

CENTRAL CRIMINAL COURT

BILL NO. CC 50 / 2006

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

V.

WAYNE DROUGHT

Judgment of Mr. Justice Charleton delivered on the 4th day of May, 2007

1. After a trial lasting four days, the accused was convicted on 16th March, 2007, of one count. The jury found that on Thursday 9th December, 2004, at the quay in Waterford the accused raped a student who was then attending a third level college in the area.

Facts

2. The victim had finished a set of examinations at third level. She was invited to a party at the flat of a friend because it had been decided that Christmas should be celebrated more than two weeks early. At the party, she drank tea, wine and vodka. The details are unclear but, whatever she had to drink, the effects were delayed. Together with some of her friends, who were girls like her in their late teens or early twenties, she first of all went to the "Ten Nightclub". There, after a time, she was asked to leave because she was adjudged to be too drunk by the security staff. With a friend she then went to "Oxygen Nightclub", which is nearby. It seems that she met the perpetrator there and that they then went back into the "Ten Nightclub". At shortly after 00.35 hours the accused escorted her outside and accompanied her up John Street, past the Town Hall, around by Reginald's Tower and onto the quays. On the way, there was at least one consensual kiss but the activity between the perpetrator and the victim did not go beyond that level. When they had gone no more than a couple of hundred metres from Reginald's Tower the perpetrator pushed the victim into a recessed doorway.

3. This place was a very short distance away from the victim's flat, a fact unknown to the perpetrator. The perpetrator pushed the victim to the ground. He was very much aided in overpowering her by the effects of the alcohol which she had drunk earlier and by the fact that she had not eaten for the entire day. In her account to the jury she recalled the perpetrator being on top of her. She said to him "I thought you were just walking me home". She then recalled him pulling down her trousers and underwear and forcing himself inside her. The attacker ripped her clothing and tore away the zipper of her trousers from the surrounding fabric. She was just finishing a menstrual period and had a tampon in place. In the aftermath of the attack, because of pain, she removed the tampon and went up the quays in the direction of her flat. The rapist had, by this stage, gone off in the opposite direction. On the quays, the victim wandered past a middle-aged couple who saw her state of dishevelment and distress. They stopped her, questioned her and then insisted on calling the gardai. The victim was brought quickly to a hospital. There, she was medically examined and the injuries that were found on her body were consistent with her account of being forcibly subjected to sexual intercourse.

4. At the trial, the perpetrator did not give evidence. Instead, he relied upon a series of statements that he made to gardai when he was arrested some days after the attack. In these, he claimed that the entire event was consensual, to the extent that he was a willing partner in sexual intercourse with the victim. The defence case was constructed cleverly by the perpetrator to take account of all the incontrovertible facts of the case and this story was altered by him during his interviews by the gardai to take into account every new fact that he discovered.

Issue

5. My function today is to decide what sentence is appropriate to the perpetrator in the circumstances of this case. Courts are guided by precedent. It can be argued that the circumstances of the perpetration of the same offence by different offenders on different occasions can be so varied that previous decided cases are of little assistance. It can also be asserted that cases can, notwithstanding variation, have similarities which become apparent once particular factors are identified as being of importance in sentencing. These factors, and the range of variability that they bring about, can be ascertained in previous rulings of this Court, the Court of Criminal Appeal and the Supreme Court. It is not my intention to establish guidelines for the sentencing of offenders who have been found guilty of rape. It is my function, however, to place the sentencing of this offender within the parameters of the existing law and practice so that the disposal of this case can be regarded as being consistent with the penal policy of the Superior Courts in dealing with rape cases. To that end, I have attempted to examine all the previous reported and unreported decisions of the Superior Courts which are relevant and, together with the judicial research section of the High Court, an analysis has been conducted of the sentences imposed by this court, or reviewed on appeal, from January, 2005 to date. In this judgment I refer to some of these. I have also asked the parties to refer me to any sentencing precedents which they consider may be of help. The remarks which follow are based on this exercise. The result is an attempt to divine both the relevant sentencing principles and the parameters within which such a sentence can be imposed for the sake of consistency and predictability. Here, I am looking solely at actual sentences of imprisonment. In many of the cases a certain portion of a sentence was suspended to encourage good behaviour after release. The question that I have posed is simply as to how long a period of imprisonment a perpetrator is required to serve and in what circumstances.

General Principles

6. Rape is an extremely serious offence. It carries a penalty of life imprisonment. There is no minimum mandatory sentence as, in the sphere of indictable crime, the judiciary have always set their own parameters as to the disposal of cases. Often these are not apparent through any other exercise than long practice. Nonetheless, they exist and they can be discovered by a scrutiny of decided cases.

7. Rape constitutes a savage attack on the bodily and psychological integrity of a woman. It overrides her right to privacy in the most intimate area of human relationships. It discounts her personality by imposing a complete nullification of her existence as a sentient person who is entitled to choose where to place her affection. Rape is always accompanied by either violence or fraud; as the obliteration of choice in sexual conduct may only be brought about through drugging the victim or through mis-using the natural physical strength of the male to imprison and then degrade the victim in order to bring about unwanted sexual penetration. In many of the cases, physical harm results. In rape, affection or sexual recreation is replaced by the opposites of violence and degradation. Attacks can result in pregnancy and in the transmission of venereal disease. Even when these, as in the great majority of cases, do not result, the victim is ordinarily left in fear and trepidation of such consequences.

8. I believe that all the judgments of the Superior Courts that concern rape sentencing reflect these fundamental concerns. This is why in *The People (Director of Public Prosecutions) v. Tiernan* [1988] 1 I.R. 250, the Supreme Court, through Finlay C.J., stated at p. 523 that although it is necessary to consider the particular circumstances that might be applied to the sentence of each offender, "It is not easy to imagine the circumstances which would justify the departure from a substantial immediate custodial sentence for rape". The Supreme Court expressed the view that because of the gravity of the offence of rape, only in the most exceptional of circumstances might a sentencing court deviate from the norm of a substantial period of imprisonment. In England, the Court of Appeal in *R. v. Roberts* [1982] 1 W.L.R. 133 expressed a similar view when they stated that rape is always a serious crime which calls for an immediate custodial sentence, other than in wholly exceptional circumstances; see for example *R. v. Taylor* (1983) 5 Cr. App.

9. It is not a principle of Irish law that an early plea of guilty could, of itself, constitute such a wholly exceptional circumstance as to require a non-custodial sentence for rape. By s. 29 of the Criminal Justice Act, 1999:-

"29. (1) In determining what sentence to pass on a person who has pleaded guilty to an offence, other than an offence for which the sentence is fixed by law, a court, if it considers it appropriate to do so, shall take into account -

(a) the stage in the proceedings for the offence at which the person indicated an intention to plead guilty, and

(b) the circumstances in which this indication was given.

