# DEVELOPMENTS IN IRISH SENTENCING

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## Introduction

On the 18th March, 2014, the Court of Criminal Appeal (CCA) gave judgment in three sentencing appeals. In these "interconnected"[1] judgments (delivered by Clarke J.), the CCA recommended a new approach to sentencing with the aim of achieving a greater level of consistency, while also giving proper weight to the particular circumstances of the accused and the facts of the particular case.[2] The Court detailed the role and responsibilities of counsel for the prosecution at the sentencing stage of a criminal trial, and the process by which the sentencing judge should arrive at a sentence. In particular, in *The People (D.P.P.) v. Z* the Court addressed the question of the assistance which a sentencing judge was entitled to receive from counsel for the prosecution at the sentencing stage of a criminal trial.
In a supplemental judgment in The People (D.P.P.) v. Fitzgibbon delivered on 17th July, 2014, the CCA acceded to the request of the Director of Public Prosecutions that the Court would, in the context of its judgment, define the precise parameters of the obligation on counsel for the prosecution to assist at a sentencing hearing.[3] Further clarification has since been provided by the newly constituted Court of Appeal (Finlay Geoghegan J.) in *The People (D.P.P.) v. Hussain*.[4]

In light of these judgments, it is necessary to reflect firstly on the development of sentencing principles in Ireland and secondly to examine the most important aspects of the final pronouncements of the CCA in relation to sentencing.

## Development of Sentencing Practices in Ireland

The People (D.P.P.) v. Tiernan

In *The People (D.P.P.) v. Ryan*, the CCA (Clarke J.) addressed the judgment of Supreme Court in *The People (D.P.P.) v. Tiernan*,[5] which had at one time been understood to prohibit Irish judges from establishing sentencing guidelines in the course of giving judgment. The applicant in Tiernan had been sentenced to 21 years penal servitude for his participation in a gang rape. The sentence was upheld by the CCA. The case was subsequently referred to the Supreme Court under section 29 of the Courts of Justice Act 1924, the Attorney General having certified that the case involved a point of law of exceptional public importance. It has been acknowledged that the Supreme Court was being asked to consider writing a "guideline judgment" which would offer guidance to the judiciary when sentencing for rape.[6] This style of

[1] *The People (D.P.P.) v. Fitzgibbon* [2014] 2 I.L.R.M. 116.
[2] *The People (D.P.P.) v. Z* [2014] 1 I.R. 613*; The People (D.P.P.) v. Ryan* [2014] 2 I.L.R.M. 98; *The People (D.P.P.) v. Fitzgibbon* [2014] 2 I.L.R.M. 116.
[3] *The People (D.P.P.) v. Fitzgibbon* (No.2) [2014] 1 I.R. 627.
[4] *D.P.P. v. Hussain* [2015] IECA 22 (Unreported, Court of Appeal, 16th February, 2015).
[5] *The People (D.P.P.) v. Tiernan* [1988] I.R. 250.
[6] O'Malley, *Sentencing Law and Practice* (Dublin: 2006), at 1.23.

judgment was popular in the Court of Appeal of England and Wales at the time, the most notable example being *R. v. Billam*.[7] In *R. v. Billam* the Lord Chief Justice provided detailed guidelines for sentencing persons convicted of rape. The Court considered the starting point for rape sentences in contested cases and then addressed aggravating factors that should be considered in such cases in that jurisdiction.

Having considered the judgment in *Billam* and a similar judgment from the Court of Appeal of New Zealand (*R. v. Puru*[8]), the Supreme Court in *Tiernan* concluded that those courts were dealing with cases where firstly, a number of different decisions were brought before them for review or consideration and secondly, where evidence was submitted of overall patterns or tendencies in the imposition of sentences within their jurisdiction for rape. The Supreme Court (Finlay C.J.) observed that the specific purpose of this form of multiple appeal in *R. v. Billam* was to seek "a broad statement on policy, almost amounting to a range or tariff of appropriate sentences for rape of different kinds". Finlay C.J. ultimately rejected the adoption of such an approach in this jurisdiction.[9]

One of the principal reasons that the Supreme Court rejected the possibility of giving a guideline-type judgment was the absence of reliable sentencing statistics or information "concerning any general pattern of sentences imposed for the crime of rape within this jurisdiction" before the Court. Conversely in *R. v. Billam*, evidence of the overall patterns or tendencies in sentencing for rape had been produced in the Court of Appeal. Secondly, the Supreme Court was concerned about "standardising" penalties for offences in criminal cases where a variety of different aggravating and mitigating factors which may be present should quite appropriately lead to different sentences being imposed. Despite this, the Supreme Court in *Tiernan* did not seem to object to the possibility of courts giving general guidance as to the principles that should be imposed in respect of certain offences, and indeed articulated valuable sentencing principles in relation to the offence of rape that have since assisted judges in similar cases.

