notice of an application for leave so to appeal, applies to the Court of Appeal for a direction in pursuance of this subsection and satisfies the Court-

(a) that the direction is required for the purpose of obtaining evidence in support of the appeal; and

(b) that the applicant is likely to suffer substantial injustice if the direction is not given,

the Court shall direct that subsection (1) of this section shall not, by virtue of an accusation which alleges a rape offence and is specified in the direction, apply in relation to a complainant so specified.

A

ANNEX B

ARRANGED QUESTION AND ANSWER: RAPE GUIDELINES

[ ] To ask the Secretary of State for the Home Department if he has yet issued revised guidance to the police on the investigation of offences of rape; and if he will make a statement.

DRAFT REPLY

Yes. My Department has issued guidance to chief officers of police which brings up to date and supplements previous guidance. A copy of the revised guidance has been placed in the Library.

The revised guidance stresses the need for rape complainants to be treated with tact and sympathy and covers a number of important areas such as medical examination, questioning about previous sexual history, anonymity and follow up action. It emphasises the importance of training and the need for interviews to be conducted by an experienced officer, and urges the participation or presence of a woman police officer.

The proper and sensitive investigation of offences of rape is a matter to which the public and chief officers of police rightly attach great importance. It is vital that women who have undergone the terrible ordeal of rape should have the confidence to report the matter to the police and I therefore welcome the opportunity which the guidance gives to draw attention to existing best practice.

010/1

Legal Procedure

Prime Minister 2

LM
19/3

PRIME MINISTER

GLASGOW CASE

As you know the application for a private prosecution was heard this week and the hearing concluded today.

The Court deferred judgment and I would think it will be a week or possibly two weeks before judgment is issued. Although it is only an impression gained at the hearing I consider it likely that the Court will grant the application if they are satisfied that there can be a fair trial in this case in spite of the very strong publicity which there has been about it. I think the hearing conluded with the Court not having made up its mind fully on this question. What the ultimate answer will be on this point I therefore cannot forecast.

I am copying this minute to the Secretary of State for Scotland and the Attorney General.

Cons

for M of C

(Dictated by the Lord Advocate and initialled in his absence)

19th March 1982.

Copy to Mr Duncan

Prime Minister

Lord Advocate's Chambers
Fielden House
10 Great College Street
London SW1P 3SL

Telephone. Direct Line 01-212 0100
Switchboard 01-212 7676

Clive Whitmore Esq.,
Principal Private Secretary,
10 Downing Street,
London SW1.

11th March 1982

Dear Mr. Whitmore,

GLASGOW RAPE CASE: PRIVATE PROSECUTION

I refer to my letter of 8th February and other correspondence.

The Lord Advocate has asked me to inform you that the Bill for Criminal Letters in connection with the above case will be heard by the High Court in Edinburgh next Tuesday and Wednesday, 16th and 17th March. The Lord Advocate will himself appear before the Court to explain his position on this case.

Yours sincerely,

Christine M Duncan

Private Secretary

Transcript:
14/2.

✓MAP

(For rape file) 2/1 Legal Academic

BRIAN WALDEN:

Sir Michael

it's clear that women want greater protection from the law against the crime of rape, and last month in the House of Commons the Prime Minister seemed to be promising that some action would be taken on those lines. Now, does the Government intend to act?

SIR MICHAEL HAVERS, Q.C.,M.P., ATTORNEY-GENERAL:

Well, everything that we have in mind we really think ought to be following consultation with the various people concerned. I've been discussing this with the Lord Chancellor and with the Home Secretary, and in particular with the Prime Minister. We are certainly not going to do nothing, but we do feel that with some, perhaps major changes, either in administration or even perhaps in procedure, that we must have the widest consultation first.

BRIAN WALDEN:

That's reassuring. I take from that that you are prepared to take drastic action and bring about quite radical changes, if the consultations lead you to think that that should be done.

SIR MICHAEL HAVERS, Q.C., M.P.:

Well, what I can say is this. I am horrified by what I've seen on some of the programmes you have shown today. I've been horrified after I read the article in the Times earlier in the week. And it seems to me quite clear that it is essential that women should have confidence in the procedure and in the trial, so that they feel justified in coming forward. Because if they don't, it can't be in the public interest that rapists are not convicted.

BRIAN WALDEN:

It does seem, I mean there are a number of things that could be done and we might mention one or two in a moment, but this is the really crucial area, isn't it? It does seem that something quite decisive has got to be done about our judicial procedure in these regards.

SIR MICHAEL HAVERS, Q.C., M.P.:

Yes. Anything that tends to lead to lack of confidence, and may I just say this. I think another reason that women don't come forward is not just the two you have shown, but also the fear that it will be known in their home, in their street, and perhaps where they work. And even without perhaps thinking it through as to what may follow afterwards, I think that, sometimes, puts them off.

BRIAN WALDEN:

Let me then run through the number of judicial changes that you might contemplate making. First, let's take something that came out, I think very clearly in our film, and is regarded by many women as an absolute scandal. Namely that the 1976 Act, which was supposed to stop them being questioned about their sexual history, in fact does not stop them being questioned, and they know that they are going to be humiliated in court, in fact, when they go into the witness box. Now is the Government going to do anything at all to tighten up that Act, so that that doesn't happen?

SIR MICHAEL HAVERS, Q.C., M.P.:

Well, the Act itself, I would have thought, really was tight enough if properly applied because ...

BRIAN WALDEN:

It isn't being properly applied then, is it?

SIR MICHAEL HAVERS, Q.C., M.P.:

Because the words are if, and only if, the judge feels the evidence must be admitted to be fair to the defence. It seems to me a very, very strict limitation.

BRIAN WALDEN:

Alright then, Sir Michael, I hate to butt in on your answers, but then I must put it to you quite bluntly. That, alright, you think that, and by the way I well remember that the House of Commons thought that in '76, but it isn't happening, is it? So will you circulate the judges, or take some other means to let them know that they should carry out what Parliament intended?

SIR MICHAEL HAVERS, Q.C., M.P.:

You know, Brian, from your days in the House, I don't circulate Judges, the Lord Chancellor does.

BRIAN WALDEN:

Alright, will you get Quentin to do so?

SIR MICHAEL HAVERS, Q.C., M.P.:

I think also, the Judges are just like any other human beings. Some of them will be seeing the programme, they read the newspapers. They react to the climate of public opinion just like anybody else, and I suspect a lot of them are going to, when faced with this problem, look at it perhaps in a new light in the future. If they don't, then there is always, of course, the power to legislate, to restrict it even more. But my belief is it is very tight at the moment.

BRIAN WALDEN:

Let's be absolutely clear on this, Sir Michael, because I think that that's important, and it will for many women, and indeed many other people, be extremely reassuring. What you're saying is that you're not altogether happy with the way the law is at present being applied. You think the law may be quite adequate, but you don't feel that the Judges are taking sufficient notice of it.

SIR MICHAEL HAVERS, Q.C., M.P.:

I think, from what one read in the article and what I've seen today there may be cases where another Judge would not have permitted the trawling through the girl's past. Which I find very objectionable. There are occasions, because the defendant is presumed innocent until he is convicted and take the case of the bottle in the Pub. I mean, I am not at all surprised that the jury aquitted on that one. The other one ...

BRIAN WALDEN:

Though bear in mind, one man in that case did plead guilty.

SIR MICHAEL HAVERS, Q.C., M.P.:

Yes.

BRIAN WALDEN:

It tells you a lot, doesn't it?

SIR MICHAEL HAVERS, Q.C., M.P.:

They probably wouldn't have known that.

BRIAN WALDEN:

Of course not.

SIR MICHAEL HAVERS, Q.C., M.P.:

In the other case, with the girl with the two men in the car, with what I called a rather bullying type cross-examination. Jurors do not like bullying by Counsel, and quite often it is counter-productive.

BRIAN WALDEN:

I wonder if I could ask you, in view of that Sir Michael, because you are obviously going to do something if they don't. Would you like to take this opportunity to suggest to Judges that they might, in fact, look again at that section of the '76 Act and be much more strict about allowing this kind of cross-examination of the women ?

SIR MICHAEL HAVERS, Q.C., M.P.:

Yes, it's not for me to suggest to Judges, but what ...

BRIAN WALDEN:

Supposing it were.

SIR MICHAEL HAVERS, Q.C.,M.P.:

But what I can say is I am absolutely confident that Judges

SIR MICHAEL cont....

will think again, in view of what has happened, many of them no doubt would be very surprised to find it was more often that not the case that this proviso was exercised. And I hope very much that they will remember the atmosphere which followed the Rose Heilbron Committee report, in which Parliament decided to implement that particular restriction upon the evidence.

BRIAN WALDEN:

I wonder if, in view of your saying that Sir Michael, that I can put it to you like this. Obviously it is clear that you think that many of these cross-examinations shouldn't be permitted by Judges. I take it from what you've said earlier that if this goes on, if in fact the '76 Act doesn't appear to work, then you are contemplating, women can be reassured, can they, that you are contemplating tightening the Law so that the intention of Parliament is actually carried out?

SIR MICHAEL HAVERS, Q.C., MP:

Yes, I think the '76 Act was right. If in fact it is failing, because of the way it is interpreted, then I should be prepared to have the law reformed to tighten even more, in the way that, in fact, Dame Heilbron suggested. You remember the striking similarity point which was lost, I think, in the House of Lords during the passage of the '76 Act.

BRIAN WALDEN:

Since you've brought up Rose Heilbron's suggestions, can we have the one about her suggestion that there should be four women on every rape jury. Now is the Government going to do anything about that?

SIR MICHAEL HAVERS, Q.C., M.P.:

I don't think it is necessary. I've had quite a lot of work done on this over the past few days, and four are usually the number anyway. Now the moment you start tinkering with a jury in order to contrive apart from being a random jury you've got a specific number of women or men or ethnic groups, then we get ourselves into the difficulty that we've had,you remember, over checking jurors in special sorts of cases. I am hoping, and certainly what I've been told seems to show this, that we are getting our four or five women on each jury, on average.

BRIAN WALDEN:

Yet it does, even if that is the case, and of course one couldn't guarantee it in the case of a particular jury, it does seem quite extraordinary, doesn't it, that defending counsels think it's worhtwhile to drag up the sort of piffle that some of them do, in order to influence the jury. How do you account for that?

SIR MICHAEL HAVERS, Q.C.,M.P.:

Well, some counsel are less experienced than others. You will very rarely find experienced counsel overdoing that. Some counsel just, I don't think appreciate, how much juries hate bullying and going beyond the limits of what they call a proper cross-examination. It may be that their pupil masters didn't teach them how to do it.

BRIAN WALDEN:

What about shifting the normal burden of proof? Now let's be careful about this because, of course, that is a very radical suggestion. But let us take that where violence has obviously been used, where an independent doctor can say that a woman is massively bruised, why shouldn't it be up to the defendant to prove that she did consent?

SIR MICHAEL HAVERS, Q.C.,M.P.:

Well. It is a fundamental change, as you say. Radical, even more. It is fundamental. I am certainly not putting it out of court. It is a thing that I am going to consider with all the other suggestions, because a programme like this, a public outcry like this, is in fact very valuable. Because it makes all of us who have to deal with this, concentrate on it, become aware of the problems, and to me, I say again, the basic problem is that we must encourage women to come forward so that the rapists are convicted. And if we have to do various things to make them come forward, to make them feel that they are going to be more sympathetically treated both by the police and in court, then the ultimate aim, that is to convict them, is worth while.

BRIAN WALDEN:

Well, I suspect that quite a lot of women will be, not all of course, not all will think that you've been radical enough, but quite a lot of women will be reassured by your saying that. However, there is something else that they will be concerned about, and that is sentencing policy. Now, does the Government, or does the Government not, intend to legislate to have automatic gaol sentences for rapists?

SIR MICHAEL HAVERS, Q.C.,M.P.:

Now, we've have considered this very carefully. I think really the issue has been resolved by what the Lord Chief Justice said. I mean he has given a direction to Judges, except in wholly exceptional cases. The rapist must go to prison at once. Now if we have an automatic sentence I believe that it will lead, in a number of cases, where it is a minor rape, perhaps between the boyfriend and girlfriend and she has gone off him, and he has persisted...

