**Neutral Citation Number: [2002] EWCA Crim 2891**

Case Nos: 2002/04734/Z4
2002/01716/Z2
2002/04256/Z4

**IN THE SUPREME COURT OF JUDICATURE**
**COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEALS FROM HHJ WILLIAMS (CROWN COURT, MAIDSTONE);**
**HHJ COTTLE (CROWN COURT, EXETER); HHJ TAYLOR (CROWN COURT NEWCASTLE)**

Royal Courts of Justice
Strand, London, WC2A 2LL

9 December 2002

B e f o r e :
**THE LORD CHIEF JUSTICE OF ENGLAND AND WALES,**
**LORD JUSTICE ROSE**
**and**
**MRS JUSTICE HALLETT**

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**Between:**

**(1) William Christopher Millberry**
**(2) Paul Robert Morgan**
**(3) Ian Stuart Lackenby** **Appellants**

**- and -**

**R** **Respondent**

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**Miss D Charles (instructed by H Roberts & Co) for the 1st Appellant**
**Mr D Batcup (instructed by Messrs Stones) for the 2nd Appellant**
**Mr D Callan (instructed by Paul Dodds) for the 3rd Appellant**
**Mr Robin Johnson for the Crown**
**Hearing dates : 21 November 2002**

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**HTML VERSION OF JUDGMENT : APPROVED BY THE COURT FOR HANDING DOWN**
**(SUBJECT TO EDITORIAL CORRECTIONS)**

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**The Lord Chief Justice:**

**INTRODUCTION**

On 24 May 2002 the Sentencing Advisory Panel (the "Panel") forwarded to this Court advice proposing a revision of the current sentencing practice for offences of rape. We consider that it is right that we should act on that advice. As a result three applications for leave to appeal are listed before us so that we can consider what revised guidelines should be given against the background of these applications. This is what we now do.

In each case we give leave and treat the hearing as the hearing of those appeals.

General guidelines as to sentencing for rape were given by this court in the case of the *R v Roberts and Roberts* [1982] 4 Cr App R (S) 8. Lord Lane, Chief Justice presided. In giving the judgment of the court he stated:

"Rape is always a serious crime. Other than in wholly exceptional circumstances, it calls for an immediate custodial sentence. . . . A custodial sentence is necessary for a variety of reasons. First of all to mark the gravity of the offence. Secondly to emphasis public disapproval. Thirdly to serve as a warning to others. Fourthly to punish the offender, and last but by no means least, to protect women. The length of the sentence will depend on all the circumstances. That is a trite observation, but those in cases of rape vary widely from case

to case."

Lord Lane then went on to identify a considerable number of features which could aggravate the crime.

Lord Lane reaffirmed what he had said in *Roberts*, in the passage to which we have just referred, in the case of *R v Billam* [1986] 8 Cr App R (S) 48. Lord Lane in *Billam* set out more extensive guidelines that have since consistently been applied by the courts up to the present time. The guidelines are based on four separate starting points for sentencing for offences of rape which reflect their different levels of seriousness. Lord Lane indicated that:

" 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 a 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.

At the top of the scale comes the defendant who has carried out what might be described as a campaign of rape, committing the crime upon a number of different women or girls. He represents a more than ordinary danger and a sentence of 15 years or more may be appropriate.

Where the defendant's behaviour has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to women for an indefinite time, a life sentence will not be inappropriate."

As the Panel makes clear in its advice it "retains the basic structure established in *Billam,* but with some significant modifications to take account of both new legislation and changes in the nature of the offence since the existing guidelines were issued" (see paragraph 6). The legislative changes since 1986 are the Sexual Offences Act 1993 which allowed boys under 14 to be convicted of rape; the recognition of marital rape as an offence (*R v R* [1991] 4 All ER 481 ), the Criminal Justice and Public Order Act 1994, the recognition of male rape as an offence by s.142 of the 1994 Act and s.109 of the Powers of Criminal Courts (Sentencing) Act 2000 (formerly s.2 of the Crime (Sentences) Act 1997, that makes a second conviction for a serious offence (including rape or attempted rape), in the absence of exceptional circumstances, attract an automatic sentence of life imprisonment.

The advice records that the average sentence for an adult offender sentenced to immediate custody for rape in 2000 was 7 years 4 months (7 years 6 months on a not guilty plea and 6 years 10 months on a guilty plea). The majority of sentences (57%) fell within the range 5-10 years, but 25% of offenders received sentences of under 5 years and 17% were sentenced to more than 10 years (including 10% whose sentence was life imprisonment).