Sentencing Precedents

Since the judgment in *Tiernan*, the practice of guardedly gathering information from diverse sources has been approved by the CCA in *The People (D.P.P.) v. Adam Keane*.[10] In that judgment, Murray C.J., in approving the decision of the Central Criminal Court (Charleton J.) in *The People (D.P.P.) v. W.D.*,[11] endorsed the careful review of previous sentencing decisions for the purpose of determining the factors to be considered in sentencing a person for committing a particular offence. Murray J. commented that the reporting of sentencing decisions in the media did provide some "useful indicators for the purpose of the broad exercise" involved and while the judgment "did not purport to set standard sentences or tariffs" it was a "valuable reference point in ascertaining the wide variety of factors … which can influence sentencing in rape cases."[12]

[7] *R. v. Billam* [1986] 1 All E.R. 985. It is broadly acknowledged that this practice commenced with the judgment of the Court of Appeal in *R v. Willis* (1974) 60 Cr. App. 146- O'Malley, *Sentencing Law and Practice* (Dublin: 2006), at 1.23. See also, O'Malley, "The Role of the Prosecution at Sentencing in the Aftermath of People (D.P.P.) v. Z (2014)", Director of Public Prosecutions Prosecutors' Conference 2014.
[8] *R. v. Puru* [1984] 2 N.Z.L.R. 248.
[9] *The People (D.P.P.) v. Tiernan* [1988] I.R. 250 at 254.
[10] *The People (D.P.P.) v. Keane* [2008] 3 I.R. 177.
[11] *The People (D.P.P.) v. W.D* [2008] 1 I.R.308.
[12] *The People (D.P.P.) v. Keane* [2008] 3 I.R. 177 at 199.

The Central Criminal Court judgment in *W.D.*[13] contained a review of rape sentencing decisions which had been a collaborative effort between Charleton J. and Aoife Marie Farrelly, who then worked for the Judicial Researchers' Office. In that decision Charleton J. examined and classified dozens of rape sentences in an attempt to establish the circumstances that might guide a mild response, an ordinary response, an exceptional response and, finally, a sentence tending towards life imprisonment.

As the decisions of the CCA demonstrate, the gathering of information is crucial to any exercise in rationalising sentencing into patterns. Judge David Riordan's study on sentencing in the District Court was pioneering in this respect. As early as 2005, Judge Riordan, then a judge of the District Court, surveyed the typical penalties attached to a number of continually recurring charges in the District Court. Judge Riordan's subsequent completion of his doctorate on the use of Community Service Orders and suspended sentences in 2009 was an outstanding contribution to the area of sentencing in Ireland.

However in recent years it has become clear that additional research is needed in this area. In early 2012 Chief Justice Susan Denham asked Mr. Justice Peter Charleton, then a judge of the High Court, to take on the role of supervising the Judicial Researchers' Office. One of the priorities of the Chief Justice was the gathering of information as to sentencing in serious cases (similar to the exercise undertaken for *The People (D.P.P.) v. W.D.*) in order to explore the patterns that precedent had laid down for other offences. It was also necessary to look at patterns that had emerged in sentencing for the offence of rape since that judgment. These tasks were taken up by the researchers under the supervision of Mr. Justice Charleton. The Chief Justice was also intent that the Irish Sentencing Information System (formerly known as ISIS) should be revived and in early 2013 three interns were recruited for this purpose.

Some judges, Sheehan J. in particular, gave written sentencing decisions which were to make the task of the researchers significantly easier.[14] Until recently, the completion of this research relied on the availability of court transcripts and newspaper reports, or a detailed survey in the case of the pioneering study by Judge Riordan. Limited information was also available on the Irish Sentencing website. Where no written sentencing decision was recorded, researchers utilised the "Digital Audio Recording" system, colloquially known as the "DAR", which allows judges and researchers to listen to sentencing hearings.[15]

A number of sentencing studies have been conducted by the Judicial Researchers' Office and are available to judges on the judicial intranet, which is a private internal information network containing years of research. The following sentencing analyses have been uploaded to the intranet since its launch in late 2012:-

rape
manslaughter
robbery and tiger kidnapping
dangerous driving

[13] *The People (D.P.P.) v. W.D* [2008] 1 I.R.308.
[14] See further, *People (D.P.P.) v. Beatty* [2012] IECCC 2 (Unreported, Central Criminal Court, Sheehan J., 11th June, 2012); *People (D.P.P.) v. R.T.* [2012] IECCC1 (Unreported, Central Criminal Court, Sheehan J., 2nd March, 2012); *People (D.P.P.) v. C.F.* [2011] IECCC 5 (Unreported, Central Criminal Court, Sheehan J., 28th October, 2011); *People (D.P.P.) v. Berry* [2011] IECCC 4 (Unreported, Central Criminal Court, Sheehan J., 21st October, 2011).
[15] Digital Audio Recording was first used in 2008 under a pilot project, but it was some time before the system was implemented in the majority of courts.

possession or importation of drugs for sale or supply
sexual assault
child pornography

A number of these reports have been made publicly available through the Irish Sentencing Information System website, namely Rape Sentencing Analysis: The WD Case & Beyond;[16] Analysis of Manslaughter Sentencing 2007-2012;[17] Analysis of Sentencing in Robbery;[18] and Analysis of Sentencing for Possession or Importation of Drugs for Sale or Supply.[19] The Dangerous Driving Sentencing Analysis is in the process of being reviewed for the Irish Sentencing website. In April 2013, Mr Justice Charleton delivered the annual Martin Tansey Memorial lecture entitled "Throw Away the Key: Public and Judicial Approaches to Sentencing - Towards Reconciliation" in which he discussed the progress of the sentencing study by the Judicial Researchers' Office and the usefulness of sentencing analyses.[20]