BRIAN WALDEN:

I don't want to pick you up on words, Sir Michael, but what on earth is a minor rape?

SIR MICHAEL HAVERS, Q.C.,M.P.:

A minor rape is where two people have been having an affair for years, perhaps months or years, and then the girl decides that she doesn't want to allow him to go to her bed and he insists. Now that is quite different from the rape where there is a stranger leaps upon a woman and drags her over the wall. I think if, in that case, the jury knew there was a mandatory sentence for imprisonment they would say not guilty. And we don't want any risk of jurors, in fact, finding verdicts because they are sympathetic, because they do not want the man to go to prison automatically.

BRIAN WALDEN:

Alright, Sir Michael. Now quite a lot of that, I think, really meets the point. But, of course, there are a lot of promises involved in it. That is understandable if consultations are still going on. Nontheless, you will be expected to deliver on those promises, and I wonder if I can ask you along with that; A, whether you are going to deliver, and secondly is there anything else, at all, that you can say to reassure any woman watching this programme who may still be doubtful that anything is going to be done to increase her protection?

SIR MICHAEL HAVERS. Q.C.,M.P.:

The promises I have made, Brian, are to some extent dependent upon what changes are brought in by the police themselves and by the Judges themselves. I am not saying that we would have to legislate. It may be that the reaction would be sufficient. That common sense will, come quite clear that this Act, for example, is applied in the way Parliament intended it to. If it isn't, then of course we would have to consider legislating. What I would like also to see is that when the complainant does go to the Police that she is sympathetically treated. That if there was an experienced woman police officer available she should be given the chance of seeing him. Medical examinations, if possible, to be in hospital and not in the Police station. A woman doctor, if available, again, if that is what the complainant wants.

BRIAN WALDEN:

And from what you have said earlier, Sir Michael, I take it that all of this is to produce a higher conviction rate, and therefore greater protection.

SIR MICHAEL HAVERS, MP., Q.C:

Yes

BRIAN WALDEN:

Sir Michael, thank you very much indeed.

WR 15/2

HOME SECRETARY

QUEEN ANNE'S GATE
LONDON SWIH 9AT

12 February 1982

Dear Ian

THE LAW ON RAPE

I attach as requested some briefing material for the Attorney General's appearance on next Sunday's "Weekend World" programme.

I am copying this note and enclosure to Willie Rickett (No.10) and Michael Collon (Lord Chancellor's Office).

Yours ever

Colin

C. J. WALTERS

J. Nursaw, Esq.

Background

1. Home Office guidance to the police, first issued in 1976 following the report of the Advisory Group on the Law of Rape (Cmnd 6352), draws attention to the following points in the report of direct concern to the police:-

a) To be fully effective, anonymity for complainants must start from the moment when the allegation of rape is made to the police;

b) Tactful and sympathetic questioning of complainants is important. Experience and sympathy in the interviewing officer are more important than his or her sex;

c) Medical examination in a clinical environment such as a hospital or surgery should reduce distress, provide an atmosphere of care and concern, and provide for immediate treatment where desirable. As, however, there may be difficulties in the way of having such examinations away from police stations, adequate and suitable facilities for medical examinations in police stations are needed.

d) If possible and if time permits the police should ensure that the complainant is referred to the appropriate services, whether medical or social : this is best done before she leaves the police station;

2. Since then and until the Thames Valley television programme, the conduct of enquiries into allegations of rape has not attracted much public attention. Such interest as there has been has centred on the role of voluntary organisations such as the Rape Crisis Centre in London. The Metropolitan Police have been suspicious of the Centre on the grounds that its staff have dissuaded victims from reporting crimes to the police and have on occasions given victims advice which has led to evidence being lost or put at risk. For its part the Centre has maintained that the police are generally unsympathetic in precisely the way shown in the television programme.

3. The only other criticism of police practice reported to the Home Office has concerned the questioning of complainants about their previous sexual experience. Mr Justice Mars-Jones has expressed concern that despite the restrictions placed by the Sexual Offences (Amendment) Act 1976 on such questioning in court, the police nevertheless ask embarrassing and irrelevant questions during their enquiries, and that the answers are liable to disclosure to the defence. However, he has so far brought only one specific case to notice; and while he

/has

has not yet been told the outcome of enquiries of the Chief Constable, it seems clear that in this case the questioning was on the whole justifiable and proper.

4. The Thames Valley television programme has demonstrated that further guidance to the police is needed, although the Home Secretary has not yet definitely committed himself to issuing it and the Association of Chief Police Officers(ACPO), who have not yet been formally consulted about its terms, may take the line that one admittedly mishandled interview does not justify a new circular or show that the great majority of interviews are being conducted other than properly. But something positive needs to be done to encourage women to come forward to the police who might now be reluctant to do so - some women's organisations have suggested that only a minority report a rape - and the televised interview demonstrated not one but a number of failings, so that a friendlier approach in future on the part of interviewing officers will not be a sufficient response.

5. Mr Pain, the Chief Constable of Kent and President of ACPO, has appeared in a pre-recorded interview about rape which it is understood will be shown during the "Weekend World" programme. He made the following points:-

a) The police had to be sure of their ground before embarking on a prosecution : rape is easy to allege but difficult to prove. Questioning should therefore be sympathetic but firm.

b) There is no need for any radical changes to police procedures or for specialist rape squads to be set up.

c) But there should be improved training in how to deal with victims of all serious crimes, including rape.

d) It is desirable for women to be medically examined earlier rather than later.

e) There is a continuing important role in this area for experienced women police officers.

6. The main points that any further guidance will make are likely to be as follows:-

a) Complainants should be treated with tact and understanding at all times.

b) A medical examination should normally be arranged before any detailed questioning, so as to permit the woman to wash and change consistent with the preservation of evidence.

/c) A

c) A strengthening of the present guidance about the desirability wherever possible of medical examination at a hospital or surgery.

d) Interviews by a series of different officers should be avoided, and consideration should be given to the participation or presence, where practicable, of a woman police officer.

e) Complainants should normally be asked whether they would like someone with them during the interview.

f) Detailed questioning should be undertaken only by an experienced officer, of either sex : there may be scope for the designation of selected officers for this purpose who would acquire special knowledge of forensic and corroboration requirements, etc.

g) Questioning about previous sexual experience should not take place unless directly relevant to the alleged offence or the credibility of the allegation; and complainants should be informed about the provisions of the 1976 Act concerning this and anonymity.

h) The desirability of maintaining contact with the complainant pending the apprehension or trial of the alleged offender.

7. The proposed guidance is therefore broadly consistent with Mr Pain's views; indeed it would be surprising if there were any marked disagreement about how the police should act in such cases.

1. What is the Government doing about the failure of the police to deal properly with complaints of rape in the light of the Thames Valley programme?

Everyone agrees that the interview shown on television was open to serious criticism. The Thames Valley Police themselves were the first to accept that they had to look carefully at their procedures. But we must be careful not to leap to the conclusion that what we saw on television truly reflects the general picture or that all rape victims are dissatisfied with the way they have been treated. The police themselves are of course very anxious that all women who have been attacked should tell them as soon as possible so that the offender can be caught, and I am sure that in the light of the programme they are fully aware of the need to encourage women to have confidence in how they will be treated and to come forward accordingly. Having said that, the Home Secretary is now considering what additional guidance can usefully be given about how cases of rape should be handled. Such cases are never easy; they invariably involve distress; and the Government is anxious that the chances of bringing offenders to justice should be maximised, and this of course requires the fullest cooperation of their victims.

2. What will this guidance say?

As I have indicated, the Home Secretary is considering this. It can of course only be guidance - chief constables are responsible for the conduct of investigations undertaken by their force. But it seems sensible that there should be agreed procedures about such matters as medical examinations /Mr Pain has already mentioned some of these matters/. Of course it also hardly needs repeating that it is essential that women should always be treated with tact and sympathy, and should never be made to feel that they are guilty of a crime rather than possibly a victim of one.

/3. Why

3. Why aren't victims automatically given a medical examination?

I have no doubt that a medical examination should be a normal procedure, but of course the police must undertake some initial enquiries when they are first told of an allegation. Unfortunately there is no question that some allegations are not only doubtful but have no basis in reality whatsoever. Our natural concern for the plight of victims should not make us lose sight of the fact that false allegations are made.

The Home Secretary is considering all this in possible further guidance, but there can be no doubt that there should be a strong predisposition to medical examniation at an early stage /as Mr Pain has already indicated/. Guidance to the police is very rarely a matter of telling them something new, it is more a question of clearly setting out what is already good practice.

4. What are the present arrangements for medical examinations?

There are no hard and fast arrangements. The Advisory Group on the Law of Rape recommended that victims should be examined in the clinical environment of a hospital or surgery with a view to reducing distress and providing an atmosphere of care and concern, but it was recognised that on occasions there was no practical alternative to using police stations. So examinations can be conducted by hospital doctors or police surgeons, who are of course general practitioners, in various places.

5. Can women insist on women doctors?

This is not something which is generally within the direct control of the police. If, for example, it is thought quickest and on the whole best to take a woman to hospital, a woman doctor may or may not be readily available. I would think that most women would not think a doctor's sex important. But I expect that the police would naturally do all they reasonably could if a woman, perhaps in a very distressed state, made a particular point of wanting to see a woman doctor.

/6. Shouldn't

6. Shouldn't there be better liaison between the police and organisations such as the Rape Crisis Centre, which has complained that it receives only hostility from the police?

The police are already advised to refer women to the appropriate medical or social services. It would be foolish to rule out anything which contributed towards the common objective of encouraging women to report crimes to the police at the earliest possible moment, or which gave women in distress any additional support they need. How this is best arranged will vary from place to place in the light of local circumstances; but the message must be that if the involvement of a particular organisation will truly help rather than hinder the police in their task of catching the offender then this should be encouraged.

7. Has the Sex Discrimination Act prevented the use of women officers in cases of rape?

No. The Act does not in any way restrict the availability of officers of either sex for particular classes of police work. If chief constables consider that selected officers should receive special training in dealing with allegations of rape or other serious sexual assaults this is wholly within the terms of the Act, provided that men and women officers have equal opportunities for such training. But I should make the point that the Advisory Group on the Law of Rape, chaired by Mrs Justice Heilbron, stressed that sympathy and experience in officers conducting interviews are more important than their sex.

8. Should special units of women police officers be established to deal with alleged cases of rape?

The Home Secretary is considering the issue of further guidance to the police about the handling of allegations of rape. But he has already made it clear that no special units need to be set up for allegations to be properly investigated; and as the Advisory Group on the Law of Rape has stressed, sympathy and experience in the officer concerned are more important than his or her sex.

/But

But there may be scope for selected officers with the right qualities to receive special training in the questioning of victims.

9. What has happened to the officers shown on the television programme?

I understand that they have been advised by senior officers about the conduct of interviews with members of the public.

10. Why do we have to wait for a TV programme to draw attention to these issues?

This suggests they are newly discovered when in fact they are not. After all the Advisory Group on the Law of Rape went into all this in their report in 1976, and the debate on the subject has been a continuing one since then. The real point perhaps is that these are issues to which it is almost impossible to give too much attention. If the result is to persuade more victims to come forward and to enhance the effectiveness of police investigations, then this controversy will have been worthwhile.

E.R.

Criticisms of the operation of the Sexual Offences (Amendment) Act 1976

1. Recent articles in the Times and in New Society have referred to research on the operation of section 2 of the 1976 Act which places restrictions on the questions that can be put to a complainant in cross-examination pertaining to her past sexual experience with anyone other than the defendant (see paragraph 2(ii) of briefing attached). That section of the Act derives directly from the recommendations of the Heilbron Report. The articles suggest that defence counsel are regularly questioning complainants about their sexual history in cases where this is of dubious relevance. This is said to occur sometimes without the leave of the court first having been obtained, and sometimes with the concurrence - or even at the initiative of - the judges themselves. We are aware of earlier similar criticisms of the working of this aspect of the law, mainly from women's groups.

