

Neutral Citation no. [2007] NICC 26

Ref: **STEC5899**

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

Delivered: **17/08/07**

**IN THE CROWN COURT OF NORTHERN IRELAND**

---

**THE QUEEN**

**v**

**AB**

---

**STEPHENS J**

**Reporting Restriction**

[1] Before passing sentence I propose to say something about the reporting restrictions in your case. Section 8(6) of the Sexual Offences (Amendment) Act 1992 was amended by paragraph 14 Schedule 2 of the Youth Justice and Criminal Evidence Act 1999. By virtue of that amendment the Sexual Offences (Amendment) Act 1992 extends also to Northern Ireland. Under Section 1 of the Sexual Offences (Amendment) Act 1992 anonymity is given to complainants in, amongst others, rape cases. Accordingly no matter relating to the complainant in this case shall, during her lifetime, be included in any publication if it is likely to lead members of the public to identify her. That is the obligation with which there has to be compliance. I make it clear that some examples of the ways in which the complainant in this case could be identified include publication of:

- (i) The complainant's name.
- (ii) The complainant's address.
- (iii) Any still or moving pictures of the complainant.
- (iv) The general location at which the offence occurred.
- (v) The name of the defendant.

- (vi) The address of the defendant.
- (vii) The name or address of any relative of the complainant or of the defendant.

[2] The extent of care which has to be taken in relation to the reporting of this case is necessary by virtue of the fact that the complainant is the aunt of the defendant. If the defendant was to be identified then that would be information likely to lead members of the public to identify the complainant. I also propose in these sentencing remarks to refer to the defendant by the initials "AB" and to the complainant and victim by the initials "CD". I make it clear that these initials have no association with either of their real names.

### **Introduction**

[3] AB you have pleaded guilty to three offences as follows namely:-

- (a) Raping CD on 12 July 2005.
- (b) Falsely imprisoning CD on 12 July 2005.
- (c) Theft of £1,250 in cash from CD on 12 July 2005.

### **Factual Background**

[4] At the time that these offences were committed you were almost 20 years of age. You lived with your grandmother. The victim of all three offences was your aunt, CD, who was then 46 years of age. There was an age difference of some 26 years between yourself and your aunt. It is quite apparent that your aunt played a full and active part over the years in providing family support and assistance to you despite the difficulties that she faced with her own health. On 11 July 2005 your aunt, CD, came to her mother's, your grandmother's, house. She spent the evening in that house. Your grandmother was absent. Earlier in the evening other persons were present in the house, but eventually you and your aunt were the only people there. Your aunt was on medication prescribed by her general practitioner. As a result of a combination of that medication and the alcohol that she had consumed she became very tired. Indeed to such an extent that she went to sleep on the floor of your bedroom. She was unconscious.

[5] It now transpires that whilst she was unconscious you moved her to your grandmother's bedroom and then abused and degraded her unconscious body by raping her. You not only abused her bodily integrity in that way but also inflicted injuries to her thighs during the course of your

sexual attack upon her. In short you used and abused her for your sordid sexual gratification.

[6] Your aunt was unconscious whilst you raped her and accordingly at the time she was unaware that you had abused her in that way. The injuries that you had caused to your aunt's thighs and the subsequent appearance of bruising in that area led to the discovery that you had raped your aunt. She describes in her police statement how she discovered the bruising and how this led to the train of inquiry that resulted in the discovery that you had raped her:-

“When I had a shower yesterday I didn't really notice any bruises but after attending the police station to give a statement I came home and changed my clothes. When I was changing I saw that a lot of bruises had come up on my inner thighs and there was like a love-bite mark on my right inner thigh. I don't know how I got these. I contacted police to tell them about these injuries and I attended ... to be medically examined. Naturally I am concerned at where the injuries are. I would state that I would never consent to sex with AB. I find the thought abhorrent. I would also say that I have never had any form of sexual relations with AB.”

[7] As I have indicated your aunt was unconscious whilst you raped her and she only woke up after she had been raped. When she woke up you were on top of her winding duct tape around her head. She started to struggle but found that you had tied her arms behind her back with what transpired to be telephone wires. Despite your aunt struggling to free herself you persisted in covering her whole head with duct tape so that it covered her mouth and nose. In order to tie up your aunt in this way you took time to obtain the two wires for her hands and the duct tape for her head together with knives to cut the tape. This was a plan to tie up your aunt which I am satisfied you devised on the spur of the moment but it was sustained in organisation and was also sustained when your aunt struggled to free herself. She was really afraid and thought at that time that she was going to die. You put her in fear of her life. You not only bound and gagged her in the way that I have described but you then imprisoned her in the house by locking the doors. After you had left the house and with some considerable difficulty she escaped by climbing out of a small kitchen window.

