

Copyright is retained by the Queensland Law
Reform Commission.

REFORM OF THE LAW OF RAPE

Report
R 21

Queensland Law Reform Commission
August 1976

LAW REFORM COMMISSION

QUEENSLAND

REFORM OF THE LAW OF RAPE

Q. L. R. C. 21

LAW REFORM COMMISSION

QUEENSLAND

REFORM OF THE LAW OF RAPE

Q. L. R. C. 21

The Hon. W. D. Lickiss, M. L. A. ,
Minister for Justice and
Attorney-General,
BRISBANE.

We refer to a request from the then Minister for Justice and Attorney-General, the Hon. W. E. Knox, M. L. A. , that the Law Reform Commission report on the reform of the law of rape. The Commission had previously intended to examine the law of rape as part of a larger inquiry into the criminal law under Item 2 of its second programme. To meet the request, however, we now make this report before continuing with the larger inquiry. We have not attempted an exhaustive examination of the law of rape. Instead we have dealt only with those matters where there seems to be a strong case for reform. Since we have not distributed a working paper in anticipation of this report, we ask that our suggestions be treated as a basis for consideration rather than a set of definitive recommendations.

At the outset we wish to acknowledge the help derived by us from recent examinations of the subject by bodies in other jurisdictions. The following must be specifically mentioned -

- (1) Report of the Advisory Group on the Law of Rape (1975) Cmnd. 6352, the result of an inquiry in the United Kingdom under the chairmanship of the Hon. Mrs. Justice Heilbron.

The Sexual Offences (Amendment) Bill, based on this report, was read a second time in the House of Commons on 13 February 1976.

- (2) Rape Prosecutions, (1976) Victorian Law Reform Commissioner's Working Paper No. 4.
- (3) Recommendations for reducing harassment and embarrassment of complainants in Rape cases, (1976) Tasmanian Law Reform Commission Report.
- (4) Rape and Other Sexual Offences, (1976) South Australian Criminal Law and Penal Methods Reform Committee Special Report.

We also wish to acknowledge the help derived from the studies on rape cases in Queensland published by Mr. R. N. Barber in the 1968, 1973 and 1974 issues of the Australian & New Zealand Journal of Criminology and from the monograph on Factors Affecting Sentencing Decisions in Rape Cases (Australian Institute of Criminology 1976) by Mr. J. E. Newton.

In this report we deal with three matters, as follows:

- (1) Protecting the privacy of the complainant in a rape prosecution;
- (2) Splitting rape into two separate offences; and
- (3) Making the husband liable to conviction for rape.

At the end of our discussion of each of these matters, we suggest amendments to the Criminal Code that would give effect to our conclusions.

PROTECTING THE PRIVACY OF THE COMPLAINANT IN A RAPE PROSECUTION

It is the revelation of what might properly be considered the complainant's private sexual history that has caused the main problem with rape prosecutions. Ordinarily, the complainant in a rape case is required to give evidence on at least two occasions, namely, at the committal proceedings that precede the trial and later, perhaps many weeks later, at the trial itself. On both occasions she is liable to be cross-examined by the defence about her previous sexual experiences. She may, of course, be asked questions about her relationship with the accused. She may also be asked questions that tend to show that she is of notoriously bad character or has been living the life of a prostitute. However, she may also be cross-examined as to her relationships with other men, it not being alleged that she is of notoriously bad character. This cross-examination will usually be conducted in a court room to which not only the complainant's acquaintances but also any other member of the public may be admitted.

The complainant may be cross-examined about her sexual history on one of two bases. Firstly, the questioning may be conducted on the basis that the evidence sought is directly relevant to an issue in the case, usually whether or not the complainant consented to the sexual intercourse charged against the accused. It is on this basis that the complainant may be asked about her relationship with the accused. It is also on this basis that she may be asked questions tending to show she is of notoriously bad character or living the life of a prostitute. In both cases, the questioning may legally be justified on the basis that it is relevant as tending to prove consent. Secondly, the complainant may be cross-examined about her sexual history on the basis that the evidence sought will tend to destroy her credit as a witness. The formal, legal justification for the questioning is that it is designed to show that she is an untruthful or unreliable witness. If the defence cannot justify its cross-examination on the basis that it is directly relevant to an issue in the case, such as consent, it can fall back on the argument that it is designed to show that the complainant is an untruthful or unreliable witness.