The child pornography and the sexual assault sentencing projects are accessible to the judiciary alone. The researchers who conducted these analyses found that a consistent pattern could not be found in sentencing decisions for these offences, despite guidance provided in judgments of higher courts. Explicit guidance on the proper approach to child pornography sentencing was provided by the CCA in the case of *The People (D.P.P.) v. Carl Loving*.[21] However, this and other judgments concerning sentencing practices had not been routinely transmitted to every Circuit Court and District Court judge prior to the completion of the sentencing analyses by the judicial researchers. There is no doubt as to how useful the guidance provided by Fennelly J. in the Loving judgment actually is. Fennelly J. urged that the sentencing judge should look at a variety of factors, including basic mitigating factors; the individual offence; the circumstances and the duration of the offences; and whether the images were shared or distributed by the accused.

There can be no doubt that the observance of the principles outlined in detail in the Loving judgment would introduce consistency into sentencing persons convicted of child pornography offences. This was noted by O'Donnell J. in *The People (D.P.P.) v. O'B*, a case concerning sentencing in respect of child pornography offences before the CCA.[22] However, the principles elucidated in *Loving* can only have an effect on sentencing if the judgment is consistently cited to judges and if counsel for the prosecution offer guidance as to where the circumstances of the offence of which the accused has been found guilty, or pleaded guilty, fit within that scheme. O'Donnell J. also commented that the availability of "valuable" analyses available on the Irish Sentencing website "is an essential step in understanding what range of sentence is being applied in respect of some offences, and identifying or allowing developments in the approach to sentencing for particular offences".[23] He deduced that this type of information, together with analysis exemplified in Loving and the factors identified in other jurisdictions can provide a useful structure for the analysis of individual offences.

[16] Katharina O Cathaoir, Rape Sentencing Analysis: The WD Case & Beyond.
[17] Michelle Lynch, Analysis of Manslaughter Sentencing 2007-2012.
[18] Laura Butler, Analysis of Sentencing in Robbery.
[19] Kelly Mackey, Analysis of Sentencing for Possession or Importation of Drugs for Sale or Supply.
[20] The Hon. Mr. Justice Peter Charleton and Lisa Scott, "Throw Away the Key: Public and Judicial Approaches to Sentencing - Towards Reconciliation ", [2013] 10 *Irish Probation Law Journal* 7.
[21] [2006] 3 I.R. 355.
[22] *Director of Public Prosecutions v. O'B* (Unreported, Court of Criminal Appeal, 17th December, 2013) at para. 10.
[23] *Ibid.*, at para. 11.

Similarly, the sexual assault sentencing analysis indicated that explicit guidance on sentencing elderly offenders in cases of historic child sexual abuse had been provided by the Central Criminal Court. In *The People (D.P.P.) v. P.H.*,[24] Charleton J. comprehensively reviewed the approach of the Superior Courts to sentencing elderly defendants in cases of child sexual abuse and set out how sentencing may be approached by a court where there has been significant delay. First, the court should look at the circumstances of the offence. Second, the mitigating factors should be noted. After this, lapse of time may or may not be a factor. Evidence of self-rehabilitation over the intervening years should be taken into account and the sentence reduced accordingly. If there was no evidence of self-rehabilitation in the intervening years it would not be appropriate to consider a discount based on the lapse of time.[25]

While the sexual assault sentencing analysis indicated that the weight that should be attributed (or not attributed) to evidence of self-rehabilitation has not been pronounced upon for sexual assault, it concluded that the courts do attach significant weight to the consequential effects of delay, for instance, where a defendant is so elderly that he is now receiving continuous medical care. In cases where the defendant is seriously ill, the courts appear to put substantial weight on illness as a mitigating factor in imposing a suspended sentence. By comparison, the analysis found that there were a number of "considerable delay" cases where the health of the defendant was not in question, and it appeared that such a defendant is more likely to receive a custodial sentence.

## Judgments of the Court of Criminal Appeal

On 18th March, 2014, three judgments were delivered by the CCA which have been lauded as "collectively represent[ing] one of the most important sentencing developments in the history of the state"[26] In *Fitzgibbon and Ryan*, the Court issued guideline-type judgments in respect of assault causing serious harm and firearms offences respectively. In *Z*, the Court focused on the issue of the role of counsel for the prosecution at the sentencing stage, reflecting the greater participation of the prosecution in the sentencing process at appeal level since the enactment of legislation (section 2 of the Criminal Justice Act 1993) which allows the prosecution to appeal a sentence to the Court where the prosecution consider the sentence to be unduly lenient.

## Assistance and the role of the Prosecution

In *The People (D.P.P.) v. Z*,[27] during the course of the sentencing hearing in the Central Criminal Court, a discussion took place between the sentencing judge (Carney J.) and counsel for the prosecution concerning the appropriate approach to sentencing in such a case. Counsel indicated that on the facts, the case lay at "the top end of the range". The trial judge sought further assistance from counsel for the prosecution in relation to the actual range of sentences which might be considered appropriate for a case of this type being one at the top end of the range.[28] Having cited the judgment in *The People (D.P.P.) v. W.D.*,[29] counsel submitted that cases

[24] *People (D.P.P.) v. P.H.*, [2007] IEHC 335, (Unreported, High Court, Charleton J., 15th October 2007), para. 26.
[25] *Ibid*., at 26.
[26] O'Malley, "The Role of the Prosecution at Sentencing in the Aftermath of People (D.P.P.) v. Z (2014)", Director of Public Prosecutions Prosecutors' Conference 2014.
[27] *The People (D.P.P.) v. Z* [2014] 1 I.R. 613.
[28] *Ibid.*, at 2.1-2.2.

at the top end of the range, even where there has been a plea of guilty, permitted either a very lengthy determinate sentence or a life sentence.

