COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF S.W. v. THE UNITED KINGDOM

(Application no. 20166/92)

JUDGMENT

STRASBOURG

22 November 1995

In the case of S.W. v. the United Kingdom [1],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A [2], as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr F. GÖLCÜKLÜ,
Mr C. RUSSO,
Mr J. DE MEYEr,
Mr S.K. MARTENS,
Mr F. BIGI,
Sir John FREELAND,
Mr P. JAMBREK,
Mr U. LOHMUS,

and also of Mr H. PETZOLD, *Registrar*,

Having deliberated in private on 24 June and 27 October 1995,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 9 September 1994, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 20166/92) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25 (art. 25) by Mr S.W., a British citizen, on 29 March 1992.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 7 (art. 7) of the Convention.

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[1] The case is numbered 47/1994/494/576. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[2] Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyers who would represent him (Rule 30).

3. On 24 September 1994 the President of the Court decided, under Rule 21 para. 6 and in the interests of the proper administration of justice, that a single Chamber should be constituted to consider both the instant case and the case of C.R. v. the United Kingdom [3].

4. The Chamber to be constituted for this purpose included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 24 September 1994, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr R. Macdonald, Mr C. Russo, Mr J. De Meyer, Mr S.K. Martens, Mr F. Bigi and Mr U. Lohmus (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr P. Jambrek, substitute judge, replaced Mr Macdonald, who was unable to take part in the further consideration of the case (Rules 22 para. 1 and 24 para. 1).

5. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the United Kingdom Government ("the Government"), the applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 3 April 1995 and the Government's memorial on 6 April. On 17 May 1995 the Secretary to the Commission informed the Registrar that the Delegate did not wish to reply in writing.

6. On 2 June 1995 the Commission produced various documents, as requested by the Registrar on the President's instructions.

7. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 20 June 1995. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Ms S. DICKSON, Foreign and Commonwealth Office, *Agent*,
Mr A. MOSES, QC, *Counsel*,
Mr R. HEATON, Home Office,
Mr J. TOON, Home Office, *Advisers*;

(b) for the Commission

Mr J. MUCHA, *Delegate*;

(c) for the applicant

Mr A. TYRELL, QC,
Mr R. HILL, Barrister-at-law, *Counsel*,

[3] Case no. 48/1994/495/577.

Mr S. GROVES, Solicitor, *Adviser*.

The Court heard addresses by Mr Mucha, Mr Tyrell, Mr Hill and Mr Moses.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

A. Events leading to charges being brought against the applicant

8. The applicant is a British citizen. His relationship with his wife, whom he married in 1987, was turbulent and came under great strain in 1990 when he became unemployed. In the early evening of 18 September 1990, she told him that for some weeks she had been thinking of leaving him and that she regarded the marriage as over. Prior to that date they had been sleeping separately - according to the applicant, for one night, or according to his wife, for five nights. The applicant did not accept that his wife meant what she said and they had a row following which he ejected her from the house, bruising her arm. She went to her next door neighbours and called the police, who subsequently visited and spoke to both the applicant and his wife separately. Later the same evening she re-entered the house and the applicant had sexual intercourse with her. Shortly afterwards she left the house, having first tried to take their child with her. She went to the neighbours crying and distressed, complaining to them and to the police, whom she telephoned, that she had been raped at knife-point.

9. On 19 September 1990 the applicant was charged with rape, under section 1 (1) of the Sexual Offences Act 1956; threatening to kill, contrary to section 16 of the Offences against the Person Act 1861; and assault occasioning actual bodily harm, in breach of section 47 of the latter Act.

B. Crown Court judgment of 30 July 1990 and Court of Appeal judgment of 14 March 1991 in the case of R. v. R.

10. On 30 July 1990 the defendant in another case, R. v. R., had been sentenced to three years' imprisonment by the Crown Court for attempted rape and assault occasioning actual bodily harm against his wife. The trial judge, Mr Justice Owen, had rejected the defendant's submission that he could not be convicted in light of a common law principle stated by Sir Matthew Hale CJ in his History of the Pleas of the Crown published in 1736:

> "But the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."