Courts tend to give a fairly free rein to the defence when it is cross-examining a witness. This is understandable because in some respects the defence is in a very weak position. Though it may have all the resources of the police force ranged against it, it may not have the means to carry out any investigations of its own. Only by conducting a wide-ranging cross-examination of a prosecution witness may it be possible for the defence to bring out facts to show that the accused is really innocent or at least entitled to a reasonable doubt. There may be no other way to ensure that

justice is done. Therefore courts are not quick to say that a particular line of cross-examination cannot be justified on either of the bases mentioned above. If a question does not appear to be directly relevant to an issue, it will often be readily assumed that it goes to the credit of the witness.

It may not be necessary to determine the basis on which a question in cross-examination has been asked unless the cross-examining party seeks to call evidence to contradict the answer. If the question is not directly relevant to an issue in the case, the party is not ordinarily entitled to call evidence in rebuttal. In these circumstances the answer given must be accepted for better or worse because, as it is said, it is collateral to the main issue. For example, a person accused of rape may not be entitled to call evidence to contradict the complainant's denial during cross-examination that she had sexual intercourse with another man. He will not be entitled to call such evidence unless the sexual intercourse alleged by him is directly relevant to an issue in his own case, such as consent.

Thus the law places an important restriction on the calling of evidence in rebuttal that it does not place on the cross-examination itself. During cross-examination, the complainant may be questioned about her relationships with other men whether or not the questions are collateral to the main issue. As we have suggested above, this seems desirable to the extent that it allows the defence to conduct an investigation that it might not be able to conduct in any other way. Only during the course of such a cross-examination may it become apparent that evidence of the other relationships is directly relevant to an issue in the case.

Why the problem has now arisen

The free rein given to the defence in its cross-examination of witnesses raises a serious problem with rape prosecutions. There are two reasons for this. Firstly, there is the greater intensity with which persons charged with criminal offences, especially serious criminal offences, are now generally defended. The defence is likely to make more extensive use of its right of cross-examination at both the committal proceedings and the trial than it formerly did. We do not here examine why this has happened but feel we can say without any hesitation that it has happened. Of course, this phenomenon is not peculiar to rape prosecutions. However, the second factor now to be mentioned aggravates it in such prosecutions.

Secondly, there is the ambivalent attitude displayed by the community towards extra-marital sexual activity. Community condemnation of extra-marital relationships has noticeably decreased and it can no longer be said that a woman participant places herself completely and irretrievably beyond any widely accepted code of behaviour. Nevertheless, the allegation or admission of such a relationship can cause considerable embarrassment and can be used to draw moral censure on the participants. A suggestion that the complainant in a rape case has on a previous occasion had sexual intercourse with another man, not her husband, can not only embarrass her but also help towards the conclusion that she consented to have sexual intercourse with the accused.

These factors may militate against the proper administration of justice in rape prosecutions. The repeated public cross-examination of the complainant in a rape case about her private sexual history may deter other

- x -

rape victims from reporting such crimes to the police. There may be a very natural disinclination by a woman to have brought out in public matters that she regards as private and that may well expose her to condemnation. Moreover, a jury might improperly deduce from the complainant's private sexual history or even the allegation of extra-marital relationships that she is not a truthful or reliable witness or that she is a person whose disposition makes it likely that she consented to have sexual intercourse with the accused. In the same way as jurors may be improperly prejudiced against an accused by evidence of his previous convictions, so they may be improperly prejudiced against a complainant by allegations and admissions of her previous sexual experiences.

Protecting the complainant under cross-examination

We think there is a case for protecting complainants under cross-examination in rape cases. We hope it is not necessary for us to affirm that we are fully aware of the special danger of unfounded accusations and unjust convictions in such cases. It is part of the traditional wisdom of the law that rape is an accusation that can easily be made and against which an accused, however innocent he might be, may be hard put to defend himself. The suggestions we make are made in the awareness that if the procedural checks and balances are tilted too far against the defence it may only be a matter of time before there results some serious miscarriage of justice.