2. This is among the matters which the Criminal Law Revision Committee will be examining in their review of the law on sexual offences; the Committee would no doubt welcome any evidence that is available about the working of these provisions of the Act.

3. It is not known whether a report has been prepared or published on the research from which the articles, which are selective and somewhat anecdotal, derive.

Need for a new inquiry into rape?

4. The Prime Minister has recently taken the opportunity to discuss with Dame Rose Heilbron, who chaired the Advisory Group which examined the law on rape in 1975, the need for a new special inquiry into rape. Her view, which the Prime Minister shared, was that the law on rape in England and Wales was basically satisfactory in its present form. This is not to suggest that it is necessarily beyond improvement. But those issues which have been identified as requiring examination which were not covered by Dame Rose Heilbron's enquiry are already under review by the Criminal Law Revision Committee in consultation with the Policy Advisory Committee on Sexual Offences,

in the context of their work on the law on sexual offences generally. This includes in particular rape and allied offences and the penalties for them.

RAPE.

The President Law on Rape

Most of the present law is contained in the Sexual Offences (Amendment) Act 1976. This implemented nearly all of the recommendations of the Advisory Group under the chairmanship of Mrs. Justice Heilbron which examined the law of rape in 1975, following public outcry, in which Jack Ashley played a major part, over decisions in certain cases.

2. The main provisions of the Act are:

(i) A man commits rape if he has unlawful sexual intercourse without the woman's consent, knowing that she does not consent, or being reckless as to whether she consents or not.

(ii) The previous sexual history of the complainant with men other than the accused is inadmissible in evidence except by leave of the trial judge, which he may grant only if satisfied that it would be unfair to the defendant to withhold it.

(iii) The complainant is protected from having her name revealed in the Press (as is the accused unless he is convicted).

The Review by the Criminal Law Revision Committee

3. The law on rape is already under review. The Criminal Law Revision Committee (Chairman, Lord Justice Lawton) is reviewing the whole of the law on sexual offences, including rape.

4. In a Working Paper published in October 1980, the Criminal Law Revision Committee said that it saw no reason for trying to improve on the definition in the 1976 Act and would concentrate on matters not covered by it. The Working Paper made certain provisional recommendations of which the following are of the most interest:

(a) Inducing sexual intercourse by fraud or threats other than threats of force should be criminal and attract heavy penalties but not be rape; a minority considered that this amounted to a narrowing of the law on rape and opposed the recommendation.

(b) The offence of rape should be extended to cover husbands who have sexual intercourse with their wives without consent (prosecutions would require the consent of the DPP).

(c) Men and women who aid or abet rape should be punished for aiding and abetting, even if the principal offender was acquitted of rape.

(d) The maximum penalty for rape should continue to be life imprisonment: in particular there should not be a two-tier offence with a lesser penalty where there was no actual ~~evidence~~ violence, or threat of violence by a stranger to the victim.

Most of the issues raised by the Criminal Law Revision Committee are relatively minor; there is no suggestion that the existing law on rape is fundamentally defective.

5. The recommendation as to marital rape followed the advice of the Policy Advisory Committee on Sexual Offences (which numbers among its members not only lawyers and judges but also doctors, social workers, sociologists, a police officer, a headmistress and a clergyman). This Committee, chaired by Mr Lord Justice Waller, was set up to provide an assessment of lay opinion and to advise the Criminal Law Revision Committee on medical and social issues.

Reaction to the Proposals

6. So far there is little consensus on the specific issues raised. Women's groups have suggested that the offence of rape should be extended to all penetrations (buggery, oral sex, assault with instruments); that the absence of consent should be replaced by the concept of "against the woman's will"; and (contrary to the general law on evidence) that the man's previous sexual offences should be made known to the jury. In general, lawyers' groups who have commented seem opposed to any widening of the law of rape.

Timing and Scope of the Review

7. The Criminal Law Revision Committee and the Policy Advisory Committee have yet to assess reaction to the Working Paper with a view to producing a final report. It is not easy to predict how long this will take, but it is unlikely that there will be a final report for at least a year.

8. The Criminal Law Revision Committee will take full account, in framing its eventual proposals, both of comment on the Working Paper and of recent events.

SUBJECT
cc Mark

file

tcc Press.

RM
Legal Procedure

10 DOWNING STREET

From the Principal Private Secretary

10 February, 1982

Weekend World Programme

on Rape

The Attorney General had a word with the Prime Minister this afternoon about the line he should take when he appeared in the forthcoming Weekend World television programme on rape.

He said that he proposed to tackle the issue in three separate stages - the investigation of a complaint of rape, the trial and sentencing. The difficulty he would face in answering questions about investigation was that he could say very little that was new. The Home Office were very chary about appearing to give instructions to Chief Constables. He would like to be able to say that police forces were of course re-acting positively to all the recent public concern about rape cases and the law of rape. On a more detailed point, it would be helpful if he could say that when a woman went to the police with a complaint of rape, she should be given the choice of being seen either by a woman police officer and a woman doctor, if they were available, or by a male police surgeon and male police officers. He would be discussing further with the Home Office precisely what he could say about the investigation stage. As regards the trial stage, he would plainly have to be very careful not to appear to be telling the judiciary what it should do but he thought that he could say that judges should handle rape cases sensitively. Judges were human beings and they read newspapers and watched television like other people. They were fully alive to the present public concern about rape and they would no doubt be re-acting to it in the way they conducted rape trials. His own father had been a High Court judge and he used to go to great pains to put complainants as much at their ease as possible when they were giving evidence. As far as sentencing was concerned, he would take the line that the Lord Chief Justice had dealt with this issue. He was however certain to be asked whether there was not a case for changing the law to allow the prosecution in a rape case to go to appeal with a view to having the sentence increased. In reply he proposed to take the line that this idea had been raised during the second reading of the Criminal Justice Bill

/and

and that he was now considering it further. But he would point out that there were a lot of objections to it and he would describe some of them. One of them, for example, was that such a change would have to apply not only to rape but to a lot of other offences, and there would almost certainly have to be some way of filtering them such as a requirement that the permission of the Attorney General had to be obtained before an appeal couldbe instituted. He would add that if there were any question of proceeding with the change, there would need to be very wide consultations before any substantive steps were taken.

The Attorney General went on to say that he would make it clear that the state of the law of rape itself was thought to be generally satisfactory, though he would not claim it was perfect and he would mention the work which the Criminal Law Revision Committee had in hand in this area. He would draw attention to the findings of the Advisory Group on the Law of Rape in 1975 and emphasise that what was needed above all was sensitivity in the way in which both the police and the courts dealt with rape cases. His efforts in this direction would not, however, be made any easier by the article in today's Times.

The Prime Minister said that she thought that the Attorney General's approach to the programme was wholly on the right lines. She agreed that it was very important that he showed himself to be sensitive and sympathetic towards the present public concern. He might find it helpful in this respect to quote what he had said about the way in which his father had dealt with rape cases, since this would give what he said on the programme a personal touch.

Yours ever,

Mervi Thatcher.

Jim Nursaw, Esq
Attorney General's Office

FROM THE PRIVATE SECRETARY

Legal Procedure

HOUSE OF LORDS,
SW1A 0PW

5th February, 1982

James Nursaw Esq.,
Legal Secretary to
The Right Honourable
The Attorney General,
Law Officers' Department,
Royal Courts of Justice,
Strand,
London,
WC2.

Ref: L12/127/08(2)

Parliamentary Question on
Contributory Negligence and Rape

With my letter to Clive Whitmore of 29th January I enclosed a copy of the inspired Parliamentary Question on contributory negligence in relation to a charge of rape, together with the answer approved by the Lord Chancellor.

You have now told me that the Attorney General is content not to press the amendment to that answer which he at one stage proposed, and Christine Duncan has confirmed that the Lord Advocate would like to see a statement added to the effect that this is also the law of Scotland. The final answer will therefore read:

> "No. Contributory negligence is a legal concept relevant only in an action for damages for negligence in the civil courts and is not relevant to a charge of rape in the criminal courts. I understand from my noble and learned Friend the Lord Advocate that this is also the law of Scotland.".

I would be grateful if you would arrange for this answer to be given.

/Contd.

I am sending copies of this letter to the recipients of my letter of 29th January.

M.H. Collon

File AH

LCS
HO
LCO
LAD
CO

10 DOWNING STREET

From the Principal Private Secretary

5 February 1982

Dear Jim,

LAW OF RAPE AND CONTRIBUTORY NEGLIGENCE

Michael Collon wrote to me on 29 January 1982 enclosing a draft Parliamentary Question and Answer on contributory negligence and rape. Christine Duncan also wrote to me on 3 February letting me have the Lord Advocate's comments on the draft Answer.

I have now been able to consult the Prime Minister and she is content with the draft Question and Answer suggested by the Lord Chancellor, as amended by the Lord Advocate. These in their final form then are as follows:-

QUESTION — To ask Mr Attorney General whether an allegation of contributory negligence can be advanced as a defence to a charge of rape or any mitigation of sentence.

ANSWER — No. Contributory negligence is a legal concept relevant only in an action for damages for negligence in the civil courts and is not relevant to a charge of rape in the criminal courts. I understand from my noble and learned Friend the Lord Advocate that this is also the law of Scotland.

Although I said in my letter of 27 January 1982 to John Halliday recording the outcome of the Prime Minister's meeting with Dame Rose Heilbron that we here would arrange for the Question to be put down to the Attorney General, you and I subsequently agreed that it would be simpler if you did this. I should be grateful if you would now go ahead as soon as possible.

I am sending copies of this letter to John Halliday (Home Office), Michael Collon (Lord Chancellor's Office, Christine Duncan (Lord Advocate's Department) and David Wright (Cabinet Office).

Yours ever,

Alex Galbraith.

AH

Jim Nursaw Esq.,
Law Officers' Department.

1.

PRIME MINISTER

c.c. Mr. Gow
Mr. Pattison

Law of Rape: Contributory Negligence

When you had your meeting with Dame Rose Heilbron last week, you said that you thought that we should get an authoritative statement on the law of rape and contributory negligence on the record in Hansard, and you invited the Lord Chancellor to produce a suitable draft Question and Answer.

Lord Hailsham has now submitted the following form of words which has been agreed with the Home Secretary, Attorney General and Lord Advocate:-

Question — To ask Mr. Attorney General whether an allegation of contributory negligence can be advanced as a defence to a charge of rape or any mitigation of sentence.

Answer — No. Contributory negligence is a legal concept relevant only in an action for damages for negligence in the civil courts and is not relevant to a charge of rape in the criminal courts. I understand from my noble and learned Friend the Lord Advocate that this is also the law of Scotland.

Are you content with this Question and Answer? If you are, arrangements will be made to get the Question put down as soon as possible.

Yes

3 February, 1982.

Lord Advocate's Chambers
Fielden House
10 Great College Street
London SW1P 3SL

Telephone: Direct Line 01-212 0100
Switchboard 01-212 7676

Clive Whitmore Esq.,
Principal Private Secretary
to the Prime Minister,
10 Downing Street,
London SW1.

3 February 1982

Dear Mr. Whitmore,

I refer to Michael Collon's letter of 29th January enclosing a draft Parliamentary Question and Answer on contributory negligence and rape.

The Lord Advocate agrees that it would be desirable to indicate the Scottish position at the same time, and suggests that to achieve this the draft Answer be expanded by adding at the end:

> "I understand from my noble and learned Friend the Lord Advocate that this is also the law of Scotland".

I am copying this letter to Michael Collon and the other recipients of his letter.

Yours sincerely
Christine M. Duncan
Private Secretary

10 DOWNING STREET

Clerk

It seems slightly odd for us to arrange for a question to be tabled to another Minister: but I see that that is implied in your record.

We could get it down today for answer tomorrow

MP 3/2.

FROM THE PRIVATE SECRETARY

HOUSE OF LORDS,
SW1A 0PW

29th January, 1982

Clive Whitmore Esq.,
Principal Private Secretary to
The Right Honourable
The Prime Minister,
10 Downing Street,
London, SW1.

