PRINCIPLES OF SENTENCING: SOME RECENT DEVELOPMENTS

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I. INTRODUCTION

For the historian of modern Irish sentencing law, the first and last decades of the 20th century are by far the most interesting. In fact, it is tempting to say that little happened in between. The early years of the century witnessed profound policy and legislative changes in the treatment of both child and adult offenders, changes that were reflected in the Probation of Offenders Act 1907, the Children Act 1908 and the Prevention of Crime Act 1908.[1] These developments were influenced in large measure by the work of those positivist criminologists who had sought, by use of scientific methods, to show that crime, like other human behaviour, was often the product of factors outside the actor's control.[2] The last decade of the 20th century brought a renewed energy in sentencing reform, though this time the emphasis was on severity rather than leniency, as is evident from the terms of the Criminal Justice Acts of 1993 and 1999 and, more recently, the Sex Offenders Act, 2001. However, the closing years of the 20th century and the early years of the 21st have also witnessed a growing and welcome tendency on the part of the Superior Courts to issue detailed and thoughtful judgments on sentencing principles. This article deals with two of those judgments, *Finn*[3] and *Redmond*,[4] both of which

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[1] See Garland, *Punishment and Welfare: A History of Penal Strategies*.

[2] See Vold, Bernard and Snipes, *Theoretical Criminology* (4th ed., 1998), particularly Chapters 3 to 7.

[3] Supreme Court, unreported, Keane C.J., 24 November, 2000.

[4] Court of Criminal Appeal, unreported, Hardiman J., 21 December,

arose from references by the D.P.P. to the Court of Criminal Appeal under section 2 of the Criminal Justice Act, 1993.

The Act of 1993 conferred on the Court of Criminal Appeal a new jurisdiction to deal with what are customarily described as prosecution appeals against sentence. More precisely what the Act does is to authorize the Director of Public Prosecutions (D.P.P.) to apply to the Court to review a sentence which appears to him to be unduly lenient, and which was imposed following conviction on indictment. It is, therefore, a condition precedent to the exercise of this power that the D.P.P. must be of the opinion that each sentence referred to the Court by him is unduly lenient, having regard to all the circumstances of the particular case. One could also argue that the Act implicitly imposed on the D.P.P. a new function of keeping all sentences imposed following conviction on indictment under observation. Otherwise, it is difficult to see how he can rationally select the sentences to be referred to the Court for review. If the cases referred to the Court were chosen on the basis of adverse media comment or representations from victims, there is a distinct danger of randomness and arbitrariness creeping into the system.

By 1993, most other common-law jurisdictions had statutory provisions allowing for prosecution appeals against sentence (as we shall describe them here for the sake of convenience). The general policy in other jurisdictions has been that such appeals should be used sparingly, and that was the clear legislative intent in Ireland as well. The D.P.P. first exercised his power under s. 2 of the Act in *Byrne*[5] where the Court of Criminal Appeal took the opportunity to set out the general principles governing prosecution appeals. While the Court has stressed in later cases that those principles are not to be interpreted as if they had the force of statute, it has nonetheless frequently invoked them as a guide to the exercise of its jurisdiction. Briefly stated, the principles are as follows. First, the D.P.P. bears the burden of proving that the

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[5] [1995] I.L.R.M. 279.

sentence in question was unduly lenient. Secondly, great weight should be afforded to the trial judge's reasons for imposing the sentence in question. Thirdly, it is unlikely to be helpful to ask whether, if a more severe sentence had been imposed, it be upheld in a defence appeal as being right in principle. Fourthly, it is clear from the wording of section 2 that nothing but a substantial departure from what would be regarded as an appropriate sentence will justify the intervention of the Court. On several occasions in Ireland and elsewhere, it has been stressed that an appeal court should not increase sentence simply because members of the court, had they been dealing with the case at first instance, might have imposed a somewhat higher sentence.[6] To justify intervention, the sentence must be manifestly and unduly lenient. In *McCormick*, the Court said that undue leniency "connotes a clear divergence by the Court of trial from the norm and would, save perhaps in exceptional circumstances, have been caused by an obvious error in principle".[7]

II. *REDMOND*[8]

The respondent in this case, George Redmond, had pleaded guilty to ten charges of failing to make tax returns and was fined a total of £7,500. The D.P.P. was not, it seems from the judgment, seeking a custodial sentence but rather a heavier fine. The first important point stressed by the Court of Criminal Appeal was that, before intervention is justified, an error in principle must be shown. This is certainly the correct interpretation of the legislative intent behind section 2 of the Act of 1993. Indeed, as the Court noted, the Minister for Justice, when introducing the legislation had said that

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[6] This point was reiterated in *Redmond*, Court of Criminal Appeal, unreported, Hardiman J., 21 December, 2000. at page 8.

[7] *D.P.P. v. McCormack*, Court of Criminal Appeal, unreported, Barron J., 18 April 2000, page 8.