That constant vigilance is necessary with rape prosecutions to ensure that justice is done is amply shown by figures supplied to us by the Commissioner of Police during the preparation of this report. They are an analysis of complaints of rape offences in certain police districts during 1975. Because of the limited time available, the analysis was restricted to the three Brisbane Police Districts and the Criminal Investigation Branch, Brisbane. The analysis shows that during 1975 in the districts to which it relates 77 complaints of rape were made. The character and result of the 77 complaints were as follows:

- 11 (15%) complaints were the subject of prosecution for rape.
- 8 (10%) complaints were not proceeded with because the complainants declined at some stage short of prosecution to involve themselves further.
- 58 (75%) complaints were shown by investigation to have no factual basis for a valid complaint of rape.

The 58 (75%) complaints shown not to have any factual basis for a valid complaint of rape were made up as follows (the percentages relate to the total of 77 complaints):

- 23 (30%) complaints were made by persons presumed to have been aware that the allegation was in fact false.
- 27 (35%) complaints - although investigation showed no factual basis for a valid complaint of rape, there seemed no desire by the complainant to misrepresent the offence alleged.

8 (10%) complaints were found to have been made by complainants subject to mental or medical conditions "their allegations being apparently the products of their own imaginations".

These figures may be compared with those published by the Victorian Law Reform Commissioner as a result of a similar analysis showing that 50% of complaints of rape offences were unfounded: Working Paper pp. 15 - 18.

It is obvious from these figures that the proper administration of criminal justice with respect to rape greatly depends upon the ability of the law-enforcement agencies to distinguish genuine cases of rape from those that are not genuine. Of course, the criminal courts are also burdened with this task. Figures supplied to us by the Solicitor-General show, for example, that in 1974 - 1975 only 12 of 34 indictments for rape resulted in a conviction for rape. Of the remaining 22, 8 resulted in an acquittal for rape and 14 in a nolle prosequi. Here it is important to remember that rape is a crime punishable with hard labour for life. In every rape trial, a most important decision must be made concerning the liberty of a citizen.

It is therefore a very grave step to reduce the information available to a criminal court, including the jury, trying a person accused of rape. Any new protection for a complainant under cross-examination necessarily reduces the information available to the court in making its decision. Nevertheless, for the reasons set out above, we think this is a step that should now be taken.

The first thing to be decided, in our opinion, is the extent to which the complainant may be cross-examined before the jury about her relationship with men other than the accused. What should the jury know in order to enable it to reach a just verdict? On the one hand, there are cases where the previous sexual history of the complainant with other men may be directly relevant to an issue in the case or to her credibility as a witness. For example, the accused might allege that the complainant consented to the sexual intercourse but afterwards for the first time demanded money from him. See R. v. Krausz (1973) 57 Cr. App. R. 466. Questions tending to show that the complainant had behaved in a like manner on other occasions with other men would be directly relevant to the issue of consent in such a case.

On the other hand, there are cases where knowledge of the complainant's previous sexual history could only make it more difficult for the jury to reach a just verdict. For example, if the evidence shows that a married woman was violently raped by a stranger who had broken into her house to steal, the fact that she had had an extra-marital relationship with some other man before her marriage would almost certainly be irrelevant to any issue before the court or to her credibility as a witness. Questions about the relationship would, very probably, only serve to embarrass her unnecessarily and to distract the attention of the jury from the real issues before it. For the reasons stated above, such questions could seriously militate against the proper administration of justice.

It seems, therefore, that although cross-examination of the complainant before the jury about her relationships with other men ought not to be prevented entirely, it ought to be kept within bounds. Subject to what we say below about the right of the defence to establish the relevance of

facts by cross-examining prosecution witnesses, the complainant ought not generally to be questioned about such relationships unless, in the words of the Victorian Law Reform Commissioner (Working Paper p. 31), they "... are considered to have real relevance to facts in issue or to be proper matter for cross-examination as to credit." Ordinarily, the jury should not hear about such a relationship unless it is of real relevance to some fact in issue, such as consent, or to credit.

Establishing the relevance of facts by cross-examination

An important procedural issue would arise if cross-examination before a jury were limited in the manner suggested above, namely: How would the trial judge decide whether particular cross-examination will elicit evidence that is of real relevance to facts in issue or to credit? The trial judge could be advised by the defence, acting on instructions from the accused, about the probable relevance of the questioning. But there is a significant difficulty here. Quite apart from the possibility that the accused might give false information to those defending him, there is the possibility that the defence might be entirely ignorant of facts which, if known, would be held to be of real relevance to the facts in issue or to credit.

