



LORDS RULE RAPE SHIELD LAW UNFAIR

Special report: House of Lords

Clare Dyer, legal correspondent
Friday May 18, 2001
The Guardian

A law that bans juries in rape trials from hearing evidence that the accused had a previous sexual relationship with his accuser breaches his right to a fair trial, five law lords ruled yesterday in a landmark judgment.

"Good sense suggests that it may be relevant to an issue of consent whether the complainant and the accused were ongoing lovers or strangers," said Lord Steyn.

"To exclude such material creates the risk of disembodiment of the case before the jury. It also increases the danger of miscarriages of justice."

The "rape shield" law, section 41 of the Youth Justice and Criminal Evidence Act 1999, was pushed through with great determination by the government to spare rape victims humiliating cross-examination and to boost the level of rape convictions, which had slumped to an all-time low.

It virtually removed the discretion of trial judges - who were seen as exercising it too freely - to allow evidence about the complainant's sexual past where the issue was consent. Criminal lawyers complained that it could bar a jury even from knowing whether a man accused of rape was a long-term live-in partner or a stranger.

The law was challenged by a defendant who was due to stand trial the day after it came into force last December. The man, named only as A because he still has to stand trial, claimed he could not have a fair trial if he was not allowed to tell the jury that he and the woman who accused him of rape had had consensual sex on several occasions in the previous month.

The five law lords refused to make a "declaration of incompatibility" holding the law incompatible with the European convention on human rights. That was a last resort, they said. Instead, they took a second option under the Human Rights Act, ruling that the law should be read so as to make it compatible with the convention.

The ruling restores some of the discretion taken away from trial judges by the rape shield law. In future, it will be for the judge to decide if the evidence the man wants to put forward is relevant to the issue of whether or not the woman consented to sex on the occasion in question. If so, the evidence will be allowed.

A's case will now go back to the trial judge for a ruling on whether the evidence is relevant in his case. He claims that the woman, who was having sex with his friend, had also willingly had sex with him several times, the last time being a week before the incident when she alleged he raped her.

Lord Steyn said: "Due regard always being paid to importance of seeking to protect the complainant from indignity and from humiliating questions, the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial. If this test is satisfied, the evidence should not be excluded."

He added: "It is true that each decision to engage in sexual activity is always made afresh. On the other hand, the mind does not usually blot out all memories. What one has been engaged on in the past may influence what choice one makes on a future occasion." Lords Slynn, Hope, Clyde and Hutton agreed.

Harriet Wistrich, solicitor for Justice for Women and other women's groups which were allowed to intervene in the case, said: "We are pleased that their lordships have taken on board our submissions and recognise the very serious problems encountered by rape victims in the criminal justice system.

"But we are unfortunately left with a situation which allows rape defendants to ask the judge to exercise his discretion in allowing questioning on previous sexual history. The legislation was poorly worded and for this reason, we will be lobbying the next parliament to draft an amendment to the act.

Vera Baird, the QC advising the women's groups, said: "We're back to the discretion of a lot of male judges. We will try to draft an amendment to go into the next criminal justice bill."