[8] You not only caused physical injuries to your aunt's thighs but you also caused other physical injuries. She had an injury to her nose where the tape was too tight, her left eye was bloodshot. Both wrists were swollen and

sore. She had bruising to her upper arms. In addition your aunt suffered the humiliation of knowing that excrement was found on her mother's bed and she could only think that she did this when you were on top of her.

[9] Having raped, bound and gagged and then imprisoned your aunt you then proceeded to leave the house. However before leaving the house you plundered your aunt's property by stealing £1,250 in cash from her. When you were arrested, which was on the same day that these offences were committed, £444.17 in cash was found in your possession but the remaining £805.83 has never been recovered nor have you ever said what has become of it. This theft demonstrated to your aunt that you considered that you could not only infringe her bodily integrity in the way that you did but that you could also deprive her of her possessions.

### **Personal Background of the Offender**

[10] You were born and raised in Northern Ireland. You have resided with your grandmother since the age of 4. Your mother and father separated when you were young due, in part, to the violent nature of their relationship. You have maintained some contact with your mother through the years but you have had no contact with your natural father. Your carer is your grandmother.

[11] Behavioural problems arose whilst you were at school and these involved a number of disruptive incidents. As a result you were removed from school and thereafter your situation deteriorated further. You were first involved in the use of illicit drugs at the age of 9. Your illicit drug use started with cannabis but by the age of 15 a wide range of drugs were available to you including amphetamines, cocaine, crack cocaine and heroine.

[12] You have been diagnosed as having Attention Deficit Hyper Activity Disorder and you have received psychiatric treatment relating to this condition.

[13] Over the years you have taken a number of overdoses as a result of over-indulging regarding the combination of alcohol and drugs. You have been referred to drugs counselling in the past but you did not accept that help. The pre-sentence report states that you now present as well motivated to accept the necessary help in order to assist you in refraining from all illegal drugs when returning to the community.

[14] I have also read and considered a report from Colin W McClelland, Educational Psychologist, dated 25<sup>th</sup> June 2007. He states that you appear to be suffering from Attention Deficit Hyper Activity Disorder. That your verbal IQ is 72 which places you in the bottom 3 percentile of the community. That your word reading score is 55 which places you in the bottom 0.1

percentile of the community and is an age equivalent ability of 7 years and 3 months whereas you were 21 years and 10 months at the time the test was performed. This means that you are functionally illiterate. In addition when considering your personal background I have considered the contents of the report from Dr Bownes dated 16<sup>th</sup> August 2007.

### **Attitude of the Offender to the Offences and Risk of Further Offending**

[15] It is claimed that you are truly remorseful for your involvement in this shocking episode. In the pre-sentence report it is recorded that you:-

“Expressed a high level of regret and remorse for (your) behaviour and in particular, (that you are) aware of the aggravating feature that the victim was (your) aunt.”

I entertain a degree of scepticism about these expressions of remorse. You did not express remorse at the earliest stage in the investigation of this offence but quite the reverse vilified your aunt to the police. You no doubt now have an appreciation of the seriousness of your own situation. I bear in mind the distinction between genuine remorse and concern as to the position in which you see yourself, see *R v Ryan Quinn* [2006] NICA 27 and *Attorney General's Reference (No. 6 of 2004) (Conor Gerard Doyle)* [2004] NICA 33 at [38]. I consider that your remorse is not at the high level that you suggest but that in part you do have a degree of remorse and shame. The shame being evidenced by the fact that you refuse prison visits from family members apart from your grandmother on the basis that you cannot face others in view of the crimes you have committed. This is evidence that you have an appreciation that what you did was abhorrent and that it remains abhorrent in the eyes of your family. However the pre-sentence report also reveals a lack of concern as to the consequences of your actions. I accept that your lack of victim awareness is linked to your misuse of drugs. The pre-sentence report under the heading “Risk of Harm to the Public and Likelihood of Re-offending” concludes as follows:-

“...(You do) not present a significant risk of physical harm to others however, without addressing (your) substance misuse and lack of concern for the consequences of (your) actions, the risk of further offending will be high.”

### **Victim Impact**

[16] A Victim Impact Report dated 23 April 2007 has been prepared by Dr Bridget O'Rawe. She interviewed your aunt and she has reported your aunt's symptomology as follows:-

“2.1 CD described herself as having recurring intrusive thoughts of the index incidents ‘every minute of every day’. She has frequent daily flashbacks, recalling him with his ‘knee on my chest and winding tape around my head, while I struggled violently’.

