

***Speech given by James Hamilton, Director of Public Prosecutions,
at the 3rd Annual Thompson Round Hall Criminal Law Conference
Law Library, Distillery Building - Saturday 12 April 2008***

'The Prosecutor's Role at Sentencing Hearings'

Introduction

My purpose in this brief paper is to examine the role of prosecutors at sentencing hearings and in relation to “undue leniency” reviews. In particular, I propose to deal with the following themes: the roles of the judge and the prosecutor in relation to sentencing, the Guidelines for Prosecutors and the Bar's Code of Conduct, the issue of advocacy in relation to sentencing and the extent to which the prosecutor may properly express an opinion to the court concerning the appropriate sentence, and recent developments in the practice in the Central Criminal Court in relation to sentence hearings.

The Traditional Role of the Prosecutor

The traditional role of the prosecutor at the sentencing hearing was limited to drawing the attention of the trial judge to legal precedents and the prosecutor did not seek to indicate to the trial judge an appropriate sentence in individual cases. This position was justified by reference to the fact that sentencing is an exclusively judicial function. However, in *People (DPP) v. Dennigan*¹ it was held that both the prosecution and defence are under a professional duty to draw the court's attention to any common law authorities or statutory

¹ (1989) 3 Frewen 253

provisions relevant to sentencing in the particular case. More recently the Court of Criminal Appeal in *People (DPP) v. Botha*² reiterated this duty of the prosecution to assist the sentencing judge with the provision of information on relevant precedents.

To go further than assisting the court in this manner would, it was felt, offend the long established principle that there must be a clear boundary between the executive and judicial roles in the sentencing process. A key principle was stated by the Supreme Court in *Deaton v. Attorney General and the Revenue Commissioners*³ where it was held that where there is a choice of punishment to be made, the choice is solely for the judiciary and not the executive. Ó Dálaigh C.J. stated:

“The individual citizen needs the safeguard of the Courts in the assessment of punishment as much as on his trial for the offence. The degree of punishment which a particular citizen is to undergo for an offence is a matter vitally affecting his liberty; and it is inconceivable to my mind that a Constitution which is broadly based on the doctrine of the separation of powers—and in this the Constitution of Saorstát Éireann and the Constitution of Ireland are at one—could have intended to place in the hands of the Executive the power to select the punishment to be undergone by citizens. It would not be too strong to characterise such a system of government as one of arbitrary power.”⁴

² [2004] 2 IR 375

³ [1963] I.R. 170

⁴ [1963] I.R. 170 at 183

Of late the courts have been increasingly open to expanding the traditional role of the prosecutor at the sentencing stage. There have been many judgments criticising the traditional limited role of the prosecutor at this stage of trial. The Office of the DPP has endeavoured to take on board these criticisms and has published Guidelines for Prosecutors which *inter alia* provide guidance to prosecutors at the sentencing phase of a trial.

Guidelines for Prosecutors

The Guidelines for Prosecutors were first published by the Office of the DPP in 2001 and are continuously revised reflecting legislative and procedural changes in the criminal justice system. Many of the guidelines regarding the prosecutor's role at the sentencing hearing have been formulated bearing in mind the recent criticisms. The Guidelines for Prosecutors outline the duties of the prosecutor in the sentencing process:

“When appearing at a hearing in relation to sentence the prosecutor has the following duties:

- (a) to ensure that the court has before it all available evidence relevant to sentencing, whether or not that evidence is favourable to an accused person;
- (b) in particular, to ensure that the court has before it all available relevant evidence and appropriate submissions concerning the impact of the offence on its victim, in accordance with the provisions of section 5 of the Criminal Justice Act, 1993, in respect of offences to which that provision applies;

- (c) in addition, to ensure that the court has before it all relevant evidence available to the prosecution concerning the accused's circumstances, background, history, and previous convictions, if any, as well as any available evidence relevant to the circumstances in which the offence was committed which is likely to assist the court in determining the appropriate sentence;
- (d) to ensure that the court is aware of the range of sentencing options available to it;
- (e) to refer the court to any relevant authority or legislation that may assist in determining the appropriate sentence;
- (f) to assist the court to avoid making any appealable error, and to draw the court's attention to any error of fact or law which the court may make when passing sentence.”⁵

In addition, the prosecutor has a duty to deal with any questions of forfeiture, compensation or restitution which may arise.⁶ Where there is a significant difference between the factual basis on which an accused pleads guilty and the case contended for by the prosecution, the prosecutor is required to adopt an adversarial role to seek to establish the facts upon which the court should base its sentence.⁷

⁵ Guidelines for Prosecutors (revised October 2007) para 8.14

⁶ *Ibid* para 8.15

⁷ *Ibid* para 8.16

The prosecutor is also required to challenge any matters advanced by the defence in mitigation which “the prosecution can prove to be wrong, and which if accepted are likely to lead the court to proceed on a wrong basis.”⁸ The correct procedure in those circumstances is firstly to inform the defence that the matter advanced in mitigation is not accepted. If the defence persists it is the prosecutor’s duty to invite the court to require the defence to prove the disputed matter and if necessary to hear prosecution evidence in rebuttal. Co-operation by convicted persons with law enforcement agencies is to be appropriately acknowledged or, as the case may be, disputed at the time of sentencing.