The Three Dimensions of the Offence

The Panel begins its proposals by suggesting that:

"…there are, broadly, three dimensions to consider in assessing the gravity of an individual offence of rape. The first is the degree of harm to the victim; the second is the level of culpability of the offender; and the third is the level of risk proposed by the offender to society."

We accept that courts should consider each of these dimensions whenever a sentence for rape is imposed. We endorse what was stated by Lord Lane in *Billam*, and repeated by the Panel in its advice, that while rape will always be a most serious offence, its gravity will depend very much upon the circumstances of the particular case and it will always be necessary to consider an individual case as a whole taking into account the three dimensions to which we have already referred.

Relationship and Acquaintance Rape

In its advice, the Panel, took into account the findings contained in a research report which it had commissioned entitled "Attitudes to Date Rape and Relationship Rape, a Qualitative Study". The advice discusses the relationship between offender and victim. The Panel states:

". . . it is important that any new appellate sentencing guidance on rape should deal explicitly with the question of sentencing levels for 'relationship rape' and 'acquaintance rape' as well as 'stranger rape'. We use the term 'relationship rape' to include both marital rape and

cases where the offender and victim, although not married to each other, were or had been partners in a consensual sexual relationship at the time of the offence. We use the term 'acquaintance rape' in preference to 'date rape' because it covers a wider range of situations, and also because the latter is sometimes taken as belittling the serious of the offence." (see paragraph 22)

Later the Panel adds:

". . . the Panel proposes that the Court of Appeal should make a clear statement to the effect that the starting point for sentence is that cases of 'relationship rape' and 'acquaintance rape' are to be treated as being of equal seriousness to cases of 'stranger rape', with the sentence increased or reduced, in each case, by the presence of specific aggravating or mitigating factors." (see paragraph 26).

These propositions we generally agree.

Male Rape

The Panel also considers the position of male rape. That is the rape by a male upon another male. As to this, the Panel proposes that:

". . . the same guidelines should apply in principle to male and female rape, with factors relevant to only one gender (such as pregnancy resulting from the rape of a woman) taken into account on a case by case basis." (see paragraph 12)

We agree.

Anal Rape

The other general position which is considered is that of anal rape. Here the Panel proposed that the new guidelines, "should make it clear that there is no inherent distinction for sentencing purposes, between anal and vaginal rape" and that, "Where a victim is raped both vaginally and anally by the offender this would be treated as repeated rape" (for the purposes of the higher starting point to which we will refer later). (see paragraph 15)

Again, we agree.

Giving Effect to These Proposals

Therefore we accept and adopt the proposals of the Panel based upon the relationship between offender and victim, whether the rape is on a male or female and as to anal rape. The way they should be given effect is to adopt the same starting point as appropriate, in the case of all kinds of rape. As is stated in "Protecting the Public" (the Command Paper of the Home Office published in November 2002 (paragraph 41) page 21):

"Date rape has recently received much attention in the media and there has been calls for the creation of a separate offence of date rape. Our view is that rape is rape, and cannot be divided in this way into more and less serious offences. It can be just as traumatic to be raped by someone you know and trust who has chosen you as his victim, as by a stranger who sexually assaults the first man or woman who passes by. It is up to the courts to take all particular circumstances of a case into account before determining the appropriate penalty."

We agree entirely that this should be the approach of the courts. There will be an appropriate starting point that we have yet to identify that will be the same for each of these different classes of rape. This does not mean that the sentence will be the same in the case of all offences to which the relevant starting point applies. All the circumstances of the particular offence, including the circumstances relating to the particular victim and the particular offender are relevant. Clearly, there can be mitigating circumstances as the Panel recognises. Where, for example, the offender is the husband of the victim there can, but not necessarily, be mitigating features that clearly cannot apply to a rape by a stranger. On the other hand, as the advice from the Panel points out, as is confirmed by the research commissioned by the Panel, because of the existence of a relationship the victim can feel particularly bitter about an offence of rape, regarding it as a breach of trust. This may, in a particular case, mean that looking at the offence from the victim's point of view, the offence is as bad as a 'stranger rape'. The court has the task of balancing any circumstances of mitigation against the aggravating circumstances. In drawing the balance it is not to be overlooked, when considering 'stranger rape', the victim's fear can be increased because her assailant is an unknown quantity. Is he a murderer as well as a rapist? In addition, there is the fact (not referred to specifically by the Panel) that when a rape is committed by a stranger in a public place, not only is the offence horrific to the victim it can also frighten

other members of the public. This element is less likely to be a factor that is particularly important in a case of marital rape were the parties to the marriage are living together.