The CCA (Clarke J.) held that such an exchange is "entirely appropriate", particularly since the enactment of section 2 of the Criminal Justice Act 1993, which allows the D.P.P. to apply to the CCA to review a sentence where it feels that the sentence was unduly lenient.[30] It has been acknowledged that the Code of Conduct of the Bar Council expressly prohibited counsel from attempting to influence the court with regard to the appropriate sentence in most circumstances.[31] However, the Code has been amended to state (at 10.19) that it is not the duty of prosecuting barristers "to obtain the imposition of the maximum possible penalty" but rather they shall "fairly and impartially lay before the court the evidence which comprises the case for the prosecution and shall assist the court with adequate submissions of law to enable the law to be properly applied to the evidence".[32]

The Court held that in many cases the CCA had endeavoured to identify the principal factors which will ordinarily influence a decision as to where a particular offence might lie along the spectrum of seriousness of the offence concerned. In some cases, the Court has endeavoured to provide further guidance as to how these factors may convert into actual sentences, such as the reasoning of Fennelly J. in *The People (D.P.P.) v. Carl Loving*.[33] The Court stated that there is no reason why the attention of a sentencing judge should not be drawn to such decisions, and indeed no reason why submissions could not be made by the prosecution as to where, in light of the analysis by the CCA, the offence in question is said to lie along a spectrum of severity.[34] The Court explicitly set out the responsibilities of counsel for the prosecution during the sentencing process:-

> "[T]here is now an obligation on the prosecution to draw to the attention of a sentencing judge any guidance, whether arising from an analysis carried out by this court or from I.S.I.S. or otherwise, which touches on the ranges or bands of sentences which may be considered appropriate to any offence under consideration and the factors which are properly, at least in ordinary cases, to be taken into account. In many cases, this should not impose any significant burden on the prosecution […]. In addition, it seems to this court that it is incumbent on the prosecution to suggest, where such guidance is available, where the offence under consideration fits into the scheme of sentencing identified and why that is said to be the case. Finally, the prosecution should indicate the extent to which it is accepted that factors urged in mitigation by the defence are appropriate and give at least a broad indication of the adjustment, if any, in the overall sentence which it is accepted ought to be considered appropriate in the light of such mitigation."[35]

The Court stated that the impact of such an approach would have the effect of creating greater consistency and would also contribute to a reduction in the number of appeals.[36] The Court

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[29] *The People (D.P.P.) v. W.D* [2008] 1 I.R.308.
[30] *The People (D.P.P.) v. Z* [2014] 1 I.R. 613 at 618.
[31] Remy Farrell S.C., "Recent Developments in Relation to Sentencing: *D.P.P. v. Z*" Circuit Court Conference 2014.
[32] Remy Farrell S.C., "Recent Developments in Relation to Sentencing: *D.P.P. v. Z*" Circuit Court Conference 2014; Bar Council Code of Conduct (Adopted by a General Meeting of the Bar of Ireland on Monday 22nd July, 2013), at 10.20.
[33] [2006] 3 I.R. 355., *supra*.
[34] [2014] 1 I.R. 613 at 618.
[35] *Ibid.* at 619.
[36] *Ibid*.

stressed that the sentencing judge is "no way bound by the submissions of the D.P.P".[37] Defence counsel also have a role to play at this stage, and may wish to argue that the offences in question fall at a different part of the spectrum, or that the range of sentences put forward by the D.P.P. is not appropriate in light of case law or other sources. Additionally, the Court found that it is open to defence counsel to indicate how any mitigating factors would affect the sentence, and the counsel for the D.P.P. may comment on the factors urged in mitigation and the weight to be attached to those factors.[38]

Following the delivery of *Z*, the D.P.P. made further submissions to the Court with regard to these issues at the adjourned hearing in *Fitzgibbon*. In that hearing, counsel for the prosecution sought clarification on what exactly was now expected of the prosecution at sentencing hearings, including the remit of the prosecution in challenging mitigating factors urged by the defence.