The accused may know very little about the complainant even though she may have been his voluntary social companion at the time of the alleged offence. Unlike the prosecution, the defence may have only meagre resources at its disposal to carry out any investigation on its own behalf. Only by subjecting the complainant to a wide-ranging cross-examination may the defence be able to discover that the complainant's previous sexual history is of real relevance to an issue in his case and, for that reason, something that should be made known to the jury. Though the possibility of such a discovery may not ordinarily be very great, it will often be impossible to exclude it altogether. Where the liberty of the subject is at stake, the right to cross-examine in this way should be preserved.

It is our opinion, therefore, that if the cross-examination of the complainant before the jury is restricted in the manner suggested, a cross-examination not so restricted should be permitted at some other time, either at the committal proceedings or before the trial judge in the absence of the jury, as on the *voire dire*. The complainant's privacy could be protected on these occasions by providing that her testimony be given in closed court and by prohibiting the publication of any details of it.

We think the best solution would be to empower the trial judge to allow the unrestricted cross-examination to be conducted before him in the absence of the jury, as on the *voire dire*. This cross-examination could be conducted at some convenient time during the course of the trial so as to permit him to decide what questioning, if any, should be allowed before the jury. The trial judge should be empowered to disallow any question put to the complainant during this cross-examination about her relationship with a man other than the accused if, in his opinion, the question is so unlikely to elicit evidence of real relevance that it would be oppressive to compel the complainant to answer it.

We realize that such a trial within a trial involves difficulties of its own. However we think it preferable to allow an accused person to cross-examine the complainant in closed court in the absence of

the jury and protected by procedural safeguards rather than to deny him any opportunity of discovering some relevant part of the complainant's previous history which in justice should be made known to the jury.

Complainant's presence at the committal proceedings

Under s. 110A of the Justices Act 1886 - 1975, introduced into that Act in 1974, justices conducting committal proceedings may, subject to certain conditions, admit as evidence written statements of witnesses without those witnesses appearing before them to give the evidence in person. Such a written statement cannot be admitted under this provision unless the defendant is represented by counsel or a solicitor and agrees to the admission of the written statement.

We have considered whether in committal proceedings where a defendant is charged with rape such a written statement by the complainant should be made admissible whether or not the defendant agrees. To make the written statement admissible without the agreement of the defendant would be to make the complainant less vulnerable to harassment and embarrassment; for she would not then ordinarily be required to give her evidence at the committal proceedings in person.

However, we have decided not to recommend the adoption of this change at the present time. In the course of our larger inquiry into the criminal law (referred to at the beginning of this report), we intend to examine the conduct of committal proceedings with a view to their improvement in the light of modern-day conditions. To introduce such a change only in relation to rape would be to create an anomalous exception to the rules of procedure at such proceedings. Moreover we would hope that as the legal profession becomes more familiar with the provisions of s. 110A and with the adoption of the restrictions upon cross-examination already suggested by us, which would apply to the committal proceedings, the complainant will be called upon less frequently in the future to give her evidence in person at such proceedings.

If these hopes are not fulfilled, there will always be an opportunity at some future time for the legislature to adopt the change contemplated above. Meanwhile we suggest that the complainant's evidence at committal proceedings for a rape offence be given in closed court and that publication of any details of it ordinarily be prohibited.

Proposed legislation

To give effect to the suggestions made above, a new section could be inserted into the Criminal Code in the form proposed below. The proposed s. 616A would restrict in rape prosecutions the questioning of a complainant about her sexual experiences with a person other than one to whom the charge relates. Under sub-s. (3), which would apply to a trial before a jury (or a Children's Court where it has jurisdiction) as well as committal proceedings, the complainant could be questioned by the defence about such matters only if they are (a) of real relevance to facts in issue, (b) proper matters for cross-examination as to credit, or (c) otherwise matters in respect of which special leave ought to be given. The provision for special leave under (c) is necessary to cover special circumstances of admissibility, for example, under the *res gestae* rule.