The Victim's Behaviour

The Panel after referring to the results of their consultation deal with the victim's behaviour in terms with which we would agree as follows:

"The Panel takes the view that although rape is always a very serious crime, the extent of the offender's culpability inevitably differs from case to case, as it does in all other offences. Where, for example, the victim has consented to sexual familiarity with the defendant on the occasion in question, but has said 'no' to sexual intercourse at the last moment, the offender's culpability for rape is somewhat less than it would have been if he had intended to rape the victim from the outset. This is *not* to say that any responsibility for the rape attaches to the victim. It is simply to say that the offender's culpability is somewhat less than it otherwise would have been. The degree of the offender's culpability should be reflected in the sentence, but, given the inherent gravity of the offence of rape, the sentence adjustment in such a case should, we think, be relatively small." (see paragraph 45)

It is relevant here to refer to the case of *M* [1995] 16 Cr App R (S) 770. In that case a man had been sentenced to 3 years imprisonment for rape committed on his wife. He appealed to this Court, presided over by Lord Chief Justice Taylor who reduced the sentence to 18 months. It was a case where the victim had told the appellant that the marriage was finished. The appellant had then gone out drinking. When he returned home, he went to bed with his wife and asked her for intercourse. She broke away from him but intercourse took place against her wishes. No violence was used towards her. The appellant expressed remorse about what he had done and immediately admitted the matter when it was raised by the police. The court emphasised that a custodial sentence was inevitable and Lord Taylor CJ said:

"In the present case we point out there is a distinction between a husband who is estranged from his wife and has parted from her and returns to the house as an intruder either by forcing his way in or by worming his way in through some device and then rapes her, and a case where, as here the husband is still living in the same house and indeed, with consent occupying the same bed as his wife. We do not consider this class of case is the same as the former class." (at p. 772)

We agree with the views expressed in that paragraph but we emphasise that today we would not have allowed that appeal. We would not regard three years as an excessive sentence on the facts set out in the judgment which may not reveal the full picture. We do, however, in relation to the 18 months sentence emphasise that today a sentence of 18 months imprisonment would only be appropriate in a minority of cases where the impact upon the victim has not been great.

Historic Cases

A matter which was raised before us by Mr Robin Johnson, who appeared on behalf of the Crown, was the position in relation to 'historic' cases where the offence is reported many years after it occurred and where the offender at the time of sentencing can be even in their eighties. In these cases also, we consider that the same starting points should apply. The fact that the offences are stale can be taken into account but only to a limited extent. It is after all always open to an offender to admit the offences and the fact that they are not reported earlier is often explained because of the relationship between the offender and the victim which is an aggravating factor of the offence. A different factor that could cause the court to take a more lenient view than it would otherwise is the consequences which results from the age of the offender. In these cases the experience is that the offender may be only a danger to members of the family with whom he has a relationship. So this is a dimension that can be taken into account if there is a reduced risk of re-offending. In addition, the court is always entitled to show a limited degree of mercy to an offender who is of advanced years, because the impact that a sentence of imprisonment can have on an offender of that age.

Length of Custodial Sentence

Having dealt with those general points it is convenient to turn to what should be the starting points for sentences after a contested trial. In *Billam* 5 years imprisonment was the figure in

a contested case where there was no aggravating feature, 8 years imprisonment the figure where there were certain aggravating features and 15 years plus for a defendant who has carried out a campaign of rape. Life imprisonment was "not inappropriate" if the offenders behaviour, "has manifested perverted or psychopathic tendencies or gross personality disorder where the offender is likely, if at large, to remain a danger to women for an indefinite time".

The 5 Year Starting Point

As to the first starting point, although some of the Panel's respondents feel that 5 years should be the minimum time that an offender convicted of rape should actually spend in custody, the Panel after giving careful consideration to the different views expressed, proposes that a custodial sentence of 5 years should continue to be appropriate for a single offence of rape on an adult victim by a single offender manifesting none of the features identified below that attract a higher starting point. In settling on 5 years the Panel took account the levels of sentencing for other types of crime. The advice of the Panel does not expressly state that this is the appropriate figure after a contested trial, but when the advice is read as a whole, this was clearly what was intended.