(2) To avoid doubt, it is hereby declared that subsection (1) shall not preclude a court from passing the maximum sentence prescribed by law for an offence if, notwithstanding the plea of guilty, the court is satisfied that there are exceptional circumstances relating to the offence which warrant the maximum sentence."

10. In *The People (Director of Public Prosecutions) v. R. McC.* [2005] I.E.C.C.A. 71, Fennelly J., on behalf of the Court of Criminal Appeal, indicated that it is not an error of principle, in appropriate circumstances, to refuse to give credit for an early plea of guilty to rape. Ordinarily, a plea of guilty, as an indication of remorse and as a means of relieving the victim of the necessity of an upsetting challenge to her true account of events, must be taken into account in a meaningful way; see the judgment of Carney J. in *The People (Director of Public Prosecutions) v. J.R.* (Central Criminal Court, 4th December 1995, unreported). The function of a court in imposing sentence is manifold. It involves punishing the offender, protecting society and offering the possibility of rehabilitation through the humane disposal within the penal system of a violent perpetrator. The court is not empowered to engage in retribution or to exact revenge; *The People (Director of Public Prosecutions) v. M.S.* [2000] 2 I.R. 592. In a similar way, Denham J. has stated that the purpose of sentencing is about rehabilitation and not about vengeance; *The People (DPP) v. M.* [1994] 3 I.R. 306 at 317.

11. In this regard, the following quotation from the judgment of Roach J.A. in *R. v. Warner* [1946] O.R. 808 at 815 is apposite:-

"It should be said at once that the purpose of punishment for crime is not that, through the medium of a judge who is authorised by law to impose it, vengeance may be wreaked upon the guilty for their crime, as though crime was private in character. In the narrow sense a crime is usually an offence against an individual, involving his person or his property. ...In the broader sense, in which the courts must regard it, crime is an offence against the State and is punished by the State on much different principles. The main purpose of the imposition of punishment is the good of the State, that is, society generally. If the culprit by his conduct has demonstrated that he is anti-social, then society excludes him from its membership temporarily or permanently. Punishment is also imposed as a deterrent to others from committing similar crimes. It is the expression of the condemnation by the State of the wrong done to society. There must, therefore, always be a right proportion between the punishment imposed and the gravity of the offence. It is in that sense that it is said that certain crimes "deserve" certain punishments and not on any theory of retribution. Added to the foregoing, of course, there is the desirability of reforming the criminal wherever that is possible, and restoring him to society."

12. These aims are not simply worthy shibboleths but are, instead, principles to be borne in mind by me in considering any sentence. There may be circumstances, however, where the nature of the offence, considered together with the character and record of the offender, is such as to require a court to impose what was described by Barrington J. in *The People (Director of Public Prosecutions) v. Holland*, (Unreported, Court of Criminal Appeal, June 15th, 1998), as a "condign punishment". The nature of the offence of rape is such as to tend in that direction.

13. I therefore turn to reports of cases, in an attempt to learn what can be discovered from the sentences already imposed, or approved, by the Superior Courts in relation to this offence. I will start with the cases which have attracted what, in this context, must be considered a lenient punishment in respect of the term of imprisonment that an offender was required to serve.

Lenient Punishments

14. There is no requirement, by way of an absolute rule, that a custodial sentence must be imposed where a perpetrator has been convicted of rape, either by verdict or by plea of guilty. In *The People (Director of Public Prosecutions) v. R.O'D.* [2000] 4 I.R. 361 at 363, the Court of Criminal Appeal indicated:-

"It is important that this court should make clear at the outset that in the absence of a statutory provision to that effect, it is never mandatory on a trial judge to impose a custodial sentence. This principle was recently reaffirmed by this court in *Director of Public Prosecutions v. McCormack* [2000] 4 I.R. 356. Needless to say that does not mean that a trial judge is at large as to whether he or she imposes a custodial sentence or not. Not to impose a custodial sentence in a particular case may amount to an error in principle which would be capable of correction by this court. But there is no question of an absolute rule that for certain types of offences a custodial sentence is mandatory."

15. I have been furnished by Mr. Liam Convey, Registrar of the Central Criminal Court, with an analysis of cases completed by that court in 2006. During that year, pleas of guilty were entered to twenty three cases in respect of an indictment alleging rape. 75% of these convictions by plea were for rape or attempted rape, with sexual assault making up the balance. I note that two suspended sentences were imposed but no figures are available as to which category, of rape or sexual assault, these two instances of a suspended sentence came into. Of twenty three rape cases in respect of which pleas of not guilty were entered, but which resulted in a verdict of guilty, it is noted that two resulted in a suspended sentence. Some of these convictions were for lesser offences, however, such as sexual assault, and only eleven of them for rape. It is doubtful if any of these suspended sentences were imposed in respect of a conviction for rape. There were also eight acquittals on all charges. There is nothing in these figures to suggest any contradiction to the principle that a suspended sentence for rape is anything other than wholly exceptional.

16. In *Director of Public Prosecutions v. N.Y.* [2002] 4 I.R. 309 the Court of Criminal Appeal made reference to the issue as to whether a non-custodial sentence could be imposed for a rape conviction. At p. 315 of the report, Fennelly J. stated:

"The fact that the crime of rape normally calls for the imposition of a custodial sentence has now been established for many years. The cases are well known. The crime of rape is one of the most serious in our criminal calendar. Normally, it will merit a custodial sentence. Nonetheless, the court imposing sentence must not deprive itself of the possibility of identifying the exceptional case where a custodial sentence may not be warranted. It is a truism that the courts must sentence the offender and not the offence."

17. It is to be noted that in that case the court referred to the imposition of a custodial sentence for rape as being normal. In looking at subsequent judgments, I am obliged to bear in mind the language of the Supreme Court in *The People (Director of Public Prosecutions) v. Tiernan* [1988] 1 I.R. 250 which indicates that a non-custodial sentence in respect of rape, whether on a plea of guilty or on conviction, should be "wholly exceptional". I note also that in *The People (Director of Public Prosecutions) v. G.D.* [2004] I.E.C.C.A. 17, McCracken J., on behalf of the Court of Criminal Appeal, referred to the circumstances of that case as being "unusual and exceptional, as they must be to justify a non-custodial sentence". Insofar as there are any divergence between the latter case and the definitive ruling of the Supreme Court in *Tiernan's* case, I am bound to follow the Supreme Court. As a matter of principle, even if not bound by that decision, I would unhesitatingly adopt the principle expressed in it.

18. I would now make brief reference to the salient facts of certain of the cases, of which reports are available to me, which resulted in a lenient sentence upon conviction for rape. In *The People (Director of Public Prosecutions) v. Horgan*, of which a newspaper report appears in the *Irish Times* on 11th March, 2006, a sixteen year old accused, who had been the subject of a re-trial, after a previous conviction, was given a sentence of eight years imprisonment for rape and manslaughter. Six years of this term were suspended by reference to the time that he had already spent in custody, which was four and a half years. He was aged sixteen years at the time of the offence and had no previous convictions. When the matter was appealed by the Director of Public Prosecutions to the Court of Criminal Appeal, the term was increased to two concurrent terms of twelve years imprisonment. Counsel for the prosecution had submitted that the facts placed the rape at the most severe end of the scale. A written judgment is expected, but the case is not relevant to this category: see the *Irish Times* 20th April, 2007.