In his judgment ([1991] 1 All England Law Reports, 747) Mr Justice Owen noted that it was a statement made in general terms at a time when marriage was indissoluble. Hale CJ had been expounding the common law as it seemed to him at that particular time and was doing it in a book and not with reference to a particular set of circumstances presented to him in a prosecution. The bald statement had been reproduced in the first edition of Archbold on Criminal Pleadings, Evidence and Practice (1822, p. 259) in the following terms: "A husband also cannot be guilty of rape upon his wife."

Mr Justice Owen further examined a series of court decisions (R. v. Clarence [1888] 22 Queen's Bench Division 23, [1886-90] All England Law Reports 113; R. v. Clarke [1949] 2 All England Law Reports 448; R. v. Miller [1954] 2 All England Law Reports 529; R. v. Reid [1972] 2 All England Law Reports 1350; R. v. O'Brien [1974] 3 All England Law Reports 663; R. v. Steele [1976] 65 Criminal Appeal Reports 22; R. v. Roberts [1986] Criminal Law Reports 188; see paragraphs 22-25 below), recognising that a wife's consent to marital intercourse was impliedly given by her at the time of marriage and that the consent could be revoked on certain conditions. He added:

> "I am asked to accept that there is a presumption or an implied consent by the wife to sexual intercourse with her husband; with that, I do not find it difficult to agree. However, I find it hard to ... believe that it ever was the common law that a husband was in effect entitled to beat his wife into submission to sexual intercourse ...
>
> If it was, it is a very sad commentary on the law and a very sad commentary upon the judges in whose breasts the law is said to reside. However, I will nevertheless accept that there is such an implicit consent as to sexual intercourse which requires my consideration as to whether this accused may be convicted for rape."

On the question of what circumstances would suffice in law to revoke the consent, Mr Justice Owen noted that it may be brought to an end, firstly, by a court order or equivalent. Secondly, he observed, it was apparent from the Court of Appeal's judgment in the case of R. v. Steele ([1976] 65 Criminal Appeal Reports 22) that the implied consent could be withdrawn by agreement between the parties. Such an agreement could clearly be implicit; there was nothing in the case-law to suggest the contrary. Thirdly, he was of the view that the common law recognised that a withdrawal of either party from cohabitation, accompanied by a clear indication that consent to sexual intercourse has been terminated, would amount to a revocation of the implicit consent. He concluded that both the second and third exceptions to the matrimonial immunity against prosecution for rape applied in the case.

11. An appeal to the Court of Appeal, Criminal Division, was dismissed on 14 March 1991 ([1991] 2 All England Law Reports 257). Lord Lane noted that the general proposition of Sir Matthew Hale in his History of the Pleas of the Crown (1736) (see paragraph 10 above) that a man could not commit rape upon his wife was generally accepted as a correct statement of the common law at that epoch. Further, Lord Lane made an analysis of previous court decisions, from which it appears that in R. v. Clarence (1888), the first reported case of this nature, some judges of the Court for Crown Cases Reserved had objected to the principle. In the next reported case, R. v. Clarke (1949), the trial court had departed from the principle by holding that the husband's immunity was lost in the event of a court order directing that the wife was no longer bound to cohabit with him. Almost every court decision thereafter had made increasingly important exceptions to the marital immunity (see paragraph 24 below). The Court of Appeal had accepted in R. v. Steele (1976) that the implied consent to intercourse could be terminated by agreement. This was confirmed by the Court of Appeal in R. v. Roberts (1986), where it held that the lack of a non-molestation clause in a deed of separation, concluded on expiry of a non-molestation order, did not revive the consent to intercourse.