Dear Clive,

Thank you for copying to me your letter of 27th January to John Halliday about the meeting between the Prime Minister, the Lord Chancellor, the Home Secretary and Mrs. Justice Heilbron.

I enclose as requested a draft Parliamentary Question and Answer on contributory negligence and rape, settled by the Lord Chancellor. I would be grateful if John Halliday and Jim Nursaw would confirm that they are content with the form of the answer and if Christine Duncan would say whether it would be desirable to indicate that the reply covers Scotland as well as England and Wales. I assume from your letter that you will then arrange for the question to be put down.

Copies go to John Halliday (Home Office), Jim Nursaw (Law Officers' Department), Christine Duncan (Lord Advocate's Department) and David Wright (Cabinet Office).

Yours ever,

Richard

M.H. Collon

Parliamentary question and answer on contributory negligence and rape

DRAFT QUESTION

To ask Mr. Attorney General, whether an allegation of contributory negligence can be advanced as a defence to a charge of rape or in mitigation of sentence.

DRAFT ANSWER

No. Contributory negligence is a legal concept relevant only in an action for damages for negligence in the civil courts and is not relevant to a charge of rape in the criminal courts.

H: of S: M.
29 Jan 82

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Legal Procedure.

10 DOWNING STREET

From the Principal Private Secretary

27 January 1982

CONFIDENTIAL

Dear Dame Rose,

The Prime Minister has asked me to repeat her thanks to you for being ready to come to see her at such short notice this morning to discuss the present public concern about rape cases. Mrs Thatcher found her meeting with you most helpful.

As the Prime Minister told you this morning, she would be very grateful if you would report the outcome of the discussion to the Lord Chief Justice, and with that in mind, I enclose, as I promised I would, a copy of my record of the meeting.

Yours sincerely,

Clive Whitmore.

Dame Rose Heilbron DBE

CONFIDENTIAL

SUBJECT

File AH

ccs LCO
SO
LOD
LAD
CO + Mr Ingham

10 DOWNING STREET

From the Principal Private Secretary

27 January 1982

cc. Master set.

Dear John,

RAPE

The Prime Minister, Home Secretary and Lord Chancellor met Dame Rose Heilbron this morning to discuss the present public concern about rape cases and the law of rape.

The Prime Minister said that public concern about the handling of rape cases by the police and the courts had reached a point where the matter was now a political problem to which Ministers had to be seen to be responding. There was a wide spread feeling that in rape cases the innocent were frequently pilloried and the guilty allowed to escape. Ministers had to see that the rule of law was upheld, that law abiding citizens received the protection they expected and that the guilty were convicted and punished. Public concern about rape had developed quickly because a few really bad cases had happened to come together and the press had given full publicity to these and the subsequent public disquiet. We had to expect that rape cases would continue to receive headline treatment in the press for the foreseeable future. The Government had to decide how to respond to the general concern, and she had thought it would be helpful to talk to Dame Rose now in the light of her extensive experience on the question of rape.

The Prime Minister went on to say that following the report in 1975 of the Advisory Group on the Law of Rape, the Sexual Offences (Amendment) Act 1976, which implemented many of the Advisory Group's recommendations, had been passed and it was generally felt that the substantive law of rape was now satisfactory and did not need fundamental revision.

In discussion there was agreement that the present situation had not come about because of any defect in the law of rape and that there was no case for major changes in the law. It was pointed out, however, that it was important not to say in public that there was absolutely no need to improve the law of rape, since to do so would call into question the work now being done by the Criminal Law Revision Committee

CONFIDENTIAL

AH

on the law of sexual offences generally, including rape. The line to follow in public was that the recent cases which had given rise to public concern had not revealed any fundamental flaw in the law of rape and the law as it stood was perfectly adequate to deal with them.

The Prime Minister said that the event which had triggered the present public disquiet was the sentence given by Judge Richards in the case of R. v. Allen and in particular his remarks about contributory negligence. Ministers had been very grateful for the Lord Chief Justice's prompt statement making it plain that, except in wholly exceptional circumstances, those convicted of rape should always receive custodial sentences. There was, however, still some pressure for mandatory custodial sentences. The Government were not disposed to accept this argument, since judges had to be allowed some discretion.

Dame Rose Heilbron said that she doubted whether the judiciary would welcome mandatory custodial sentences for those convicted of rape. The Home Secretary added that he thought that some of the pressure in the House of Commons for mandatory prison sentences was diminishing and he expected to be able to resist any amendments to the Criminal Justice Bill designed to make custodial sentences mandatory. A strong argument against mandatory sentences was that they would probably lead to more acquittals and to even fewer women than now being ready to take rape cases to the police.

The Lord Chancellor said that as regards the question of contributory negligence, he had put the record straight immediately in his letter to Mr Jack Ashley MP which had been published. The Prime Minister said that she nonetheless thought there was a case for getting the position on the record in Hansard.

Dame Rose Heilbron said that she thought that many of the present difficulties centred on the handling of rape cases by the police. She had the impression herself that the approach which the Advisory Group on the Law of Rape had advocated in their report and which had informed the subsequent legislation had still not percolated through to some police forces. Her misgivings had been considerably reinforced by the recent television programme showing how the Thames Valley Police had dealt with a woman who had complained that she had been raped. The Times of the previous day had carried an interesting article about the way in which the police in New York handled rape cases. She wondered whether the police in Britain could establish groups of officers who were given special training in how to handle the very difficult circumstances which almost invariably surrounded any rape case.

In discussion there was general agreement that the police frequently showed a degree of insensitivity in the way they dealt with allegations of rape. This was particularly true of

the way they conducted the questioning of the complainant. On the other hand, it was very difficult for them not to become case-hardened, and given the difficulty of securing a conviction for rape, they felt bound to do all they could to satisfy themselves that a prosecution was likely to stand up in court. Nonetheless, there was a good case for considering further whether the police should train a certain number of officers with the appropriate personal qualities to handle rape cases. The Home Secretary was already thinking of sending out to the police new guidelines on the handling of rape cases and this might be a suitable way of inviting the police to provide special training in this difficult area.

Dame Rose Heilbron said that a related problem was the question of the part played by corroboration in dealing with rape cases both by the police and the courts. Corroboration was a rule of practice in England and Wales, and the need for corroboration was more strongly emphasised to juries in rape cases than in almost any others. Yet juries were also told that if they were satisfied that the complainant was telling the truth, then corroboration was not necessary. There was some inconsistency here. The Advisory Group on the Law of Rape had been aware that there were problems about corroboration but they had not had time to look into them. Moreover, the police when conducting the initial investigations into a rape case often did not take it as seriously as they might because they could not immediately see that the corroboration which would need to be demonstrated in court would be available. Again, the police sometimes did not seem to be fully alive to the opportunities to provide corroboration that were readily available. This too was something which might appropriately be taken care of by changes in police training and could perhaps be covered in the guidance which the Home Secretary had it in mind to issue.

In further discussion it was suggested that more effort should be made to mitigate the ordeal which women had to go through in rape cases, for example in the process of medical /and examination/in cases where the defence was one of consent. One possibility was to make more use of hearings in camera. There was no reason in theory why more cases should not be heard in camera, but there was likely to be a strong body of judicial opinion against such a development. In the end it must be for the trial judge to decide whether the administration of justice required a case to be heard in camera. It might be possible to exclude the general public but to continue to allow the press to be present. Dame Rose Heilbron added that another area where the Advisory Group had suggested women involved in rape cases might be given assistance was that of social and medical advice: such women often needed guidance and support even in dealing with their own families.

Finally, Dame Rose Heilbron raised a matter not directly related to the issue of rape - the question of unsworn statements from the dock. Until a few years ago such statements were

rare events. Now they were being made in many cases. They were bound to have an effect on juries, even though they were not to be given the same weight as evidence given in cross examination. There was widespread concern among the judiciary about this development which many thought would result in an increase in undeserved acquittals. If the Government decided to deal with the matter, perhaps in the present Criminal Justice Bill, it should be possible to carry the Criminal Bar Association with any change, provided they were consulted fully.

The Prime Minister, summing up the discussion, said that they were agreed that no immediate change in the substantive law of rape was required to deal with the present situation. Nor should mandatory custodial sentences for rape be introduced. We should stand on the statement by the Lord Chief Justice on sentencing. As regards the position on the question of contributory negligence, she would arrange for an inspired Parliamentary Question to be put down to the Attorney General. She would be grateful if the Lord Chancellor, in conjunction with the Attorney General, could let her have as soon as possible a suitable draft Question. The Home Secretary should consider how best to pursue the question of encouraging the police to deal with rape victims more sympathetically and to improve their methods of investigating complaints, including their approach to the issue of corroboration. Progress on these matters might best be achieved through improved police training, and it might be appropriate to cover them in the guidelines which he was considering circulating to Chief Constables. He should seek the views of the Lord Chancellor and Dame Rose Heilbron on any guidelines before they were issued. The Home Secretary should also consider whether the Criminal Law Revision Committee should be invited to look into corroboration as part of their review of the law on sexual offences generally. The Home Secretary should examine, with the Lord Chancellor, whether the problem of unsworn statements from the dock to which Dame Rose Heilbron had drawn attention could be dealt with in the Criminal Justice Bill. She would be grateful if Dame Rose Heilbron could report the outcome of their meeting to the Lord Chief Justice, and for this purpose she would arrange for her to receive a copy of the record of the discussion. Finally, the press were showing close interest in the meeting, and she proposed to take the line that she, the Home Secretary and Lord Chancellor had found it very helpful to discuss with Dame Rose Heilbron the recent events which had given rise to so much public concern and that Ministers would be considering further the issues involved. She would like to keep in touch with Dame Rose Heilbron.

I am sending copies of this letter to Michael Collon (Lord Chancellor's Office), Muir Russell (Scottish Office), Jim Nursaw (Law Officers' Department), Christine Duncan (Lord Advocate's Department) and David Wright (Cabinet Office).

Yours ever,

John Halliday Esq.,
Home Office.

SUBJECT.

Due 17th
ccs
+ Bernard Ingham

10 DOWNING STREET

From the Principal Private Secretary

26 January 1982

sc. Master set.

Dear John,

LAW OF RAPE

The Prime Minister held a meeting this morning with the Home Secretary, Lord Chancellor, Secretary of State for Scotland, Attorney General and Lord Advocate to discuss the present public concern about rape cases and the law of rape.

The Prime Minister said that the impression was gaining ground that in rape cases the law was on the side of the guilty and against the innocent and that it did not offer adequate protection to women. There was a widely held view that in questioning complainants, the police behaved as though they disbelieved the allegations they were investigating. Similarly, people believed that judges were predisposed to think that when rape was committed, it was the fault of the woman involved. It might well be the case that the law of rape could not be improved in any substantive way, but the fact remained that public concern had now reached a point where it was a political problem and the Government had to be seen to be responding. They could not get away with doing nothing. Such was the public interest in the matter now that the press would go on giving extensive publicity to any rape cases. The question was what the Government should do. She had had a preliminary word with the Lord Chancellor the previous week, and he had suggested that as far as the law of rape in England and Wales was concerned, it might be possible to build on the review of the law conducted by the Advisory Group on the Law of Rape in 1975 and to ask Mrs Justice Heilbron, who had chaired the review, to consider further the Advisory Group's findings in the light of recent events.

The Home Secretary said that the Criminal Law Revision Committee was in the process of reviewing the law on sexual offences, including rape, but they were not expected to report until mid-1983. They had issued a working paper which dealt in depth with the law of rape, and they were still receiving comments on their proposals. He doubted whether it would be possible to get the committee to report earlier. Moreover, it was unlikely that the committee or indeed any other inquiry would propose major changes in the law of rape. Virtually all of the Advisory Group's recommendations had been implemented in the Sexual Offences (Amendment) Act 1976.

CONFIDENTIAL

As regards the approach of the police to rape cases, they often had to question complainants persistently and in detail in order to establish the facts. Nonetheless, the Home Office had prepared guidance for Chief Constables on the handling of rape cases, and he was considering whether to issue it and if so, when.