19. In *The People (Director of Public Prosecutions) v. Dodd*, a report is available in respect of this in the *Irish Times* on 26th April, 2006, the victim was fifteen years old. There was a plea to unlawful carnal knowledge and a sentence of eighteen months was imposed. In *The People (Director of Public Prosecutions) v. McLaughlin* [2005] 3 I.R. 198, the Court of Criminal Appeal imposed a custodial sentence of four years, with the final three years suspended, in the light of the payment of substantial compensation and its acceptance by the victim. Any expectation that a perpetrator may have to a suspended sentence, or a reduction, on paying compensation to the victim is dealt with in this case. *The People (Director of Public Prosecutions) v. Maher* (Unreported, Court of Criminal Appeal, 18th December, 2002), was argued by the appellant to concern two young people engaging in sexual experimentation over more than three years. However, the Court of Criminal Appeal held that whilst this may have initially been so, this mitigating factor went as the exploitation continued. There was a five year age gap. The conviction was for three counts of rape and four counts for sexual assault. A four year sentence for rape was reduced to two years with fourteen months suspended and a conviction for sexual assault was reduced to one year with six months suspended.

20. In *The People (Director of Public Prosecutions) v. William Conroy*, (Unreported, High Court, Flood J., July, 1992), a nine year suspended sentence was imposed in the Central Criminal Court. In *The People (Director of Public Prosecutions) v. M.S.* [2000] 2 I.R. 592, the accused was convicted of rape in March, 1997. After some consensual kissing, the perpetrator knocked the victim onto a bed and tried to open the buttons on her jeans. He initially accepted the rejection of the victim but then he followed her, pulled her on to a grassy area and put a knife to her face and then raped her. He made a full confession and was highly co-operative; his behaviour was regarded as evidence of genuine remorse. The offence was regarded as being out of character and the victim indicated that she would not like to see him going to prison "for a long time". The accused was sentenced to six years imprisonment. Following procedural debate in the Court of Criminal Appeal, and a scheme of probation organised after the sentence had been imposed, the balance of the imprisonment was suspended by the Court of Criminal Appeal in May, 2000. This apparently lenient sentence, when examined, therefore, is found to equate to a sentence of approximately four years, allowing for an adjustment to take account of the actual time that would have been served in normal course, less statutory remission.

21. In *The People (The Director of Public Prosecutions v. R. O'D.* [2000] 4 I.R. 361, the accused pleaded guilty to several counts of sexual assault on his two sisters during a time somewhere between sixteen and twenty-nine years earlier. He had been, himself, abused by another perpetrator. Both of the victims requested that a custodial sentence should not be imposed. Apparently, it was because the sentencing judge believed that he was obliged to impose a mandatory custodial sentence that he imposed a sentence of five years imprisonment on two counts of rape and two counts of buggery, suspending four years therefrom. The Court of Criminal Appeal held that while a court is obliged to take into account the effect of a crime on a victim, as required by s. 5 of the Criminal Justice Act, 1993 that this did not allow the victim to express a view as to what the appropriate sentence should be. The balance of the custodial sentence was then suspended. In *The People (Director of Public Prosecutions) v. McHugh*, a report of which is available in the *Irish Times* on the 24th January, 2006, a sentence of five years was imposed, with four years of that suspended conditionally, making a one year sentence of imprisonment, when the victim accepted €20,000 in compensation. The suspension was subject to the perpetrator attending therapy and joining up with Alcoholics Anonymous. In *The People (Director of Public Prosecutions) v. N.Y.* [2002] 4 I.R. 309, the accused was sentenced by the Central Criminal Court to three years imprisonment with the final nine months thereof suspended. The Court of Criminal Appeal, when it came before them after the usual delay, suspended the balance of the sentence, stating that it was taking into account the remorse of the accused and his early entry of a guilty plea. In *The People (Director of Public Prosecutions) v. G.D.* [2004] I.E.C.C.A. 17, the balance of a three year sentence imposed by the Central Criminal Court was suspended on an appeal to the Court of Criminal Appeal. The Court took into account the age of the perpetrator, who was fifteen years old, the early plea of guilty and his full statement to the gardai admitting his involvement. I note from the report that the perpetrator and the victim were extremely drunk, and that the attack on the male victim was out of character and in the context of the emerging homosexual orientation of the accused.

22. A forgiving attitude by the victim towards the perpetrator can be a factor in sentencing, on the decided cases. It can never, however, be determinative because a crime is an attack on society and not simply a private wrong. In England it has been emphasized that while the views of the victim can be taken into account by the sentencing court, it is the public interest that is the paramount consideration. The forgiving attitude of the victim can, however, be factored in; *R. v. Dredge* [1998] 1 Cr. App. Rep(S) 285, *R. v. Mills* [1998] 2 Cr. App. Rep(S) 252. This principle appears to be based on the idea that if the victim has forgiven the perpetrator that an inference may be drawn that his or her suffering must be very much less than would normally be the case; *R. v. Perks* [2000] Crim. LR 606.

23. Lenient sentences have been imposed in cases where the victim has consented at first to sexual intercourse and then changed her mind. In *R. v. Greaves* [1999] 1 Cr. App. Rep. (S) 319, sexual intercourse had been willingly commenced but, when the victim changed her mind, the perpetrator completed the act. A sentence of eighteen months was imposed.

24. The cases referred to above indicate that a suspended sentence can only be contemplated where the circumstances of the offence are such as to be so completely exceptional as to allow the court to approach sentencing for an offence of rape in a way that deviates so completely from the norm established by the case law.

25. This analysis also indicates that there is no reported case of the Court of Criminal Appeal ever indicating that it was wrong to have imposed a custodial sentence in the case of rape. At the most, the Court of Criminal Appeal has suspended the balance of a

sentence after some time has been served in imprisonment, and then only in the most extraordinary circumstances.

Ordinary Punishments

25. In *R. v. Billam* [1986] 1 WLR 349, the Court of Appeal in England listed a number of cases where there had been a conviction for rape or attempted rape in order to restate principles which should guide judges sentencing "in this difficult and sensitive area of the criminal law". The court analyzed the sentences imposed for these offences in 1984. In that year, 28% of offenders received sentences of two years or less; 23% of over two years and up to three years; 18% of over three and up to four years; 18% of over four and up to five years; and 8% of over five years, with 2% of these receiving the ultimate sentence of life imprisonment. The court commented that these statistics showed an approach to sentencing for rape which was too lenient. At p. 351, Lord Lane C.J. commented:-

"The variable factors in cases of rape are so numerous that it is difficult to lay down guidelines as to the proper length of sentence in terms of years. ... There are however many reported decisions of the court which give an indication of what current practice ought to be and it may be useful to summarise their general effect. For rape committed by an adult without any aggravating or mitigating features, a figure of five years should be taken as the starting point in a contested case. Where rape is committed by two or more men acting together, or by a man who has broken into or otherwise gained access to a place where the victim is living, or by a person who is in a position of responsibility towards the victim, or by a person who abducts the victim and holds her captive, the starting point should be eight years."