With regard to “matters in mitigation of which the prosecution has not been given prior notice or the truth of which the prosecution is not in a position to judge” the prosecutor is to “invite the court to insist on the matters in question being properly proved if the court is to take them into account in mitigation.”⁹

The two preceding Guidelines were drafted bearing in mind the following judgments: in *People (DPP) v. George Redmond*¹⁰, a review of sentence on the grounds of undue leniency, the Court of Criminal Appeal would not allow the prosecution to raise an issue concerning the assertion by the defence at the sentencing hearing that the accused was now destitute when the prosecution had failed to challenge this assertion at the sentence hearing. In

⁸ *Ibid* para 8.17

⁹ *Ibid* para 8.18

¹⁰ [2001] 3 IR 390

*People (DPP) v Kevin Keegan*¹¹ Hardiman J. in the Court of Criminal Appeal criticised the prosecution for failing to test “the very informal manner” in which evidence was given by the defence as to the defendant’s drug problem at the sentencing stage. He stated:

“... Does the defendant have a drug problem or does he not? The evidence for this was extremely sparse but it was taken without objection. If appeals are to be conducted or applications for a review of this sort are to be conducted on a proper basis, it appears to us that some greater formality, both from the prosecution and the defence in the presentation of evidence in relation to sentence is necessary. There is no doubt at the moment that Gardaí give evidence of opinion on general matters which if the strict rules of evidence were to be applied would not pass muster and there is certainly no doubt that the defence, by handing in letters of various sorts and getting people to say things which they understand to be so but can’t really prove themselves, depart very significantly from these rules. And, as I say, that must enure against the party bearing the onus of proof on the hearing of an appeal. For instance if proof is required that the defendant is suffering from a drug problem, that proof is defective here, but it was given without objection and it was accepted to the extent that it was in the piece of the transcript I have just quoted, by the learned trial judge. It is very difficult now to turn around and say (when no objection was taken at the time) that the judge erred in principle in taking that into account. It seems to us that these appeals, these applications for review raise serious questions of a procedural nature which have yet to be fully thought through.”¹²

¹¹ Unreported, Court of Criminal Appeal, 28th April 2003

¹² At pp. 6-7

The Guidelines also deal with the situation where the court seeks the views of the Director as to whether a custodial sentence is required in a particular case. In such circumstances the prosecutor should not express his or her own views in relation to the matter but must seek instructions from the Director.¹³ The prosecutor must make it clear to the court that in order to give instructions in such a case the Director would require sight of all the relevant material before the court, including all reports and transcripts of relevant evidence, and adequate time to give a proper views. This provision aims to give effect to the decision of the Court of Criminal Appeal in *People v. Patrick Furlong*¹⁴ where Keane C.J., speaking on behalf of the Court, held that it was reasonable to expect the Director, on request, to give such views.

The Code of Conduct for the Bar and the Issue of Advocacy

From the above outlined Guidelines one might infer that the prosecutor is to a degree extending the adversarial system to the sentencing stage where, for example, the prosecutor may refer authorities to the trial judge, this practice not being conditional on a request from the court to do so. Arguably the provision of a selection of ‘relevant’ authorities to the court could amount to a form of advocacy when there is no agreement as to what the relevant authorities are. The Office of the DPP, however, emphasises in its Guidelines

¹³ Guidelines for Prosecutors para 8.21

¹⁴ Unreported, Court of Criminal Appeal, 3rd July 2000

that the prosecutor must not seek to persuade the court to impose a particular sentence:

“The prosecutor must not seek to persuade the court to impose an improper sentence nor should a sentence of a particular magnitude be advocated. However, the prosecutor may, at the request of the court, draw the court’s attention to any relevant precedent.”¹⁵

The Code of Conduct for the Bar also deals with the duty of prosecuting counsel at the sentencing phase of a trial. It provides as follows:

“Prosecuting barristers should not attempt by advocacy to influence the court in regard to sentence. If, however, an accused person is unrepresented it is proper for a prosecuting barrister to inform the court of any mitigating circumstances as to which they are instructed.”¹⁶