The 8 Year Starting Point

This is recommended by the Panel after a contested trial where there is present any of the following features (the first three of which were identified in Billam as attracting the 8 year starting point):

"i. the rape is committed by two or more offenders acting together;

ii. 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)

iii. the offender abducts the victim and holds him or her captive

iv. rape of a child, or a victim who is especially vulnerable because of physical frailty, mental impairment or disorder, or learning disability

v. racially aggravated rape, and other cases where the victim has been targeted because of his or her membership of a vulnerable minority (e.g. homophobic rape)

vi. repeated rape in the course of one attack (including cases where the same victim has been both vaginally and anally raped)

vii. rape by a man who is knowingly suffering from a life-threatening sexually transmissible disease, whether or not he has told the victim of his condition and whether or not the disease was actually transmitted."

(see paragraph 34)

The Panel emphasises that the presence of any of the aggravating factors to which we have just referred attracts the higher starting point. The 8 year starting point is recommended either because of the *impact of the offence upon the victim* or *the level of the offender's culpability*, or both. The Panel adds that factors reflecting a high level of *risk to society*, in particular evidence of repeat offending, will indicate a substantially longer sentence.

15 Years Starting Point

The Panel confirms the 15 years and upwards starting point for a campaign of rape. This is recommended where the offender has repeatedly raped the same victim over a course of time as well as for those cases involving multiple victims.

Life Sentence

The Panel also agrees with this court in *Billam* that a life sentence will not be "inappropriate" where the offender "has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to women for an indefinite time". The Panel points out that unless there are exceptional circumstances (as now defined by the Court of Appeal in *Offen* [2001] 2 Cr App R (S) 144) if a defendant has a previous conviction for rape or a conviction for another serious offence he will be subject to an automatic sentence of life imprisonment under s.109 of the Powers of Criminal Courts (Sentencing) Act 2000. (see paragraph 37)

The seven grounds for raising the starting point to 8 years each can, depending on the circumstances, vary in gravity. In a really bad case not only can they mean that 8 years is the appropriate starting point, it can mean a higher figure is appropriate.

The Panel makes specific reference to the case where an offender is in a position of responsibility towards the victim. They point out that there is an argument for extending this category of aggravation to cover any situation where a victim had established a relationship of trust with the offender, "whether as a friend, client, sexual partner or in some other capacity". The Panel points out while they recognise the force of arguments which have been advanced to them, that while they have extended "the position of responsibility" category to include cases where the victim has placed his or her trust in the offender by virtue of his office of employment, they have not gone so far as to include in this category cases where the victim and offender are friends or sexual partners. They have not done so because of the approach which they have adopted of taking the same starting point whether it is a case of stranger, relationship or acquaintance rape. (see paragraphs 38 and 39)

We accept the advice and comments of the Panel as to starting points. This means that there is no substantial departure from the general approach laid down in *Billam*. There are, however, differences of emphasis because of the need to recognise that where there is a relationship the impact on a particular victim can still be particularly serious. In other cases this may not be the situation because of the ongoing nature of the relationship between the offender and the victim. In such a situation the impact on the victim may be less. It may also be the case where, while the offender's conduct cannot be excused, the continuing close nature of the relationship can explain how a particular offender came to commit what is always a serious offence that is out of character. There can be situations where the offender and victim are sharing the said same bed on a regular basis and prior to retiring to bed both had been out drinking and because of the drink that the offender consumed he failed to show the restraint he should have. It would be contrary to common sense to treat such a category of rape as equivalent to stranger rape as on one interpretation of the research material, the Panel could appear to be suggesting. This takes us to mitigating factors and guilty pleas.

Mitigating Factors and Guilty Pleas

The court is required by s.152 of the Powers of Criminal Courts (Sentencing) Act 2000 in determining what sentence to pass on an offender to have regard to whether the offender has pleaded guilty and if so at what stage in the proceedings this happened. Although many participants in the Panel's research project found the idea of substantial mitigation for a guilty plea unacceptable, this may be because as the Panel point out, it was seen "as being primarily about saving court time and costs and allowing the defendant to manipulate the system in his favour". This is not, however, the reason why the courts are prepared to and should reduce sentences in a case in which the offender pleads guilty. The first reason why courts adopt this approach is because it is well known that victims of rape can find it an extremely distressing experience to give evidence in open court about what has happened to them, even where their identity is protected.