26. In Robert Banks, *Banks on Sentencing* (London, Butterworths, 2003) the author, at p. 484, makes this comment on the above decision and how it has affected sentencing in rape cases:-

"The sentences passed have been very loyal to *R. v. Billam* [1986] 82 Cr. App. Rep. 347. There is a consistency and predictability absent in the sentencing of many other offences. This and the growing use of life sentences is likely to continue."

27. It is appropriate to analyze the decisions of the Superior Courts with a view to discovering whether any such norm, as set out in *R. v. Billam*, might inform the principles of sentencing in this jurisdiction. In attempting to discover whether there is a normal sentence for rape, my view on this matter is one based on research and is not the establishment of, much less the declaration of, a norm.

28. Within the category of sentences for rape ranging from three years to eight years, I looked at reports of forty-two cases. The majority of these cases concluded with sentences of five to seven years. I start with the more serious cases within that band of sentence. I will then look at cases attracting sentences of imprisonment from nine to fourteen years and finally consider the cases that required offenders to serve terms of from fifteen years to life imprisonment.

29. When one turns to the cases where a sentence of eight years was imposed, one sees that these are characterized by either a more than usual degree of violence on the part of the perpetrator, by a particularly unfortunate effect on the victim or by instances of the conviction being recorded on number of different counts. An example of violence is *The People (Director of Public Prosecutions) v. O'Neill*, report in the *Irish Times*, the 2nd March, 2007. This was an appeal to the Court of Criminal Appeal which failed. The victim knew the perpetrator and, on the evening in question, he was walking her home from a disco. She was only eighteen years old. The violent circumstances included the perpetrator asking the victim if she "wanted to die" and his threatening to "snap her neck". In *The People (Director of Public Prosecutions) v. O'Sullivan*, *Irish Times* 20th December, 2005, a case of attempted rape accompanied by a threat to kill, the attack was by a stranger. The victim was only sixteen years old, in contrast to the age of the defendant who was almost forty. The sentence imposed was of eight years imprisonment. A similar sentence was imposed in *The People (Director of Public Prosecutions) v. McDonagh*, report in the *Irish Times*, the 28th June, 2005, which was a case of rape and oral rape. The victim and the perpetrator had just met. He was sixteen while she was thirteen. The aggravating factors included her age and there is a note that excessive violence was used. In *The People (Director of Public Prosecutions) v. Goggin*, a report of which appears in the *Irish Times* on 29th January, 2005, a sentence of eight years was also imposed. This case involved a conviction after a plea of not guilty to kidnapping and false imprisonment, rape, aggravated sexual assault, an assault causing harm. The reasoning of the court seems to have been based on the effect which the attack had on the victim but also, it is apparent that there were aggravating factors beyond the norm.

30. Within the band of eight years a number of cases occur of rape and serious sexual assault over a number of years to young victims by perpetrators who are family members or friends. In general, these seem to be more lenient sentences at the eight years imprisonment mark, as many of these, depending on the circumstances, have been seen to carry nine and more years; a matter to which I will shortly turn. They are often very old cases where the perpetrator may have led a better life in the intervening years.

31. I turn now to cases where seven years imprisonment was imposed. One of these, cases namely *The People (Director of Public Prosecutions) v. J.D.*, was disposed of on the 29th July, 1997, by the Central Criminal Court. This is an example of multiple counts in respect of a sexual partner's nieces where there seem to have been particularly strong factors present in the case to reduce the penalty to this level. Another such case *The People (Director of Public Prosecutions) v. Sweeney*, *Irish Times*, 6th April, 2005, where the victims were the accused's siblings, but the report does not carry details of any mitigating factor. In *The People (Director of Public Prosecutions) v. Flynn*, *Irish Times* 26th April, 2005, the plea was not guilty in respect of one incident. The male victim was fourteen years old and the crime had a particular effect on him. The perpetrator showed no remorse. In *The People (Director of Public Prosecutions) v. Buckley*, a report of which is available in the *Irish Times* on 11th October, 2005, a sentence was increased to seven years by the Court of Criminal Appeal in circumstances where a stranger had attacked the victim. The violence involved in the offence included choking and a threat to kill. In *The People (Director of Public Prosecutions) v. Morrison*, a report of which is in the *Irish Times* on 21st January, 2006, an appeal was brought to the Court of Criminal Appeal against conviction. That failed but the sentence was reduced from nine years to seven years. The victim was the perpetrator's daughter and the court indicated that the trial judge had failed to take sufficient account of the defendant's age, health and lack of previous convictions. In *The People (Director of Public Prosecutions) v. Healy* (Unreported, Court of Criminal Appeal, 9th October, 2006), a sentence of six years and nine months was imposed on appeal. The sentence was increased from six years. There was an early indication of a plea of guilty. The offence involved the accused following the victim, catching hold of her and holding something to her throat and saying "do you feel a knife", telling her she would be killed if she continued screaming. In *The People (Director of Public Prosecutions) v. Kovalenko*, the victim and perpetrator met moments before the rape. He pleaded not guilty to the offence; see the *Irish Times*, 27th June, 2006. In *The People (Director of Public Prosecutions) v. Doherty*, *Irish Times* 11th October, 2006, a nine year sentence was regarded as appropriate by the court but was set at seven years where the offence was twenty-five years old, even though the victim was then thirteen years of age.

32. In *The People (Director of Public Prosecutions) v. Fitzgerald*, *Irish Times*, 4th April, 2006, six years was imposed on a guilty plea to rape with the aggravating circumstances of additional convictions for criminal damage and threatening to kill. The victim had feared for her life. In *The People (The Director of Public Prosecutions) v. Anonymous*, *Irish Times*, 21st November, 2006, the perpetrator

raped his wife. A sentence of six years imprisonment was imposed on a plea of not guilty. In *The People (The Director of Public Prosecutions) v. Caffrey*, *Irish Times*, 22nd February, 2007, the perpetrator suffered from a mental illness and was already serving six years for rape. This offence, which was of sexual assault, added a further six years imprisonment to that. In *The People (Director of Public Prosecutions) v. Crowley*, a report of which is available in the *Irish Times* 25th July, 2006, a sentence of six and a half years was also imposed where the perpetrator was a stranger. This sentence was imposed despite earlier admissions, a plea of guilty and the mitigating factor of remorse. The victim was, however, only fourteen years old and it appears that violence, including threats to kill her, was used by the perpetrator in order to commit this crime.

