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SENTENCING GUIDELINES AND INFORMATION COMMITTEE – SENTENCING JUDGMENTS

Comhairle na mBreithiúna
The Judicial Council

SENTENCING GUIDELINES – THE JUDGMENTS

Introduction

The practice of issuing judgments setting out sentencing guidelines in respect of particular offences is relatively new in the Irish appellate courts. This document is intended to summarise the existing case law. Part 1 looks at the development of the practice and offers some observations about how trial judges should apply guideline judgments. Part 2 lists the guideline judgments under subject headings. It is hoped that, pending the introduction of new guidelines by the Judicial Council, this list can be added to if or when new judgments are delivered.

Part one – how guideline judgments have come to be produced

In *People (Director of Public Prosecutions) v. Tiernan* [1988] I.R. 250 the appellant had received a sentence of twenty-one years for rape. The sentence was affirmed by the Court of Criminal Appeal. Under the law as it then stood, no further appeal was possible without a certificate from either the Court of Criminal Appeal or the Attorney General that the case involved a point of law of exceptional public importance. The Attorney General issued a certificate, identifying the point of law as being "the guidelines which the courts should apply in relation to sentences for the crime of rape".

The judgment delivered on behalf of the majority of the Supreme Court (by the Chief Justice) made it clear in the first paragraph that it did not intend to set out such guidelines.

> "Although the certificate of the Attorney General states that the point of law he certified was the guidelines which the courts should apply in relation to sentences for the crime of rape, having regard to its appellate jurisdiction this Court dealt only with the issues arising under the grounds of appeal submitted in this individual case and did not receive submissions nor reach any decision with regard to questions which might be applicable to cases of rape which had different facts and circumstances surrounding them. As counsel for the Director of Public Prosecutions submitted, the certificate must be read as

> stating the point of law to be whether on the application of the correct principles this sentence was appropriate.
>
> Many of the considerations, however, which arise for determination on this appeal will hopefully be of assistance to judges having responsibility to decide on sentences appropriate on convictions for rape."

The parties had drawn the attention of the Court to a number of sentencing decisions of appellate courts in England and New Zealand. In particular, stress was laid upon the decision in England of Lord Lane L.C.J. in *R. v. Billam* [1986] 1 W.L.R. 349, and in New Zealand by Woodhouse P. of the Court of Appeal in Wellington, in *R. v. Puru* [1984] 2 N.Z.L.R. 248. In referring to these, Finlay C.J. said:

> "It is necessary to emphasise that these decisions, while very helpful, were delivered in cases in which the structure and matters before the courts were wholly different from the instant appeal. Both the Criminal Division of the Court of Appeal in London, in *R. v. Billam*, and the Court of Appeal in New Zealand, in *R. v. Puru*, were dealing with cases where a number of different decisions were brought before them for review or consideration, and where evidence was submitted of overall patterns or tendencies in the imposition of sentences within their jurisdiction for rape. The specific purpose of this form of multiple appeal in the case of *R. v. Billam* was to seek from the Criminal Division of the Court of Appeal a broad statement on policy, almost amounting to a range or tariff of appropriate sentences for rape of different kinds.
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> Having regard to the absence of any statistics or information before this Court in this appeal concerning any general pattern of sentences imposed for the crime of rape within this jurisdiction, general observations on such patterns would not be appropriate. Furthermore, having regard to the fundamental necessity for judges in sentencing in any form of criminal case to impose a sentence which in their discretion appropriately meets all the particular circumstances of the case (and very few criminal cases are particularly similar), and the particular circumstances of the accused, I would doubt that it is appropriate for an appellate court to appear to be laying down any standardisation or tariff of penalty for cases."

There were, therefore, two important reasons for declining to take up the suggested task of setting out guidelines. The first lay in the fact that the parties had, in the normal way, concentrated their submissions on the case in hand and had not provided the Court with any broader arguments or information. Unlike the court in *Billam*, the Supreme Court had no evidence before it in relation to the pattern of sentencing for rape in this jurisdiction, and that lack of reliable information meant that the Court was not in a position to make general observations about the issue. The Court was also concerned that a question of principle arose, as to whether it was appropriate for an appellate court taking on the role of setting down tariffs. However, more recently, the appellate courts have felt that both of these concerns can now be addressed, and a number of guideline judgments have been issued over the last fifteen years or so.

The first relevant change in circumstance may have been the introduction, by s.2 of the Criminal Justice Act 1993, of the procedure by which the Director of Public Prosecutions can seek to have a sentence reviewed on grounds of undue leniency. That led to a feeling amongst both trial and appellate judges that if prosecutors could appeal sentence decisions, then they should no longer adopt their conventionally passive stance towards the question of sentence but should be required to assist the court in choosing the appropriate sentence range. A second influential factor was the fact that although information about sentencing, particularly in the District and Circuit Courts, remained undesirably sparse there was a welcome increase in the availability of data at least in respect of some offences, through various initiatives including the work of the Irish Sentencing Information System and of the Judicial Researchers' Office.