Lord Lane added the following observations:

> "Ever since the decision of Byrne J in R. v. Clarke in 1949, courts have been paying lip-service to Hale CJ's proposition, whilst at the same time increasing the number of exceptions, the number of situations to which it does not apply. This is a legitimate use of the flexibility of the common law which can and should adapt itself to changing social attitudes.
>
> There comes a time when the changes are so great that it is no longer enough to create further exceptions restricting the effect of the proposition, a time when the proposition itself requires examination to see whether its terms are in accord with what is generally regarded today as acceptable behaviour.
>
> ...
>
> It seems to us that where the common law rule no longer even remotely represents what is the true position of a wife in present-day society, the duty of the court is to take steps to alter the rule if it can legitimately do so in the light of any relevant parliamentary enactment. That in the end comes down to a consideration of the word 'unlawful' in the 1976 Act."

Lord Lane then critically examined the different strands of interpretation of section 1 (1) (a) of the 1976 Act (see paragraph 20 below) in the case-law, including the argument that the term "unlawful" excluded intercourse within marriage from the definition of rape. He concluded:

> "... [W]e do not consider that we are inhibited by the 1976 Act from declaring that the husband's immunity as expounded by Hale CJ no longer exists. We take the view that the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim.

> The remaining and no less difficult question is whether, despite that view, this is an area where the court should step aside to leave the matter to the parliamentary process. This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it.
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> Had our decision been otherwise and had we been of the opinion that Hale CJ's proposition was still effective, we would nevertheless have ruled that where, as in the instant case, a wife withdraws from cohabitation in such a way as to make it clear to the husband that so far as she is concerned the marriage is at an end, the husband's immunity is lost."

12. On 23 October 1991, on a further appeal by the appellant in the above case, the House of Lords upheld the Court of Appeal's judgment, declaring, inter alia, that the general principle that a husband cannot rape his wife no longer formed part of the law of England and Wales. It stressed that the common law was capable of evolving in the light of changing social, economic and cultural developments. Whilst Sir Matthew Hale's proposition had reflected the state of affairs at the time it was enunciated, the status of women, and particularly of married women, had changed out of all recognition in various ways. Apart from property matters and the availability of matrimonial remedies, one of the most important changes had been that marriage was in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband (R. v. R. [1991] 4 All England Law Reports 481).

13. On 31 March 1992 the above appellant R. brought an application (no. 20190/92) to the Commission. The Commission referred his application (C.R. v. the United Kingdom) to the Court on the same date as the present case (see paragraphs 1 and 3 above).

C. The trial of the applicant in the present case

14. At the commencement of his trial on 16 April 1991, the applicant submitted that there was no case to answer on the rape charge. In the first place, he argued that the trial judge, Mr Justice Rose, should follow the Court of Appeal's approach in the case of R. v. Steele ([1976] 65 Criminal Appeal Reports 22) and should not consider himself bound by the 14 March 1991 judgment of that court in R. v. R. in so far as it purported to change the principle that a husband could not be found guilty of rape upon his wife. Secondly, he maintained that the retrospective effect of the change in the law effected by R. v. R. should be pronounced incompatible with Article 7 (art. 7) of the Convention. He referred, inter alia, to the judgment by the Court of Justice of the European Communities in R. v. Kent Kirk (European Court Reports [1984] 2689), dealing with a penal provision in relation to fishing, which was allegedly imposed retroactively.

15. With regard to the applicant's first submission, Mr Justice Rose held on 18 April 1991 that he considered himself bound by the Court of Appeal's judgment in R. v. R. He was not persuaded that there was a conflict between the ratios of that decision and the judgment in R. v. Steele. Moreover, the decision in R. v. R. was not reached in ignorance of R. v. Steele but had regard to the latter.