33. I turn now to indications that have given in the context of a penalty of five years imprisonment. In *The People (Director of Public Prosecutions) v. Friday*, *Irish Times* 27th July, 2005, a school friend was raped. There was a degree of strangulation and the victim was only fifteen years old. The rape was perpetrated by a school friend who himself was only sixteen years old. In *The People (Director of Public Prosecutions) v. O'Connell*, *Irish Times* 9th May, 2006, a plea of guilty was entered to rape. The perpetrator met the victim at a disco. She was fourteen while he was fifteen. He pleaded guilty. He had a dysfunctional background and suffered from alcohol and drug abuse from an early age. He had also pleaded guilty, but had not yet been sentenced, for other crimes. In *The People (The Director of Public Prosecutions) v. J.G.*, the offence was sexual assault (Unreported, Court of Criminal Appeal, 10th March, 1999). The victim was his stepdaughter. The court said it could detect no error of principle in a sentence of this magnitude. *The People (Director of Public Prosecutions) v. Fahy*, Unreported, Court of Criminal Appeal, 27th April, 2006, was unusual. The penalty of five years was substituted by the Court of Criminal Appeal where the accused was very elderly, despite the age of the victims when the offences occurred many years previously.

34. Cases which have attracted four and a half years imprisonment, four years imprisonment or three years imprisonment all seem to involve strong mitigating factors. Of the eight cases of which I have reports, only one involved a plea of not guilty. This was *The People (Director of Public Prosecutions) v. Leech*, Unreported, Court of Criminal Appeal, 3rd June, 2003. The perpetrator met the victim on the evening of the rape. The Court of Criminal Appeal changed a suspended sentence of four years into an actual sentence, stating that the trial judge had placed disproportionate weight on the fact that the perpetrator had a childhood accident which had affected his intellectual development to some extent. The court went on to state that a sentence at this level was light. The reasoning for not disturbing it is set out at pp. 7-8 of the decision by Keane C.J.:-

"...the trial judge, in the view of this court gave wholly disproportionate weight to the particular circumstances of the respondent and far too little weight to the consequences of the rape for the complainant (victim). Even more markedly [he] seems wholly to have failed to take into account the fact that the respondent had contested the matter and had subjected the victim of the rape to the ordeal of a prolonged trial. His only reference to anything in that context was to the fact of the inculpatory statement was [of] admitting to being the person involved in a sexual act with the complainant on that occasion. Of course, if it had been followed by a plea of guilty [it] would have been a relevant factor but followed as it was by [a] plea of not guilty it was a factor to which no significance in the view of the court could be attached in the present case. The court has to say that a custodial sentence of four years in the circumstances of the present case would, if anything, be a sentence of the lower end of the possible sentence[s] which might have been imposed in a case of rape attended as this was not only by aggravating circumstances by a plea of not guilty. The Director of Public Prosecutions does not invite us to treat this on that ground alone as an unduly lenient sentence and the court in these circumstances is satisfied that while it should not interfere with the sentence of four years imposed by the trial judge, the court is satisfied that it was not a case in which any part of that sentence should have been suspended".

35. It is clear that in sentencing towards the upper end of the range of three to eight years, the counts take into account aggravating factors. It is further clear that a sentence at the upper end of this scale can be imposed on a plea of guilty. I would suggest that the decided cases tend to indicate that where there has been a worse than usual effect on the victim, where particular violence has been used or where there are relevant previous convictions, such as convictions for violence of some kind, the perpetrator may expect to receive a sentence of eight years imprisonment, or more if the circumstances are sufficiently bad.

36. The reports tend to indicate that where a perpetrator pleads guilty to rape in circumstances which involve no additional gratuitous, humiliation or violence beyond those ordinarily involved in the offence, the sentence tends towards being one of five years imprisonment. The substantial mitigating factor of a guilty plea, present in such a case, suggests that such cases will attract around six to seven years imprisonment where the factors of early admission and remorse coupled with the early entry of a plea of guilty, are absent.

Severe Punishments

37. Within the category of rape cases which attracted punishments of between nine and fourteen years imprisonment, I examined twenty-two cases. Of these, five were individual offences of a single count of rape; a further nine were of a single attack that generated more than one conviction; for example oral rape, rape and anal rape. Others, such as *The People (Director of Public Prosecutions) v. Anonymous*, report in the *Irish Times*, 14th November, 2006, involved multiple counts, sometimes over some years. There the perpetrator was a family friend who abused a brother and a sister. He pleaded guilty to eighteen sample charges out of a possible 281 counts in the indictment set between 1992 and 1997. The sentence was nine years imprisonment. A similar case was *The People (Director of Public Prosecutions) v. Stafford*, *Irish Times* 17th January, 2006, which attracted a penalty of nine and a half years imprisonment. The perpetrator pleaded guilty to a number of counts of rape and sexual assault inflicted on a neighbour's child when the victim was aged between seven and seventeen years. A similar case was *The People (Director of Public Prosecutions) v. W.G.* [2004] I. E. C. C. A. 43, where a sentence of twelve years was imposed on a number of counts in respect of the perpetrator's daughters and nieces. Another case involving a ten year sentence of imprisonment was *The People (Director of Public Prosecutions) v. G. Mc C* (Unreported, Court of Criminal Appeal, 31st October, 2003). There were six victims but only one plea of guilty to male rape. The rest of the pleas involved counts of sexual assault and of child pornography. Carney J. originally imposed life imprisonment for the rape count but the Court of Criminal Appeal reduced this to ten years and reduced the pornography counts as well. It is difficult to see this case fitting in with any emerging pattern of sentencing bands. The case seems more naturally to fit within the category in which Carney J. structured the sentence.

38. As regards individual cases, previous convictions for a sexual offence were clearly an aggravating factor where courts imposed severe sentences within this band. In *The People (Director of Public Prosecutions) v. Melia* (Unreported, Court of Criminal Appeal, 29th November, 1999), the sentence was twelve years imprisonment. Three of the four victims were prostitutes. The perpetrator pleaded guilty. *Melia* had previous convictions, including one for rape. In *The People (Director of Public Prosecutions) v. Dimitrikov*, *Irish Times* 27th February, 2007, a sentence of twelve years imprisonment was imposed in respect of counts involving rape and assault causing harm. The case involved serious violence. The perpetrator had eleven previous convictions in the three years prior to sentence and the court noted that his plea of not guilty had deprived him of the concession that would otherwise be available if he had admitted his wrong. In *The People (Director of Public Prosecutions) v. Healy*, *Irish Times*, 28th October, 2006, there was a previous conviction for rape and a high risk of re-offending. The sentence was ten years imprisonment.