In *People (DPP) v. W.D.* [2008] 1 I.R. 308, Charleton J., as a judge sitting in the Central Criminal Court, delivered an influential written judgment when passing sentence after a rape trial. He explained his purpose and methodology as follows:

> "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."

The usefulness of this exercise was confirmed in the following passage from the judgment of the Court of Criminal Appeal in *People (DPP) v. Keane* [2008] 3 I.R. 177:

> "In *The People (Director of Public Prosecutions) v. W.D.* [2007] IEHC 310, [2008] 1 I.R. 308, Charleton J. in the Central Criminal Court, reserved judgment in order to ascertain the features or factors which tended to place those convicted for the offence of rape into particular ranges of sentencing from lenient, to ordinary, to serious to meriting condign punishment. In doing so reliance was placed on reported decisions of our courts and these are the only relevant precedents for sentencing purposes. Assistance was also obtained from cases as reported in the media. Reference to the latter group of cases was, quite properly, qualified because as they did not report all the facts and circumstances of the case and they cannot be regarded as a source of legal precedent. Nonetheless, with that qualification in mind, they did provide some

> useful indicators for the purpose of the broad exercise involved in that case. The judgment did not purport to set standard sentences or tariffs but is a valuable reference point in ascertaining the wide variety of factors, as mentioned above, which can influence sentencing in rape cases. The incidents of aggravation and mitigation of offences can be so variable that no court should consider itself bound by precedent on a rigid basis and due weight should be given to considerations that at times can be unique to the features of a particular case. As this court stated in *The People (Director of Public Prosecutions) v. R.* (Unreported, Court of Criminal Appeal, 15th March, 1999):-
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> > 'As there are no universal standards applicable in determining penalties for rape or any other offence one must approach reported cases and the analysis of the sentences imposed therein with considerable caution.' "

The use of information about sentences passed in comparable cases was therefore approved, provided that the quality of the information was assessed in an appropriately guarded fashion. The second of the concerns expressed by Finlay C.J. was also implicitly dealt with, in that the court was not taking upon itself the task of setting tariffs, but was simply drawing on and analysing precedent sentencing decisions to assist a sentencing judge to see where on the relevant scale the offence before the court might be found.

The courts remained cautious, however. Two judgments in 2012 reflect possibly conflicting approaches – *People (DPP) v. Murray* and *People (DPP) v. Begley* (see below under the heading "Tax and Social Welfare Fraud").

In March 2014, the Court of Criminal Appeal issued three judgments on the same day. Two set out indicative bands for sentencing in relation to assault causing serious harm (*People (DPP) v Fitzgibbon* [2014] ILRM 116) and firearms offences (*People (DPP) v. Ryan* [2014] IECCA 11, while the third (*People (DPP) v. Z.* [2014] IECCA 13) discussed the exceptional category of cases where a life sentence might be imposed in a case of rape and child cruelty. In each, the Court stressed the importance of the availability of sentencing information in respect of the offence under consideration and the role of the Director of Public Prosecutions in assisting the sentencing court. The judgment in *Ryan* expressly addresses the question of

the extent to which the Court had jurisdiction to give general guidance on sentencing. Having considered the rationale of *Tiernan*, the judgment continues:

> "For reasons which the Court will address in due course, the first of the concerns expressed by Finlay C.J. is, at least to a material extent in respect of certain types of offences, significantly reduced today. The very detailed analysis conducted on this appeal by counsel of the various sentencing cases in respect of a like offence allows, as a matter of practice, at least general observations to be made on the view which this Court has taken of sentence for such offences. In addition, there are, increasingly, sentencing surveys and statistics available which can provide the kind of assistance which the Supreme Court did not have available to it at the time of *Tiernan*. For example, the ISIS (Irish Sentencing Information System) project provides details as to the range of sentences which are typically imposed by sentencing judges for many types of offences.
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> 2.3 Finlay C.J. did, in the passage just cited, make clear that he doubted the appropriateness of an appellate court, such as this Court, appearing 'to be laying down any standardisation or tariff of penalty'. That was, of course, because all relevant facts as to the severity of the offence, the culpability of the accused and the circumstances of the accused need to be taken into account. In those circumstances, to attempt any standardisation of penalty would clearly be inappropriate. However, this Court does not read the judgment of the Supreme Court as precluding some broad level of guidance being given by this Court as to the range of sentences which may be appropriate for an offence under consideration on an appeal, having regard to the severity of the offence and the culpability of the accused. It clearly remains a matter for the sentencing judge to form a judgment, on all of the relevant facts, as to where on that range the offence for which the accused is to be sentenced lies. It is also clearly a matter for the sentencing judge to decide on the extent to which any aggravating or mitigating factors identified ought increase or decrease the sentence to be imposed. Thus, any such range provides broad guidance but does not seek to impose any form of standardisation of penalty. In addition, it needs to be emphasised, even at this early stage, that there will always be cases which disclose highly unusual features and which will not readily fit into any particular pattern.