2.2 She described avoidance phenomena of crowds, refusing to go out alone, and requiring company to go shopping.

2.3 She described herself as always nervous and locking her house door day and night; of locking herself in the car when she is driving and when parking the car in a car park would only exit the car when there are no men about.

2.4 She described always being scared and hyper-vigilant and of taking frequent panic attacks (three per day) when she is unable to breathe.

2.5 Other symptoms are of sleep disturbance, especially initial insomnia, weight loss; she has reduced three sizes over the last two years, very poor concentration and memory, low mood, depressive thoughts, occasional thoughts of life not worth living and breaking down frequently in tears throughout the day.”

[17] Later in her report Dr O’Rawe under the heading of “Diagnosis and Discussion” sets out the psychological sequelae caused by the offences you committed. In that respect she reported as follows:-

“The psychological sequelae caused by the index incident, now 20 months ago, still impacts significantly on CD’s life. When examined on 23 April 2007 there was no doubt that she fulfilled the criteria for Post Traumatic Stress Disorder (PTSD) as outlined in Diagnostic and Statistical Manual of Mental Disorders (DSM IV R).

- CD was exposed to a traumatic life-threatening (as interpreted by herself) event as outlined in criteria

A (Sexual Assault and Imprisonment).

- She has persistent re-experiencing of the event through intrusive distressing recollections and flashbacks.
- She avoids stimuli associated with trauma by avoiding thoughts, feelings and conversations, by abusing alcohol, (by avoiding) the company of males, isolated places, car parks and social gatherings.
- She avoids people and places and is now living quite a secluded existence. Her interest in herself has diminished.
- She has constant feelings of increased arousal and hyper-vigilance, which affects her sleep and concentration.

The impact of this sexual assault was further heightened by

- The fact the perpetrator was a known and trusted family member.
- That force and aggression were used during the assault.
- That he apparently denied the charge of rape against him until the last moment prior to CD having to witness in court (20 months post index incident).
- That it caused major divisions within the family in particular regarding her mother's loyalty between herself and AB (cross reference related traumas).

CD reported never being close to her mother. The events since the index incident however have further alienated her from her mother and other family members at a time when affirmation and support would help her come to terms with the index incident."

[18] The prognosis in the Victim Impact Report is as follows:-

“Prognosis is always very difficult in such a case. I believe CD has a resilient personality, however her life is severely restricted by the psychological sequelae of the index incident and her ongoing abuse of alcohol will hinder ability to work in therapy to deal with the trauma issues. Should she successfully address her alcohol use and engage in therapy, her prognosis would be greatly improved.”

### **Procedural requirements for custodial sentences**

[19] A pre sentence report has been made available to me and I have considered it in accordance with the provisions of Article 21 of the Criminal Justice Order (Northern Ireland) 1996.

[20] There are additional procedural requirements specified by Article 22 of the Criminal Justice (Northern Ireland) Order 1996 in the case of a person who is or appears to be mentally disordered. Article 2(2) of the Criminal Justice (Northern Ireland) Order 1996 defines mentally disordered by reference to the definition contained in the Mental Health (Northern Ireland) Order 1986. Article 3 (1) of the 1986 Order defines “mental disorder” as “mental illness, mental handicap and any other disorder or disability of mind”. I consider that you are mentally disordered within that definition by virtue of the fact that you suffer from Attention Deficit Hyper Activity Disorder for which you have received psychiatric treatment. Accordingly before passing a custodial sentence other than one fixed by law the court, unless it considers it unnecessary to do so, shall obtain and consider a medical report within the meaning given to that term by Article 22(5) of the Criminal Justice (Northern Ireland) Order 1996. It is unfortunate that my attention was not drawn by counsel to the procedural requirements contained in Article 22 of the Criminal Justice (Northern Ireland) Order 1996. It had not been suggested at the earlier review hearings either by the prosecution or the defence that a medical report should be obtained prior to the hearing of the plea in mitigation. Accordingly, although there was a report from Colin W McClelland, Educational Psychologist, there was no medical report from a registered medical practitioner appointed by the Mental Health Commission for Northern Ireland available when the plea in mitigation was heard. Furthermore the absence of such a report was not brought to my attention at that stage. When I became aware of the procedural requirements I directed that such a report should be obtained and I have now had the opportunity of considering its contents.

[21] The medical report which has been obtained is from Dr. Bownes and it is dated 16<sup>th</sup> August 2007. I have considered that report. It is apparent that you suffer from Attention Deficit and Hyperactivity Disorder which is a classifiable mental disorder. In your case that disorder is of a level of severity that requires



long term treatment with medication under specialist supervision. I consider that a custodial sentence will have no adverse impact on your mental condition or on the treatment for your condition. I note that whilst you have been in prison on remand through your good behaviour you have achieved the status of enhanced prisoner. That you are doing guitar lessons and have engaged in Arts and Crafts.