39. These individual cases requiring a sentence of nine years imprisonment can sometimes be examples of the kind of bad individual sexual attacks that have in some instances attracted a penalty of eight years where there has been no plea of guilty. In *The People (Director of Public Prosecutions) v. F.S.*, Unreported, High Court, O'Higgins J., 20th April, 2007, nine years imprisonment was imposed. The victim was a teenage mother living with a baby on her own. A number of men came into her flat, on the night of the offence, to drink. Of them, the perpetrator stayed behind. The victim was tripped, knocking her head, and then overpowered. There were a number of penetrations by way of rape, digital penetration and a violent attempt at oral penetration. The victim was told that if she complained that no one would believe her as she was, according to the offender, "a little whore", and she was threatened with his fists when she had her baby in her arms. O'Higgins J., in passing sentence, stated:-

"The victim...was very vulnerable but she showed remarkable, quite remarkable courage since. I do accept the victim impact report in its entirety, that she is still traumatised or suffering post traumatic stress following this horrible attack. And I do accept that her difficulties are not all behind her yet in coping with this. But it does seem that she is a person of very great courage and determination. The attack was shocking. It was vicious. It was unprovoked. And a jury have found by their verdict that her version is correct, and I think it was suggested that she mightn't be believed, but she stood in court, she's given her evidence, the jury believed it. Hence the verdict. She has coped better than some people with this very, very serious crime. I have not heard the accused express any remorse. He is not to be penalised for defending the case, that is his constitutional entitlement, and it would be wrong for the court to penalise him for exercising his rights. He has a number of previous convictions, a great number of previous convictions, but I accept ...that most of these are for petty crime and the assaults would appear to be at the lower end of the scale and there has not been anything remotely resembling an attack of this nature before. While he can't come before the court as a man of good character, his convictions are relevant, less weight will be put on them than if some convictions were more serious. I have considered the matter carefully and having regard to all the circumstances of the case including the details of the transaction itself, the nature and extent of the ordeal which was quite protracted. I have also taken into account that there isn't in this case the aggravating factor in relation to weapons or weapons of some kind. But having regard to all the circumstances...the least sentence that I can impose on the accused is a sentence of nine years imprisonment".

40. Leaving aside these factors of multiple counts, a number of victims and abuse of trust, there are clearly cases where a sentence of ten years imprisonment can be appropriate for an individual instance of rape. However, a sentence of ten or eleven years imprisonment appears to be unusual, even after a plea of not guilty to rape, unless there are circumstances of unusual violence or pre-meditation. Examples of this include *The People (Director of Public Prosecutions) v. Doherty*, *Irish Times*, 3rd February, 2004, and *The People (Director of Public Prosecutions) v. Murphy*, *Irish Times*, 10th October, 2006.

41. The degree to which the perpetrator chooses to violate and humiliate the victim can bring the appropriate sentence into the upper end of the band of nine to fourteen years. In *The People (Director of Public Prosecutions) v. Mullen*, *Irish Times* 15th February, 2006, a thirteen and a half years sentence was imposed in respect of a number of counts involving rape and kidnapping, notwithstanding a guilty plea and co-operation with the gardai. These factors caused the final one and a half years of a fifteen year sentence to be suspended. Carney J. remarked that the circumstances of the offences involved "a new depth of depravity". In *The People (Director of Public Prosecutions) v. Dunne*, *Irish Times*, 9th May, 2006, the Court of Criminal Appeal refused leave to appeal a fourteen year sentence consequent on convictions for rape, false imprisonment and burglary. The perpetrator broke into and burgled the victim's home and subjected her to a horrific level of degradation. He had previous convictions for non-sexual offences.

Condign Punishments

42. Within the category of offences of rape attracting punishments between fifteen years and the ultimate punishment of life imprisonment, I examined twenty-two cases. Of these nine concerned a single incident, though lasting a considerable time of hours, or nearly that, in most cases. Two of these seven cases concerned men who participated in a gang rape, and the rest involved multiple incidents or multiple victims, or both.

43. A gang rape is regarded as being particularly serious. In *The People (Director of Public Prosecutions) v. Tiernan* [1988] 1 I.R. 250, the victim and her boyfriend were discovered by three men in the back of a car. They were taken away to a solitary place. Her boyfriend was taken out and locked in the boot while she was subjected to a vicious rape by two of the men and subjected to sexual assaults involving perversion. The accused pleaded guilty in that case. The sentence of twenty one years was reduced by the Supreme Court to seventeen years in order to allow some hope of rehabilitation. In *The People (Director of Public Prosecutions) v. Barry*, Unreported, Court of Criminal Appeal, 16th October, 2006, originally from the time of the trial mentioned in the *Irish Times*, 28th June, 2005, a courting couple were likewise come upon in a car in an isolated location. Again, the victim's companion was locked in the boot of the car. The couple were threatened by armed men and the particular accused had thirty six previous convictions. The charges to which Barry pleaded guilty included rape, assault causing harm, the false imprisonment of two persons and theft. The court asserted that the fact that he was not the leader of the gang was not mitigation in the context of this attack. Kearns J., in upholding a sentence of twenty years imprisonment laid stress on the nature of the wrong done to the victims:-

"From the victim impact reports it is quite clear that the victims of this crime will never get over what happened to them and it is difficult to see how such barbaric behaviour could do anything other than leave an indelible imprint on the victims of those crimes who have to live for the rest of their lives with the memory of how they were so humiliated, so frightened and so horribly treated on the night in question. The court has to bear those circumstances in mind when dealing with this case".

44. The nature of the victim, as being very young or very old, the effect the attack has on her and the especial nature of the violence or degradation inflicted on her are characteristic of sentences within this most serious category. In *The People (Director of Public Prosecutions) v. Cummins*, *Irish Times*, 13th March, 2007, a sentence of fifteen years was imposed for rape and anal rape. The perpetrator had broken into the victim's home. She was threatened and in addition to the indignities ordinarily inherent in the offence of rape, she was seventy five years old. In *The People (Director of Public Prosecutions) v. Condra*, *Irish Times*, 27th April, 2006, a plea was entered on the sixth day of the trial. A sentence of sixteen years imprisonment was imposed in respect of rape and other offences. The accused had previous convictions for robbery, false imprisonment and burglary. The offences involved continually threatening the victim with death. In *The People (Director of Public Prosecutions) v. McGee*, a sentence of seventeen years was imposed on a plea of guilty in 2003; see report in *Irish Times* 19th July, 2005. The incident involved a number of rapes with violence over four hours involving terror, torture and degradation, including the use of a knife against a number of victims. In *The People (Director of Public Prosecutions) v. Bermingham*, Unreported, Court of Criminal Appeal, 5th April, 2005, there was a single incident but it involved three different victims. Geoghegan J. set out the circumstances as follows at p. 2 of the judgment:-

"He had sexual intercourse with each of them against their will and committed acts of oral rape. An unusual and horrifying feature of this case was that the victims were made to perform sexual acts on themselves and assist him in his own sexual gratification. It must have been quite terrifying from the point of view of the three women and one of them feigned

a kind of fainting which did not work. He held a scissors over them in a threatening fashion....It is only fair to say that very quickly after that and perhaps this was as a consequence of recovery from whatever effects he had from the drugs he did show huge remorse for what happened and requested the gardaí to convey that remorse. Ultimately, he also paid €5.000 to each victim, a total of €15,000”.