Subsection (5) would allow the trial judge to order the cross-examination of the complainant in the absence of the jury if he thinks this desirable to enable him to determine whether any questioning should be allowed before the jury under sub-s. (3). Subsections (6), (7), (8) and (9) would apply to proceedings under sub-s. (5). Subsection (7) provides for a closed court not only for proceedings under sub-s. (5) but also for committal proceedings while a complainant is giving evidence.

The proposed s. 616A does not prohibit the publication of details of proceedings. To accomplish this, we suggest that s. 71A(2) of the Justices Act 1886 - 1975, which prohibits the publication of proceedings in certain circumstances, be extended so as to apply automatically to a proceeding under the proposed s. 616A(5) or to a committal proceeding while a complainant is giving evidence unless the Court or justices orders otherwise for reasons expressly stated. Unlike the analogous provisions of the Victorian Judicial Proceedings Reports Act 1958 s. 4, the Justices Act s. 71A(2) applies only if the appropriate order is made by the Court or justices.

We propose for consideration the following draft provisions:

New Section 616A. The Criminal Code to be amended by inserting after section 616 the following section:-

- "
- 616A. Restrictions on questioning with rape offences. (1) In any proceeding wherein a person is charged with a rape offence, the complainant shall not be asked by or on behalf of the defence any questions tending to show that the complainant has had sexual experience (of any kind and at any time) with any person other than a person to whom a charge preferred in that proceeding relates, except -
- (a) as authorised by leave given pursuant to subsection (3); or
 - (b) upon a cross-examination conducted pursuant to subsection (5).
- (2) Leave shall not be given except on an application by or on behalf of the defence which -
- (a) if made in a trial by jury is made in the absence of the jury; and
 - (b) specifies the matters in respect of which the application is made.
- (3) Upon an application for leave, the Court or justices shall give leave only if satisfied that the matters in respect of which the application is made are -
- (a) of real relevance to facts in issue in the proceeding;
 - (b) proper matters for cross-examination as to credit; or
 - (c) otherwise matters in respect of which leave ought to be given.
- (4) If the defence so requests, an application for leave shall be made in the absence of the complainant.

(5) In order to determine whether leave ought to be given, the Court of trial may allow the complainant to be cross-examined by or on behalf of the defence in the absence of the jury (if any) about the matters, or any of the matters, in respect of which the application for leave is made.

(6) Upon a cross-examination pursuant to subsection (5), the Court may disallow any question which, in the opinion of the Court, is so unlikely to elicit evidence showing that leave ought to be given that it would be oppressive to compel the complainant to answer it.

(7) While any complainant is giving evidence -

(a) upon a cross-examination pursuant to subsection (5); or

(b) before justices conducting a proceeding with a view to determining whether a person charged with a rape offence should be committed for trial,

the Court or justices shall exclude from the room or place where the evidence is given all persons except officers of the court, the prosecutor, a legal representative or adviser of the prosecutor, the person charged, a legal representative or adviser of the person charged, any person authorised by the complainant, any person authorised by the Court or justices for reasons expressly stated by the Court or justices.

The provisions of this subsection shall be construed as subject to and not in derogation of the provisions of subsection (1) of section 71A of the Justices Act 1886 - 1975.

(8) Before or during a cross-examination pursuant to subsection (5), the Court may order that a person charged in the proceeding be excluded from the room or place where the cross-examination is conducted during the whole or any part of the cross-examination provided that the cross-examination be conducted by or in the presence of the legal representative of that person.

(9) The record of a cross-examination pursuant to subsection (5) shall be confidential and shall after the completion of such cross-examination be sealed by the Registrar or other proper officer of the Court in an envelope to be placed with the record of the proceeding.

The Court may order that any record or part of a record made of the cross-examination be destroyed after the expiration of the time for an appeal against a conviction in the proceeding or after the determination of such appeal.

(10) In this section -

"complainant" means a woman or girl upon whom, in a charge for a rape offence to which the proceeding in question relates, it is alleged that rape was committed, attempted or proposed;

"defence", in relation to a proceeding, means any person charged in that proceeding whether or not he is charged with a rape offence;

"rape" includes gross sexual imposition; and

"rape offence" means any of the following, namely, rape, counselling or procuring rape, attempt to commit rape, attempt to procure the commission of rape and conspiracy to commit rape. "

SPLITTING RAPE INTO TWO SEPARATE OFFENCES

We recommend that the existing offence of rape be split into two separate offences, namely, "rape" (as newly defined) and "gross sexual imposition". Our main reason for this recommendation is that rape, as at present defined, covers too broad a band of criminal behaviour. The law does not sufficiently discriminate between offences of only moderate seriousness on the one hand and offences of an extremely serious character on the other.