> 2.4. Finally, it is important to emphasise that such an exercise can only legitimately be carried out if the court has, as it had in this case, the opportunity, through the industry of counsel, to conduct a comprehensive review of the views on sentences which this Court has expressed and/or has available to it detailed information of sufficient quality on the type of sentences typically imposed by sentencing judges. To attempt to give guidance without such assistance would, in this Court's view, be inappropriate. Against that background, it is next necessary to turn to the approach to sentencing which any such guidance might permit."

The Court concluded that where, as in the case under consideration, there had been a detailed analysis of many recent decisions concerning the sentence deemed appropriate for offences which might be described as at least broadly similar to the one under consideration, it might be appropriate to attempt to set out broad guidance as to the range of sentences that would ordinarily be appropriate for the offence in question across the spectrum. While allowing for the possibility of unusual cases, it was envisaged that in most cases an offence could, by reason of its gravity and the culpability of the accused, be placed appropriately placed at the lower, middle, or higher end of the range.

Edwards J. described the process by which formal guideline judgments are formulated, and the distinction between "formal" and "informal" guidance, in *People (DPP) v. O'Sullivan* [2020] IECA 331.

> *"By 'formal' we mean a judgment in which the court says it is providing guidance, one in which advance notice was given of the intention to provide guidance, one in which the court attempts to review sentencing for a whole offence or for a class of offences, and one in which the parties were invited to address submissions to the court on aspects of sentencing for the offence or class of offences in question that go beyond issues arising on the facts of the case. Moreover, although it has not invariably been the case, formal guideline judgments (of which there are relatively few) have sometimes been formulated in the context of several appeals relating to sentencing for the offence or class of offences in respect of which it is intended to provide guidance being listed together for hearing purposes so as to facilitate the incorporation of a wider range of views, than might otherwise be available, in the*

guidance to be formulated. Where this has been done individual decisions have still been rendered but with the judgment in one of the cases heard together providing the vehicle by means of which guidance for the future is provided, as well as deciding the immediate issues that fall for decision in the particular case.

Broadly speaking such formal guidance as has been issued by the Irish appellate courts has tended not to be prescriptive or "top down" in its approach; but rather merely descriptive of patterns based on a synthesis of previous decisions, i.e. "bottom up" in its approach, suggesting indicative ranges for the purpose of assessment if gravity,, and identifying potentially aggravating circumstances, or mitigating circumstances bearing on culpability, to be taken into account in determining the appropriate indicative range in which to locate a case.

Much more commonly, although still relatively infrequently, the Irish appellate courts have also seen fit to issue 'informal' guidance in a judgment that would not qualify as a 'formal' guideline judgment in the sense just spoken about. Where such informal guidance has been offered it will not necessarily be the case that the court will have given advance notice of its intention to offer guidance, or that it will have invited submissions on issues beyond those arising for decision in the case before it. Such informal guidance may only seek to address certain manifestations of the offence rather than the whole offence, and may not necessarily be comprehensive in the identification of the relevant factors. Moreover, it tends to be even more 'bottom up' in its approach than is to be found in formal guideline judgments."

It should be noted that the Court also observed that while undue leniency reviews can be unsuitable for use as comparators, the judgments may on occasion be used for the purpose of giving informal guidance.

Applying guideline judgments and comparators

Typically, a guideline judgment will divide the available custodial sentencing options into three indicative bands or ranges (in the case of assault manslaughter there are four), on the basis of the gravity of the offence. Sentencing judges should bear in mind that the sentence ultimately imposed does **not** necessarily have to be within the range indicated by the assessment of gravity – the purpose of placing the offence within a band is to assist in

selecting a **headline or pre-mitigation** sentence. The judge then goes on to consider all relevant mitigating factors.

It should also be borne in mind that if a sentencing judge seeks guidance by way of the results in comparable cases dealt with by the Court of Criminal Appeal or the Court of Appeal, caution should be used in respect of the outcome of undue leniency reviews. As the judgment in *O'Sullivan* points out, the sentence ultimately to be served by the offender may for various reasons not reflect the views of the Court of Appeal in relation to the appropriate sentence for the case.

Part two – the guideline judgments

Assault manslaughter

Mahon [2019] IESC 24

The appellant had been charged with murder but convicted of the lesser offence of manslaughter, in circumstances where he had produced a knife in the course of an altercation with the victim.

The judgment of Charleton J. refers to the research carried out by the Judicial Researchers' Office and to the annual report of the Irish Prison Service for 2019 (being the most recent then available) for an indication of the sentences then being served for manslaughter. Having regard to the very broad range of conduct that can arise in a manslaughter case (from intentional killing down to criminal negligence or assault without intent to kill or to cause serious injury), he considered it appropriate to offer guidance on the basis of four bands rather than three.

(i) Worst culpability – some unlawful killings can be almost indistinguishable from murder in terms of culpability. Cases involving the highest level of culpability attract an appropriate sentence of 15 to 20 years. A life sentence is possible and has been imposed in certain cases.