With regard to the applicant's second submission, Mr Justice Rose observed:

> "... I shall assume for the purpose of the present argument that the effect of Kirk is via the Treaty of Rome and the decision of the [Court of Justice of the European Communities] to render Article 7 para. 1 (art. 7-1) part of English law. However, it seems to me that the effect of Article 7 para. 2 (art. 7-2) is to prevent reliance by the defendant on Article 7 para. 1 (art. 7-1).
>
> Furthermore, ... a succession of cases ... in which the [Court of Justice] ... has developed the principle of protection of fundamental rights in cases concerning economic and financial matters ... it seems to me in so far as they touch upon the matter at all, and it is accepted that they do not deal with criminal offences of the kind with which I am concerned, no doubt preserve the fundamental right of a woman not to have non-consensual sexual intercourse forced upon her.
>
> Furthermore, the nature of the common law, developing as it does from judicial decision to judicial decision, but being deemed to be always that which it is currently declared to be, is such that if Article 7 (art. 7) is part of English law, Article 7 para. 2 (art. 7-2) is not incompatible with that common law approach. Non-consensual sexual intercourse is in English law, as no doubt it is in the legal systems of many civilised nations, ... a criminal offence. In so far as there was by the end of the 19th Century in English law ... a matrimonial exception, that matrimonial exception has, particularly over the last 30 or 40 years, been whittled away by judicial decision to the extent that ... it no longer exists. It seems to me that to say that in these circumstances this defendant is in the terms of Article 7 para. 1 (art. 7-1) at risk of conviction in relation to conduct 'which did not constitute a criminal offence under national or international law at the time when it was committed' is or would be an abuse of language. Accordingly, [counsel for the applicant's] second submission fails ... Having regard to the conclusions which I have reached ... there is, in my judgment, a case to answer."

16. On 19 April 1991 the applicant was found guilty by the jury of all three offences (see paragraph 9 above). He was sentenced to a total of five years' imprisonment: five years for rape, two years for making a threat to kill and three months for the offence of assault occasioning actual bodily harm - the sentences of two years and three months were expressed to run consecutively to each other but concurrently with the five-year sentence.

17. The applicant lodged an appeal against conviction and sentence in which he repeated the submissions set out in paragraph 14 above.

18. In view of the House of Lords' ruling of 23 October 1991 in R. v. R. (see paragraph 12 above) the applicant was advised by his lawyers on 3 January 1992 that his appeal against conviction offered no prospect of success. He therefore withdrew his appeal against conviction on 15 January

1992. His appeal against sentence was dismissed by the Court of Appeal on 30 July 1992.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The offence of rape

19. The offence of rape, at common law, was traditionally defined as unlawful sexual intercourse with a woman without her consent by force, fear or fraud. By section 1 of the Sexual Offences Act 1956, "it is a felony for a man to rape a woman".

20. Section 1 (1) of the Sexual Offences (Amendment) Act 1976 provides, in so far as it is material, as follows:

> "For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if
>
> - (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it ..."

21. On 3 November 1994 the Criminal Justice and Public Order Act 1994 replaced the above provisions by inserting new subsections to section 1 of the Sexual Offences Act 1956, one of the effects of which was to remove the word "unlawful":

> "1. (1) It is an offence for a man to rape a woman or another man.
>
> (2) A man commits rape if - (a) he has sexual intercourse with a person ... who at the time of the intercourse does not consent to it ..."

B. Marital immunity

22. Until the case of R. v. R. the English courts, on the few occasions when they were confronted with the issue whether directly or indirectly, had always recognised at least some form of immunity attaching to a husband from any charge of rape or attempted rape by reason of a notional or fictional consent to intercourse deemed to have been given by the wife on marriage. The proposition of Sir Matthew Hale quoted above (see paragraph 10) has been reaffirmed until recently, for example in the case of R. v. Kowalski ([1987] 86 Criminal Appeal Reports 339), which concerned the question whether or not a wife had impliedly consented to acts which if performed against her consent would amount to an indecent assault. Mr Justice Ian Kennedy, giving the judgment of the court, stated, obiter:

> "It is clear, well-settled and ancient law that a man cannot, as actor, be guilty of rape upon his wife."

And he went on to say that that principle was

> "dependent upon the implied consent to sexual intercourse which arises from the married state and which continues until that consent is put aside by decree nisi, by a separation order or, in certain circumstances, by a separation agreement".