The Guidelines for Prosecutors are intended to supplement rather than replace the professional codes governing the conduct of counsel acting on behalf of the DPP.¹⁷ The question of whether there is a conflict between the Bar Code of Conduct and the DPP’s Guidelines would seem to depend on what is meant by an “attempt by advocacy to influence the court in regard to sentence”¹⁸. If there was ever any serious argument that putting relevant

¹⁵ Guidelines for Prosecutors para 8.20

¹⁶ Rule 10.23, Code of Conduct for the Bar of Ireland

¹⁷ Guidelines for Prosecutors para 3.1

¹⁸ For analysis of possible conflict between the two documents see the Final Report of the Balance in the Criminal Law Review Group

evidence before the court, objecting to the admission of inadmissible evidence or citing relevant precedent to the court fell within these prohibited categories that argument is surely unsustainable in the light of the decisions in *Keegan* and *Botha*.¹⁹ The Code of Conduct of the Bar must be interpreted in the light of these judgments. In addressing this possible anomaly, I understand that the Bar Council is currently reviewing this section of its Code of Conduct. Meanwhile, at least in the Central Criminal Court, the practice has moved on. Counsel for the prosecution in that court now regularly refer to relevant authorities and on occasion identify aggravating and mitigating factors, a development I shall refer to later in this paper.

Prosecution Reviews of Sentence

An area of sentencing which does not preclude advocacy on the part of the prosecutor is the prosecutorial review of sentence on the grounds of undue leniency. Under the Criminal Justice Act, 1993, the DPP may seek a review of sentence imposed on conviction on indictment. The Court of Criminal Appeal, having considered the application by the DPP, may either quash the sentence and impose such sentence as it considers appropriate, as long as the substituted sentence is one that could have been imposed by the trial court, or may refuse the application. This mechanism for a prosecutorial review of sentence on grounds of undue leniency reflects the approach of other common law jurisdictions. The Criminal Justice Act 1988 (ss. 35 & 36)

¹⁹ Unreported, Court of Criminal Appeal, 28th April 2003 & [2004] 2 IR 375

introduced the procedure in England and Wales.²⁰ In Scotland provision is made in the Prisoners and Criminal Proceedings (Scotland) Act 1993 and in the Criminal Procedure (Scotland) Act 1995 for a prosecution appeal against sentence on a point of law.

As regards principles governing a sentence review in this jurisdiction, the Court of Criminal Appeal has held that the onus lies on the Director to show that the sentence is not merely lenient but unduly so. In such a review, great weight is attached to the trial judge's reasons for imposing the sentence. Since the finding must be one of undue leniency, nothing but a substantial departure from what would be regarded as the appropriate sentence would justify the intervention of the court in order to increase the sentence: *People (DPP) v. Byrne*.²¹ There must have been an error of principle by the sentencing court to justify altering the sentence: *People (DPP) v. Redmond*.²² The Court of Criminal Appeal will not, therefore, increase a sentence because of a mere disagreement with its level or because, had the court been in the position of the trial judge, it would have imposed a different sentence. It is necessary that there be a substantial departure from the accepted range of appropriate sentences for the offence committed in the circumstances of the case, including the specific elements relating to the offender, or an error of principle in the way in which the trial judge approached sentencing. In order to ensure the effective and consistent application of the power to seek a sentence review the DPP's Office must be made fully aware of the reasons for

²⁰ In England and Wales prosecution appeals are taken by the Attorney General.

²¹ [1995] 1 I.L.R.M. 279

²² [2001] 3 I.R. 390

the imposition of the sentence at issue by the trial judge as well as the evidence that was before the court at the sentencing hearing.²³ In practice, for this purpose I have to rely on reports from my own solicitor and counsel. It is rarely possible to obtain a transcript within the time allowed to seek a review even though there are cases where knowledge of the precise reasoning of the sentencing judge might have been of assistance. This can in particular arise where a judge has formed an opinion on the likelihood of an offender re-offending based on probation reports or other expert assessments.

Guidance from the Courts

There has been some criticism that prosecution reviews of lenient sentences have been used more frequently than initially envisaged. Having regard to the relatively high proportion of reviews resulting in an increase in sentence – 30 out of 39 in 2007. I do not accept that that criticism is well-founded. The traditional antipathy of the higher courts to anything in the nature of a “tariff”, which could in turn inform the manner in which trial judges exercise the wide discretion granted to them, has in my opinion contributed to a lack of consistency, predictability and clarity in some cases. I do not, however, wish to overstate this; the number of undue leniency reviews in the average year is about 2% of all indictable cases, which indicates that the DPP’s Office does not consider the other 98% to fall into the unduly lenient category.