(ii) High culpability – cases that attract a sentence of 10 to 15 years. They tend to involve aggravating factors which may include a history of violence between the accused and the victim, callousness towards the victim, confrontation with

a potentially lethal weapon, and death resulting from an unlawful act carrying a high risk of serious injury of which the accused was aware or ought to have been aware. Previous convictions for assault or other relevant convictions may also be a factor.

(iii) Medium culpability – the headline sentences in this category tend to be between 4 to 10 years. They include cases where the offence involves an unlawful act which would not normally be expected to result in death, and where the act was not premeditated but there is still a degree of culpability.

(iv) Lower culpability – these cases involve a sentence of up to four years. The lowest sentences within this range are imposed in cases where the accused is at fault, but the aggravating factors found in the higher ranges are absent and culpability is not especially high. Cases of diminished responsibility or extreme provocation may come into this category. Fully suspended sentences have been imposed in exceptional cases.

Charleton J. added that two factors should be regarded as substantially aggravating – the use of violence by men against women, and the production of a knife in the course of an argument.

Rape

Tiernan [1988] I.R. 250

Although, as discussed above, the Court declined to set out sentence guidelines, a number of observations were offered for the assistance of sentencing judges. Finlay C.J. noted that rape, even if committed without aggravating circumstances, is one of the most serious offences in our criminal law. It is a crime that cause potentially lifelong harm, a gross attack on human dignity and bodily integrity and a violation of human and constitutional rights. As such it must attract very severe legal sanctions. The appropriate sentence for any rape is, therefore, a substantial immediate period of detention or imprisonment. It is not easy to imagine circumstances which would justify departure from that approach, and they would probably be wholly exceptional.

F.E. [2019] IESC 85

In this case the accused was convicted of raping his wife. He was also convicted of threatening to kill her, threatening to cause her serious harm, and serious assaults with a hammer on her and her mother. The various offences were committed over a period of some weeks, and part of the concern of the court, therefore, was to identify the proper approach to sentencing in that situation. The use of concurrent and consecutive sentences is discussed in this context.

The analysis of sentences for rape commences with the observation that while there is no absolute rule that a custodial sentence must be imposed regardless of a plea of guilty, it is all but inescapable and a non-custodial sentence should be wholly exceptional.

Lower level - consideration in a case where aggravating factors such as coercion or force are not at the more serious level should commence in terms of mitigation with a headline sentence of 7 years.

More serious cases – this category merits a headline sentence of 10 to 15 years. What characterises these cases is a more than usual level of degradation of the victim, or the use of violence or intimidation beyond that associated with the offence, or the abuse of trust.

Cases requiring up to life imprisonment – these cases may involve particular violence, more than usual humiliation, or the subjection of the victim to additional and gratuitous sexual perversions. Other aggravating factors are abuse of trust, abuse of a position of authority or of a position of dominance within a family, the planning of the offence, the involvement of more than one offender, tricking a victim into a position of vulnerability or abusing a disparity in age. Cases in this category may often involve a series of separate offences.

Assault causing serious harm

Fitzgibbon [2014] IECCA 12

In this case, which involved a very serious assault, counsel had produced a number of precedent decisions for consideration by the Court of Criminal Appeal. In setting out indicative bands for the guidance of sentencing courts, the Court acknowledged that the authorities to which it had been referred were, by and large, about offences at the upper end of the scale. For that reason, the guidance given in respect of the lower end of the range was

necessarily tentative and was open to review in the light of further experience and information.

Subject to the caveat that there may be special or unusual features which can properly influence the sentencing judge, the first significant factor in a serious assault is identified as being the severity or viciousness of the assault. The second is the injuries suffered, although it is acknowledged that there is not always an exact correspondence between the severity of an attack and the degree of injury caused. The injuries are of greater weight where they are such as might reasonably be expected to follow from the nature of the assault concerned. The next factor is the degree of culpability of the accused – an entirely unprovoked attack is regarded more seriously than an assault arising out of an incident, particularly if the situation was not of the perpetrator's making. It is legitimate to take provocation into account. Finally, the general circumstances of the assault, including whether or not it was carried out in the context of other criminality and whether or not a weapon was used, can be an important factor.

(i) Lower end – a sentence of two to four years, before mitigating factors are taken into account.
(ii) Middle range – between four and seven and a half
(iii) More serious – seven and a half to twelve and a half

There may be exceptional cases which warrant a higher sentence including, in wholly exceptional cases, life imprisonment.

McGrath, Dolan and Brazil [2020] IECA 50

These were three unconnected cases involving s.3 assault charges, in which the Director brought appeals on grounds of alleged undue leniency. In each case, the Director argued that the headline sentence identified by the trial judge was inadequate.

The Court of Appeal observed that sentencing judges might be too reluctant consider placing the pre-mitigation sentence at the maximum figure of five years. Such a starting point was not excluded in high-end s.3 assaults. Regard should be had to the overall architecture of the assault-type offences provided for in the Non-Fatal Offences Against the Person Act 1997. There could be cases where a decision whether to charge s.3 or s.4, or to accept a plea to s.3 where a s.4 charge had been preferred, would be finely balanced. Judges should not,

therefore, operate on the basis that a starting point of five years was not available other than in exceptional circumstances.