### **Sentencing Guidelines in Relation to the Offence of Rape**

[22] Initially Mr Weir QC, who appeared on behalf of the prosecution, was not in a position to refer me to any guideline authorities in relation to any of the offences. I rose to enable him to prepare his submissions in relation to those guidelines. In relation to the offence of rape he then unfortunately referred me to the cases of *R v McDonald & others* [1989] NI 37 and *Attorney General's Reference (No 1 of 1989)* [1989] NI 245 which were the earlier guideline cases in Northern Ireland. The guidelines contained in those cases have now been superseded by the decisions of the Court of Appeal in *Attorney General's Reference (No 2 of 2004) (Daniel John O'Connell)* [2004] NICA 15 and *Attorney General's Reference (No 3 of 2006) (Michael John Gilbert)* [2006] NICA 36. He did not refer me to those decisions. There are substantial differences between the earlier and current guidelines. Also I was not referred by Mr Weir to the 2002 guidelines published by the Sentencing Advisory Panel in England & Wales or to the 2007 guidelines published by the Sentencing Guidelines Council in England & Wales. Mr Weir was unable to refer to any guideline decision in relation to false imprisonment except that he drew to my attention that Mr Cinnamond QC, who appeared on behalf of the defendant, would refer to the decision of Mr Justice Hart in the case of *R v McKenna & another* [2007] NICC 15. In relation to sentencing guidelines Mr Cinnamond QC did hand into court the decision in *R v McKenna & another* but also specifically stated that the guidelines were still the cases of *R v McDonald & others* and *Attorney General's Reference (No 1 of 1989)*. It was the obligation of both counsel to be aware of and to have available copies of guideline cases and to draw them to my attention. The obligation extends to a requirement to list out the aggravating and mitigating features and to be in a position to make informed submissions as to whether the guidelines or the guideline cases support the proposition that these features are or are not aggravating or mitigating features. The failure to do so in this case has led to delay as I considered it appropriate to allow and have heard further submissions in relation to the guidelines upon which I intended to rely. The failure could have led to an inappropriate sentence being passed on the defendant. This can be demonstrated by the fact that the higher starting point under the old guidelines was 11 years imprisonment, see *R v McQuillan & another* 02/05/1997 whereas it is presently 8 years. Accordingly if I had not reserved my decision in relation to sentence a considerable injustice could have been caused. A further illustration of the detail required is that it was submitted on behalf of the defendant that intoxication by drink and drugs

was a mitigating feature. I should have been referred to the 2007 guidelines which indicate that it is an aggravating feature and to the authorities which establish that the lack of premeditation and planning (in this case caused by intoxication through drink and drugs) is a neutral feature.

[23] In fixing your sentence in relation to the offence of rape I have sought to follow the guideline contained in the decisions of the Court of Appeal in *Attorney General's Reference (No 2 of 2004) (Daniel John O'Connell)* [2004] NICA 15 and *Attorney General's Reference (No 3 of 2006) (Michael John Gilbert)* [2006] NICA 36. At paragraph [19] of *O'Connell's case* it was stated that sentencers should apply the starting points recommended by the Sentencing Advisory Panel in England and Wales in its 2002 guidelines ("the 2002 guidelines"). For rape these are 5 years with no aggravating or mitigating factors and 8 years where a number of enumerated features are present. Paragraph 19 then continues as follows:-

"New draft guidelines have been prepared for sentences for offences (including rape) provided for in the Sexual Offences Act 2003. It may be necessary to review sentencing levels after the new guidelines for England and Wales have been finalised, although, of course, these will not apply directly to Northern Ireland."

[24] Since the decisions in *O'Connell's case* and *Gilbert's case* and in April 2007 new guidelines were published by the Sentencing Guidelines Council in England and Wales ("the 2007 guidelines"). The 2007 guidelines are for every type of sexual offence. At page 15 point (vi) it is stated that the starting point of 5 years for the rape of an adult with no aggravating or mitigating factors (derived from *Millberry & Ors* [2003] 2 Cr App Rep(S) 31) was the baseline from which all other sentences had been calculated. Accordingly the sentencing levels for rape remain as 5 years with no aggravating or mitigating factors and this is the base upon which all sentences for other offences have been derived. Also the sentencing level for rape where a number of enumerated features are present remains at 8 years in the 2007 guidelines.