The Lord Chancellor said that none of the recent rape cases had shown up any serious defect in English law, and he could not see how it could be substantively improved. Where the defence was consent, the burden of proof fell on the prosecution, and this meant that the woman very often had to go through a very considerable ordeal in giving detailed evidence. Even then she might well see the defendant found not guilty, with the implication that she had had sexual relations with a stranger.

As regards sentencing, the Lord Chief Justice, at his prompting, had made an admirable and proper statement from the Court of Appeal, and he did not see what more could be done in this respect. He had himself dealt with Judge Richards and his remarks about contributory negligence, and he had no intention of going any further on that matter.

He thought that it would be useful if the Prime Minister and one or two of her colleagues were to see Mrs Justice Heilbron to ask her, in the light of the work of her Advisory Group on the Law of Rape, how she thought the present disquiet should be dealt with.

The Attorney General said that the Advisory Group's recommendations in 1975 had been well received at the time. Many of them had been designed to make it more tolerable for the woman to proceed with her complaint, and the Group's report particularly offered some very good guidelines for police and medical investigations. He agreed that the law of rape itself was perfectly satisfactory as it stood at present: the present problems arose with the pre-prosecution period and the post-conviction stage, i.e. with police inquiries and with sentencing.

The Prime Minister, summing up this part of the discussion, said that she would be grateful if the Home Secretary could let her have a form of words for her use at Question Time that day on the work which the Criminal Law Revision Committee were undertaking on the law of rape. He might wish to clear this with Lord Justice Lawton, the Chairman of the Committee. The Lord Chancellor should get in touch with Mrs Justice Heilbron to invite her to come and see the Prime Minister to discuss the present situation. She would like to be able to say at Question Time later in the day that she would be seeing Mrs Justice Heilbron, and the Lord Chancellor should ensure that this was acceptable to Mrs Justice Heilbron.

The Prime Minister then turned to the question of the law of rape in Scotland. She understood that the complainant in the Glasgow rape case was now planning to bring a private prosecution. This meant that although the case was not yet strictly sub judice, it would be wrong for her to offer any comment on it at Question Time.

The Lord Advocate said that he understood that the woman's solicitor would need some fourteen days to prepare the material on which to base an application to the court for permission to institute a private prosecution. When the application was heard, he as the public prosecutor would have to state his position. This would not be easy, given the earlier decisions on the case taken by the Crown Office. He was of course very well aware of the sensitivity of the matter and he would be extremely careful in the words he used. He proposed to explain why it had been decided not to prosecute before, and he would go on to say that if the reasons for the decision not to prosecute no longer applied, he would not oppose the application. But he would have to make it clear that because the Crown Office had previously decided not to prosecute he, as a technicality, could not formally concur in the private prosecution.

The Secretary of State for Scotland said that there was a good deal of press interest in whether the woman would receive legal aid for her private prosecution. It was not clear whether she would be eligible under the existing arrangements, but if she were not, he proposed to make every endeavour to ensure that she would not be out of pocket as a result of the private prosecution. It might be necessary for his department to make an ex-gratia payment.

As regards the wider question of the law of rape in Scotland, the Scottish Home and Health Department had begun a research study into sexual assaults in 1980. It was due to be completed in 1982. It was, however, a departmental review and as such would not carry the same authority in public as the work of the Criminal Law Revision Committee in England.

The Lord Advocate said that the Scottish Law Commission was already examining the law of evidence generally and their review would cover the law of evidence as it related to rape. It would be possible to say in public that the findings of the SHHD study would be made available to the Scottish Law Commission to see whether it added anything to their inquiry into the law of evidence. If the SHHD review recommended any change in the substantive law of rape, that would be a matter for the Secretary of State for Scotland to pursue.

The Prime Minister, summing up this part of the discussion, said that her office would prepare, in the light of the discussion, a line for her to take at her Question Time on the law of rape in Scotland and the Glasgow rape case. This would be cleared with the Secretary of State for Scotland and the Lord Advocate.

I attach in its final form the material which was prepared for the Prime Minister's use during her Questions today. You and the copy addressees of this letter kindly cleared the parts of it which are of direct concern to you and them. In the event, the Prime Minister drew on virtually all of it except the passage on the law on rape in Scotland.

I am sending copies of this letter and of the attachment to Michael Collon (Lord Chancellor's Office), Muir Russell (Scottish Office), Jim Nursaw (Law Officers' Department) and Christine Duncan (Lord Advocate's Department).

Yours ever,

Steve Whatmore.

John Halliday, Esq.,
Home Office.

LAW OF RAPE IN ENGLAND AND WALES

Building on the changes made in 1976 following the Report of the Advisory Group on the Law of Rape, chaired by Dame Rose Heilbron, the Criminal Law Revision Committee has carried out a comprehensive review of sexual offences, including rape and allied offences and the penalties for them. In October 1980 it published an important Working Paper on which it invited comments. The Chairman of the Committee, Lord Justice Lawton, has confirmed to the Home Secretary that comments on the Working Paper, which dealt in depth with the law on rape, are still being received and that the Committee's eventual Report will take full account both of these and of recent events. The Committee's intention is to produce a Report which places the law on rape in the context of sexual assaults generally.

Dame Rose Heilbron

More immediately, I thought that I would find it helpful to discuss recent events with Dame Rose Heilbron in her capacity as the Chairman of the Advisory Group on the Law of Rape which reported in 1975. She will be coming to see me in the next day or so.

LAW OF RAPE IN SCOTLAND

The Scottish Law Commission is already examining the law of evidence generally. Their review covers the law of evidence as it affects rape.

At the same time the Scottish Home and Health Department has been undertaking a research study into sexual assaults. This has examined, among other things, police and medical procedures and complainers' court and trial experiences. The study will indicate whether particular changes of practice or procedure would be helpful and the scope for changes in the law.

The study is due to be completed in the middle of this year, and its findings will be made available to the Scottish Law

/ Commission

Commission to see whether they add anything to their inquiry into the law of evidence. If the study recommends any change in the substantive law of rape in Scotland, that will be a matter for my rt hon Friend the Secretary of State.

GLASGOW RAPE CASE

I understand that an application for permission to institute a private prosecution is likely to be made in the near future, and it would therefore be wrong for me to offer any comment now on that particular case.

/ Legal Aid: If legal aid cannot be granted under the existing regulations, my rt hon Friend the Secretary of State will make every endeavour to see that the complainer is not out of pocket as a result of her private prosecution. /

From: THE PRIVATE SECRETARY

HOME OFFICE
QUEEN ANNE'S GATE
LONDON SWIH 9AT

26 January 1982

Dear Clive,

RAPE

In case it is helpful for tomorrow's meeting with Dame Rose Heilbron, the Home Secretary has asked me to send you the enclosed background note.

Yours ever,

J. F. HALLIDAY

Clive Whitmore, Esq.

RAPE.

The ~~President~~ PRESENT. Law on Rape

Most of the present law is contained in the Sexual Offences (Amendment) Act 1976. This implemented nearly all of the recommendations of the Advisory Group under the chairmanship of Mrs. Justice Heilbron which examined the law of rape in 1975, following public outcry, in which Jack Ashley played a major part, over decisions in certain cases.

2. The main provisions of the Act are:

(i) A man commits rape if he has unlawful sexual intercourse without the woman's consent, knowing that she does not consent, or being reckless as to whether she consents or not.

(ii) The previous sexual history of the complainant with men other than the accused is inadmissible in evidence except by leave of the trial judge, which he may grant only if satisfied that it would be unfair to the defendant to withhold it.

(iii) The complainant is protected from having her name revealed in the Press (as is the accused unless he is convicted).

The Review by the Criminal Law Revision Committee

3. The law on rape is already under review. The Criminal Law Revision Committee (Chairman, Lord Justice Lawton) is reviewing the whole of the law on sexual offences, including rape.

4. In a Working Paper published in October 1980, the Criminal Law Revision Committee said that it saw no reason for trying to improve on the definition in the 1976 Act and would concentrate on matters not covered by it. The Working Paper made certain provisional recommendations of which the following are of the most interest:

(a) Inducing sexual intercourse by fraud or threats other than threats of force should be criminal and attract heavy penalties but not be rape; a minority considered that this amounted to a narrowing of the law on rape and opposed the recommendation.

(b) The offence of rape should be extended to cover husbands who have sexual intercourse with their wives without consent (prosecutions would require the consent of the DPP).

(c) Men and women who aid or abet rape should be punished for aiding and abetting, even if the principal offender was acquitted of rape.

(d) The maximum penalty for rape should continue to be life imprisonment: in particular there should not be a two-tier offence with a lesser penalty where there was no actual evidence, or threat of violence by a stranger to the victim.

Most of the issues raised by the Criminal Law Revision Committee are relatively minor; there is no suggestion that the existing law on rape is fundamentally defective.

5. The recommendation as to marital rape followed the advice of the Policy Advisory Committee on Sexual Offences (which numbers among its members not only lawyers and judges but also doctors, social workers, sociologists, a police officer, a headmistress and a clergyman). This Committee, chaired by Mr. Justice Waller, was set up to provide an assessment of lay opinion and to advise the Criminal Law Revision Committee on medical and social issues.

Reaction to the Proposals

6. So far there is little consensus on the specific issues raised. Women's groups have suggested that the offence of rape should be extended to all penetrations (buggery, oral sex, assault with instruments); that the absence of consent should be replaced by the concept of "against the woman's will"; and (contrary to the general law on evidence) that the man's previous sexual offences should be made known to the jury. In general, lawyers' groups who have commented seem opposed to any widening of the law of rape.

Timing and Scope of the Review

7. The Criminal Law Revision Committee and the Policy Advisory Committee have yet to assess reaction to the Working Paper with a view to producing a final report. It is not easy to predict how long this will take, but it is unlikely that there will be a final report for at least a year.

8. The Criminal Law Revision Committee will take full account, in framing its eventual proposals, both of comment on the Working Paper and of recent events.

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Signature: [signature] Dept: SHHD Room: 169

Support for Jamble private Case.

PS/Secretary of State

Copy to Mrs Duncan
Miss Pollock
Mr Malcolm
PS/Mr Rifkind
PS/US of S

LAW ON RAPE

I attach a brief for the use of the Secretary of State at the Prime Minister's meeting on Tuesday 26 January at 9.30 am. We have had preliminary exchanges with Home Office and Crown Office but have not yet had the opportunity to consult them on the line taken.

J GILMOUR

PS/SUHD
25 January 1982
ENC

LAW ON RAPE

BRIEF FOR USE BY THE SECRETARY OF STATE AT THE PRIME MINISTER'S MEETING ON TUESDAY 26 JANUARY AT 9.30 AM

BACKGROUND

In her letter of 22 January to the Lord Chancellor, the Prime Minister expressed her intention of arranging a meeting to decide upon the next steps both on the broad question of the law of rape and on the narrower issue of the Scottish case, as to which the Prime Minister expressed the hope that a private prosecution would be brought and that there would be no question of a private prosecution failing because the complainer lacked the necessary funds.

GENERAL ISSUES: PENALTIES

2. Concern has been expressed about the penalties for rape in the context of the recent English case where a fine was regarded as an appropriate disposal. Rape is a common law offence in Scotland which is tried in the High Court of Justiciary which has the power to impose any length of custodial sentence and/or an unlimited fine or compensation order. Rape has always been regarded as a serious crime meriting condign punishment and in a recent case the Lord Justice Clerk took the opportunity of reiterating this (as has the Lord Chief Justice in England). The table at Annex A sets out the incidence and disposal of rape cases in Scotland for the period 1976 to 1979 (the latest year for which detailed figures are available) with certain earlier years: these bear out that the likely outcome of a conviction for rape is a custodial sentence; it may be assumed that there were good reasons for the few non-custodial sentences.