Dangerous driving causing death and serious bodily harm

The formal guideline judgment here is *People (DPP) v. Flynn* [2020] IECA 294. However, to put this decision in context, it is necessary to note that in *People (DPP) v. Stronge* [2011] IECCA 79 the Court of Criminal Appeal had declined to issue any general guidelines other than in respect of the need to bear in mind the distinction between this offence and that of manslaughter. It is also relevant to note that in *People (DPP) v. Casey* [2015] IECA 199 the Court of Appeal found a sentence of seven years to be significantly out of line with eight cases (a number of which were undue leniency reviews) decided between 2000 and 2014 that were offered by the appellant as comparators. In six of those cases there had been a sentence of less than five years, while five years was imposed in the remaining two.

Flynn [2020] IECA 294

This was a case of dangerous driving causing serious bodily harm. The prosecution sought a review of a sentence of four years, with thirty months suspended, on the basis of undue leniency.

It is noticeable that all of the cases considered by the Court post-dated *Casey*. Although the Court acknowledged that most of the cases attracting headline sentences included multiple additional aggravating factors, and that it was not a properly representative survey, they shared the aggravating factors of the offender having driven while significantly intoxicated and having caused either death of life altering injuries. In each, the headline sentence had been six years or more, and a headline sentence of four years was therefore out of kilter.

The maximum sentence for this offence being ten years, the Court of Appeal divided that figure into three indicative bands of zero to three years and four months (forty months), a mid-range of up to six years and eight months (eighty months) and the higher range up to ten years (one hundred and twenty months). Where the aggravating factors of driving while significantly intoxicated and causing either death or life changing injuries are present, the

headline sentence should be six or more years. Other aggravating factors include previous relevant convictions, leaving the scene, driving while disqualified, having no insurance and speeding.

Possession of a firearm in suspicious circumstances

Ryan [2014] IECCA 11

Pursuant to statute, there is a presumptive minimum sentence of five years and a maximum of fourteen. The Court of Criminal Appeal examined ten cases decided over the previous six years. It also considered the offence in the context of the range of other firearms offences (the most serious of which is possession or control of a firearm with intent to endanger life – an offence carrying a presumptive minimum sentence of ten years and a maximum of life imprisonment). Having carried out this exercise, the Court concluded that the principal factors that would normally require to be taken into account were the nature and quantity of the firearms concerned, the extent to which it had been produced or brandished in a way giving rise to concern that it would be used, the extent to which possession was linked with criminality generally or to specific and personal circumstances, and any circumstances concerning the culpability of the accused.

Having regard to the statutory presumptive minimum sentence of five years, an offence at the lower end of the range ought to attract a sentence of five to seven years (before adjustment for mitigation). The middle of the range is seven to ten, and the upper end is ten to fourteen.

Defilement

J. McD. [2021] IECA 31

This judgment is in the informal guidance category, as the Court of Appeal did not consider that it had sufficient data to give formal guidelines.

The offence of defilement of a child under the age of 15 (s.2(1) of the Criminal Law (Sexual Offences) Act 2006) carries a potential sentence of up to life imprisonment. The Court noted, as it had previously, that where the legislature has provided for that range most cases will fall at some point on an effective 15 year spectrum. The three generally applicable ranges are 1-5

years, 5-10 years and 10-15. Truly egregious cases will be over 15 years, and may be up to life, but these will be rare.

The Court considered that it could safely say that defilement offences not involving seriously aggravating circumstances would in general merit a headline sentence in the low range.

If the parties are in the same age range, consent may be relied upon as a mitigating factor.

The seriously aggravating factors include force or coercion (including blackmail-type behaviour); abuse of a dominant position; exploitation of power; multiple instances of offending over a prolonged period; causing significant harm, suffering, degradation or humiliation beyond that intrinsic to the basic violation; exploitation of a known vulnerability; gross breach of trust and recording by film or photography. The last-mentioned practice is a very serious aggravating factor because it is a further violation that (regardless of motivation) increases the culpability of the offender and adds to the harm done to the victim.

Child pornography

Note – the two cases referred to here were decided prior to the amendment of s. 6 of the Child Trafficking and Pornography Act 1998 by s.14 of the Criminal Law (Sexual Offences) Act 2017. However, the statutory sentence limits were not amended.

Loving [2006] 3 IR 355

This was only the second case of possession of child pornography (contrary to s. 6 of the Act) that had come before the Court of Criminal Appeal. The first had been an appeal from the Central Criminal Court, where the offence of possession had been accompanied by one instance of rape and the filming and recording of sexual acts against children. The Court did not, therefore, have a body of precedent decisions of its own, but it did take account of fourteen cases, dealt with in the Circuit and District Courts, that had been reported in the Irish Times between January 2003 and February 2006. It also considered the judgment of the English Court of Appeal in *R. v. Oliver* [2003] 1 Cr. App. R. 28, where that court had given guidance on the levels of seriousness in respect of images of child pornography. The levels are:

1. Images depicting erotic posing with no sexual activity;

2. Sexual activity between children solo or masturbation as a child;
3. Non-penetrative sexual activity between adults and children;
4. Penetrative sexual activity between children and adults;
5. Sadism or bestiality.