The sentence was reduced by the Court of Criminal Appeal from twenty-one years to fifteen years as it was regarded by the court as “unusually high in the type of circumstances indicated”, p.6. In *The People (Director of Public Prosecutions) v. Salman Dar*, Unreported, Court of Criminal Appeal 13th February, 2006, the sentence was for three vicious rapes. The terms imposed were of 10, 12 and 15 years. The court had particular regard to the principle that the totality of a sentence should be correct. . An unusual feature was an undertaking by the perpetrator to return to Pakistan on the completion of the sentence. It might reasonably seem that any of the offences described in the judgment of the Court of Criminal Appeal made if fit naturally into the most serious category of sentences for rape.

45. In *The People (Director of Public Prosecutions) v. Kelly*, *Irish Times*, 23rd January, 2007, a life sentence was imposed for aggravated sexual assault, where the accused had previous convictions, including one of ten years for rape. The offence was committed five months after he had been released from that sentence. Carney J. was of the opinion that there was nothing less than the ultimate sentence to protect the community. The victim was threatened with serious violence and was warned off reporting the offence.

46. A life sentence has also been imposed, apart from those instances where there have been a need to protect the community, where very serious and vicious and degrading sexual crimes have been committed against a victim over a period of years. Instances include *The People (Director of Public Prosecutions) v. Anonymous*, *Irish Times*, 25th March, 2006, another case which I am obliged to similarly name reported in the *Irish Times* on 13th May, 2005, and *The People (Director of Public Prosecutions) v. D.* [2004] I.E.C.C.A. 8. In *The People (Director of Public Prosecutions) v. R. Mc C* [2005] I.E.C.C.A.71, a life sentence was imposed on an offender in respect of multiple counts on multiple young victims in respect of crimes over an eleven year period.

47. An example of a case where the Court of Criminal Appeal has approved a life sentence is *The People (Director of Public Prosecutions) v. John Adams*, Unreported, Court of Criminal Appeal, 21st December, 2004. The court has described this case as “one of the gravest cases to come before the courts in recent times”. The accused pleaded guilty to six counts, at a late stage, of unlawful carnal knowledge in relation to two victims, and two counts of sexual assault on a third victim. The appellant was described as having “a history of sexual offending of a quite alarming type”. Under the guise of friendship with their family he started abusing the victims who were in their pre-teen years. He took photographs of the offences and these showed that the incidents involved full penetrative intercourse. Kearns J. remarked at p. 3 of the unreported judgment:-

“Here there is a significant and extremely alarming history of sexual offences. Three incredibly young lives were damaged in a very significant way by what happened and the plea of guilty, when it came, came only some seven years down the road, when eventually this matter came before Carney J. in the Central Criminal Court on 28th July, 2003. ... We would also take the view that a life sentence should only be imposed in these sort of cases in exceptional circumstances, but the factors to which I have adverted and the previous history of the accused and the *modus operandi* of deceiving and gradually embroiling these young girls in systematic and depraved abuse shows that there are quite exceptional circumstances operating in this case. We are conscious of the age of the appellant but it does not seem to us that we can rule out the possibility that, insofar as any determinate sentence is concerned, that at least for the foreseeable future, that the risk of re-offending might not be present having regard to the past history. ... The taking of the photographs has to be seen as an aggravating feature and it is distressing for the court to note ... the humiliation and degradation to which [these young children] were subjected.”

48. A factor that emerges as being of importance in case where a condign punishment has been imposed on a perpetrator is that of abusing trust. Many of the relevant cases involved schoolteachers, or persons in other positions of authority and dominant family members. A case which instances that, and which also involved the accused having serious prior convictions, was the decision of Carney J. in *The People (Director of Public Prosecutions) v. Griffin*, *Irish Times* 25th April, 2007. The victim was the teenage daughter of the perpetrator's long term partner. The sentencing judge, in imposing a life sentence, emphasised the age of the victim and the effect that the three year campaign of abuse had on her. Prior sentences of the perpetrator to sentences of 3, 9 and 6 years imprisonment had had no rehabilitative effect.

Another factor which is seen as aggravating is the pursuit of a campaign of rape, for instances against prostitutes. In *R. v. Billam* [1986] 1 WLR 349, it was remarked that an offender who has embarked on a plan of raping women represents a more than ordinary danger and that a sentence of fifteen years or more may be appropriate. In *The People (Director of Public Prosecutions) v. King* (Unreported, Court of Criminal Appeal, 7th April, 2005) a single incident gave rise to five convictions after a trial. A life sentence was upheld by the Court of Criminal Appeal as the accused had said that he was “empowered by God” to rape not only this victim but all “bad women”. A plea of insanity failed.

Aggravation and Mitigation

49. Reading the reports of these cases indicates that a number of factors are regarded by the courts as aggravating the offence of rape. The courts have placed particular emphasis on the harm that rape does to the victim and where there is a special violence, more than usual humiliation, or where the victim is subjected to additional and gratuitous sexual perversions, these will have a serious effect on the eventual sentence. Abusing a position of trust, as with a person in authority, misusing a dominant position within a family, tricking a victim into a position of vulnerability or abusing a disparity in ages as between perpetrator or victims also emerge as aggravating factors. Abusing a particularly young or vulnerable victim increases the already serious nature of the offence of rape. Coldly engaging in a campaign of rape, shows a particularly remorseless attitude which is not necessarily mitigated by later claims of repentance. Participating in a gang rape involves a terrifying experience for the victim and using death threats and implements of violence for the purpose of wielding authority or sexual perversion are also serious aggravating factors. Attacking the very young or the very old also emerges as an important aggravating factor from these cases.

50. I note that the Law Reform Commission from para. 5.31 of their Consultation Paper on Sentencing, March 1993, list a number of factors of aggravation for crimes in general. Since these can be relevant to sentencing rape and serious sexual assault cases I list them. They are:-

“Premeditation or planning;

Offending as part of a group organised for crime;

- Offending for profit or remuneration;
- Exploitation of a weak or defenceless victim;
- Abuse of exploitation of a position of confidence or trust;
- Inducing a weaker or younger person or participate in the commission of the offence;
- Threatening to use or actually using violence or a weapon;
- Use of excessive cruelty;
- Knowledge that the victim's access to justice may be impeded;
- Participation in a campaign of offences on multiple victims or of multiple offences;
- Causing substantial economic loss for the victim;
- Causing, threatening or risking death or serious injury;
- Committing the offence for pleasure or excitement;
- Acting as a ringleader in the commission of an offence;
- Offence by a Law Enforcement Officer;
- Offending while under the influence of alcohol or drugs;
- Offending against a Law Enforcement Officer."

