

Reforming the Laws on Sexual Violence Crimes of Sexual Violence: Debates and Developments in Irish Law Debates & Developments from the Prosecution Perspective

I have selected four areas to talk to you about this afternoon that I believe reflect important debates and developments in the area of sexual crimes from the prosecution perspective.

1. The effects on prosecutorial practice as a result of the loss of strict liability in cases of unlawful carnal knowledge.
2. An overview of two research projects on attrition rates in rape cases in which we are participating.
3. Practice developments in sentencing hearings in rape cases.
4. The arguments in support of the need for urgent consideration for the codification of Sexual Offences.

1. Loss of Strict Liability in cases of Unlawful Carnal Knowledge – the fallout from the CC decision

Much has been written and debated following the Supreme Court's decision in the CC case¹ and the subsequent loss of the protective strict liability provisions in relation to unlawful carnal knowledge of a girl under 17 and 15 respectively. I expressed my views at the time to the Oireachtas Committee on Child Protection that a constitutional referendum should be held to reinstate the offence of statutory rape, I believe it is reasonable to require adults to ensure their sexual partners are at least 17. My view is that those who don't do so ought to risk criminal prosecution. I do not intend here to enter into a protracted debate about the merits of the judgment in the CC case or indeed the legislative haste which surrounded the enactment of the Criminal Law (Sexual Offences) Act 2006. What I propose to highlight are the practical problems facing prosecutors who now find themselves equipped with a far more limited range of legislative 'tools' or options as a result.

Prior to the successful challenge to the Criminal Law Amendment Act, 1935, when faced with an allegation of rape of a young woman or child under 17 or indeed 15, the natural and indeed practical choice of charge in such circumstances was under the provisions of the 1935 Act as the offence in its various incarnations through the Offences Against the Person Act, 1861, and the Criminal Law (Amendment) Act, 1885 had an unbroken history of interpretation as a strict liability offence, thereby rendering it unnecessary for the prosecution to prove the absence of consent. Proof of age accompanied by proof of the 'carnal knowledge' sufficed. The accused's knowledge or lack of knowledge as to the age of the complainant was not relevant to culpability, although it was deemed relevant to sentence.

¹ CC v Ireland & Ors [2006] 4 I.R. 1

The provisions of the new 2006 Act now mean that the task of prosecuting in such cases is immensely more difficult. This is because it may be necessary to prove the absence of consent if the accused can show that he or she honestly believed that the child had attained the age of 15 or 17 years. Whilst the jury is to have regard to the presence or absence of reasonable grounds for the defendant so believing and all other relevant circumstances², what remains is a wholly subjective (honest - though not necessarily reasonable) belief in consent which has the effect of fully exonerating conduct that the legislature in their wisdom had sought to criminalize for the protection of young girls for over a century – even to the extent of protecting them from themselves, although it may be unfashionable to say so.

At the request of the Rape Crisis Network and the Ombudsman for Children's Office, the Prosecution Policy Unit in the DPP's Office recently undertook an analysis of prosecutorial decisions in sexual offences concerning children, specifically examining defilement, formerly unlawful carnal knowledge. In my view a difference can be discerned under the new statutory scheme, though further research needs to be done to empirically establish the change which appears to be evident. Whereas the 1935 Act dealt with exploitation where a man had a consensual sexual relationship with a young girl, it was often used in circumstances in which rape or sexual assault charges would have been appropriate, and indeed sustainable. It would often be decided that for the sake of the young complainant in such files it would be better to proceed with a charge which did not require her going through the ordeal of giving evidence in relation to the issue of consent. In this regard the statutory rape law fulfilled a vital place in the scheme of criminal law relating to sexual offences against children.

In contrast the Criminal Law (Sexual Offences) Act 2006 is being used almost exclusively in circumstances where there is consensual sexual activity, but where that activity clearly amounts to sexual exploitation. Frequently this arises where there is a large discrepancy between the ages of the suspect and the complainant.

Thirteen files in which a charge for defilement was directed in 2007 were examined*. Of the files in which a direction was made to prosecute the average suspect age was 26.38 years. The average complainant age was 14.3, a difference in age of 12 years. The greatest age difference was 31 years, while in one case the complainant and suspect were the same age. To break down the files examined into categories of age difference:

² A similar provision to s.2(2) of the Criminal Law (Rape) Act, 1981.

* Initially 12 files were examined, however after the paper was delivered an additional 2007 defilement file was identified as having been omitted from the analysis (as it had been associated with a 2008 judicial review). In that file the suspect and complainant were the same age, both 15 years old. Based on the sample of 12 files, the age difference had been assessed as 27.33 and 14.25 for accused and complainant respectively. The inclusion of the additional file gives a slightly different age profile of 26.38 years and 14.3 years for accused and complainant respectively. The percentages in the paper and in the accompanying table have been revised accordingly.