In a supplemental judgment of the Court in *The People (D.P.P.) v. Fitzgibbon (No.2)* issued in July 2014,[39] the CCA was keen to emphasise that the question of sentencing remains a purely judicial matter and that is not for any party to give guidance as to what sentence should be imposed in a particular case. However, there is a "very real difference" between guidance and assistance.[40] The Court emphasised that the judgment in Z was suggesting that counsel for the prosecution should "be of assistance in drawing to the attention of the Court, any relevant material which, it may be suggested, the Court should take into account in imposing sentence".[41] The Court stated that it is not for the D.P.P. to suggest a particular range of sentences as being appropriate, but it is for the D.P.P. to draw attention to "any guidance on sentencing which has been given either by this Court or from other relevant sources […] and to make submissions as to where, in light of that guidance the case in question falls." The Court emphasised that in this capacity, counsel will be doing no more than what is required of any counsel in any case, whether civil or criminal—that is, drawing the Court's attention to the applicable law and making submissions as to the result of applying the law to the particular facts of the case.[42] Additionally, the Court noted that it did not see any reason why the sentencing judge cannot equally ask defence counsel as to where the defence believes the offence lies on any "spectrum of seriousness", particularly where the defence submits that the assistance provided by the prosecution is not fully relevant or correct.[43]

While no issue was raised in relation to a general obligation of the prosecution to draw the attention of the sentencing judge to guidance, counsel for the prosecution did make some enquiries to the court with regard to this obligation:

> The parameters of "what might properly come within the ambit of such guidance"
> The role of counsel for the prosecution where there was no guidance in relation to the particular offence
> The role of counsel for the prosecution in relation to matters of mitigation, which was the principal focus of the submissions made by the D.P.P. in this case.[44]

[37] *Ibid.* at 620.
[38] *Ibid*.
[39] *The People (D.P.P.) v. Fitzgibbon* (No.2) [2014] 1 I.R. 627.
[40] *Ibid.*, at 633.
[41] *Ibid*.
[42] *Ibid.*, at 634.
[43] *Ibid*.
[44] *Ibid.*, at 631.

In relation to the first issue, the Court held that where reliable information as to the range of sentences for particular offences is available, the prosecution should draw attention to that information. This will include both guidance from the CCA and any reputable analysis of the sentences typically imposed by sentencing judges in respect of the particular offence. The judge is not bound by any such analysis, and the sentencing judge must be allowed a "real margin of appreciation" in determining the appropriate sentence having regard to the particular facts of the case.[45]

On the second concern of counsel, the Court held that in the absence of the type of guidance envisaged by the Court (that being jurisprudence of the CCA or a proper analysis of sentences for the offence), counsel should refrain from suggesting any range of sentence.[46]

As to the question of mitigation, counsel for the prosecution highlighted paragraphs 8.17, 8.18 and 8.20 of the Guidelines for Prosecutors, which deal with the obligation of the prosecution to engage with the mitigating factors asserted by the defence. The Court emphasised that while the Z judgment did deal with the obligations of the prosecution in relation to submissions by the defence in mitigation, nothing in that judgment imposed an obligation on the prosecution to engage with mitigation in any greater degree than envisaged by the guidelines for prosecutors. [47] However, where certain mitigating factors are elucidated by the defence upon which the defence urges significant weight must be placed, and the prosecution is aware of jurisprudence that conflicts with that assertion or the weight the mitigating factor is asserted to bear on the appropriate sentence, then it would be necessary for the prosecution to address the sentencing judge on that matter.[48] Advocating the adoption of a practical approach, the Court conceded that the prosecution could not be expected to deal with every issue raised in mitigation, but where a matter of significance is urged in mitigation and the D.P.P. does not consider it a mitigating factor in accordance with the jurisprudence of the courts, or in a situation where significant weight is urged to be attached on a matter, which for similar reasons that the D.P.P. does not consider would warrant significant weight, the obligation will arise.[49]

O'Malley notes that the judgment in *Fitzgibbon (No.2)* suggests that the court "did not intend to place a particularly onerous duty on the prosecution", rather, the Court in *Z* was noting that counsel for the prosecution should "remain alert" to any defence submissions in relation to mitigating factors.[50]

Establishment of sentencing ranges

In *The People (D.P.P.) v. Ryan*, [51] the CCA (Clarke J.) sought to give guidance in relation to sentencing for firearms offences contrary to section 27A of the Firearms Act 1964 (as amended), which carry a maximum sentence of 14 years imprisonment as well as a presumptive minimum of five years imprisonment on a first conviction. Counsel for the accused produced a detailed analysis of sentencing for similar offences. Having considered

[45] *Ibid.*, at 635.
[46] *Ibid.*, at 636.
[47] *Ibid.*, at 637-8.
[48] *Ibid.*, at 638.
[49] *Ibid.*, at 638.
[50] O'Malley, "The Role of the Prosecution at Sentencing in the Aftermath of *People (D.P.P.) v. Z* (2014)", Director of Public Prosecutions Prosecutors' Conference 2014.
[51] *The People (D.P.P.) v. Ryan* [2014] 2 I.L.R.M. 98

previous sentencing appeals for such decisions, the Court indicated three sentencing categories for offences under section 27A:-

> In the absence of exceptional and specific circumstances, there is, of course, a minimum presumptive, although non-mandatory, sentence of 5 years. Before considering any appropriate adjustment to reflect mitigating factors, it seems to this Court that, in general terms, an offence at the lower end of the range ought attract a sentence of 5 to 7 years, an offence in the middle of the range ought attract a sentence of 7 to 10 years and an offence at the top of the range a sentence of 10 to 14 years.[52]

Speaking generally on the categorisation of offences for the purpose of sentencing, the Court noted that because of the broad range of factors which can properly be taken into account in assessing the gravity of the offence, the culpability of the offender and the individual circumstances of the accused, it will rarely be possible to engage in a direct comparison between one case and the next. However, courts can attempt to maintain a broad level of consistency. The Court set out a way in which a judge could determine an appropriate sentence, which can be paraphrased as follows:

> A sentencing judge, having assessed the gravity of the offence and the culpability of the accused, may seek to "place the offence itself at an appropriate point on the spectrum of offences of that type". Offences can typically be divided into lower, middle and upper parts, though no specific formula of words is necessary. The judge should be aware that there may be "exceptional or unusual cases" which do not readily fit into any such range or ranges and where the judge will have to engage in a "novel analysis" in order to determine the appropriate sentence. In order to convert such an analysis into an actual sentence, the sentencing judge should firstly determine the appropriate sentence for the offence itself "having regard to where the offence lies along that range.