Having to give evidence and especially being cross-examined can make a victim relive the offence. We have seen many victim impact statements that make this clear. Obviously the distress which is avoided is greater the earlier the victim is informed so the discount should be reduced if there is not an early plea. There is also the fact that the plea demonstrates that the offender appreciates how wrong his conduct was and regrets it. While it is desirable to avoid taking up the time of the court and incurring expense unnecessarily, this is a less important in mitigation than the other two factors we have just mentioned. With the Panel, we stress that the maximum credit should only be given for a timely guilty plea. (see paragraphs 41 and 42)

The Defendant's Good Character

While the fact that an offender has previous convictions for sexual or violent offences can be a significant aggravating factor, the defendant's good character, although it should not be ignored, does not justify a substantial reduction of what would otherwise be the appropriate sentence. Here again we are endorsing the approach of the Panel.

Young Offenders

We agree with the Panel that even in the case of young offenders, because of the serious nature of the offence custody will normally be the appropriate disposal. Like the Panel we nonetheless conclude that the sentence should be "significantly shorter for young offenders". In dealing with the position of young offenders, the Panel expresses concern about the apparent shortage of adequate treatment programmes for young sex offenders.

They indicate that the Youth Justice Board has told them that it appreciates the problem, but that it will be some years before the problem can be put right. (see paragraph 47) We very much regret that this should be the position and we would urge the Home Secretary to consider giving greater priority to this shortage.

Aggravating Factors

The Panel identify nine aggravating factors, the first five of which are the same as those identified in *Billam*. Those aggravating factors do not include the age of the victim since that is already a factor which is taken into account in determining that there should be the highest starting point of 8 years. (see paragraph 33)

The nine factors which the Panel identifies with which we agree are as follows:

"i. the use of violence over and above the force necessary to commit the rape

ii. use of a weapon to frighten or injure the victim

iii. the offence was planned

iv. an especially serious physical or mental effect on the victim; this would include, for example, a rape resulting in pregnancy, or in transmission of a life-threatening or serious disease

v. further degradation of the victim, e.g. by forced oral sex or urination on the victim (referred to in *Billam* as 'further sexual indignities or perversions')

vi. the offender has broken into or otherwise gained access to the place where the victim is living (mentioned in *Billam* as a factor attracting the 8 year starting point)

vii. the presence of children when the offence is committed (cf. *Collier* (1992) 13 Cr App R (S) 33)

viii. the covert use of a drug to overcome the victim's resistance and / or obliterate his or her memory of the offence

ix. a history of sexual assaults or violence by the offender against the victim"

(see paragraph 32)

Extended and Longer Than Commensurate Sentencers

We agree with the Panel that in all cases of rape, sentencers should consider whether it would be appropriate to impose a longer than commensurate sentence or an extended sentence or both under s.80 and 85 of the 2000 Act.

The Role of Guidelines

Before concluding our general guidance with regard to sentencing on rape and turning to the cases of the individual appellants, we would emphasise that guidelines such as we have set out above can produce sentences which are inappropriately high or inappropriately low if sentencers merely adopt a mechanistic approach to the guidelines. It is essential that having taken the guidelines into account, sentencers stand back and look at the circumstances as a whole and impose the sentence which is appropriate having regard to all the circumstances. Double accounting must be avoided and can be a result of guidelines if they are applied indiscriminately. Guideline judgments are intended to assist the judge arrive at the current sentence. They do not purport to identify the correct sentence. Doing so is the task of the trial judge.

In accordance with the Crime and Disorder Act 1998 in framing these guidelines we have had regard to the considerations that we are required to take into account under s.81 (3) of the Act.

**Application of Paul Robert Morgan**

On 8 January 2002 at the Crown Court at Exeter before His Honour Judge Cottle, Paul Robert Morgan who is now aged 32 on re-arraignment pleaded guilty. On 27 February 2002 he was sentenced to 9 years imprisonment for rape together with an extended licence for 5 years under s.85 Powers of Criminal Courts (Sentencing) Act 2000.