In another example, Lord Justice O'Connor in the R. v. Roberts case ([1986] Criminal Law Reports 188) held:

> "The status of marriage involves that the woman has given her consent to her husband having intercourse with her during the subsistence of the marriage ... she cannot unilaterally withdraw it."

23. However, on 5 November 1990, Mr Justice Simon Brown held in R. v. C. ([1991] 1 All England Law Reports 755) that the whole concept of marital exemption in rape was misconceived:

> "Were it not for the deeply unsatisfactory consequence of reaching any other conclusion on the point, I would shrink, if sadly, from adopting this radical view of the true position in law. But adopt it I do. Logically, I regard it as the only defensible stance, certainly now as the law has developed and arrived in the late twentieth century. In my judgment, the position in law today is, as already declared in Scotland, that there is no marital exemption to the law of rape. That is the ruling I give."

On the other hand, on 20 November 1990, in R. v. J. ([1991] 1 All England Law Reports 759) Mr Justice Rougier upheld the general common law rule, considering that the effect of section 1 (1) (a) of the 1976 Act was that the marital exemption embodied in Hale's proposition was preserved, subject to those exceptions established by cases decided before the Act was passed. He further stated:

> "... there is an important general principle to be considered here, and that is that the law, especially the criminal law, should be clear so that a man may know where he stands in relation to it. I am not being so fanciful as to suppose that this defendant carefully considered the authorities and took Counsel's advice before behaving as alleged, but the basic principle extends a long way beyond the bounds of this case and should operate to prevent a man being convicted by means of decisions of the law ex post facto."

On 15 January 1991, Mr Justice Swinton Thomas in R. v. S. followed Rougier J, though he considered that it was open to judges to define further exceptions. Both Rougier and Swinton Thomas JJ stated that they regretted that section 1 (1) (a) of the 1976 Act precluded them from taking the same line as Simon Brown J in R. v. C.

24. In its Working Paper 116 "Rape within Marriage" completed on 17 September 1990, the Law Commission stated:

> "2.8 It is generally accepted that, subject to exceptions (considered ... below), a husband cannot be convicted of raping his wife ... Indeed there seems to be no recorded prosecution before 1949 of a husband for raping his wife ...
>
> ...

2.11 The immunity has given rise to a substantial body of law about the particular cases in which the exemption does not apply. The limits of this law are difficult to state with certainty. Much of it rests on first instance decisions which have never been comprehensively reviewed at appellate level ..."

The Law Commission identified the following exceptions to a husband's immunity:

- where a court order has been made, in particular:

(a) where an order of the court has been made which provides that a wife should no longer be bound to cohabit with her husband (R. v. Clarke [1949] 33 Criminal Appeal Reports 216);

(b) where there has been a decree of judicial separation or a decree nisi of divorce on the ground that "between the pronouncement of decree nisi and the obtaining of a decree absolute a marriage subsists as a mere technicality" (R. v. O'Brien [1974] 3 All England Law Reports 663);

(c) where a court has issued an injunction restraining the husband from molesting the wife or the husband has given an undertaking to the court that he will not molest her (R. v. Steele [1976] 65 Criminal Appeal Reports 22);

(d) in the case of R. v. Roberts ([1986] Criminal Law Reports 188), the Court of Appeal found that where a non-molestation order of two months had been made in favour of the wife her deemed consent to intercourse did not revive on expiry of the order;

- where no court order has been made:

(e) Mr Justice Lynskey observed, obiter, in R. v. Miller ([1954] 2 Queen's Bench Division 282) that a wife's consent would be revoked by an agreement to separate, particularly if it contained a non-molestation clause;

(f) Lord Justice Geoffrey Lane stated, obiter, in R. v. Steele that a separation agreement with a non-cohabitation clause would have that effect.

25. The Law Commission noted that it was stated in R. v. Miller and endorsed by the Court of Appeal in R. v. Steele that lodging a petition for divorce would not be sufficient.