The Act provided for a maximum sentence on summary conviction of one year, and five years on indictment. The Court of Appeal noted that since the offence was triable either way, it followed that the Oireachtas did not intend that every offence of possession must automatically attract a penalty of more than one year.

When dealing with such a case, it was necessary to consider the individual offence. The factors to be taken into account were – the seriousness and number of the images, the circumstances and the duration of the activity leading to possession of the images (including any interaction with, for example, alcohol abuse), whether the images had been paid for or shared with others including with children, and whether there were any linked offences against children.

In *People (DPP) v. O'Byrne* [2013] IECCA 93 the Court of Criminal Appeal observed that the phenomenon of internet child pornography was still relatively new and that the sentencing of persons convicted of possession was "not a well worn or well lit path". The Court endorsed the guidance given in *Loving*, and emphasised the significance of the possibility of a suspended sentence in a case where the accused took responsibility for his offending and was willing to engage in appropriate therapy. It also endorsed the use of the levels of seriousness set out in *Loving.*

Robbery

The formal guideline judgment in this area is *People (DPP) v O'Sullivan* [2020] IECA 331. However, the judgment in *O'Sullivan* refers extensively to that in *People (DPP) v. Byrne* [2018] IECA 120.

Byrne was an undue leniency review, and was one of the cases heard together by the Court of Appeal for the purpose of producing the *Casey and Casey* guideline judgment in respect of burglary (see below). The accused in *Byrne* had been sentenced for one robbery as well as burglary and aggravated burglary. In discussing the appropriate sentence for the robbery, the Court noted that while the available options ranged from non-custodial sentences up to

imprisonment for life, the practical reality was that the range of custodial sentences capped out at around fifteen years for all but the most exceptional cases. The low range, therefore, was zero to five years, the mid-range six to ten, and the higher range eleven to fifteen years.

In *O'Sullivan*, the Court stated that the judgment in *Byrne* should be seen as important informal guidance in respect of robbery, heavily influenced by the approach adopted in respect of sentencing for burglary and aggravated burglary. The indicative bands set out in *Byrne* were approved.

However, it was noted that *Byrne* had offered little guidance on the weight to be attributed to different aggravating factors. The Court expressed broad agreement with the analysis of those factors in O'Malley on *Sentencing Law and Practice* (3rd ed.). In summary, use of a knife or other weapon will bring the offence into the mid-range or higher, especially where any appreciable level of violence is inflicted and irrespective of the value of any property taken. Carefully planned robberies, often involving a number of participants clearly willing to use serious violence, will also be at the high end of the middle range. Carrying out a series of robberies over a short period of time, involving the cumulative infliction of a good deal of injury or damage, will have the same consequence, as will carrying out robberies in shops or other premises where a number of people are traumatised.

Cases at the lower end of the scale will involve the threat, but not use, of violence, where the property taken was not of great value and there was no severe or lasting impact on the victim.

Cases in the highest range will, as a rule, involve the actual or planned taking of a very significant amount of money or valuables. However, the value is not the sole factor that would place the robbery in the top range. The infliction of serious or life-threatening injuries, the targeting of an elderly or vulnerable victim, confrontation with gardaí arriving at the scene, or being instrumental in the loss of life are all factors that may bring the offence into the highest category.

Burglary

Casey and Casey [2018] IECA 121

The Court identified a number of factors as aggravating – the planning of the burglary; the targeting of residential dwellings of persons known to be vulnerable; confrontation with an

occupant (particularly if the confrontation is aggressive and/or violence is used); entry into a premises without ascertaining whether or not it is occupied (since the likelihood of confrontation thereby increases); taking an item such as a carving knife to use as a weapon; ransacking a dwelling; any injury caused to the victim (whether physical or psychological); the taking of items of significant monetary value (judged from the perspective of the victim) or sentimental value; and relevant previous convictions.

Where a number of these factors are present, the offence will be in at least the middle range, and usually above the mid-point. The presence of a considerable number of factors, or of one or more factors in a particularly serious form, will raise the case to the highest category.

Mid-range offences merit pre-mitigation sentences in the range of four to nine years, and cases in the highest range nine to fourteen years. However:-

> "The Court recognises that the circumstances surrounding individual offences can vary greatly, and that is so even before one comes to consider the circumstances of the individual offender. While a consistency of approach to sentencing is highly desirable, it is not to be expected that there will be a uniformity in terms of the actual sentences that are imposed. There are just too many variables in terms of the circumstances of individual offences, but even more so in the circumstances of individual offenders, for that to happen. Again, the Court recognises that there is no clear blue water between the ranges. Often the most that can be said is that an offence falls in the upper mid-range/lower higher range. In many cases whether an offence is to be labelled as being at the high end of the mid-range or at the low end of the high range for an offence is often a fine call. The judge's legitimate margin of appreciation may well straddle both. In that event, how it is labelled may in fact not impact greatly on the sentence that will ultimately be imposed."