Age Difference	Number of Files	Percentage
0 – 4 years	1 file	8%
5 years	1 file	8%
6 – 9 years	4 files	31%
10-20 years	5 files	38%
More than 20 years	2 files	15%

It is of interest to note that the highest percentage of files (38%) fell within the 10 – 20 year age difference category. Two files (or 15% of the total) concerned sports coaches, and in many of the files there was evidence of grooming, that is to say the building of a relationship between the older person and the young girl. This included text messaging, arranging to collect the young girl from school, purchasing alcohol and supplying drugs such as cannabis. Accordingly it is misguided to suggest that the legislation is being used to criminalize the sexual experimentation of teenage peers. That is simply not the case.

In examining the files relating to underage sex we have seen in practical terms the impact of the Supreme Court decision in *C C v Ireland*. The fall-out has resulted in inordinate delays, such that many of the cases which relate to events in 2004 and 2005 have not reached the sentencing stage: they would have been at varying points in the prosecution process when the unlawful carnal knowledge provision was found to be unconstitutional. Those in which a sexual assault charge could be substituted proceeded on that basis, but one obvious consequence is that the accused person and the injured party will have had the proceedings hanging over them for up to 5 years which is highly problematic for all concerned. More importantly, at trial and sentence the injured party who was then 14 may now be 18, and that may well have an impact on the perception of the offence and of the injured party, who presents in court as an adult but was victimised as a child. As a result I will be issuing to the Gardaí a recommendation that a photograph or indeed video-recording of the complainant should be made as soon after the allegation as possible to assist the jury in their deliberations.

However, particularly in cases of recent complaint, it is imperative that we expedite such trials, not least because it will always be in the best interests of the child that such matters are not protracted across their most formative years.

2. Our participation in two research projects- Attrition in Rape Cases (NUI Galway) & The Daphne Rape Attrition Project (Trinity College Dublin).

My Office is currently participating in two research projects in the area of sexual offences. The first is all but complete and the second in its initial stages.

The NUI Galway Study

The Office of the DPP has been involved in a major research project in collaboration with the National University of Ireland, Galway (commissioned by the Rape Crisis Network Ireland) examining the points and causes of attrition in rape cases. This study involves the assessment of attrition rates in adult rape cases in Ireland, attrition in this context referring to the decreasing numbers of cases that reach each successive stage of the criminal justice process. The project looks at attrition rates from a number of perspectives including the factors involved in a complainant's decision to report or not report to the Gardaí, the factors that influence the decision to initiate a prosecution, and matters which arise between that and the trial itself. Our part in the project has been in the provision of the raw material for this part of the study. Questionnaires have been completed on a total of 642 rape files dealt with between 2000-2004. As I am sure you can imagine, this was a very resource intensive project but a very rewarding process from our point of view through which we have learnt a great deal. The knowledge attained will be informing our practice and policy in relation to the prosecution of rape into the future, we will be closely scrutinising a number of aspects, particularly complainant withdrawal, and seeking ways of ensuring that we continue to adopt best practice regarding our approach to the prosecution of sexual crimes, an area of prosecution universally accepted as having particular challenges given the nature and contexts within which such offences frequently occur.

The TCD Study

More recently we have been approached by Dr. Paul O'Mahony³, the Irish partner on a European comparative rape attrition study comprising of 11 countries: England, Ireland, France, Belgium, Sweden, Germany, Austria, Switzerland, Greece, Hungary and Portugal 'tracking' 100 reports of adult rape from 1st April 2004 looking at the points and causes of attrition. The project has 4 strands:

- i. The tracking of 100 rape reports made after 1 April 2004 through to conclusion
- ii. A history of legislation/policy/practice in relation to rape over the past 30 years
- iii. Interviews with key personnel in participating countries
- iv. A mapping of the steps in the criminal justice process in each participating country

³ Senior Lecturer in Psychology, School of Medicine, Trinity College. Dr. Paul O'Mahony was formerly a forensic psychologist in the Irish Prison Service and a research psychologist within the Dept. of Justice. He is the author of : Crime Punishment in Ireland,1993; Criminal Chaos: Seven Crisis in Irish Criminal Justice, 1996; Mountjoy Prisoners A Sociological & Criminological Profile,1997; Prison Policy in Ireland: Criminal Justice versus Social Justice, 2000; Criminal Justice in Ireland, 2002 (ed); The War on Drugs, 2008.