[25] I bear in mind that there are significant differences as between the substantive law in relation to sexual offences in England and Wales and in Northern Ireland by virtue of the various provisions of the Sexual Offences Act 2003 which do not apply in this jurisdiction. I also bear in mind that the 2007 guidelines do not apply directly in Northern Ireland. I also bear in mind that there are some differences between those guidelines and the 2002 guidelines. A significant difference is that the 2007 guidelines not only provide starting points but also sets out sentencing ranges for each offence. There are other differences for instance new starting points are suggested for cases of rape in which the victim is under either 16 or 13 years of age. I have

given consideration to the relevant differences between the 2002 guidelines and the 2007 guidelines when considering your case. There is no increase in the basic sentencing level in relation to the rape of an adult with no aggravating or mitigating factors or a rape where a number of enumerated features are present as between the 2002 and the 2007 guidelines. I apply the 2002 guidelines to your case but I also take into account the 2007 guidelines in so far as they do not conflict with the 2002 guidelines and in so far as the 2007 guidelines are not affected by the differences which now exist between the law in England & Wales and the law in Northern Ireland in relation to sexual offences.

[26] In assessing the gravity of the offence of rape I will at all stages give consideration to the broad three dimensions set out by the Court of Appeal in England and Wales in *R v Millberry & Ors* [2003] 2 Cr App R (S) 31 as approved by the Court of Appeal in *O'Connell's case* and *Gilbert's case*. Those broad three dimensions are as follows namely:-

- (i) The degree of harm to your victim.
- (ii) Your level of culpability.
- (ii) The level of risk posed by you to society.

[27] In approaching the dimension of culpability I bear in mind the following passage in the 2007 guidelines:-

“1.12 Culpability is determined by the extent to which the offender intends to cause harm – the worse the harm intended, the greater the offender’s culpability.”

The guidelines at paragraph 1.12 then continue:-

“Sexual offences are somewhat different in that the offender’s intention may be to obtain sexual gratification, financial or some other result rather than to harm the victim. However, where the activity is in any way non consensual, coercive or exploitative, the offence is inherently harmful and therefore the offender’s culpability is high. Planning an offence makes the offender more highly culpable than engaging in opportunistic or impulsive offending.”

[28] I also bear in mind when considering your sentence the distinction between aggravating and mitigating features on the one hand and neutral features on the other. The Court of Appeal gave consideration to this issue in, amongst others, *R v William Desmond Gallagher* unreported, delivered on 6<sup>th</sup>

April 1990, when it was necessary to consider whether the lack of premeditation in rape was a mitigating factor. The Court of Appeal stated:-

“We consider that the learned trial judge was right to take the view that the consideration of these rapes were not premeditated, did not amount to mitigation but, as he said, were neutral factors and, as appears from Lord Lane’s judgment in *Billam* if the rapes had been premeditated, that would have been an additional aggravated feature, but the fact that that additional aggravated feature was absent, does not in itself constitute mitigation.”

[29] I do not propose to apply the 2002 guidelines in a mechanistic manner. In that respect the approach that I adopt is set out in paragraph 1.3 of the 2007 guidelines as follows, namely:-

“For these types of offence (namely sexual offences) more than for any many others, the sentencing process must allow for flexibility and variability. The suggested starting points and sentencing ranges contained in the offence guidelines are not rigid, and movement within and between ranges will be dependent upon the circumstances of individual cases and, in particular, the aggravating and mitigating factors that are present.”

I also bear in mind the totality principle.

### **The Starting Point**

[30] An issue which arises in your case is as to the selection of the appropriate starting point for the offence of rape. You are related to your victim. The question arises as to whether that factor alone requires the higher starting point of 8 years before taking into account any aggravating or mitigating factors. It was submitted to me by Mr Weir QC, who appeared on behalf of the prosecution, that by virtue of the relationship that existed between you and your victim, your case involved a breach of trust. That there was a relationship of close family trust between yourself and your aunt which you abused. At paragraph 34, page 9 of the 2002 guidelines it is stated that one of the features indicating the 8 year starting point is:-

“The offender is in a position of responsibility towards the victim (e.g. in the relationship of

medical practitioner and patient, teacher and pupil); or the offender is a person in whom the victim has placed his or her trust by virtue of his office or employment (e.g. a clergyman, an emergency services patrolman, a taxi driver or a police officer)."

In the 2007 guidelines this feature becomes "abuse of trust" see page 25 or "Abuse of a Position of Trust" see page 9. I interpret abuse of trust as requiring a position of responsibility towards a victim or alternatively that the offender is a person in whom the victim has placed his or her trust by virtue of his office of employment. There has to be a position of power and authority by the offender over the victim. I do not consider that a nephew is in a position of responsibility in that sense towards his aunt. Accordingly I proceed on the basis that your relationship to your victim does not affect the starting point.