It referred also to the ruling by Mr Justice Owen in the case of R. v. R. where an implied agreement to separate was considered sufficient to revoke the immunity and that, even in the absence of agreement, the withdrawal from cohabitation by either party, accompanied by a clear indication that consent to sexual intercourse had been terminated, would operate to exclude the immunity. It found this view difficult to reconcile with the approach in Steele that filing a divorce petition was "clearly" not sufficient. The ruling in R. v. R. appeared substantially to extend what had previously been thought to be the law, although it emphasised that factual separation, and not mere revocation of consent to intercourse, was necessary to remove the immunity.

26. The Law Commission pointed out that its inquiry was unusual in one important respect. It was usual practice, when considering the reform of common law rules, to consider the grounds expressed in the cases or other authorities for the current state of the law, in order to analyse whether those grounds were well-founded. However, that step was of little assistance here, not only because there was little case-law on the subject but also, and in particular, because there was little dispute that the reason set out in the authorities for the state of the law could not be supported (paragraph 4.1 of the Working Paper). The basis of the law was that intercourse against the wife's actual will was excluded from the law of rape by the fictional deemed consent to intercourse perceived by Sir Mathew Hale in his dictum. This notion was not only quite artificial but, certainly in the modern context, was also quite anomalous. Indeed, it was difficult to find any current authority or commentator who thought that it was even remotely supportable. The artificial and anomalous nature of the marital immunity could be seen if it was reviewed against the current law on the legal effects of marriage (paragraph 4.2).

The concept of deemed consent was artificial because the legal consequences of marriage were not the result of the parties' mutual agreement. Although the parties should have legal capacity to enter into the marriage contract and should observe the necessary formalities, they were not free to decide the terms of the contract; marriage was rather a status from which flow certain rights or obligations, the contents of which were determined by the law from time to time. This point had been emphasised by Mr Justice Hawkins in R. v. Clarence (1888) when he said: "The intercourse which takes place between husband and wife after marriage is not by virtue of any special consent on her part, but is mere submission to an obligation imposed on her by law " (paragraph 4.3).

In this connection, the Law Commission stressed that "[t]he rights and duties arising from marriage have, however, changed over the years as the law has adapted to changing social conditions and values. The more modern view of marriage is that it is a partnership of equals" (paragraph 4.4). It then gave examples of such changes in the law and added:

> "4.11 This gradual recognition of mutual rights and obligations within marriage, described in paragraphs 4.3-4.10 above, in our view demonstrates clearly that, whatever other arguments there may be in favour of the immunity, it cannot be claimed to be in any way justified by the nature of, or by the law governing, modern marriage."

27. The Law Commission made, inter alia, the provisional proposal that "the present marital immunity be abolished in all cases" (paragraph 5.2 of the Working Paper).

PROCEEDINGS BEFORE THE COMMISSION

28. In his application of 29 March 1992 (no. 20166/92) to the Commission, the applicant complained that, in breach of Article 7 (art. 7) of the Convention, he was convicted in respect of conduct, namely the rape upon his wife, which at the relevant time did not, so he submitted, constitute a criminal offence.

29. The Commission declared the application admissible on 14 January 1994. In its report of 27 June 1994 (Article 31) (art. 31), the Commission expressed the opinion that there had been no violation of Article 7 para. 1 (art. 7-1) of the Convention (eleven votes to six). The full text of the Commission's opinion and of the two separate opinions contained in the report is reproduced as an annex to this judgment [4].

FINAL SUBMISSIONS MADE TO THE COURT

30. At the hearing on 20 June 1995 the Government, as they had done in their memorial, invited the Court to find that there had been no violation of Article 7 (art. 7) of the Convention.

31. On the same occasion the applicant reiterated the request to the Court stated in his memorial to find that there had been a breach of Article 7 (art. 7) and to award him just satisfaction under Article 50 (art. 50) of the Convention.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 7 (art. 7) OF THE CONVENTION

32. The applicant complained that his conviction and sentence for rape of his wife constituted retrospective punishment in breach of Article 7 (art. 7) of the Convention, which reads:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

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[4] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 335-B of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

2. This Article (art. 7) shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

33. The Government and the Commission disagreed with the above contention.

A. General principles

34. The guarantee enshrined in Article 7 (art. 7), which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 (art. 15) in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.