My Office is giving its full support to this project. A number of my most senior staff with extensive experience in prosecuting rape cases have been interviewed. The newly established Prosecution Policy Unit have taken responsibility for the tracking of the sequentially reported rape cases reported to the Gardaí which result in files being submitted to the Office for consideration. We hope to have completed our contribution to this project by early Autumn.

Again, as with the NUI Galway project, we hope to gain a greater insight into the factors influencing attrition over which we have a degree of control. Moreover, in an area virtually devoid of authoritative, empirically supported, culturally specific research, we are delighted to contribute our (albeit already very stretched) resources in the pursuit of a greater understanding of this complex area.

My Office is very pleased to co-operate with this follow-on comparative rape attrition study not least because of the opportunity it affords to correct the statistical information provided to the researchers compiling the previous study the results of which were published as: Rape: Still a Forgotten Issue⁴, The following 'country data' appears in that publication and its source is attributed to the Department of Justice, Equality and Law Reform:

'Reporting [of rape in Ireland] is relatively stable from 1977-1987, and then begins a more rapid increase, with a couple of single year falls, which are recovered in the subsequent year. The numbers are relatively small, however, compared to many other countries, partly to do with the population of Ireland. There has been a fall in the rate of prosecution overall, with variation year on year, from two-thirds in the 1970s to an average of a third in 1998-2000. What is disturbing about the Irish conviction rates is the fluctuation year on year and the extremely low rate of 1-2 per cent from 1993-2000. The overall trends are that whilst prosecutions have risen alongside reporting, convictions have fallen in both percentage and absolute terms. Ireland has the lowest conviction rate among countries providing data.'

Despite the considerable lapse of time since this publication I believe it is important to explain that having made enquiries from the researcher of that study that the source of the statistics supplied was the Garda Annual Report's figures. These figures tracked the outcome of proceedings but only within the year in which the complaint is made. No attempt was made to track the case further at the end of that period. Accordingly, given the length of time rape proceedings take to conclude in our jurisdiction, a measure of 'proceedings and convictions' of a year's reports of rape cases could not be measured accurately within examination of that same year. Indeed, one would not expect more than a tiny proportion of rape cases to be prosecuted to a final conclusion within the calendar year in which the complaint was made.

⁴ Prof. Liz Kelly & Linda Regan, 2003.

It is very important that I highlight the erroneous calculation of a conviction rate of 1 - 2%, not least because of its potential disincentive to a complainant considering reporting a crime we know to be significantly under-reported.

I would hope that this new research will correct the entirely unsatisfactory statistics all too frequently quoted in the media and in other research giving a distorted, inaccurate and unhelpful picture of our record on rape proceedings/convictions in this jurisdiction. Whilst it must be acknowledged that our jurisdiction is not without its problems in relation to rape cases, our situation is broadly similar to that in neighbouring common law jurisdictions. Whilst no empirical research, that I am aware of, has calculated the rate of conviction I believe that a reliable estimation of such a rate is likely to fall to in or around 7%, which while low, is comparable to our common law neighbours and is nowhere nearly as bad as the erroneous and frequently reported figure of 1%. Indeed in terms of percentages of proceedings resulting in convictions it seems likely we have a significantly higher conviction rate than England and Wales.

3. Developments in Practice at Sentence Hearings

It is no longer true that there is no information available concerning the general pattern of sentences imposed for the crime of rape.⁵ That said, I will begin by referring to a manslaughter case. The case of *The People (DPP) v Kelly*⁶, set out the manner in which a trial judge should approach sentencing by establishing where on the scale of possible severity of sentence a case lay and then adjusting the actual sentence to take account of relevant aggravating and mitigating factors. In the more recent Central Criminal Court case of *The People (DPP) v Drought*⁷ Charleton J. analyzed a substantial number of sentences for rape cases. He undertook a lengthy survey of sentences imposed in rape cases over the previous several years and usefully categorised the cases in question by the leniency or severity of the sentences imposed. Also, in the last few years the Court of Criminal Appeal has been more active in setting out general principles in sentencing, which is a welcome development.

Of course, the approach in *Kelly* and in *Drought*, although very useful, has some limitations. *Kelly* in particular, apart from setting out a general approach, is principally a descriptive exercise. It lacks the detailed analysis of *Drought* and gives little guidance as to what appropriate sentences ought to be.

A recent practice development that I have instigated now means that the prosecution offer a view as to the 'seriousness' of a particular rape or manslaughter. The initial impetus behind this development was Mr. Justice Carney's request that instructions be sought from me as to where a particular case of rape or manslaughter was on a scale of gravity, whether a suspended

⁵ The absence of statistical data available to the Supreme Court in *People (DPP) v. Tiernan* [1988] IR 250 was one of the reasons why the Court refused to offer guidelines for sentencing in rape cases.

⁶ [2005] 1 I.L.R.M. 19.