[31] However that does not mean to say that because the existence of a close blood relationship does not affect the starting point that it will not affect the overall sentence. The 2002 guidelines at paragraphs 16-26 and paragraphs 38-39 give consideration to the relative impacts upon the victim of stranger rape on the one hand and rape where the offender and the victim are known to each other. Rape where the offender and the victim have been in a previous sexual relationship ("relationship rape") and rape where the victim and the offender are known to each other ("acquaintance rape") are equally as serious as "stranger rape" by virtue of the fact that a breach of trust is inherent in such rapes. At paragraph 39 of the 2002 guidelines it is stated that

"...breach of trust is inherent in both relationship rape and acquaintance rape. Since it is this factor which people see as making such offences equally serious as stranger rape, it would clearly be unfair to treat breach of trust in such a case as an additional aggravating factor."

[32] However I do consider that in your case the close blood relationship between you and your victim is an additional aggravating factor. The existence of your close blood relationship can and in your case did cause the victim to feel particularly bitter about the offence of rape. In your case the unpleasant intimate proximity involved in the rape that you committed was heightened by your close blood relationship to your victim. The impact on your victim was one of particular abhorrence and particular degradation. There has been a greater psychological impact on your victim by virtue of the close blood relationship that existed between you and her. You demonstrated to her that by degrading and abusing her body that she could not trust a close relative and indeed a relative whom she had assisted over the years. I also

bear in mind that it would be natural for the abhorrence of the victim to be increased the closer the degree of relationship. In that respect I note that an aunt is in the prohibited degrees of relationship which will avoid a marriage for the purposes of the Matrimonial Causes (Northern Ireland) Order 1978 and for instance within the categories of relationship with whom penetrative intercourse is prohibited in England & Wales by Section 64 of the Sexual Offences Act 2003.

[33] The fact that you and your victim are related has also lead to severe disruption in your victim's wider family circle. Not only has your victim sustained greater psychological injury by virtue of the relationship between you and her but also there is a strong element of estrangement from her wider family circle as a result of the rape that you perpetrated.

[34] It was said on your behalf that by virtue of your plea of guilty your aunt was saved the anguish of having to give evidence against a member of her own family. That her evidence would have been against "kith and kin" and "a nephew for whom she was affectionate and in front of other members of her family". You saved her that ordeal by entering a plea of guilty but that is the very ordeal through which you put your aunt when you raped her. She must live with the knowledge that she was raped by her "kith and kin". That the rape was committed by "a nephew for whom she was affectionate". That her closest family members know of her humiliation and degradation not only by virtue of the offence itself but by the way in which you attempted to vilify your aunt to the police when questioned about that offence.

[35] I do not overlook when considering your relationship to your aunt as an aggravating feature in your case that rape by a stranger can lead to features which are not present in your case. When considering "stranger" rape the victim's fear can be increased because the assailant is an unknown quantity.

[36] I do not take into account when fixing the starting point the fact that your victim was your aunt. However in fixing the starting point I do take into account another feature which is present in your case. In every offence of rape there is an element of detention. The 2002 guidelines proposed a starting point of 8 years after a contested trial for a case where "the offender abducts the victim and (emphasis added) holds him or her captive". The 2007 guidelines indicate an 8 year starting point for a rape accompanied by "abduction or (emphasis added) detention". Both the 2002 and the 2007 guidelines are not to be applied mechanistically. I interpret the 2002 guidelines in your case as indicating an 8 year starting point on the basis of your detention of your aunt despite the lack of any element of abduction. By virtue of the existence of the feature of detention in this case and under both the 2002 and the 2007 guidelines I fix the starting point at 8 years before I turn to any consideration of aggravating and mitigating factors.

### **Aggravating Features Relating to the Offender**

[37] You have a criminal record consisting of 22 previous convictions. For the most part none of those previous convictions are relevant in the context of the offence of rape. There are no previous convictions for any sexual offences. There is no significant history of violence. There is one isolated conviction for robbery. On 23 November 2005 you were convicted of robbery at Antrim Crown Court. For that offence you were sentenced to be detained in a Young Offenders Centre for 12 months. You have accordingly demonstrated that in the past you have been prepared to commit acts of violence against people. I take into account your previous conviction for robbery as an aggravating feature but not as a significant aggravating feature.

[38] I also take into account as an aggravating feature the fact that you were on bail in relation to other charges when you committed these offences against your aunt. Indeed the terrible irony being that it was your victim who facilitated your bail by agreeing to be your surety.