In our view, the existing state of the law is almost as undesirable as if offences of such different seriousness as assault occasioning bodily harm, wounding and doing grievous bodily harm were all lumped together into a new offence called "doing bodily harm". An assault occasioning bodily harm, if dealt with under s. 343A of the Criminal Code, is punishable with imprisonment with hard labour for six months. It would clearly be undesirable to merge this offence with wounding or doing grievous bodily harm which, if dealt with under s. 317 of the Criminal Code, is punishable with imprisonment with hard labour for life. Yet something rather similar is done by the law upon rape. Extremely serious criminal conduct is lumped together under the one name with criminal conduct of only moderate seriousness.

In Queensland, rape is defined by s. 347 of the Criminal Code as follows:

Definition of rape. - Any person who has carnal knowledge of a woman, or girl, not his wife, without her consent, or with her consent, if the consent is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false and fraudulent representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of a crime, which is called rape.

This definition includes all cases where "carnal knowledge" (that is, sexual intercourse) of a woman or girl is had without her consent, or with her consent if the consent is obtained by any of the specified means which render

it ineffective. The Criminal Code does not distinguish between one kind of rape and another according to the circumstances in which the offence is committed. Under s. 348, every person who commits rape is liable to imprisonment with hard labour for life.

The circumstances in which a man may have sexual intercourse with a woman without her effective consent may vary greatly in seriousness. At one end of the scale, a man may rape a woman who has not done anything to encourage his sexual advances, violently overcoming any resistance she may offer. At the other end of the scale, a man may have sexual intercourse with a woman who, although she did not consent to his act, did previously allow him to take intimate sexual liberties with her. Nor is this all. The idea of consent is itself not an easy one. There are certainly cases where the woman wholeheartedly rejects the man. However there are other cases where the woman is divided in her own mind, not knowing whether to encourage or reject the man's advances. Though technically this may amount to lack of consent, the case is obviously less serious than one in which the woman unquestionably does not agree to the act.

We think it wrong in principle to treat acts of such different seriousness as the same offence. It is true that a judge when imposing sentence can mitigate the penalty according to the circumstances of the case. The penalty prescribed by s. 348 is a maximum, not a mandatory, penalty. However the extent to which the judge can mitigate the penalty for rape is limited. Though the penalty prescribed by s. 348 is only a maximum, courts are inevitably influenced by the fact that the penalty it prescribes is imprisonment with hard labour for life. Moreover the word "rape" tends to be associated with acts of extreme violence deserving severe punishment. There is not always the realization by members of the public that rape can include cases where the woman, perhaps unwittingly, has been partly responsible for her predicament and the man has used or threatened little or no force to have sexual intercourse with her. For cases such as these, only a much reduced penalty may be deserved. Yet the courts may be unable to reduce the penalty sufficiently if the offence of which the accused stands convicted is called "rape".

It must also be remembered that, in the absence of a specific finding or recommendation by the jury, the trial judge does not know upon what basis the jury has reached its verdict. If the jury finds the accused guilty of rape, the judge may not know whether the jury regarded the offence as being of the extremely serious kind or of the less serious kind. In such circumstances, the judge knows only that the jury has been prepared to find the accused guilty of rape, an offence for which the legislature has fixed a very severe maximum penalty. In determining sentence, the judge must at least start with the assumption that the accused should be punished severely. If, instead, the jury had returned a verdict of some lesser offence not called rape, the judge would thus be enabled to deal with the convicted person more leniently.

It is quite possible that by splitting the existing offence of rape into two separate offences, namely, "rape" (as newly defined) and "gross sexual imposition", the criminal law would afford greater protection to women than it does now. If it remains widely accepted, as we think it is, that rape is always an extremely serious offence that should be punished severely, the less serious forms of the offence may go almost entirely unpunished. It becomes known that courts will only convict when the case is a bad one, and the police and other prosecuting authorities act accordingly. We think there is a great deal of substance in the argument that a severe penalty for all

cases of rape can actually lessen the protection afforded by the law to women. See [1975] Crim. L. R. 323 at p. 328 and (1973) 61 Calif. L. Rev. 919 at p. 940.