His application for leave to appeal against sentence was refused by Mr Justice Morland who stated, "Albeit that you pleaded guilty, the circumstances of the rape were so grave that the sentence of 9 years imprisonment was entirely justified". Morland J was justified in describing the offence as grave. The case is an example of a serious relationship rape. From about mid-1996 Morgan and the victim had had a relationship. As a result a child was born in January 2000. Thereafter they lived in a flat together. When the relationship broke down in November 2000, the appellant moved out. In December 2000 the appellant

travelled down from Exeter to visit his daughter and he stayed at the flat with the victim. However, he became involved in a fight with the victim's new boyfriend. This resulted in his being arrested although he was released without being charged.

Shortly after his release he attempted to commit suicide and was detained in hospital for two days. He refused to accept the relationship was over. He visited the victim and their daughter on two occasions. Reluctantly the victim agreed to let him visit again over Easter 2001. On 14 April 2001 the appellant arrived at the flat. After he had arrived, the victim noticed a bar had been attached to the skirting board and asked about it. The appellant denied that he had been responsible for its attachment. That evening the victim's brother arrived at the house and some wine was consumed while they watched television.

After her brother had left, the appellant spoke to the victim about a reconciliation. She did not want to recommence the relationship. After the victim had retired to bed, the appellant appeared in the bedroom, produced a knife and held it against her cheek. She suggested they went downstairs to talk about matters to avoid waking their child and this he agreed to do. When the victim entered the lounge she noticed some rope and handcuffs on the floor. These objects were familiar to her since they had been used while they were engaged in sexual activity before the relationship terminated. The appellant was handcuffed and tied to the bar attached to the skirting board. Her underwear was removed by the appellant and a video camera was placed opposite her legs which were tied in an open position. The appellant briefly performed oral sex on the victim rubbed his penis against her mouth and penetrated her although he was unable to ejaculate.

The victim was then released from the handcuffs and required to select a vegetable from a quantity of fruit and vegetables which the appellant had produced and place it in her vagina. After masturbating himself, the appellant removed the vegetable and penetrated the appellant again. He subsequently ejaculated over her face and urinated over her chest, belly and legs. The incident lasted some 5 hours.

The appellant remained in the flat until the following morning. The victim left the flat with their daughter after promising the appellant that she would not tell anybody what had happened. In fact, she went to her mother's home and complained.

When the police were called they searched the flat and in it found a notebook. The appellant had written in this a detailed attack on a victim which included humiliating and raping her before breaking her neck and making it look like an accident. The writing was entitled "The rape and humiliation of the package ending in her death". When interviewed, the appellant agreed that the victim was the "package". He said that he had written in the notebook about the 27 December 2000. Initially during the interview he said all the sexual activity had taken place with the victims consent. The similarity between what was written and what happened was coincidental.

In passing sentence the judge drew attention to the fact that it was only days before the trial that the appellant had pleaded guilty. The appellant knew the relationship was over but the appellant had put together a plan of action designed to humiliate and terrify the victim. The judge said that many of the features that aggravated the already immensely serious offence of rape were present and the appellant had attempted to cover his tracks. The appellant was entitled to much less than full credit to his plea since he had only pleaded guilty shortly before the trial.

We have before us reports from a probation officer and a psychiatrist. The probation officer concluded that "Power, control, obsession, a desire to humiliate and revenge appear to be the cardinal factors that led to the commission of this offence." The offence was intended to have maximum impact upon the victim. At the time he saw the probation officer the appellant was still seeking to suggest that the victim was a consenting party. The officer assessed the risk of further offending in a similar manner, within the context of personal relationships, as relatively high. A psychiatrist reported that the appellant was not suffering from any mental disorder other than difficulty in coping with the breakdown of his relationship with the victim. Asked to deal specifically with the question of whether or not Morgan presented a serious danger to the public he felt unable to comment.

Mr Batcup, who appears on behalf of the appellant, submits that the trial judge failed to give adequate credit for the guilty plea and attached too much weight to the written note. He does, however, accept that this rape was "particularly unpleasant".

There were here a number of aggravating features. The offence was planned and there was considerable humiliation and degradation of the victim. Not surprisingly the effect of the offence on the victim was substantial. The scale of the aggravating features justified the sentence of 9 years. In relation to the extended sentence, we have taken into account the judgment of this court in the case of *Nelson* [2002] 1 Cr App R (S) 565. In view of the concerns indicated by the probation officer, the extended sentence was appropriate. The application is dismissed.