### **Aggravating Features Relating to the Offence**

[39] I take into account as an aggravating feature the relationship that existed between yourself and your victim for the reasons set out earlier in this judgment. I consider that this is a serious aggravating feature in your case. Your culpability was greater in that you must have known of your aunt's emotional vulnerability and the actual harm which you caused by your conduct was considerably greater by virtue of this feature.

[40] I also take into account the feature that your aunt was in a vulnerable position at the time that this incident occurred. When you committed the rape upon your aunt she was in a completely defenceless position. She was unconscious and unable to react in any way in order to prevent you from committing these indignities upon her. When considering this aspect of the case I also bear in mind that at the time this rape was committed upon your aunt she knew nothing about it. That you did not tie her up in order to rape her. That she did not have to endure the horror of knowing that she was going to be raped due to the fact that she was unconscious at the time. Your victim endured the aftermath of the rape but she was spared the details of the actual rape itself.

[41] I also take into account as an aggravating feature the fact that you stole from your aunt after you had perpetrated this rape upon her.

[42] For the avoidance of doubt I have already taken into account the detention of your aunt in setting the higher starting point and that detention involved a greater degree of violence than was necessary to commit the rape.

I do not take either of those factors into account now at this stage as aggravating features. They have already been taken into account in setting a higher starting point.

[43] I also take into account as an aggravating feature the fact that when you committed this rape you were under the influence of alcohol and drugs, see page 9 paragraph 1.20 of the 2007 guidelines. The risks to victims are greatly increased if perpetrators are disinhibited and lack control and proportion due to the influence of drink and drugs. This is a further specific aggravating feature in your case. I bear in mind that the commission of this offence was not planned and was opportunistic. The lack of premeditation and planning was caused by your consumption of drink and drugs. However the lack of premeditation and planning is a neutral feature. The commission of an offence under the influence of drink or drugs is an aggravating feature.

### **Mitigating Features in Relation to the Offence**

[44] It was submitted by Mr Cinnamon QC, who appeared on your behalf, that at the time that you committed these offences you were heavily intoxicated with crack cocaine and alcohol. That your perception of events may accordingly have been badly distorted. That the offences were not premeditated or planned. I do not consider that this is a mitigating feature. I consider that the lack of premeditation and planning is a neutral feature. I have already taken into account your intoxication with crack cocaine and alcohol as specific aggravating features.

### **Mitigating Features in Relation to the Offender**

[45] I have set out and taken into account your personal circumstances but in doing so I bear in mind that in cases of this gravity your personal circumstances are of limited effect in the choice of sentence, see *Attorney General's Reference (No 7 of 2004) (Gary Edward Holmes)* 2004 NICA 42 and *Attorney General's Reference (No. 6 of 2004) (Conor Gerard Doyle)* [2004] NICA 33.

[46] I take into account your expressions of remorse on the basis that I have set out earlier on in this judgment as a mitigating feature.

[47] I take into account your mental condition as a mitigating factor, see page 10 of the 2007 guidelines. I note that in the opinion of Dr. Bownes that you had embarked on the sequence of events resulting in your arrest impulsively and opportunistically in the context of the victim's availability and vulnerability and the disinhibiting effects of alcohol and other psychoactive substances. I consider that in your case your mental condition had very little if any impact on the degree of your culpability. Your intentions were almost entirely influenced by your desire for sordid sexual



gratification and the drink and drugs that you had consumed. However I take your mental condition into account as some degree of mitigation in your case.

[48] I take into account as a mitigating factor your age at the time that these offences were committed but I do so on a strictly limited basis see *Gilberts Case* at paragraph [25].

[49] I will deal separately with the mitigating feature that you have pleaded guilty to these charges. If you had not pleaded guilty then taking into account the aggravating and mitigating features in your case I would have sentenced you to a period in prison of at least 11 years. I now turn to consider the mitigating effect of your plea of guilty. It has to be seen in the context that you did not admit your guilt during interview with the police and indeed you made false and perverted sexual allegations against your aunt. You maintained your innocence over the whole period up to the very start of the trial when the jury had been sworn. Accordingly I have not given the full element of discount which I would accord to an earlier plea of guilty. However I do recognise that you ultimately pleaded guilty and thereby saved your aunt the very considerable additional trauma of having to recount her horrific experiences in a public environment against her nephew in front of her family. I also recognise that eventually at trial you did not persist in your scandalous allegations against your aunt which saved her from your attempts to further degrade and humiliate her.