35. Accordingly, as the Court held in its Kokkinakis v. Greece judgment of 25 May 1993 (Series A no. 260-A, p. 22, para. 52), Article 7 (art. 7) is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. In its aforementioned judgment the Court added that this requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. The Court thus indicated that when speaking of "law" Article 7 (art. 7) alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability (see, as a recent authority, the Tolstoy Miloslavsky v. the United Kingdom judgment of 13 July 1995, Series A no. 316-B, pp. 71-72, para. 37).

36. However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 (art. 7) of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the

resultant development is consistent with the essence of the offence and could reasonably be foreseen.

B. Application of the foregoing principles

37. The applicant maintained that the general common law principle that a husband could not be found guilty of rape upon his wife, albeit subject to certain limitations, was still effective on 18 September 1990, when he committed the acts which gave rise to the rape charge (see paragraph 8 above). A succession of court decisions before and also after that date, for instance on 20 November 1990 in R. v. J. (see paragraph 23 above), had affirmed the general principle of immunity. It was clearly beyond doubt that as at 18 September 1990 no change in the law had been effected, although one was being mooted.

When the House of Commons debated the Bill for the Sexual Offences (Amendment) Act 1976 (see paragraph 20 above), different views on the marital immunity were expressed. On the advice of the Minister of State to await a report of the Criminal Law Revision Committee, an amendment that would have abolished the immunity was withdrawn and never voted upon. In its report, which was not presented until 1984, the Criminal Law Revision Committee recommended that the immunity should be maintained and that a new exception should be created.

In 1988, when considering certain amendments to the 1976 Act, Parliament had the opportunity to take out the word "unlawful" in section 1 (1) (a) (see paragraph 20 above) or to introduce a new provision on marital intercourse, but took no action in this respect.

On 17 September 1990 the Law Commission provisionally recommended that the immunity rule be abolished (see paragraphs 26-27 above). However, the debate was pre-empted by the Court of Appeal's and the House of Lords' rulings in the case of R. v. R. (see paragraphs 11 and 12 above). In the applicant's submission, these rulings altered the law retrospectively, which would not have been the case had the Law Commission's proposal been implemented by Parliament. Consequently, he concluded, when Parliament in 1994 removed the word "unlawful" from section 1 of the 1976 Act (see paragraph 21 above), it did not merely restate the law as it had been in 1976.

38. The applicant further argued that in examining his complaint under Article 7 para. 1 (art. 7-1) of the Convention, the Court should not consider his conduct in relation to any of the exceptions to the immunity rule. Such exceptions were never contemplated in the national proceedings, Mr Justice Rose having taken his decision in reliance on the Court of Appeal's ruling of 14 March 1991 in R. v. R. to the effect that the immunity no longer existed. Mr Justice Owen's decision of 30 July 1990 in R. v. R., adding implied agreement to terminate consent to intercourse to the list of

exceptions, had not been reported by 18 September 1990 and was not a binding authority. In any event, the facts in the present case suggest that no such agreement existed.

39. Should a foreseeability test akin to that under Article 10 para. 2 (art. 10-2) apply in the instant case, the applicant was of the opinion that it had not been satisfied. Although the Court of Appeal and the House of Lords did not create a new offence or change the basic ingredients of the offence of rape, they were extending an existing offence to include conduct which until then was excluded by the common law. They could not be said to have adapted the law to a new kind of conduct but rather to a change of social attitudes. To extend the criminal law, solely on such a basis, to conduct which was previously lawful was precisely what Article 7 (art. 7) of the Convention was designed to prevent. Moreover, the applicant stressed, it was impossible to specify with precision when the change in question had occurred. In September 1990, change by judicial interpretation was not foreseen by the Law Commission, which considered that a parliamentary enactment would be necessary.