The sentencing judge is then required, in accordance with established jurisprudence, "to take into account the circumstances of the individual accused and make such adjustment (if any) as may be appropriate to reflect the individual circumstances of that accused". Where there are significant mitigating and other personal factors, then a specified reduction in sentence and/or a suspension of sentence in whole or in part may be appropriate.[53]

The Court stated that by adopting this methodology, the sentencing judge indicates what the appropriate sentence might be, were it not for the individual circumstances of the accused concerned, and then adjusts the sentence to reflect those individual circumstances. The Court also suggested another methodology:-

> *However, a sentencing judge does not necessarily have to indicate what sentence would be appropriate for the offence itself. Rather the sentencing judge may determine where it is appropriate to place the offence in the spectrum and then adjust that place to reflect any individual circumstances of the accused so as to determine where the sentence itself should lie along the range of appropriate sentences having regard both to the offence and the circumstances of the accused.*[54]

[52] *Ibid,* at 7.16.
[53] Summary of paras. 3.1-3.3 of the judgment.
[54] *Ibid.* at 3.3.

The Court concluded that the use of either method is "*an entirely appropriate way for a sentencing judge to approach the question [of what sentence to impose]*". [55]

In *The People (D.P.P.) v. Fitzgibbon*,[56] another judgment of the CCA which was decided on the same date, similar guidance was provided in respect of assault causing serious harm contrary to section 4 of the Non-Fatal Offences Against the Person Act 1997, which carries a maximum sentence of life imprisonment. Having reviewed the authorities, Clarke J. stated:-

> [I]n the absence of such unusual factors, a sentence of between 2 and 4 years would seem appropriate, before any mitigating factors are taken into account, for offences at the lower end of the range. A middle range carrying a sentence of between four and seven and a half years would also seem appropriate. In the light of the authorities to which counsel referred, and which have been analysed in the course of this judgment, it seems that the appropriate range for offences of the most serious type would be a sentence of seven and a half to 12 and a half years. It must, in addition, be acknowledged that there may be cases which, because of their exceptional nature, would warrant, without mitigation, a sentence above 12 and a half years up to and including, in wholly exceptional cases, the maximum sentence of life imprisonment.[57]

The CCA followed the methods of determining an appropriate sentence that were outlined by the Court in *The People (D.P.P.) v. Ryan*.[58] However the Court cautioned that it is only appropriate for the CCA to give guidance on the range of appropriate sentences where sufficient materials are made available to the Court to enable it to make an appropriate assessment. This may depend on the adequacy of such information and the degree to which it can be regarded as comprehensive.[59] The Court also emphasised that a sentencing judge should set out clearly the factors which have been taken into account in arriving at an appropriate sentence and then specify the approach adopted in coming to a conclusion as to the appropriate sentence having regard to all of those factors.[60]

O'Malley draws attention to an interesting section of the judgment which addresses the "relationship between intention and consequences in the punishment of offences", which is particularly relevant to sentencing in cases of manslaughter and serious assault.[61]

In that regard, the Court stated:-

> *To a significant extent those who commit significant assaults take a chance on the consequences. However, there will always be cases where the unfortunate consequences of an assault are wholly disproportionate to the severity of the relevant assault and, thus, the blameworthiness of the guilty party. For those, or other unusual reasons, there will always be cases where, even without significant mitigation, and notwithstanding the serious consequences of the relevant assault, a non-custodial sentence would still be the appropriate starting point.*[62]

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[55] *Ibid.* at 3.3.
[56] *The People (D.P.P.) v. Fitzgibbon* [2014] 2 I.L.R.M. 116.
[57] *Ibid*, at 8.10.
[58] *The People (D.P.P.) v. Ryan* [2014] 2 I.L.R.M. 98.
[59] [2014] 2 I.L.R.M. 116 at 7.2.
[60] *Ibid.*, at 7.3.
[61] O'Malley, "The Role of the Prosecution at Sentencing in the Aftermath of People (D.P.P.) v. Z (2014)", Director of Public Prosecutions Prosecutors' Conference 2014.
[62] *Ibid*, at 8.8.