Sentencing for multiple offences

The Court made some general observations in *Casey and Casey* about sentencing in a case where multiple offences have been committed in the course of a "spree", stating that it was desirable that the sentencing court should take account of the overall gravity of the offending conduct viewed globally.

> "Where a court is sentencing for multiple offences committed in a spree, the fact that they were committed in a spree should be regarded as an aggravating factor. That it was part of a spree renders the gravity of each offence more serious and the overall offending conduct must consequently be regarded as more serious than any individual offence considered in isolation. There are a number of ways in which this increased gravity can be reflected. The first is to impose proportionately higher sentences for each individual offence and simply make them all concurrent. The second is to assess gravity in respect of each individual offence without reference in the first instance to the fact that they were committed in a spree and then, having done so, to at that point seek to reflect the aggravating circumstance of the spree by having recourse to at least some degree of consecutive sentencing. However, going further and nominating a global headline sentence, while certainly possible, complicates the sentencing process…"

The first issue with the identification of a global headline was that ultimately there had to be an individual sentence for each individual offence, or at the very least a sentence or sentences for one or more offences with others taken into consideration. The latter is not considered to be desirable (since it is always possible that the conviction on which sentence is passed might be overturned on appeal). The provision that permits offences to be taken into account was intended to relate to matters that had not yet been charged, rather than convictions. Another problem is that taking offences into account may give the impression, both to the offender and to a relevant victim, that the offender is in some respect getting a "free ride".

On the other hand, the Court did consider it to be open to the sentencing court to determine, in the first instance, a global pre-mitigation sentence reflective of the overall gravity of the offending provided that the totality principle was respected. This requires an acute focus on proportionality at each stage. Using the global figure as a reference point, the court must then assess the gravity of each individual offence and use a combination of consecutive and concurrent sentences to ensure that the cumulative total aligns with the global figure, by making adjustments up or down as required. Appropriate discounts should then be applied to each individual sentence to reflect mitigation. If left in any doubt, the judge should step back and consider whether the final figure requires further adjustment in the interests of proportionality.

Drug offences – cannabis cultivation and s.15A

Samuilis [2018] IECA 316

The evidence was that the appellant was an organiser, but not in overall charge, of a cannabis growing operation.

The Court of Appeal considered a number of decisions relating to "grow houses". It was noted that where the plants found are not mature, they have only a potential, rather than actual, market value. Accordingly, where a charge under s.15 or s.15A is not appropriate, it is usual to prefer a charge of cultivation contrary to s.17 of the Misuse of Drugs Act 1977, as amended. Where they are mature, such a charge may be laid in addition to the charge of possession for the purpose of sale or supply. The Court found that this distinction was not material to sentence.

> *"What can be taken from this review is that persons involved in grow house operations…generally fall into three categories in terms of their involvement and consequently their culpability. There are principal or top tier organisers who fund and orchestrate the setting up of the operation, and the sale and distribution of the produce, and who get to keep and enjoy the profits earned. Such persons will be regarded as having a high level of culpability. Then there are the second tier managers, who provide logistical and supervisory support, usually receiving a substantial fee for their efforts, although not sharing in the ultimate profits. The culpability of persons in this category will usually be located in the mid-range. Finally, there are low level operatives/gardeners who frequently are economic migrants, usually of foreign nationality, who are exploited due to their poverty, and low level of education and sophistication; or, worse still, they are persons trafficked illegally into the country as virtual slaves specifically to fulfil the gardening role, and who receive very little remuneration, if any at all. The culpability of persons in this category will generally be regarded as falling within the low range."*

The Court added that the scale and sophistication of a grow house operation was clearly a relevant factor in assessing gravity, as was the value of any actual drugs or mature/harvestable plants seized and the potential value of any immature plants.

Where a s.15A charge is preferred, gravity should be assessed in the first instance without reference to the presumptive minimum sentence. Mitigation is then applied to the headline or

pre-mitigation figure arrived at. It is only if the figure ultimately arrived at falls below the presumptive minimum that the sentencing court must consider whether there are exceptional and specific circumstances which would render it unjust to impose that presumptive minimum. If not, the minimum sentence must be imposed.

The Court stated that in the great majority of s.15 and s.15A cases the effective maximum sentence was about fifteen years (apart from truly egregious cases where higher sentences might be justified). It then divided the fifteen-year range into three categories to provide for a low range of zero to five years, a mid-range from five to ten years and an upper range of ten to fifteen years.

Sarsfield [2019] IECA 260

In this appeal the Court of Appeal requested submissions as to the circumstances in which a court would or would not be justified in departing from the presumptive minimum sentence provided for an offence contrary to s.15A of the Misuse of Drugs Act 1977 as amended. A detailed survey of cases dealt with in the Court of Appeal and its predecessor Court of Criminal Appeal was presented, with the results being set out in the judgment in tabular form. The information before the court suggested that the average sentence for cases involving a value exceeding €1m was nine years with some part suspended. The average effective sentence was six and three-quarter years.