**Application of Ian Stuart Lackenby**

Ian Stuart Lackenby seeks leave to appeal from his conviction on 20 May 2002 at the Crown Court of Newcastle-upon-Tyne of two offences of rape and one offence of attempted rape, in relation to which he pleaded guilty and was sentenced to 10 years imprisonment concurrent on each offence. The period of his license was also extended for seven years. His application for leave to appeal was referred direct to this court by the Registrar.

This is a further relationship case. The appellant is 48 years of age. The appellant is the former partner of the victim. The relationship between her and the appellant had commenced in about September 2000 and ended in October 2001. The appellant made attempts to resume the relationship but the victim made it clear that she did not wish the relationship to continue. On Sunday 18 November 2001 the appellant came to the victim's home and made a threat to rape her but when she protested he pulled himself together and did not pursue his threat. On 19 December 2001 the victim returned to her home after dark and found that the appellant had broken in. He said to her "I'm your worst fucking nightmare!" and placed both his hands around her neck and said he was going to "do this, then I'm going to kill myself". He added "we can do this the hard way or the easy way, take your clothes off!" This was repeated and eventually the victim felt so frightened that she took off all her clothes, but put on a dressing gown. Subsequently notwithstanding her resistance he raped her and attempted anal rape. During the whole incident the victim was crying. Later he caused her to get into bed and he again entered her. Eventually having masturbated himself he ejaculated on her chest and then rubbed it in. Afterwards he indicated that he wanted his last night with her before he killed himself. During the night there was another incident when he raped her, again the matter concluding as it had done before. About 6.30 am, the following morning, there was again a further incident where he attempted to have sexual intercourse with her.

Following this, he made threats that both she and the appellant would be dead. The appellant was not able to go to work and she had to remain in the flat until about 12 noon when they went out of the flat together. While out she was able to enter a shop alone, she there broke down and reported the matter and the police were called and the appellant arrested.

Initially during long interviews the appellant gave untrue accounts of what had happened in which he said that she had consented to his having intercourse with her. It was after the plea and directions hearing that he offered the pleas, which were accepted.

In addition to the offences, to which he had pleaded guilty, a not-guilty verdict was accepted to an offence of burglary. Further counts of rape, false imprisonment and threatening to kill were left on the file on the usual terms.

In her victim impact statement, the victim explains that after the offences, for a period of time, she was unable to enter her own home but eventually she was able to return. She is unable to leave her flat after dark. She requires counselling and has been consulting a psychologist. He feels that she may not again be able to form a relationship with another man.

When interviewed by a member of the sex offender team this appellant also remained ambivalent about accepting responsibility for the offences. He made some attempts to justify his behaviour by interpreting his victim's compliance with his demands as encouragement on her part. The probation officer assessed the risk of re-offending as follows: "While Mr Lackenby has not been in trouble previously and his involvement in this offence is clearly linked to his distress at the breakdown of his relationship with the victim, his response was extreme and very worrying." The officer was of the opinion that there was no evidence to suggest the appellant posed a risk of harm to women in general.

On behalf of the appellant it is contended that insufficient account was taken of his guilty pleas and his positive good character. We have seen references supporting his good character.

Mr David Callan, in his economic and realistic submissions contends that the starting point

taken by the judge must have been 15 years, which is too high. However, this assumes that the appellant is entitled to the maximum allowance for pleading guilty which he is not. Particularly in view of the attitude that the appellant adopted during his interviews with the police, he is only entitled to a modest discount for his plea. Although we accept that in view of the plea accepted in relation to the count of burglary, the appellant did not enter the victim's premises with intent to rape, the fact is that the offences were committed when he was unlawfully on her premises. In view of the history he knew perfectly well that she did not wish to resume her relationship and he embarked on a course of conduct which continued over seven hours which was horrendous, humiliating and frightening for the victim. On her account of the matter, she thought her life was in danger. The words of the appellant used at the commencement of the incident indicate that he appreciated that it was, as the trial judge stated, in fact "any women's worst nightmare". Again, quoting from the trial judges sentencing remark the appellant "subjected her to continual degrading, demeaning and humiliating sexual acts, which caused her great terror, and again you attempted to throttle her in the early hours of the morning and she had to plead for her own life".

While 10 years is a heavy sentence for a person of the appellant's background who did not contest the trial we are of the conclusion that the sentence cannot be described as excessive. We do, however, consider the period of the extended sentence, namely seven years is longer than is required. We substitute an extended sentence of four years for the seven years imposed.

