

A clear message

The judges and the Cautionary Rule

The half-naked woman sitting in full public view at the local charge office was a shocking reminder of the insensitive way that police treat women complaining of rape. But were the courts or the law any better? The question raised itself one Saturday afternoon a year ago.

The woman who prompted it had been sitting in the public office most of the day. She kept dialling home from a call box in the charge office, hoping to raise someone to fetch her and bring her some clothes. Each time she walked to the phone booth, she clutched pieces of her torn bra to cover her breasts from the eyes of every-

The Cautionary Rule which effectively discredited the testimony of the rape victim, is no more. CARMEL RICKARD, the Sunday Times legal editor who has been watching its use in the courts since she was a member of Rape Crisis in Durban in the early 1980s, wrote a very persuasive column in her newspaper last year arguing for its demise. Radio Today picked up the issue and had a phone-in. Then the Commission

for Gender Equality started to watch what was happening. The accumulative effect of all this attention has been that the rule has been pronounced unconstitutional. Rickard tells us how it happened.



one else in the room. She had laid a charge of attempted rape that morning but now was unable to find anyone to take her home.

That same afternoon the next term's roll for the Appeal Court in Bloemfontein arrived on my fax machine. One of the cases involved a young man convicted of serial rape. He would be arguing that he was innocent and that the magistrate who heard the case had not given enough weight to the "cautionary rule".

His appeal would be the first time that this court, with its new powers under the Constitution, might hear argument relating to the cautionary rule. Would the court use the opportunity – and its new powers – to reconsider the rule? Or would the chance pass by, as seemed likely because neither side in the case had got to grips with the issue in their written heads of argument?

The cautionary rule is a long-standing rule of evidence, responsible for many of the difficulties experienced by women trying to bring rapists to justice. It perpetuates the myth of women as lying, deceptive, irrational creatures, driven by neuroses and hormones. Under this rule, a judge or magistrate has to view the evidence of someone who claims to be the victim of a sexual offence – the overwhelming majority of whom are women – with great caution.

The rule stresses that the story told by such a

witness is "inherently, potentially unreliable". In other words, the court must start from the basis that the evidence of a woman who complains of rape is probably not true.

Over the decades, the Appeal Court consistently applied the cautionary rule. But the Chapman case came at a moment when, for a number of reasons, a different approach was suddenly possible. One of these reasons was that the new Constitution gave the Appeal Court the power to ensure that the common law (of which the cautionary rule formed part) was developed in accordance with the spirit and values of the Constitution – and that, surely, must include ensuring that women are treated with equal dignity by the law.

In addition, shortly before the Chapman case was argued, the Constitutional Court had handed down a decision which dealt in detail with the danger of continuing gender-based stereotypes and appeared to commit that court to eradicating legal props which shore up these myths.

Three judges sat to hear the Chapman case. Most senior was the new Chief Justice, Ismail Mahomed, fresh from the Constitutional Court where he had been part of the landmark judgment on gender stereotypes. Sitting with him was his deputy, Judge Hennie van Heerden, and Judge Pierre Olivier. During argument the chief justice intervened on several occasions to spell out the court's revulsion at crimes of violence against women.

"We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights," he said. He added that Chapman's crime was particularly serious: his method of operating was to cruise the streets outside city night spots, pick up a woman on her own and obviously distressed after an argument with her boyfriend, then offer her a lift home and rape her on the way.

The judges said: "The courts are under a duty to send a clear message to the accused, to other potential rapists and to the community; we are determined to protect the equality, the dignity and freedom of all women, and we shall show no mercy to those who seek to invade these rights."

The judgment has since been quoted in a number of courts by other judges and by magistrates, to justify tough sentences handed down for rape. But while the words might have a satisfying ring, the court made it clear that this was not an appropriate case in which to deal with the question of the cautionary rule. The two sides had not come prepared to present full argument on the subject nor was the subject canvassed fully in their written heads of argument. The cautionary rule would have to wait until another time for evaluation.

Finally the right case arrived. Rodney Jackson, a Cape Town policeman, was convicted of the attempted rape of a schoolgirl, a friend of his younger sister.

On February 23, Jackson appealed against sentence and conviction, arguing that the girl had "consented" before suddenly running away, and that the magistrate had erred in not properly applying the cautionary rule. This time, both sides were fully prepared.

Ronel Berg from the Attorney General's staff in Cape Town specifically asked the court to make a ruling on whether the rule was valid.

This time the court was also fully prepared – five judges, a full bench, had been convened to consider the question and they included the three judges who heard the Chapman case.

During debate in court, the judges once again made their revulsion at violence against women plain. Several of the judges also indicated their disquiet about the cautionary rule. When the unanimous decision was handed down on March 20, it grasped this old nettle firmly and ripped it out.

Judge Olivier, who wrote the decision, said the notion that women were habitually inclined to lie about being raped was of ancient origin. Attempts had been made by the courts to justify the cautionary rule by relying on "collective wisdom and experience". This justification, he ruled, lacks any factual or reality-based foundation. Research had not shown that women were any more likely to lie than men, nor that they were "inherently unreliable witnesses". The Supreme Court of California had found that the rule was unwarranted "by law of reason", that it discriminates against women, "denies them equal protection of the law and assists in the brutalisation of rape victims by providing an unequal balance between their rights and those of the accused".

Judge Olivier said it was incorrect to say that it was easy to cry rape but difficult to refute the claim. "Few things may be more difficult and humiliating for a woman than to cry rape: she is often, within certain communities, considered to have lost her credibility; she may be seen as unchaste and unworthy of respect; her community may turn its back on her; she has to undergo the most harrowing cross-examination in court, where the intimate details of the crime are traversed ad nauseum."

He also found that the burden of proof was affected and that it was harder to prove a rape case than any other case. The court listed a number of other countries where the rule had been discarded, and concluded: "The cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable." The judges said sometimes the facts of a particular case might require a cautionary approach to the evidence, but that was a far cry from starting each trial with the odds stacked against the woman.

Since the judgment was delivered, the Appeal Court has been inundated with requests for copies, and the decision has already been quoted and followed in rape cases in many parts of South Africa. Despite the general sense of jubilation among women's organisations, however, gender commissioner Cathi Albertyn believes the battle is not yet over. She says that the Appeal Court is to be congratulated for taking the lead in undermining offensive sexual stereotypes. But she predicts that defence counsel in rape cases will now try to present the evidence in a way that undermines the credibility of the woman complainant so that the presiding officer will be pushed into adopting "a cautionary approach".

The way to protect women against this, she says, is to ask the Appeal Court to issue strict guidelines on the limits of cross examination about the woman's previous sexual history, and for Parliament to be asked to consider enacting legislation on this issue.