We think the situation is reminiscent of a remarkable event that occurred in Britain in 1830 when seven hundred and thirty-five bankers and company directors from two hundred and fourteen cities and towns petitioned Parliament for the abolition of the death penalty for forgery upon the ground that their property would be more effectively protected by a more lenient law: Radzinowicz History of English Criminal Law Vol. 1, pp. 591 - 592. The petitioners were arguing that the severe penalty then imposed on forgers was actually nullifying the law against forgery. We do not argue by analogy from this that the maximum penalty for rape should be reduced. Without doubt, some offences of this kind are extremely serious in character and deserve severe punishment. We do suggest, however, that women might consider themselves to be better protected if the less serious offences of this kind were removed from the definition of rape and given a name suggesting a less serious kind of criminal conduct attracting a much smaller penalty.

The strongest argument against splitting the offence of rape into two separate offences is that this might lead to compromise verdicts. A jury might agree to return the lesser verdict in circumstances when it should have found the accused either guilty of rape or not guilty of any offence. In our opinion, however, the possibility of compromise verdicts does not outweigh the greater benefit of splitting the existing offence. The criminal courts are quite used to guarding against compromise verdicts. Such a verdict is a possibility upon a large number of indictments presented in the criminal courts. For example, on an indictment of murder there is the possibility that the jury will compromise on a verdict of manslaughter. Even on an indictment of rape under the existing law there is often the possibility that the jury might return a compromise verdict of indecent assault or of unlawful carnal knowledge. This possibility has not in the past posed a serious problem. We do not anticipate that it will pose a serious problem if our recommendation is accepted.

Three ways of splitting the existing offence

Splitting the existing offence of rape into two offences of different degrees of seriousness could be achieved in three ways. Firstly, the definition of rape in s. 347 of the Criminal Code (see above) could be left as it is while circumstances of mitigation are specified that would reduce what would otherwise be rape to the lesser offence of (say) gross sexual imposition. This scheme would be similar to that by which under s. 304 of the Criminal Code provocation reduces what would otherwise be murder to manslaughter. We recommend against such a scheme because it would be awkward to charge the lesser offence on indictment in the first instance. We think it should be possible to charge gross sexual imposition in the first instance and not only to have it as an alternative verdict on a charge of rape.

Secondly, the definition of rape in s. 347 could be left as it is, though attracting a lesser penalty than life imprisonment. Circumstances of aggravation could then be specified that would allow a jury to return a verdict of aggravated rape which could attract the maximum penalty of imprisonment for life. This is substantially the kind of scheme recommended by the American Law Institute in its (1962) Model Penal Code s. 213. Rape is there defined as a felony of the second degree unless -

- (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or
- (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties,

in which case the offence is a felony of the first degree. As we see it, the difficulty with this kind of scheme is that the lesser offence is still called "rape". We think it essential that the word "rape" be not used to designate the lesser offence. If an accused is convicted of an offence called "rape" it will always be difficult for a court to deal with him leniently, for example, by admitting him to probation. This will continue to be so though the accused has been acquitted by the jury of aggravated rape.

Thirdly, the definition in s. 347 could be modified so that it defines, not an offence called "rape", but an offence called "gross sexual imposition" attracting a lesser penalty than rape. "Rape" could then be defined in terms of gross sexual imposition accompanied by one or more circumstances of aggravation. This scheme, which is the one we recommend, would have the advantage that the lesser offence is not called rape and the courts in proper cases could deal with an offender quite leniently, for example, by admitting him to probation. The offence could be treated as one of only moderate seriousness not involving the severe consequences associated with rape.

Proposed legislation

We set out below the sections that could be inserted into the Criminal Code to give effect to the scheme we propose. They would amend s. 347 (see above) so that it defines "gross sexual imposition" rather than "rape". Gross sexual imposition, thus defined, would be punishable with imprisonment with hard labour for seven years. A new s. 348A would define "rape", a crime punishable with imprisonment with hard labour for life. By virtue of s. 578 of the Criminal Code, in its existing form, gross sexual imposition would be a possible verdict on an indictment for rape. The proposed new s. 578A would set out the possible verdicts on an indictment for gross sexual imposition or for unlawful and indecent assault, which would both be offences punishable with imprisonment with hard labour for seven years.