Clarification from the Court of Appeal

The newly constituted Court of Appeal (Finlay Geoghegan J. giving judgment) discussed the implications of the judgments of its predecessor in *Z* and *Fitzgibbon (No.2)* in *The People (D.P.P.) v. Hussain*.[63] The sentencing judge in the Circuit Court, having regard to the judgment in *The People (D.P.P.) v. Z*, had invited counsel for the Director to assist the court in relation to sentencing for an offence contrary to s.3(2A) of the Child Trafficking and Pornography Act 1998 (as inserted by s. 6 of the Criminal Law (Sexual Offences) (Amendment) Act 2007. Counsel endeavoured to do so (in circumstances where the offence contrary to s.3(2A)(as inserted) had not been prosecuted previously) by providing the sentencing judge with a note of sentences handed down in cases which involved offences that counsel argued were similar in nature. Additionally, counsel for the prosecution made submissions as to where, in terms of gravity, the offence in question lay in the context of other offences created by s.3 of the Act of 1998.

The Court acknowledged that while the sentencing court had proceeded in the light of the judgment in Z, it had not had the benefit of the clarifications contained in the judgment of *Fitzgibbon (No. 2)*.[64] The Court of Appeal drew attention to "two separate forms of potential guidance from an appeal court and assistance which might be given by the prosecution" envisaged by the CCA in Z.[65] First, judgments which "analyse factors to be taken into account in sentencing for particular offences upon the basis of which the prosecution may or should make submissions 'as to where, in the light of the analysis by [the appeal court], the offence in question is said to lie along a spectrum of severity'".[66] Second, judgments which pertain to sentencing those convicted of particular offences and which "give guidance as to how such factors may convert into actual sentences or the range of sentence for such offences", such as the judgments of the CCA in Ryan and Fitzgibbon.[67]

The Court of Appeal considered that the CCA in Z was confining the assistance by the prosecution to analyses carried out by the Court of Criminal Appeal, the Irish Sentence Information website or otherwise which look at factors to be taken into account and the ranges of sentences referable to the actual offence under consideration by the sentencing judge.[68]

The Court of Appeal considered that the role of the prosecution counsel where there is no guidance emanating from an appeal court in relation to an offence had been addressed at p. 636 of *Fitzgibbon (No.2)* where the court stated that suggesting a range of sentence in such circumstances would lead to "prosecuting counsel straying into suggesting a sentence as such rather than making a submission as to where, in the light of the sentencing jurisprudence of this court or in the light of a proper analysis of sentences typically imposed by sentencing judges, the range for the offence in question lies".[69] The Court clarified that the CCA was referring to "the range in the sense of a number of years".[70]

[63] *D.P.P. v. Hussain* [2015] IECA 22 (Unreported, Court of Appeal, 16th February, 2015).
[64] *Ibid.,* at para. 33.
[65] *Ibid.,* at para. 33.
[66] *Ibid.,* at para. 33.
[67] *Ibid.*
[68] *Ibid.,* at para. 35.
[69] *The People (D.P.P.) v. Fitzgibbon* (No.2) [2014] 1 I.R. 627 at p.636.
[70] *D.P.P. v. Hussain* [2015] IECA 22 (Unreported, Court of Appeal, 16th February, 2015) at para. 41.

The Court of Appeal sought to clarify what the judgment in *Z* and the two judgments in Ryan and Fitzgibbon set out in relation to participation of the prosecution. The Court clarified that the prosecution is entitled and should first place the offence on the "spectrum of severity", and secondly, may assist the judge in relation to where on the range of sentences (in terms of the number of years) the offence at issue lies.[71] In relation to placing the offence on the spectrum of severity the Court was of the view, following the judgments of its predecessor in *Z* and *Fitzgibbon (No. 2)*, that the prosecution, even in the absence of appropriate guidance, may in some instances assist the judge by placing the offence committed on the "spectrum of severity" for the offence, without making further submissions with regard to the appropriate range of sentence.[72] On the second issue of assistance on the range of sentences, the Court set out the limit of this form of assistance:-

> *a. The prosecution should draw to the attention of the sentencing judge any guidance given by decisions of an appeal court in relation to the sentence to be imposed for the offence in question and any guidance to be obtained from any reputable analysis of the sentences typically imposed by sentencing judges for the offence in question.*
> *b. Where there exists guidance of either type described then it is open to the prosecution to make submissions as to where, in the light of that guidance and the facts admitted or proved the appropriate sentence for the offence in question falls on the range of sentences.*
> *c. Where no guidance from an appeal court or a reputable analysis of sentences typically imposed by sentencing judges for the offence in question exists, it is not appropriate for the prosecution to suggest any sentence or a place on the range of sentence for the offence in question.*[73]

The Court indicated that the CCA was not intending that the prosecution cease to identify the minimum and maximum sentence for the offence, even in circumstances where there is no guidance available.[74] The Court identified that where there are judgments of an appellate court which identify the factors to be taken into account in sentencing a particular offence it would be appropriate for the prosecution "to draw attention to these judgments and to make submissions as to where in the light of that guidance the offence in question falls on the spectrum of severity.".[75] The Court found that there may be other circumstances in which this type of assistance is also permissible, but made it clear that it would only consider circumstances relevant to the appellant's case.[76]

In a section entitled "Application of principles in *Z* and *Fitzgibbon (No. 2)* to this appeal", the Court considered that certain submissions made by the prosecution during the sentencing hearing were impermissible.[77] First, the prosecution was not acting in accordance with sentencing principles by submitting sentencing jurisprudence pertaining to offences other than the offence with which the accused had been convicted. Second, the Court stated that the prosecution were not permitted, having regard to *Z* and *Fitzgibbon (No. 2)*, to make submissions as to the appropriate sentence in circumstances in which there was no guidance either from an appeal court or a reputable analysis in relation to the offence. The prosecution was entitled and should, however, to assist in placing the individual offence of which the accused had been convicted at an "appropriate point on the spectrum of gravity of the