40. The Government and the Commission were of the view that by September 1990 there was significant doubt as to the validity of the alleged marital immunity for rape. This was an area where the law had been subject to progressive development and there were strong indications that still wider interpretation by the courts of the inroads on the immunity was probable. In particular, given the recognition of women's equality of status with men in marriage and outside it and of their autonomy over their own bodies, the adaptation of the ingredients of the offence of rape was reasonably foreseeable, with appropriate legal advice, to the applicant. He was not convicted of conduct which did not constitute a criminal offence at the time when it was committed.

41. The Court notes that the applicant's conviction for rape was based on the statutory offence of rape in section 1 of the 1956 Act, as further defined in section 1 (1) of the 1976 Act (see paragraphs 19 and 20 above). The applicant does not dispute that the conduct for which he was convicted would have constituted rape within the meaning of the statutory definition of rape as applicable at the time, had the victim not been his wife. His complaint under Article 7 (art. 7) of the Convention relates solely to the fact that in deciding on 18 April 1991 that the applicant had a case to answer on the rape charge, Mr Justice Rose followed the Court of Appeal's ruling of 14 March 1991 in the case of R. v. R. which declared that the immunity no longer existed.

42. It is to be observed that a crucial issue in the judgment of the Court of Appeal in R. v. R. (summarised at paragraph 11 above) related to the definition of rape in section 1 (1) (a) of the 1976 Act: "unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it". The question was whether "removal" of the marital immunity

would conflict with the statutory definition of rape, in particular whether it would be prevented by the word "unlawful". The Court of Appeal carefully examined various strands of interpretation of the provision in the case-law, including the argument that the term "unlawful" excluded intercourse within marriage from the definition of rape. In this connection, the Court recalls that it is in the first place for the national authorities, notably the courts, to interpret and apply national law (see, for instance, the Kemmache v. France (no. 3) judgment of 24 November 1994, Series A no. 296-C, pp. 86-87, para. 37). It sees no reason to disagree with the Court of Appeal's conclusion, which was subsequently upheld by the House of Lords (see paragraph 12 above), that the word "unlawful" in the definition of rape was merely surplusage and did not inhibit them from "removing a common law fiction which had become anachronistic and offensive" and from declaring that "a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim" (see paragraph 11 above).

43. The decisions of the Court of Appeal and then the House of Lords did no more than continue a perceptible line of case-law development dismantling the immunity of a husband from prosecution for rape upon his wife (for a description of this development, see paragraphs 11 and 23-27 above). There was no doubt under the law as it stood on 18 September 1990 that a husband who forcibly had sexual intercourse with his wife could, in various circumstances, be found guilty of rape. Moreover, there was an evident evolution, which was consistent with the very essence of the offence, of the criminal law through judicial interpretation towards treating such conduct generally as within the scope of the offence of rape. This evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law (see paragraph 36 above).

44. The essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords - that the applicant could be convicted of attempted rape, irrespective of his relationship with the victim - cannot be said to be at variance with the object and purpose of Article 7 (art. 7) of the Convention, namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment (see paragraph 34 above). What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.

45. Consequently, by following the Court of Appeal's ruling in R. v. R. in the applicant's case, Mr Justice Rose did not render a decision permitting a finding of guilt incompatible with Article 7 (art. 7) of the Convention.

46. Having reached this conclusion, the Court does not find it necessary to enquire into whether the facts in the applicant's case were covered by the

exceptions to the immunity rule already made by the English courts before 18 September 1990.

47. In short, the Court, like the Government and the Commission, finds that the Crown Court's decision that the applicant could not invoke immunity to escape conviction and sentence for rape upon his wife did not give rise to a violation of his rights under Article 7 para. 1 (art. 7-1) of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no violation of Article 7 para. 1 (art. 7-1) of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 22 November 1995.

Rolv RYSSDAL
President

Herbert PETZOLD
Registrar