3. The Home Secretary has confirmed the inaccuracy of Press reports to the effect that he contemplated amendments to the Criminal Justice Bill which would introduce mandatory prison sentences for rape. The Lord Chancellor has pointed out to colleagues that it is of first importance that Ministers should not make any public statements which could be construed as an attempt to interfere with the independence of the judiciary. It would be contrary to current practice to introduce a minimum sentence for any offence and might be counter-productive; there would be pressure for similar provisions for other repellant crimes, but there might be a reaction to the application of minimum sentences in particular cases and there might also be a reluctance on the part of juries to convict (as in capital cases previously). The general rule should be to allow the judiciary to exercise their discretion in particular cases: there is no doubt that rape is regarded by Scottish judges as a serious crime for which a custodial sentence would usually be appropriate.

GENERAL ISSUES: EVIDENTIAL ETC REQUIREMENTS

4. Of more concern than the question of disposal is the means of securing convictions. Following the report of the Heilbron Committee in 1976, the Sexual Offences (Amendment) Act 1976 made it no longer permissible in England and Wales, without special leave of the judge, for the defence to introduce material about the complainant's previous sexual activity with men other than the accused.

While there is no such provision in Scotland there are certain safeguards under the common law of Scotland. If the accused wishes to attack the character of the complainant as part of his defence then notice of this intent has to be given in advance to the court and the prosecutor.

Provided notice has been given timeously the defence may competently attack the complainant's general character by putting questions to her or by seeking to prove her bad repute at the time of the offence. The defence may not however seek to prove individual sexual acts on the complainant's part with other men.

5. There is no statutory provision in Scotland guaranteeing the anonimity of the complainer; however, it is a long-established practice on the part of the police and the courts to conceal as far as possible from the public the identity of the complainant during the investigation and at any subsequent criminal proceed

REVIEW OF THE PRESENT POSITION

6. The major problem appears to lie not in the law of rape or in the relevant criminal procedures but in reconciling the legitimate but usually conflicting interests of the victim and the accused in rape cases. On the one hand, rape is a most serious crime of which no one should be convicted unless the evidence establishes his guilt beyond any reasonable doubt. On the other, the powers of police questioning and of cross-examination in court necessary to establish the truth may be distressing in the extreme to the victim and is apparently a deterrent to the reporting of such crimes.

Against this background, a research study into sexual assaults was set up by SHHD in 1980. This examined police and medical procedures, complainers' court and trial experience, the reasons for the high percentage of cases which are discharged on trial or abandoned at an early stage. It is intended to indicate whether particular changes of practice or procedure would be helpful, and the scope for legislative change. The components of the research are an analysis of police, fiscal and court records, interviews with a sample of sexual assault victims and interviews with police officers responsible for the investigation of sexual assault complaints. No new cases have been followed up since May 1981, and work is continuing on processing

material. A final report should be available in mid-1982, but no decision about publication can be taken until the outcome is known.

8. This study may provide the basis for a review of policy and practice in relation to the law of rape in Scotland. It has been suggested that in England and Wales Mrs Justice Heilbron's enquiry might be reviewed, but we would not recommend an extension of this to Scotland in the different circumstances prevailing. A separate enquiry would be appropriate, if required, and this might best be judged in the light of the outcome of the research study. The main difficulty which has arisen in the Glasgow case appears to be in the administration of the present procedure rather than in the procedure itself.

FUNDS FOR PRIVATE PROSECUTION

9. A private prosecution requires the consent of the High Court of Justiciary, who will usually look for the concurrence of the Lord Advocate. The Lord Advocate will no doubt speak to this aspect of the case at the meeting. The statutory system of criminal legal aid does not contemplate payments to private prosecutors (the procedure is very rarely used). On first sight, any payment would have to be made ex gratia, but this will require further consideration in the light of the action currently undertaken by the complainer's solicitor and of the consultation with Treasury; consultation with the Lord Chancellor's Department has established that a private prosecutor in England and Wales would not receive legal aid as such, but might be able to recover costs from public funds after a successful prosecution under provisions not applicable in Scotland.

OTHER COMPLAINTS

10. The complaints against sentencing and against police conduct (in Reading) have not been features of recent rape cases in Scotland. In the Glasgow case, the complainer was reported as appreciative of police action.

CONCLUSION

11. We would therefore recommend that at this stage:-

(a) no action should be contemplated to introduce a mandatory minimum sentence for rape, given past practice and the recent remarks by the Lord Justice Clerk;

(b) any question of a review of the law of rape and the relevant procedure in Scotland should await resolution of the proposed private prosecution and the completion of the current SHHD research study into cases of sexual assault;

(c) in any case, any review of the law of rape and related offences in Scotland should be conducted separately from, although having regard to, any such review for England and Wales, where concern has been generated by different circumstances.

ANNEX A

RAPE IN SCOTLAND

Year	Cases recorded by the police	Cases cleared up	Persons proceeded against	Charge proved	Custodial sentence	Given other sentence	Details of non-custodial sentence
1959	34	23	6	2	-	2	(2 probation)
1962	42	36	13	9	7	2	(1 fined, 1 admonished)
1967	101	78	19	12	7	5	(1 fined, 2 probation, 2 other*)
1976	184	111	52	28	26	2	(1 probation, 1 admonished)
1977	178	125	60	35	35	-	-
1978	166	118	52	29	28	1	(1 probation)
1979	145	102	50	34	33	1	(1 guardianship order - implies mental illness, probably mental deficiency)
1980	166	133	N/A	N/A	N/A	N/A	N/A

*details not available

2.

10 DOWNING STREET

PRIME MINISTER

There are only two ways in which the EDM can be removed from the Order Paper: by having it debated and defeated, or by the sponsors withdrawing it. At present, there seems no prospect of taking the latter course, although it might be possible to raise the subject in the future when the current fuss has died away.

26 January, 1982

PRIME MINISTER

RAPE MEETING - Media

I have no idea about what may come out of this meeting and we cannot say anything before we know the conclusions

I have not revealed today that you are to hold your meeting on this subject tomorrow but when pressed I have not ruled out a gathering this week.

I shall, however, be chased at each Lobby and it would be sensible tomorrow morning (at 1100) to say your meeting is either taking place or has concluded. It would be useful to take credit for a meeting held as soon as possible after a weekend of serious Ministerial reflection on the subject and to brief on the outcome.

You may, of course, wish to save up a report on the meeting for your Question Time - not least as a means of distracting attention from the unemployment figures.

However, we could get the best of both worlds - my reporting to the Lobby that the meeting has taken place, who attended, what was discussed and giving some lead to the conclusions but suggesting that, if asked, you will give a fuller report during your Question Time.

Content therefore for me to brief at 1100 tomorrow to the extent that it is possible at that time or, as and when possible later, to feed out a little more and build up interest in your Question Time?

POLICE CUTS

So far as the AMA's threat is concerned, we have knocked down any idea of police cuts. Bob Carvel, in The Standard, said Mr. Whitelaw would tell the AMA tomorrow that there is no question of reducing the numbers.

The BBC this evening carried a similar report, plus figures I have been feeding out all day on the increase in police strength (up well over 6,500) since the Government took office.

BERNARD INGHAM
25 January 1982

2

PRIME MINISTER

Here is the letter about Judge Richards to which the Lord Chancellor referred in Cabinet yesterday. I believe he also raised the subject with you today.

He is asking here that Ministers should do something in the Commons to rebut the argument in the EDM.

This is not easy. The Lord President can be briefed on the topic in case it arises on the Business Question, and we can also get a suitable form of words for you. Failing that, there is little that Ministers can do.

MAP

22 January, 1982.

I am sure that there have been previous similar motions and that the practice is to leave them there for some time and then ask for them to be removed. ? Admin please. MT

CONFIDENTIAL

SUBJECT

File AH

CC HO
SO
LOD
LAD
B. Ingham

10 DOWNING STREET

From the Principal Private Secretary

22 January 1982

Lcc. Master set.

Dear Michael,

LAW OF RAPE

The Prime Minister and the Lord Chancellor had a word this afternoon about the present public concern about rape cases and the law of rape.

The Prime Minister said that there was a great deal of pressure building up in both Parliament and the press for some kind of inquiry. There were those who were arguing for an investigation into the conduct of the Scottish rape case which had been the subject of statements in Parliament the previous day. Others were proposing that there should be an inquiry into the effectiveness of the law of rape generally. What was clear was that the press would go on giving a great deal of publicity to rape cases for some time to come, and the political need for the Government to be seen to be responding to public concern would probably grow. She would like to discuss what the Government should do at a meeting early next week with the Home Secretary, the Lord Chancellor, the Secretary of State for Scotland, the Attorney General and the Lord Advocate, and she had thought it would be helpful for her to have a preliminary word with the Lord Chancellor.

The Lord Chancellor said that while he acknowledged the demands that the Government should do something, it was not easy to see what that something should be. Mrs Justice Heilbron had conducted a review of the law of rape eight or ten years ago. She had come to a number of sensible conclusions which broadly amounted to an endorsement of the present law. It was difficult to see what a new inquiry into the law of rape could add to her findings.

The Prime Minister suggested that Mrs Justice Heilbron might be invited to review her conclusions of ten years ago in the light of developments since then, and to recommend whether there was now a need for changes in the law. It would be necessary to consider how the Scottish law of rape could be taken into account in any such review.

CONFIDENTIAL

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The Lord Chancellor said that he saw no objection in principle to what the Prime Minister had suggested, though he remained of the view that there was really nothing of substance for Mrs Justice Heilbron to look at and she was likely to produce a mouse. If it was decided to ask Mrs Justice Heilbron to conduct a review, there might be something to be said for the Prime Minister and him seeing her informally at an early stage. His office could make the necessary arrangements.

The Prime Minister said that as far as the Scottish rape case was concerned, she hoped very much that a private prosecution would be brought. This would put a stop, at least for the time being, to demands for a judicial inquiry into the handling of the case. She hoped that there would be no question of a private prosecution failing because the complainer lacked the necessary funds. Her office would arrange a meeting early next week with the Ministers concerned to decide what the next steps should be on both the broad question of the law of rape and on the narrower issue of the Scottish case.

9.30 am
26/1/82 X

I am sending copies of this letter to John Halliday (Home Office), Muir Russell (Scottish Office), Jim Nursaw (Law Officers' Department) and Christine Duncan (Lord Advocate's Department).

Yours ever,

Steve Whitmore.

Michael Collon Esq.,
Lord Chancellor's Department.

PS/SNHD
PS/Mr Ryskind
PS/OSGS.

10 DOWNING STREET

From the Private Secretary

22 January, 1982

I enclose a copy of a letter to the Prime Minister from Mr. Jack Ashley, M.P. in which Mr. Ashley presses for an investigation into the law relating to rape and its administration.

The Prime Minister is holding a meeting here next week to discuss these matters. I should be grateful if, thereafter, you could arrange for a suitable draft reply for her signature.

I am sending copies of this letter and enclosure to John Halliday (Home Office), Muir Russell (Scottish Office) Christine Duncan (Lord Advocate's Office) and Jim Nursaw (Law Officers' Department).

M. A. PATTISON

M. H. Collon, Esq.,
Lord Chancellor's Office

From: The Rt. Hon. Jack Ashley C.H., M.P.

HOUSE OF COMMONS
LONDON SW1A 0AA

20th January 1982

The Rt. Hon. Margaret Thatcher, PM
10 Downing Street

R21

Dear Margaret,

Public anxiety is mounting as one rape scandal succeeds another. Although Ministers have responded with commendable speed to recent events, an ad hoc approach of this kind is hopelessly inadequate. What is now needed is a comprehensive inquiry. I am writing therefore to ask you to order an investigation by the Lord Chancellor and Home Secretary into the law relating to rape, the operation of the law and the attitude of the police to the victims of this crime.

Among separate and specific complaints voiced recently are the inadequacy of existing law, the evasion of some of the present provisions, inadequate or disparate sentences, the failure of some police to deal properly with women's allegations of rape and to pursue this crime with their usual vigour. These various but related problems can only be effectively dealt with by a full investigation and I hope you will initiate this as soon as possible.

Yours,
Jack

Legal Procedure

GLASGOW RAPE PROSECUTION

My Lords,

With your Lordships' permission, I should like to make a statement on the case of alleged rape and serious assault in Glasgow which has been the subject of much recent comment.