51. The strongest factor commonly present as mitigating offences of rape and serious sexual assault is an early admission of guilt. An early admission of guilt may be evidence of a contrite approach to wrongdoing. The later that admission comes, on arraignment, on the day of the trial, or during the trial and after the cross examination of the victim of the offence, the less effect it will have on a sentence. Where an offender is very young, is mentally ill or has been subjected to sexual indignities which leave him with a disorder, these factors can be taken into account while bearing in mind that the purpose of the criminal law is to protect the community through the rehabilitation and punishment of offenders. Since rape is very often an individual offence, it can rarely be the case that a participant has played only a small part. That can, however, happen.

52. Since provocation is listed by the Law Reform Commission in their consultation paper on Sentencing, from para. 5.51, as one of the factors which can mitigate against the seriousness of an offence it is as well to note that it has no application to this offence. Kissing a man, wearing revealing clothing, taking a lift in a car, or accepting an invitation to a flat for refreshments are not invitations to rape. Rape is a most serious offence involving the absence of consent to sexual intercourse. It seems to me that it is only where there has been consent to sexual intercourse which is withdrawn during the act that anything involving the conduct of the victim can be regarded as relevant. The entitlement of a woman to refuse to consent to sexual intercourse is absolute since the presence of consent is what makes the act of sexual intercourse lawful.

53. Since the Law Reform Commission have offered a useful analysis of factors which can mitigate crime in general I would now list them. These are:-

- "Duress;
- Provocation;
- Impulse;
- Reduced mental capacity;
- Strong temptation;
- Offender motivated by strong human sympathy;
- Offender very young or very old;
- Offender played only a minor role in the commission of the offence;
- No serious injury resulted or was intended;
- Offender made voluntary attempts to alleviate the effects of the offence;
- Excusing circumstances which, although not constituting a defence to liability, tend to justify or excuse the offence;
- Offender shows no sustained motivation to break the law;
- Ignorance of the law;
- Mistake of fact."

54. Finally, the offender's background and previous convictions have to be taken into account as well as the foregoing factors in aggravation of sentence or in mitigation of the offender's guilt. I now turn to the individual circumstances pleaded in aid of this offender, the probation and psychological reports on him and the victim impact statement on the victim of his offending.

This Offender

55. Wayne Drought put the victim of this offence through the ordeal of contesting his untrue version of events. That was his right and I do not take that into account. The Probation Service report on him dated the 2 May, 2007 states that he is "adamant that he did not commit the offence and knows in his heart and soul that he did not commit it." A report by Professor Harry Kennedy was also sought by the court. This repeats that sentiment of the offender, in different words. I have therefore to treat the perpetrator as a person who shows no regret as to his offending and no insight into an episode of violent and cowardly behaviour. Professor Kennedy states that there are two possible scenarios related to this offence. One is that the offender mistook drunkenness for consent and the other is that he may have singled out a vulnerable intoxicated woman, retained physical control over her and forcibly raped her. The latter scenario accords with the facts as found by the jury. Professor Kennedy warns that in that event:-

"Mr Drought would have exhibited the capacity to plan to approach or select a vulnerable potential victim and a glib willingness to mislead. There would be a significant risk for further offending in the future if this...is held to be correct."

56. Frankly, I find this worrying. In a powerful plea on his behalf, counsel for the defence has urged on me that at the time of this offence he was only 18 years old and that his state of immaturity contributed significantly to his criminal conduct. He has pleaded that he has no previous convictions and has thus not come through the usual litany of minor crime before an offence of this magnitude; that he comes from a good and hard-working family; that while the jury has shown by its verdict that he lied to the gardai about the offence that his approach to the court was to shy away from intimidation, an increasing incident of the response of violent offenders; and that there should be a real attempt by the court to look to rehabilitation rather than simple punishment. On the issue raised by Professor Kennedy, he urges that this is a pessimistic view and that to accept it is for the court to be tempted down the road, which would be wrong, of preventative incarceration. I do not construe Professor Kennedy's report in that way at all and I regard it as most helpful. Professor Kennedy does not urge preventative sentencing, and I am not going to do that. All of the other points urged by counsel for the defence are ones that are pertinent and I take them into account in fixing sentence. I also, as urged, must look to rehabilitation as well as punishment and in this regard I note that all of the programmes that could help the perpetrator to gain insight into his behaviour are available, as Professor Kennedy writes in his report, within the prison system. I must hope that the offender will make use of the prison system for education and for rehabilitation and his youth and good work record makes me lean towards a sentence that will encourage that process.

57. On the other hand, the victim impact statement indicates that the victim had difficulty sleeping at first and suffered panic attacks. Her concentration went as to her studies and she began to panic about small matters. She lost interest in study and almost dropped out and left her part time job. She suffered a big character change from being outgoing and into being closed with family and friends. Now she is uncomfortable in the presence of men and wary while out particularly at night and looking over her shoulder. This was a horrible predatory attack on a young woman who was drunk. She was left wandering in a shameful state, through no fault of her own, having been raped in a public place just a short way from her flat. She showed particular courage in the witness stand and it was obvious that she had to overcome considerable emotion to be able to speak of this.

Result

57. The nature of the attack and its effect on the victim, somewhat worse than is usual, requires me to look to a sentence at the upper end of the normal range. The approach of the accused makes it difficult for me to discount the sentence in any meaningful way. However, I hope that much of the glib deceit of the perpetrator is due to his immaturity and that leaving hope of rehabilitation will assist him and society. Though I have doubts as to this, I feel I must try to offer a chance for his better side to emerge after he has been released. This sentence is being imposed under the Sex Offenders Act 2001. I therefore sentence the perpetrator to seven years imprisonment but I will suspend the last eighteen months of that on his undertaking to enter into a bond to keep the peace and be of good behaviour towards all the people of Ireland during that time and on condition that he should enter a course of counselling as a sex offender during his time in prison and should be subject to the direction of the Probation Service for 18 months on his release and will come up if called upon to do so to serve the portion of the sentence of the court that is to be now suspended. In the event of any further serious offending by Wayne Drought, this balance will have to be served if a further offence is committed within that time, together with any further sentence imposed consecutive to that. If Wayne Drought fails, without reasonable excuse, to comply with any of the supervision period conditions during those 18 months of his suspended portion of the sentence, then under s. 33 of the Sex Offenders Act, 2001, an offence is committed and the potential penalty is a fine of what was £1,500 or imprisonment for up to 12 months or both. Such imprisonment, if it happens, suspends the period of supervision and it will continue until it expires on his release from prison. The bond is to be in the sum of €500. On the basis of the sentencing exercise conducted, the effective sentence is thus of five years and six months imprisonment with supervision held over him after that. He is to be registered as a sex offender as well.