[50] I also bear in mind the discounts for a plea of guilty in *Gilbert's case* and in the decision in *Attorney General's Reference (No 12 of 2003) (Sloan)* [2003] NICA 35. In both of those cases the discount for a plea of guilty at a late stage was 20%. I have considered whether you are entitled to a greater discount by virtue of the fact that you spared your "kith and kin" the additional trauma of giving evidence in front of her own family against you. However I also bear in mind the scandalous allegations that you made about her to the police. Accordingly I consider that the discount that should be given in your case is one of 20%. In arriving at your final sentence I have also at this stage borne in mind the totality principle.

[51] In determining your sentence I have borne in mind the provisions of Article 19 (2) (a) and (b) and Article 19(4) of the Criminal Justice (Northern Ireland) Order 1996. I consider that all of the offences before me now are so serious in their content that only a custodial sentence is justified and that also given that one of your offences was a violent offence and a sexual offence and another was a violent offence, I also consider that only such a sentence would be adequate to protect the public from serious harm from you. I am of that opinion for the reasons I have set out in this judgment. I repeat you have committed a most serious offence. You are a danger and a risk to others.

[52] As you must receive a substantial period of imprisonment in excess of 12 months I am required by statute to consider whether I should impose a Custody Probation Order. Such an order is considered in the pre-sentence report. The Court of Appeal pointed out in *R v Quinn* [2006] NICA 27 at paragraph 29 that:-

“A Custody/Probation Order should only be made where it is considered that the offender would benefit from probation at the conclusion of a period of custody and that it is deemed necessary to enable him to reintegrate into society or because of the risk that he would otherwise pose”.

I have concluded that you would so benefit from probation at the conclusion of a period of custody in view of your abuse of alcohol and drugs prior to the commission of these offences and the previous lack of stability in your life.

[53] If you consent to a Custody Probation Order I will sentence you as follows:-

- (i) For the offence of rape 8 years imprisonment followed by 2 years probation. There will be a number of requirements in the Probation Order as follows namely:
  - (a) You address your impulsive and risk-taking behaviour as directed by your supervising probation officer.
  - (b) You develop an involvement in constructive and purposeful activity as directed by your supervising probation officer.
  - (c) You examine the consequences of your behaviour both on yourself, your family and in particular victims as directed by your supervising probation officer.
  - (d) You engage in counselling and treatment for alcohol and drug abuse as directed by your supervising probation officer. Thereafter you attend such a course if so directed by your supervising probation officer.
  - (e) That you are assessed for suitability regarding attendance on the PBNI community sex offender programme as directed by your supervising probation officer.

(f) That you follow such professional guidance and supervision as directed by Dr Bownes in accordance with the 6 matters listed on page 10 of his report dated 16<sup>th</sup> August 2007.

(ii) For the offence of false imprisonment 3 years imprisonment concurrent to the sentence in (i) above.

(iii) For offence of theft 6 months imprisonment, concurrent to the sentences in (i) and (ii) above.

[54] If you do not consent to Custody Probation I will sentence you to 9 years imprisonment in relation to the offence of rape, 3 years for false imprisonment and 6 months for theft. All concurrent.

[55] I make it clear that the 2 year probation period does not equate to the reduction in the period that you will spend in custody for the offence of rape. I consider that you require 2 years probation to enable you to reintegrate into society and because of the risk that you would otherwise pose. In addition you need that length of probation in view of your history of alcohol and drug addiction.

[56] I must now enquire from you as to whether you consent to a Custody Probation Order. Do you consent to a Custody Probation Order being made?

[57] I understand that you consent. Accordingly I sentence you as follows:-  
(i) For the offence of rape 8 years imprisonment followed by 2 years probation. There will be a number of requirements in the Probation Order as follows namely:

- (a) You address your impulsive and risk-taking behaviour as directed by your supervising probation officer.
- (b) You develop an involvement in constructive and purposeful activity as directed by your supervising probation officer.
- (c) You examine the consequences of your behaviour both on yourself, your family and in particular victims as directed by your supervising probation officer.
- (d) You engage in counselling and treatment for alcohol and drug abuse as directed by your supervising probation officer. Thereafter you attend such a course if so directed by your supervising probation officer.

- (e) That you are assessed for suitability regarding attendance on the PBNI community sex offender programme as directed by your supervising probation officer.
  - (f) That you follow such professional guidance and supervision as directed by Dr Bownes in accordance with the 6 matters listed on page 10 of his report dated 16<sup>th</sup> August 2007.
- (ii) For the offence of false imprisonment 3 years imprisonment concurrent to the sentence in (i) above.
- (iii) For offence of theft 6 months imprisonment, concurrent to the sentence in (i) and (ii) above.