The draft provisions we propose for consideration are as follows:

Amendment of Section 347. Section 347 of The Criminal Code to be amended by omitting the word "rape" and substituting the words "gross sexual imposition".

Repeal of and new Section 348. The Criminal Code to be amended by repealing section 348 and substituting the following section:-

" 348. Punishment of gross sexual imposition.
Any person who commits the crime of gross sexual imposition is liable to imprisonment with hard labour for seven years."

New Sections 348A, 348B. The Criminal Code to be amended by inserting after section 348, as suggested above, the following sections:-

" 348A. Definition of rape. A person is guilty of a crime which is called rape if he commits gross sexual imposition upon a woman or girl and -

- (a) the woman or girl has not on the occasion of the gross sexual imposition and before it is committed allowed him to take intimate sexual liberties with her; or
- (b) at or about the time of the gross sexual imposition and in order to commit it he kills, does grievous bodily harm to, or wounds any person or threatens to kill, do grievous bodily harm to, or wound any person.

348B. Punishment for rape. Any person who commits the crime of rape is liable to imprisonment with hard labour for life. "

New Section 578A. The Criminal Code to be amended by inserting after section 578 the following section:-

" 578A. Charge of gross sexual imposition. Upon an indictment charging a person with the crime of gross sexual imposition upon a woman or girl or with unlawfully and indecently assaulting a woman or girl, he may be convicted of any of the offences following, that is to say -

- (a) gross sexual imposition upon the woman or girl;
- (b) unlawfully and indecently assaulting the woman or girl;
- (c) having or attempting to have unlawful carnal knowledge of the girl under the age of sixteen years; or
- (d) unlawfully and indecently dealing with the girl under the age of fourteen years or with the girl under the age of sixteen years,

if any such offence is established by the evidence. "

MAKING THE HUSBAND LIABLE TO CONVICTION FOR RAPE

A husband is not guilty of rape under the existing law though he has sexual intercourse with his wife without her consent. The existing definition of rape in s. 347 of the Criminal Code applies only when a man has carnal knowledge of a woman or girl not his wife. It is true that a husband is guilty of rape if he aids another person in committing rape upon his wife or counsels or procures another person to commit rape upon his wife. However, he is not guilty of rape if he himself perpetrates what would otherwise be the offence.

We think that a husband should be liable to be convicted of rape if he commits acts upon his wife that would, were he not her husband, bring him within the new definition of rape we have proposed above (see the proposed s. 348A). We accordingly suggest the following amendment to the Criminal Code to achieve this result:

New Section 348C. The Criminal Code to be amended by inserting after section 348B, as suggested above, the following section:-

" **348C. Rape by husband. (1) Notwithstanding section 347, a husband is guilty of committing rape upon his wife if he has carnal knowledge of her under circumstances which if she were not his wife would constitute rape.**

(2) Nothing in subsection (1) shall affect the liability of a husband to be convicted of any offence otherwise than by virtue of subsection (1). "

SUMMARY OF RECOMMENDATIONS

1. The privacy of complainants in rape prosecutions be protected by the introduction of a new provision into the Criminal Code that would restrict the extent to which they may be questioned about their previous sexual history, and by the amendment of the Justices Act 1886 - 1975, s. 71A(2) (pp. 2 - 10).
2. The existing offence of rape be split into two offences, namely, rape (punishable with imprisonment with hard labour for life) and gross sexual imposition (punishable with imprisonment with hard labour for seven years) (pp. 10 - 14).
3. A husband be made liable to conviction for rape if he commits acts upon his wife that would, were he not her husband, bring him within the new definition of rape we have proposed (pp. 14 - 15).

Signed: Hon. Mr. Justice D. G. Andrews
(Chairman)

Signed: Mr. B. H. McPherson, Q. C.
(Member)

Signed: Dr. J. M. Morris
(Member)

Signed: Mr. G. N. Williams
(Member)

Signed: Mr. J. J. Rowell
(Member)

13th August, 1976.
BRISBANE.