[71] *Ibid.,* at para. 44.
[72] *Ibid.,* at para. 47.
[73] *Ibid.,* at paras. 44-46.
[74] *Ibid.,* at para. 46.
[75] *Ibid.,* at para. 48.
[76] *Ibid.*
[77] *Ibid*., at para 49-50.

offences included within s. 3(2A) of the 1998 Act." Counsel were not permitted to make these submissions with reference to other offences created under section 3 of the 1998 Act.[78]

The position which the sentencing judge should take in relation to assistance where an offence has not been prosecuted previously was clarified by the Court of Appeal in Hussain. In any sentencing hearing, the prosecution should only submit to the sentencing judge authorities which relate to the offence with which the person has been convicted. Additionally, the prosecution should not make any submission as to the appropriate sentence where there is no relevant guidance emanating from an appeal court or a reputable analysis of sentences imposed by sentencing judges for the offence at hand.

However, even in those circumstances it continues to be appropriate for the prosecution to make submissions in order to assist the sentencing judge to place the offence committed, having regard to circumstances of the case, at "an appropriate point on the spectrum of gravity of the offence". The prosecution should not, however, stray into comparing the nature of the offence with that of other offences contained in the same act.

## Conclusion

It was thought that the judgment in *Tiernan* prevented the CCA from introducing sentencing guidelines in the course of its judgments. However, if one reads the judgment in Tiernan closely, it is clear that Finlay C.J. wanted to prevent general observations on such patterns being made by the court in circumstances where there was an "absence of any statistics or information" before the court concerning "any general pattern of sentences imposed for the crime of rape within this jurisdiction".[79]
Since the judgment in *Tiernan* things have changed significantly, and it has been possible for judges to give general observations on patterns of sentencing for certain offences. What has changed? It has always been the case that practitioners have looked at precedent. The late Mr. Justice Carney, for example, had a vast memory bank of sentencing decisions in respect of different offences. Other judges, particularly those who are not frequently assigned to the criminal courts, may not have such a considerable knowledge of sentencing decisions. There have, however, been two factors which have assisted in the transmission of guidance to members of the judiciary. The first was the pioneering study by Judge David Riordan, who surveyed of the typical penalties attached to a number of continually recurring charges in the District Court and his valuable doctorate on the use of Community Service Orders and suspended sentences. The second were the decisions of Charleton J. in *W.D.*[80], in which relevant sentencing precedents were gathered in relation to rape offences, and also *The People (D.P.P.) v. P.H.*, in which a similar exercise was conducted in relation to sentencing elderly defendants in cases of historic child sexual abuse.[81] Since these judgments there have been further efforts to gather information in this way in order to provide reputable analyses to members of the judiciary. The analyses conducted by the Judicial Researchers' Office, the majority of which are publically available on the Irish Sentencing website, are an asset to both the judiciary and practitioners in the criminal courts and have been cited by judges and counsel in the course of sentencing hearings and sentencing decisions.[82]

[78] *Ibid*., at para 49-50.
[79] *The People (D.P.P.) v. Tiernan* [1988] I.R. 250, at 254.
[80] *The People (D.P.P.) v. W.D* [2008] 1 I.R.308.
[81] *The People (D.P.P.) v. P.H.*, [2007] IEHC 335, (Unreported, High Court, Charleton J., October 15th, 2007), para. 26.
[82] http://www.irishsentencing.ie/en/ISIS/Pages/WP09000222

The child pornography sentencing analysis is a good example of what happens when there is an absence of clear sentencing parameters for similar offences. Research by the Judicial Researchers' Office indicates that the judgment in Loving was not consistently cited in sentencing hearings where persons were guilty of child pornography offences. While that has changed since the publication of the analysis on the intranet, this demonstrates the problems that arise if the Court of Appeal does not specify its intentions and simply issues statements of principle; those principles will not be cited by practitioners in sentencing hearings. The usefulness of declarations of principle must be doubted as a practical tool in sentencing. The *W.D.* case led to a sea-change in rape sentencing, and it was based merely on precedent. It appears the judgments in *Ryan*, *Z* and *Fitzgibbon* mark a departure from broad statements of principle.[83] Since March 2014 it is common to hear the *Ryan*, *Z* and the *Fitzgibbon* judgments being cited or applied by counsel and members of the judiciary in the course of sentencing hearings, at least in Dublin Circuit Criminal Court. The application of these judgments will contribute to greater consistency in sentencing. As time goes on, it is hoped that the number of cases giving practical but non-binding guidance in sentencing increases, possibly leading to a non-binding but "broad statement on policy" which was unavailable, due to a lack of reliable information, when the Supreme Court delivered its judgment in *Tiernan*.[84]

[83] *Z* [2014] 1 I.R. 613; *Ryan* [2014] 2 I.L.R.M. 98; *Fitzgibbon* [2014] 2 I.L.R.M. 116.*; Fitzgibbon* (No.2) [2014] 1 I.R. 627

[84] *The People (D.P.P.) v. Tiernan* [1988] I.R. 250 at 254.