(The Court noted that it was necessary to exercise some caution in respect of such a survey, since by definition it concerned only cases where one side or the other felt that the Circuit Court sentence was not appropriate.)

The Court identified some additional difficulties in addressing sentencing in this area and its observations were, accordingly, tentative. As it said, comparators are at their most useful when one is comparing "headline", or pre-mitigation, sentences with each other. However, the Oireachtas had nominated a sentence that was, presumptively, to be actually served. If the appropriate sentence as identified by the sentencing court was at or in excess of that nominated figure, nothing further was required. If the sentence being contemplated was below the presumptive minimum, it was necessary for the court to address that issue and consider whether the imposition of the presumptive minimum sentence would, in the circumstances of the case, be unjust.

That said, the Court stated that where there has been *significant involvement* in a *very high-level* drug offence, the headline or pre-mitigation sentence likely to be well in excess of the presumptive minimum. In a case of high-level commercial drug dealing involving *very large quantities of drugs*, the Court would expect the headline sentence to be in the order of fourteen or fifteen years and, in some exceptional cases, significantly higher.

The comments about how the ultimate sentence should be arrived at were even more tentative because of the very wide variation in the circumstances of offenders coming before the courts. However, it could be said that in the very high-end, commercial drug trafficking cases a plea of guilty without more was unlikely to justify a reduction below the presumptive minimum, particularly where the evidence was very strong or overwhelming.

Tax and welfare fraud

This area has evolved significantly in recent years.

Murray [2012] 2 IR 477, [2012] IECCA 60

While the Court of Criminal Appeal made some general remarks in *Murray* that were addressed to sentencing judges, it was not a "formal" guideline judgment in the sense described above. The appellant received a series of consecutive sentences of six months, adding up to a total of twelve and a half years, in respect of one count of having a false passport and twenty-five sample counts of social welfare fraud, carried out over several years, that had netted him about €250,000.

The Court of Criminal Appeal considered that it was appropriate to give some general guidance for sentencing courts dealing with unlawful tax evasion and false social welfare claims, given the importance of such issues to the public weal, especially in the context of the financial emergency. It stated that offences of this kind struck at the heart of the principles of equity, equality and social solidarity, and that deterrence had an important value in relation to crimes affecting the public purse. In that context, it was suggested "for the future guidance of sentencing courts" that significant and systematic frauds relating to tax or social welfare should generally meet with an immediate and appreciable custodial sentence, although naturally the sentence imposed in any given case must have appropriate regard to the individual circumstances of the accused. However, the sentence was reduced to nine years with one suspended.

Begley [2013] 2 IR 188, [2013] IECCA 32

The case concerned a number of counts of fraudulent evasion of customs duty, to a total value of approximately €1.6m.

In its judgment, a different panel of the Court of Criminal Appeal said that while much of what had been said in *Murray* was undoubtedly correct, it was most unlikely that the Court had intended to offer guidelines of a general nature. To do so would have been in breach of the views of the Supreme Court in *Tiernan*. Further, the Court said that it would have significant concerns about advocating any "blanket" approach in tax cases. Such offences were totally dissimilar to many others and the variation within cases was great. Factors such as restitution might have a higher level of value that in, for example, crimes against the person, and many cases were dealt with by payment of penalties and interest. Admissions and pleas were a crucial part of the process, and unless they were incentivised the prosecution of white-collar crime would be even more "retarded" than it currently was.

Maguire [2018] IECA 310

In this case the Court of Appeal made it clear that tax fraud and social welfare fraud were not to be treated as separate from all other frauds, and were to be treated in accordance with the normal principles of sentencing. The appellant had signed pleas of guilty to a number of counts of theft, fraud, larceny and forgery. These were sample counts, representing over a thousand potential charges arising from the fraudulent negotiation of individual cheques dealt with by her in the course of her work over the course of fourteen years. The total value was over €1m. She received concurrent sentences of four years on all charges.

Having reviewed the comparators, the Court observed that the (unappealed) sentence of twelve years imposed in the case of fraudulent solicitor Thomas Byrne was at one extreme. That case had been wholly exceptional in terms of the scale of the fraud (about €52m) and the losses caused. The majority of (headline) sentences considered ranged from two to four years imprisonment. *Murray* was seen as being significantly out of kilter, and the Court stated that it should be treated with caution. In no case was the starting point a non-custodial sentence although that was sometimes the outcome.

The Court noted that the comparators revealed certain common features. Fraud offences were often committed by persons with no previous convictions, who were otherwise of good character. The risk of reoffending was relatively low. There were relatively few cases where the motive was clearly criminal or where there had been carefully planned – where such factors were present, they were regarded as seriously aggravating. It was also apparent that the cases tended to require rigorous analysis and weighing of the relevant factors.

The scale indicated by the comparators was a low range from zero to forty months, a mid-range from forty-one months to eighty months and an upper range of eighty-one to one hundred and twenty months.

The sentence was quashed and replaced by one of three years with the final year suspended.