⁷ Unreported, Central Criminal Court, May 4, 2007.

sentence “was on or not” and what other options were available. The background to this request was Mr. Justice Carney’s view that it was “totally unacceptable” that I should appeal as unduly lenient a sentence in the Court of Criminal Appeal without first offering a view on sentencing in the trial court. The difficulty from my point of view, however, was what I regarded as a then over-restrictive interpretation by some members of the Bar of its Code of Conduct which meant that some barristers were reluctant to say anything about sentencing at all. Thankfully that overly restrictive interpretation appears to be in retreat.

This development has in effect led to a practice in the Central Criminal Court similar to that recommended in the Final Report of the Balance in the Criminal Law Review Group.⁸ It is now common for the prosecution to indicate through counsel whether the offence is seen as falling into the upper, the middle or the lower end of the scale, but without putting forward an actual figure.

On the whole, I think this development is a healthy one which should lead to a greater consistency of approach and perhaps a reduction in the number of appeals, although giving instructions concerning submissions on sentence does place a greater burden on the Office’s resources. In adopting this approach it is, however, important not to lose sight of the principle that the selection of punishment is solely for the judge, not the prosecutor, but that it is proper for the prosecutor to draw attention to relevant precedents, including precedents relating to the question of what is an appropriate sentence. At the end of the day what my counsel says is only a submission. It is the judge’s duty to impose the sentence he or she thinks proper, and not to accept a submission from the prosecution he or she disagrees with.

When the ongoing Irish Sentencing Information System (ISIS) project under the chairmanship of Ms. Justice Susan Denham is completed it will represent a further advance in achieving consistency and fairness in sentencing. This project will undertake extensive research into sentencing patterns and statistics so that a comprehensive sentencing database system can be established. If feasible the judiciary may then have access to this when deciding on an appropriate sentence in each individual case.

4. Need for Codification of Sexual Offences

The arguments in favour of codification appear compelling when one considers the sheer volume of relevant legislation covering sexual offences in our jurisdiction.⁹

⁸ Published 15th March 2007

⁹ In reverse order: Criminal Law (Sexual Offences) (Amendment) Act 2007, Criminal Law (Sexual Offences) Act 2006, Sex Offenders Act 2001, Child Trafficking and Pornography Act 1998, Criminal Law (Incest Proceedings) Act 1995, Sexual Offences (Jurisdiction) Act 1996, Criminal Law (Sexual Offences) Act 1993, Criminal Law (Rape) (Amendment) Act 1990, Criminal Law (Rape) Act 1981, Criminal Law Amendment Act 1935, Incest Act 1908, Offences Against the Person Act 1861.

The main advantages which would flow from the codification process are of course accessibility and comprehensibility. These advantages are important in relation to all our law, but perhaps particularly relevant in relation to sexual offences, an area of law which universally impinges on such intimate and private aspects of our humanity.

It is essential that the rules relating to this crucial area of law are clear and easily understood (and not just by lawyers). Before enactment they should be subjected to a careful process of debate and consultation. They should be the product of a careful process of distillation. They should be cleansed of populist, tabloid responses to perceived social ills. They should be presented in a cogent and coherent text. They should be regularly updated. They should be informed by solid, empirical research valid in the Irish context, and enforce and affirm the agreed values of our society.

Jeremy Bentham argued fervently in favour of a criminal code, and stated that its purpose was:

"to set forth the whole of the penal law with such simplicity and clarity that the average citizen would be able to understand it and the average judge would be unable not to."

The English Law Commission put it less pithily (though perhaps with more deference to the judges) when it said in 1989 in the context of its proposals for a Criminal Code for England and Wales:

".....since the criminal law is arguably the most direct expression of the relationship between the State and its citizens, it is right as a matter of constitutional principle that the relationship should be clearly stated in a criminal code the terms of which have been deliberated upon by a democratically elected legislature."

We are indeed a long way behind many other jurisdictions (including India, Canada, and the U.S) in undertaking the enormous task of codification. Indeed many jurisdictions are undertaking re-codification projects. However, we have finally commenced the process. A lawyer from our Directing Division is representing the Office on the Criminal Law Advisory Committee which was established by the former Minister for Justice, Equality & Law Reform, Mr. Michael McDowell, on a statutory basis under Part 14 of the Criminal Justice Act 2006. The function of the Committee is to oversee the development of a programme for the codification of the criminal law.

The codification of our law on sexual offences will offer unique contexts for debates on such difficult matters as whether we ought objectively or subjectively to analyse consent, the appropriateness of retaining the current ages of consent and the measures necessary to protect the vulnerable from sexual exploitation whilst endeavouring to leave outside the scope of criminal culpability non-exploitative sexual exploration.