In Scotland, the Lord Advocate is answerable to Parliament for the conduct of criminal prosecutions. It is however the practice not to divulge any details of the evidence in particular cases. This is intended for the protection of all the parties involved, and it is particularly important in the present case, where it is possible that the complainer may at some future date make an application to the High Court of Justiciary to bring a private prosecution; it is particularly important in these circumstances that nothing is said that might affect any such application, the interests of the complainer, or the interests of any person who may be accused by her, and who under our legal system is entitled to the presumption of innocence. Subject to these restraints, I wish, however, to be as frank and open as possible about this matter to the House and to the public on account of the anxiety aroused by the case.

In this case the Procurator Fiscal, on receipt of information from the police charged 4 youths with rape and with attempted murder. On reporting the case to Crown Counsel in Edinburgh, they, in the exercise of their responsibility as independent prosecutors, indicted 3 of these youths with one charge of rape and one charge of assault to severe injury, permanent disfigurement and danger to life. The case was put out for a sitting of the High Court in Glasgow in June 1981. When the victim appeared it was apparent that she was not in a fit state to give evidence and on the instructions of Crown Counsel she was examined by a consultant psychiatrist. In the interests of the woman I would not wish to reveal the details of the report save to say that her medical history since the events complained of caused the psychiatrist to conclude that a court appearance at that time would be detrimental to her health and carried a hazard of suicide both before and after the trial whatever the result. Accordingly,

the case was not called.

Thereafter the decision had to be taken whether the trial should be further postponed, or whether the Crown should proceed with the whole, or part of the indictment in the absence of the complainer's evidence, or whether the case should be dropped altogether. In coming to that decision Crown Counsel was principally influenced by the likely effect on her health of the prospect of having to give evidence.

Given that the complainer was not at that stage able to give evidence, the difficult decision arose whether on the remaining evidence available the Crown should proceed with both or one of the charges. The view was taken by Crown Counsel that in the light of all the circumstances in the absence of the complainer it would not have been proper to proceed on the whole or any part of the indictment.

With regard to obtaining the evidence of the complainer in the situation where she was not able to give her evidence in court, it has been suggested that her evidence could have been taken on commission under section 32 of the Criminal Justice (Scotland) Act 1980. In terms of subsection (2)(b) of the section, the application to take evidence in this way may only be granted if the judge is satisfied that there would be no unfairness to the other party or parties. I am of opinion that an application in this case to take the evidence on commission of the complainer would not have been granted.

In the light of the information available to him Crown Counsel considered that the prospect of sufficient improvement in the complainer's health to alter the situation was not sufficient to justify keeping the proceedings alive any further and, accordingly, instructions were given that the case should be dropped. Once that has been done a prosecution at my instance is no longer possible.

Crown Counsel exercise their independent professional judgment in coming to decisions on matters such as those I have referred to but in cases of difficulty they may, and do, refer questions for my decision.

I have decided to instruct that no decision to drop proceedings altogether in any case of murder or rape should be taken before the hearing of evidence has begun without the question being referred to me for decision.

Background Note to the Statement on the Rape Case in Scotland which was not proceeded with.

It is traditional that the prosecution in no circumstances divulge the evidence available to them and despite the fact that evidence has been given in the press as proporting to reflect evidence available to the Crown it is not our intention to refer to it or indeed to reveal it for historic and important reasons. Nevertheless it is perhaps important that we should point out certain facts. The first charge was a charge of rape. In the absence of the complainer's evidence there was no possibility whatsoever of establishing the essential element of rape which was lack of consent which would certainly have been denied by all the accused. The woman was intoxicated, whether or not she was assaulted is a matter of dispute. Even with her evidence it is unlikely that we could have established a charge of rape and had we been able to do so it is even more unlikely that we would have been able to establish a charge of rape against more than one of the accused. The almost inevitable influence is that any serious assault which was committed against her was committed after sexual intercourse and not before and was the act of one accused and had no consent from or consensus with any of the others.

2. It is suggested that we could have proceeded in the second charge which was assault with a razor or knife and not with the first charge. But they were so much a part of one incidence that to charge one and not the other would have been impossible and to charge both in the knowledge that one could never go to the jury would have been highly prejudicial and quite wrong.

3. It has been suggested, correctly, that the Crown cannot now re-indict any of the accused. But there is a remedy open to the complainer to bring a private prosecution. This has been suggested in the press. It is not something in which we could in the circumstances concur, nor I think in the circumstances could we oppose it and I think that it would be a perilous course. Nevertheless, it is open to the complainer if she now wishes to expose herself to the grim experience that would inevitably be hers were she to bring a private prosecution on the matter of these charges and there is a possibility she could succeed. I think it is right that she should be advised that that is a possibility and it is for this reason that we have been cautious, not to say that success on either charge was impossible. What we have said is that in the absence of our evidence success on the rape charge was in our judgement impossible and to proceed on the second charge in its absence would in our judgement have been improper. I should add that the right to bring a private prosecution depends upon an order of the High Court of Justiciary in Scotland. It is normal that this would only be granted with a concurrence of the Lord Advocate. In this case it is clear the Lord Advocate could neither concur nor demur and accordingly it would be for the court to grant that right or to refuse it.

FROM:

THE RT. HON. LORD HAILSHAM OF ST. MARYLEBONE, C.H., F.R.S., D.C.L.

HOUSE OF LORDS,
SW1A 0PW

21st January, 1982

CONFIDENTIAL

The Right Honourable
The Prime Minister

Dear Margaret,

The Judge Richards Affair

Though I cannot recommend any effective action (except perhaps from our back bench) I would like to share with you my concern about the implications of the Early Day Motion standing in the names of Jo Richardson, MP and over 90 other Labour Members calling upon me to exercise my statutory powers to remove Judge Richards.

Obviously, this Motion has been prompted by the rape case in which the Judge's sentence and his comments attracted such adverse comment in many quarters. I am troubled on two grounds. First, readiness on the part of MPs to put down a Motion of this nature following what can, at the most, be criticised as a single unwise decision strikes at the root of the independence of the judiciary. If a Judge is going to have to consider, every time before he gives judgment or imposes sentence, that his whole future may be called in question simply because an unpopular decision may give rise to public clamour followed by political pressure for his removal, he is not going to feel, or to be, truly independent in the exercise of his judicial functions. That would not only constitute a serious erosion of our liberties, but would have a very adverse effect on the whole of the judiciary: I have already had not only the Richards case (which has caused the judge great personal anguish), but also the Maw sisters' case, where the late Mr. Justice Smith was pilloried for exactly the opposite fault (i.e. for passing an allegedly too severe sentence) and put under pressure which, I am sure, contributed to his untimely death. Parliamentary hounding of Judges is not going to improve the quality of justice or make it easier for me to get the best people to accept office.

Secondly, the Motion is urging me to do something which is not only grossly unfair to the Judge, but also illegal. It would be unfair to penalise a single error by the abrupt termination of a Judge's office with all the implications for his professional and personal future: any employer who sought to dismiss an employee after many years of distinguished service on such flimsy grounds would rightly be made by the courts to pay compensation for grossly unfair dismissal. It would be illegal for me to act in

/Contd.

this way, since, in the case of a Circuit Judge, the Lord Chancellor can exercise his powers only on the same grounds as Parliament can carry an address to the Sovereign to remove a Judge of the Supreme Court. Not by the wildest stretch of the imagination can one injudicious comment and one over-lenient sentence amount to "incapacity or misbehaviour" and, if a Lord Chancellor purported to deprive a Judge of his office in these circumstances, it is clear to me that, not only would he be exceeding his power, but his action could be challenged in the courts and the challenge would certainly succeed.

On both these grounds, I think the presence on the House of Commons' Order Paper of this Motion is highly undesirable and sets a precedent which ought not to be followed. I should, therefore, like to see my arguments advanced publicly in some way. My difficulty is that I cannot properly do this, because it would not be appropriate for a member of the House of Lords to criticise openly the contents of the Commons Order Paper. I thought, however, that it was right that you, the Home Secretary, the Lord President, the Attorney General, the Chief Whip and the Chairman of the Party (to whom I am sending copies of this letter) should be aware of my very real concern. I hope very much that you or they may be able to find some way of bringing my points home to the House of Commons (or at least our own side of it) without breaking any of the conventions or resurrecting an issue which has already done a great deal of harm to the administration of justice.

yrs:

Lord Advocate's Chambers
Fielden House
10 Great College Street
London SW1P 3SL

Telephone: Direct Line 01-212 0100
Switchboard 01-212 7676

Mike Pattison Esq
Private Secretary
10 Downing Street
London SW1

21st January 1982

Dear Mike,

GLASGOW RAPE CASE - LORD ADVOCATE'S ORAL STATEMENT

I attach a draft of the statement which as you know the Lord Advocate proposes to make ~~tomorrow~~ today in the House of Lords on the above case, together with a copy of the background notes. The statement is to be repeated in the Commons by the Solicitor General for Scotland.

Copies of the draft statement go also to the Private Secretaries to the Home Secretary, the Lord Chancellor, the Lord President of the Council (with the background note), the Secretary of State for Scotland, to the Legal Secretary to the Attorney General, the Private Secretaries to the Chief Whips in both Houses, the Secretary to the Cabinet, and to the Chief Press Secretary, No.10.

Yours sincerely
Christine M. Duncan

Private Secretary

GLASGOW RAPE PROSECUTION

Draft Statement on Rape Prosecution in Scotland

In Scotland the system of prosecution of crime is wholly independent of political influence and the reasons for proceeding or not proceeding with a particular prosecution are properly regarded as confidential in their detail. In the interests of the complainer in this case, and for the protection of any person who might be accused of an offence in relation to the facts of the case, I do not propose to go into detail ~~ac~~ except to the extent that I believe it to be desirable to reassure the House and the public.

It should be borne in mind that no prosecution will be brought in Scotland where there is not prime facie corroborated evidence capable in the opinion of the Crown of achieving a conviction. The question in this as in all cases is whether it would be proper, in the face of evidence which taken together produces the view that the case would be withdrawn from the jury, for the Crown to proceed to ~~accuse~~ prosecute persons by means of evidence which they believe could not lead to a conviction.

In this case the Procurator Fiscal, on receipt of information from the police, charged 4 youths with rape and with attempted murder. On reporting the case to Crown Council in Edinburgh, they, in the exercise of their responsibility as independent prosecutors, charged 3 of these youths with one charge of rape and one charge of assault to severe injury, permanent disfigurement and danger to life. The case called at the May 1980 sitting of the High Court in Glasgow, when the case did not proceed because the complainer failed

to appear and the police had been unable to cite her to attend. The Advocate Depute in charge of the case therefore did not call the case in court and put it out for the June sitting of the court. In the interval, the complainer was traced as the result of her having attempted to commit suicide. On the instructions of Crown Council, she was examined by a consultant psychiatrist acting on behalf of the Crown. It would not be proper in the interests of the complainer to refer to ~~that evidence~~ his finding. On the basis of ~~the~~ his ~~evidence~~ report however Crown Council took the view that the complainer should not be called to give evidence at that time or in the forseeable future. Accordingly the case was not called at the next sitting of the High Court in June 1981.

Thereafter the decision had to be taken whether the trial should be indefinitely postponed, or whether the Crown should proceed with the whole, or part of the indictment in the absence of the complainer's evidence, or whether the case should be dropped altogether.

In a case of rape the Crown will not be able to obtain a conviction on evidence merely of intercourse with the complainer. It is necessary also to prove the absence of consent by the complainer, and in the absence of the complainer that is extremely difficult to prove. Given that the complainer was not at that stage able to give evidence, the difficult decision arose whether on the remaining evidence available the Crown should proceed with both or one of the charges. The view was taken by Crown Council that it would not have been possible to proceed with the charge of assault

without also proceeding with the charge of rape. The difficult decision therefore arose whether to proceed with two charges which were so inextricably connected that it would have been difficult to treat them separately, in the knowledge that ~~it was to say the least improbable that there was any evidence~~ there was no sufficient evidence to prove the charge of rape. Crown Counsel in this difficult situation took the view that it would not have been proper either to proceed with both charges, in the situation where a conviction could not have been obtained on the charge of rape, or to proceed on the single charge of assault, which in their view was inextricably connected with the charge of rape. This is a difficult matter of choice on which I would not wish to criticise the decision of Crown Counsel, who decided that it was not proper to proceed with either.