**Application of William Christopher Millberry**

William Christopher Millberry is 18 years of age. On 29 July 2002 the appellant pleaded guilty on re-arraignment and was sentenced to five years detention in a young offenders institution for an offence of rape. He was also required to register under the Sex Offenders Act.

The victim was 15 years of age and met the appellant, who was then 17, some two weeks before the offence took place. The victim was the same age as the appellant's brother and he was a member of the same social group. On 11 March 2002 the appellant, on an occasion when the other members of the group were not around invited the victim back to his house. While they were there after some initial horseplay the appellant pulled the victim to the floor. Having pulled down his own trousers, the appellant engaged in oral sex, he then pinned the victim down by kneeling on his arms, pulled the victims trousers down and had anal sex. He threatened the victim that if told anyone he would make it worse for him. Afterwards the appellant told the victim that they were going out wherever the victim wanted to go and this they did. On the following day the appellant was arrested and he then made a full and frank admission.

Approximately a year previously the appellant had been cautioned for a minor indecent assault on an 11 year-old boy. The pre-sentence report indicates a high risk of re-offending. However, the appellant while in custody has been receiving training to address his problems and he is apparently making good progress on the course.

The trial judge, Her Honour Judge Williams, in the course of her sentencing remarks stated that as the victim was the appellant's brother's friend, "as such (the appellant) betrayed the trust which is implied in such a relationship". The trial judge went on to indicate that as against this she had taken into account that at the time of the offence the appellant was only 17. The judge also took account of the frank admission made to the police and the plea of guilty. The trial judge subsequently added:

"It is also of great concern to the court that you have very frankly set out to the probation officer in answer to the questions, no doubt asked, that you cannot, at this stage, give any undertaking that should you feel sexual attraction to someone that you will not act upon those impulses and that means that at the present time you are dangerous."

Miss Deborah Charles, who appeared on behalf of the appellant, contends the sentence which was imposed was manifestly excessive. Her submission includes that the starting point was too high, insufficient attention had been paid to his plea of guilty and his personal circumstances, including his youth. On the other hand, too much attention had been given to the statement in the pre-sentence report as to what his response would be in the future and to the previous caution for the indecent assault.

In her argument before us, Miss Charles said everything which could appropriately be said in Millberry's favour. As to her first submission, we accept that this is a case where the starting

point should be five years. Looking at the general guidelines we have given above, as to aggravating and mitigating circumstances, the following points can be made. First, as to aggravation there is the age of the victim, 15. Secondly, there is the fact that some force was used but that force was within the range of force that can be inherent in the case of forcible rape.

As to the impact upon the victim, we have a statement of the victim's mother. There is no doubt that this has been significant. We take this into account. Miss Charles says we should not hold it against this appellant that he had been frank to the probation officer. We accept that the fact that he has been frank is in his favour but the trial judge could not ignore the probation officer's conclusion that he was assessed by her as posing a high risk of re-offending, involving a high risk of harm to the public and especially to pubescent boys from the age of 11.

From the psychiatric report it appears clear that Millberry was having difficulty in adjusting to the fact that he was homosexual. The psychiatrist found his emotional and social development had a number of deficits. However, the fact that he is successfully taking part in a sex-offender treatment in custody may mean that the risk he previously constituted is not now so great.

Although he did not plead guilty at the outset, this was explained by the need to obtain a medical report and at a directions hearing Aikens J indicated that full credit was to be given in the case of a guilty plea being forthcoming as a result of the medical evidence. This is precisely what happened, so there is force in Miss Charles' submission that the sentence was equivalent to 7½ years sentence if the case had been contested.

In addition, we agree that the judge's sentencing remarks, that this case involved a breach of trust, could have been more appropriately worded. As we have indicated friendship is not a factor which in itself justifies the use of the 8-year starting point.

Miss Charles also relied on the case of *R v Willis* [1974] 60 CAR 146. This case is of limited value because it reflects an approach, at an earlier date, to sentencing for offences of buggery when a more lenient approach was adopted than is now adopted in the case of male rape.

Despite this we have come to the conclusion that this sentence was longer than it should be and we quash the sentence of five years detention and substitute a sentence of four years detention in its place. This sentence is more in line with the guidelines which we have set out in this judgment.

The three applications provide an insight as to how the guidelines can apply in practice. We note that the courts prior to the guidelines were regarding relationship rape as serious and deserving heavy sentences.