²³ The Guidelines for Prosecutors set out guidelines for sentence reviews at paras 11.5 – 11.9

In *People (DPP) v Tiernan*²⁴ the Supreme Court rejected the notion of a standardisation or tariff of penalty for cases in the following terms:

“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.”²⁵

From this it appears that two reasons were cited for the Court’s refusal to lay down any standardisation or tariff – first, the lack of data before the court on patterns of sentencing and secondly a reluctance to interfere with the discretion of trial judges.

It is no longer true that there is no information available concerning the general pattern of sentences imposed for the crime of rape. The cases of *The People (DPP) v Kelly*²⁶ and *The People (DPP) v Drought*²⁷ have analysed a substantial number of sentences for, respectively, manslaughter and rape. In

²⁴ [1988] 1 I.R. 250

²⁵ [1988] 1 I.R. 250 at 254

²⁶ [2005] 1 ILRM 19

²⁷ Unreported, Central Criminal Court, 4th May 2007

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. In a series of cases culminating in the *People (DPP) v. Kelly*²⁸ the method of arriving at a proportionate sentence was examined. A judge should begin by assessing the gravity of the offence itself and locating it on the scale of the available penalty. The usual formula is to consider whether the starting point should be at the low, middle or high end of the scale. The court must then proceed to decide if further credit is to be given for any mitigating factors and if any such factors are present, a further downward departure will be necessary. Application of this two-stage process requires the identification of a starting point for a sentence by reference to a “scale” before then taking into account the mitigating and aggravating factors in the individual case, notwithstanding the dicta in *Tiernan* disapproving the idea of tariffs.

The case of *People (DPP) v. Loving*²⁹ dealt with sentencing for possession of child pornography. On this issue the Court of Criminal Appeal stated:

“An examination of the cases shows that the courts have frequently imposed suspended sentences or fines in cases where much more child pornography was involved and where credit cards had been used. Where the offence is at the lower levels of seriousness, there is no suggestion of sharing or distributing images, the accused is cooperative and it is a first offence, the option of a suspended sentence should at least be considered. Finally, it

²⁸ [2005] 1 ILRM 19

²⁹ Unreported, Court of Criminal Appeal, 10th March 2006

should be recalled that the applicant will be placed on the register of sex offenders.”

In *People (DPP) v. Drought*³⁰, before imposing a sentence in a rape case in the Central Criminal Court, Charleton J. conducted an extensive examination of all previous reported and unreported decisions of the Superior Courts. He stated that:

“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.”³¹

Of course, the approach in *Kelly* and in *Drought*, although very useful, has some limitations. *Kelly* in particular is principally a descriptive exercise in analysing what courts have actually done in manslaughter cases rather than prescribing what appropriate sentences ought to be.

These and other helpful judgments, by elucidating sentencing principles, represent in my opinion a major advance towards achieving consistency and fairness in sentencing. 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. This project will undertake extensive research into sentencing patterns and statistics so that a comprehensive sentencing database system can be established. If feasible

³⁰ Unreported, Central Criminal Court, 4th May 2007

³¹ At p. 4 of the judgment

the judiciary may then have access to this when deciding on an appropriate sentence in each individual case.

Developments in Practice at Sentence Hearings

One of the effects of the undue leniency jurisdiction has been to put pressure on the prosecution to be more forthcoming in indicating its view on sentencing. In particular, Mr. Justice Carney on a number of occasions both on and off the Bench was critical of the prosecutors' tendency to say little or nothing at the sentence stage itself about what the appropriate sentence should be, and then to seek a review of the sentence and to be critical of the judge's approach to sentencing at the appeal stage. I have long felt that there was considerable force in such criticisms. The difficulty from my point of view, however, was that what I regarded as an over-restrictive interpretation by some members of the Bar of its Code of Conduct meant that some barristers were reluctant to say anything about sentencing at all.

The increase in the number of judgments in which the Court of Criminal Appeal has given real guidance on the principles to be applied in sentencing has, however, led in recent times to the development of a practice in the Central Criminal Court whereby it has become common for counsel for the prosecution to be asked where in the Director's opinion the offence should be located in the overall scale of gravity, in accordance with the methodology suggested in *Kelly*. In anticipation of such requests I have instituted a practice in Central Criminal Court of seeking the advice of counsel in advance

of sentence hearings and giving them instructions on how to respond to such requests. 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. 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. *Kelly* or *Drought* have in many cases proved to be of particular assistance in providing authority for that assessment of gravity. Almost always also the judge will indicate prior to sentencing what he or she sees as aggravating or mitigating factors, giving counsel for both sides an opportunity to make submissions on the point should it prove necessary to do so.

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.

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12 April 2008