With regard to obtaining the evidence of the complainer in the situation where she was not able to give ~~that~~ her evidence in court, it has been suggested that her evidence could have been taken on commission under section 32 of the Criminal Justice (Scotland) Act 1980. This is a misunderstanding of the purpose and scope of that section, which provides that the application to take evidence in this way may only be granted if the judge is satisfied that there would be no unfairness to the other party. I can conceive of no circumstances in which the application in this case to take the evidence on commission of the complainer would have been granted.

Having decided that there was insufficient evidence on one charge in the absence of the complainer's evidence, and that it would be improper to proceed in that knowledge with either charge,

Crown Counsel had the choice between deserting the indictment pro loco et tempore (thus retaining the right to reindict the accused if and when the complainer became fit to give evidence) or on the other hand deserting the diet simpliciter, thus precluding further proceedings by the Crown in terms of the case of Her Majesty's Advocate against THOM. No doubt Crown Counsel, being in possession of the opinion of the psychiatrist, had particularly in mind the importance of the safeguards in the law of Scotland to prevent injustice through delay. In these circumstances he decided to desert the diet simpliciter. In all the circumstances, having considered the evidence myself, I am bound to say that the decision to desert simpliciter instead of postponing the indictment at that stage was wrong. In order to prevent such a difficulty arising in the future, I have given instructions that in future cases, before any decision is taken to drop proceedings in the High Court in the case of any plea of the Crown - that is to say any case of murder, treason or rape - the question whether the proceedings should be dropped altogether must first be referred to a Law Officer.

Background Note to the Statement on the Rape Case in Scotland which was not proceeded with.

It is traditional that the prosecution in no circumstances divulge the evidence available to them and despite the fact that evidence has been given in the press as proporting to reflect evidence available to the Crown it is not our intention to refer to it or indeed to reveal it for historic and important reasons. Nevertheless it is perhaps important that we should point out certain facts. The first charge was a charge of rape. In the absence of the complainer's evidence there was no possibility whatsoever of establishing the essential element of rape which was lack of consent which would certainly have been denied by all the accused. The woman was intoxicated, whether or not she was assaulted is a matter of dispute. Even with her evidence it is unlikely that we could have established a charge of rape and had we been able to do so it is even more unlikely that we would have been able to establish a charge of rape against more than one of the accused. The almost inevitable influence is that any serious assault which was committed against her was committed after sexual intercourse and not before and was the act of one accused and had no consent from or consensus with any of the others.

2. It is suggested that we could have proceeded in the second charge which was assault with a razor or knife and not with the first charge. But they were so much a part of one incidence that to charge one and not the other would have been impossible and to charge both in the knowledge that one could never go to the jury would have been highly prejudicial and quite wrong.

3. It has been suggested, correctly, that the Crown cannot now re-indict any of the accused. But there is a remedy open to the complainer to bring a private prosecution. This has been suggested in the press. It is not something in which we could in the circumstances concur, nor I think in the circumstances could we oppose it and I think that it would be a perilous course. Nevertheless, it is open to the complainer if she now wishes to expose herself to the grim experience that would inevitably be hers were she to [illegible] bring a private prosecution on the matter of these charges and there is a possibility she could succeed. I think it is right that she should be advised that that is a possibility and it is for this reason that we have been cautious, not to say that success on either charge was impossible. What we have said is that in the absence of our evidence success on the rape charge was in our judgement impossible and to proceed on the second charge in its absence would in our judgement have been improper. I should add that the right to bring a private prosecution depends upon an order of the High Court of Justiciary in Scotland. It is normal that this would only be granted with a concurrence of the Lord Advocate. In this case it is clear the Lord Advocate could neither concur nor demur and accordingly it would be for the court to grant that right or to refuse it.

10 DOWNING STREET

From the Principal Private Secretary

11 January 1982

Dear Michael,

R. v. ALLEN :
RAPE CASE AT IPSWICH

I have shown the Prime Minister your letter of 8 January 1982 about this case.

She was grateful not only to be shown the exchange of correspondence between the Lord Chancellor and Mr Jack Ashley MP but also to have the further information about the case contained in your letter.

If the Prime Minister has Questions about the case when Parliament resumes, she will follow the line suggested in the last paragraph of your letter.

Yours ever,

Clive Whitmore.

Michael Collon Esq.,
Lord Chancellor's Office.

FROM:

THE RT. HON. LORD HAILSHAM OF ST. MARYLEBONE, C.H., F.R.S., D.C.L.

HOUSE OF LORDS,
SW1A 0PW

8th January, 1982

The Right Honourable
Jack Ashley, C.H., M.P.,
17 Bridge Road,
Epsom,
Surrey,
KT17 4AW.

Dear Jack:

R. v. Allen

Thank you for your letters of 6th and 7th January and for your advice and various suggestions, which I will gladly bear in mind.

You may be quite sure that I will deal with the matter most carefully and in my own way, with due regard both to the seriousness of the detestable crime of rape and to the limitations on the constitutional position of the Lord Chancellor. In the meantime I am informing myself more fully of the facts of the case and of what transpired at the hearing.

Contributory negligence does not, of course, constitute any defence to rape, nor in my view, in the absence of actual sexual provocation, should imprudence on the part of the victim operate as a factor of mitigation in reduction of sentence.

I do not of course suggest either factor was present in the actual case, and no suggestion of direct provocation was in fact made.

Yrs:

Q.H.

From THE RT. HON. LORD HAILSHAM
OF ST. MARYLEBONE, CH, FRS, DCL.

D10

FROM THE PRIVATE SECRETARY

HOUSE OF LORDS,
SW1A 0PW

8th January, 1982

Prime Minister.

8.1.82

Confidential

Clive Whitmore Esq.,
Principal Private Secretary to
The Right Honourable
The Prime Minister,
No. 10 Downing Street.

Ref: L12/127/08

Dear Clive,

R. v. Allen:
Rape Case at Ipswich

I know from your Press Office that you have been receiving a considerable amount of correspondence concerning the £2000 fine imposed by Judge Bertrand Richards in this case. Jack Ashley MP has written two letters to the Lord Chancellor, and the Lord Chancellor has now replied. I have sent copies of this correspondence to your Press Office, but in case the Prime Minister is interested you may like to have, not only copies of that correspondence, but further particulars.

Some correspondents, though not Jack Ashley, have called upon the Lord Chancellor to dismiss the judge. The only power which the Lord Chancellor has to dismiss a Circuit Judge is contained in section 17(4) of the Courts Act 1971, which allows him to do so "on the ground of incapacity or misbehaviour". The imposition by a judge of a sentence which is widely (and possibly rightly) criticised cannot by any conceivable stretch of the imagination be described as misbehaviour.

In his second letter, Jack Ashley asks the Lord Chancellor to remind Judge Richards of his power under section 11(2) of the Courts Act to vary his sentence within 28 days. In point of fact, that section was repealed on 1st January 1982 by Schedule 7 of the Supreme Court Act 1981, but re-enacted in identical terms in section 47(2) of that Act. But that is a trivial point; what is relevant is that this section was not designed to be used to increase a sentence except possibly in the case of clerical error; it has never, to the knowledge of anyone in this Department, been known to be used except to reduce sentences. Moreover, it would be an abuse of the Lord Chancellor's powers (and indeed a contempt of court) for him to attempt to influence the judge to use the section.

/Contd.

There is no question of the Lord Chancellor convening a sentencing conference. Such conferences are held regularly, convened by the Lord Chief Justice and other senior judges, and it is for them to decide whether or not sentences for a particular crime should be put on the agenda.

The judge has admitted, in a confidential letter to the Lord Chancellor, that his reference to the concept of contributory negligence by the hitch-hiker was inappropriate, and he has apologised for this; and you will see that this is the one point on which the Lord Chancellor's reply to Jack Ashley does impliedly criticise the judge.

Finally, as to the sentence itself. The Lord Chancellor never comments on sentences in individual cases, since to do so would be interference by the executive with the independence of the judiciary. But, in imposing this sentence, the judge was undoubtedly influenced by facts which cannot be made public but of which the Prime Minister may like to be aware. The victim was not a young lady of unblemished reputation. Although aged only 17, she has had sexual intercourse with four boyfriends, has had one abortion, and has suffered from venereal disease. These facts are contained in the victim's sworn statement to the police. The only reason they cannot be made public is that she was not cross-examined on that statement; and the only reason for this is that, after she broke down in tears in court, the defendant changed his plea from not guilty to guilty. I have no idea whether, at the time of the rape, the defendant was aware of the victim's previous sexual experience; but at the time of the trial he was undoubtedly aware of what she would be spared if he changed his plea, and the judge was therefore fully entitled to take his change of plea into account when deciding on the sentence.

I think it very likely that, when Parliament resumes, there will be questions to the Prime Minister concerning this case. I should perhaps emphasise that, while she will wish to emphasise the independence of the judiciary, and may wish to mention the Lord Chancellor's statutory power to dismiss Circuit Judges, she should not of course comment on the particular sentence imposed, still less mention the facts concerning the victim which I have mentioned earlier.

Yours sincerely,

Michael Collon

M.H. Collon

From: The Rt. Hon. Jack Ashley C.H., M.P.

PCard 81.

HOUSE OF COMMONS
LONDON SWIA OAA

7th January 1982

The Rt. Hon. Lord Hailsham, CH
House of Lords
London SW1A OAA

Dear Quintin,

I was astounded to learn that when Judge Richards spoke of "contributory negligence" in the recent rape case he was relying on an out of date legal text book. He is quoted in the press as referring enquirers to David Thomas's book "The Principles of Sentencing". But in an old edition of that book the term "contributory negligence" was used only in relation to length of sentences, and the phrase was removed from the later edition. The author has assured me that there is nothing in his book which would support the imposition of a fine in this particular case.

I therefore suggest that when you meet Judge Richards to discuss the case you should ask him why he relied on an out of date text book and why he so misunderstood it. I also suggest that you confirm to the Judge that "contributory negligence" has no legal place in determining whether or not a rapist should be allowed to walk free.

Although the prosecution currently has no right of appeal, I believe you should remind the Judge of a little known fact: that under Section 11(2) of the Courts Act 1971 he, and only he, has the power to vary his decision within 28 days. This provision was designed for the rectification of mistakes in sentencing and I should be very interested to hear from you of Judge Richard's response.

Yours,

Jack

From: The Rt. Hon. Jack Ashley C.H., M.P.

LCC Sir Wilfrid Bourne
PCack 7/1

HOUSE OF COMMONS
LONDON SWIA OAA

6th January 1981

The Rt. Hon. Lord Hailsham, CH
House of Lords

Dear Quinton,

The comments, and the sentence of a mere fine, by Judge Bertrand Richards for the serious crime of rape call for urgent action by you. Even though the victim may have been unwise to hitch-hike, the Judge's comment that she "was guilty of a great deal of contributory negligence" will be interpreted as a licence to rape any hitchhiker. The concept of contributory negligence has no validity in the law of rape and the Judge was not only foolish in utterance but wrong in law.

The derisory sentence will give solace and comfort to rapists. It constitutes an insult to women everywhere and is a grave judicial error. Neither the comment nor the sentence can be ignored and I hope you will take the following actions to undo some of the damage and help to avoid a repitition of such preposterous comments and sentences.

Firstly, you should publicly repudiate Judge Richard's injudicious comment. Secondly, you should deplore the inadequate sentence. Thirdly, you should summon Judge Richards and demand his withdrawal of the comment. You should also acquaint him with the gravity of the crime of rape and seek an explanation of his extraordinary sentence. Fourthly, I suggest that you convene an early conference of judges on sentencing policy for rape so that eccentric and damaging judgements of this kind are actively discouraged.

Yours,

Jack