[8] Court of Criminal Appeal, unreported, Hardiman J., 21 December 2000. *D.P.P. v. Egan* [2001] 2 I.L.R.M. 299 is now a fuller authoritative source on the principles applicable in prosecution appeals.

sentence would be increased only where there was "a serious breach of accepted principles of sentencing". Another, equally important, reason for requiring an error in principle is that, in Ireland, there are no formal tariff sentences akin to those stipulated from time to time by the English Court of Appeal (Criminal Division). If the Court were to adopt the approach suggested by the prosecution in *Redmond*, it would risk creating unwarranted disparity, as it would have to rely primarily on intuition in selecting a new sentence (assuming it decided to vary the sentence). By far the preferable approach is to ask if the trial judge took all the relevant attributes of the offence and offender into account and if he or she applied the settled principles of sentencing. A sentence must be proportionate to the gravity of the offence and the personal circumstances of the offender. The sentencing judge, therefore, must locate the offence on a scale of gravity, bearing in mind that the maximum sentence is to be reserved for the more egregious instances of the offence in question. It is only by having due regard to the circumstances of the offence and the offender as well as to the accepted principles of sentencing that this exercise can properly be performed.

The next major issue in *Redmond* was the impact of certain collateral hardships on sentence. Collateral hardships consist of penalties or other detriment suffered by the offender as a result of conviction but separate from the formal sentence imposed.[9] Typical examples would be the loss of employment or family breakup. Increasingly nowadays, collateral hardships consist of civil penalties imposed by, say, the Revenue Commissioners, as occurred in *Redmond*. Mr. Redmond appeared to have paid at least £782,000 as a global settlement of his tax liabilities. The Court (*per* Hardiman J.) said that "the fact that portion of that sum may be attributed to penalties or penal interest is a legitimate factor to be considered when sentencing" as it was "a punitive

[9] For a characteristically illuminating discussion of this question, see Ashworth, "Justifying the Grounds of Mitigation" (1994) 13: 1 *Criminal Justice Ethics* 5.

consequence to the offender".[10] A difficulty arose in this case because of lack of clarity as to what portion of the £782,000 was attributable to Revenue penalties as opposed to payment of tax owing, but it was agreed that some portion of that sum was so attributable. The most significant legal principle emerging from this case was that the penalty already paid as part of the global settlement was a legitimate factor to be taken into account in assessing the proportionate punishment to be imposed following conviction for the criminal offence. The Court said:

> In the present case, the prosecution fairly and properly conceded that the Court may have regard in considering sentence, to sums paid in the nature of civil penalties. We would only add that this is consistent with the attitude of the Court in other cases. It would be unreal and unjust to exclude from consideration in a larceny case the fact that restitution has been made or damages paid, for example.[11]

Redmond therefore follows a cumulative approach towards the assessment of proportionate punishment. Courts in other jurisdictions have been following the same approach especially in relation to white-collar crime. In *McDonald*, the Federal Court of Australia said:

> ...the most serious consequences of the conviction of a 'white-collar' offender … must be loss of his own self-respect and the suffering of disgrace and humiliation, as well as the complete loss of his previous standing in the community, his professional position, and the means of livelihood he has chosen and in which he has acquired expertise. The conviction is a personal calamity. So far as

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[10] *Redmond*, page 21.

[11] *Redmond*, page 24.

> [jail] is concerned, to be sent there is also a disaster of the greatest magnitude. These are the considerations that must loom large if a professional person is confronted by a situation inducing thought about the personal cost of committing comparable offences, and a significant period in jail attended by such consequences, must constitute a weighty deterrent. Indeed, an equivalent [jail] term is plainly a severer punishment for a man like the appellant than it would be for many violent criminals, who could take up much the same life upon leaving [jail] as they had led before.[12]

This, it must be said, has not been the unanimous view, in Australia or elsewhere,[13] but it is certainly regarded now as an acceptable view. The precise status of this version of proportionality of punishment may soon become a live issue in Ireland, now that the Sex Offenders Act, 2001 has entered into force. This Act provides, *inter alia*, for post-release supervision orders in the case of persons convicted of certain sexual offences. Essentially this will mean that at the sentencing of the offender, the court may order that on his release from prison he is to remain under the supervision of a probation and welfare officer for a set period of time. The combined duration of the custodial term and the period of supervision may not exceed the maximum sentence applicable to the offence in question. Section 29 (3) provides that any term of imprisonment imposed "shall not be less than the term the court would have imposed if it had considered the matter apart from the provisions of this Part." In other words, the supervision element may not influence the decision on the amount of primary punishment to be imposed when that primary punishment is imprisonment. This may

[12] (1994) 48 F.C.R. 555, at 564-5.

[13] See Fox and Freiberg, *Sentencing: State and Federal Law in Victoria*, 344-347.

give rise to two questions. First, is the supervision element to be treated as a penalty or a punishment? It flows directly from the conviction and, while it may be defended in the interests of public safety, it certainly imposes some restrictions on the offender's liberty after release from prison. It is, therefore, a type of collateral hardship. The next question is whether proportionality of punishment and, more specifically, the requirement of cumulative proportionality as applied in *Redmond*, is a constitutionally-mandated principle? If both questions are to be answered in the affirmative, then the constitutionality of section 29 (3) would have to be in some doubt. It might be argued that proportionality of punishment is merely a common-law requirement, although there are certainly dicta to suggest that it has a constitutional foundation as well.[14]

III. *FINN*[15]

Section 3 of the Criminal Justice Act, 1993 permits an appeal to the Supreme Court from a determination by the Court of Criminal Appeal following a reference by the D.P.P. under section 2 of the Act. As in the case of appeals taken under section 29 of the Courts of Justice Act, 1924, the latter court must certify that the case involves a point of law of exceptional public importance and that it is desirable in the public interest that a further appeal be taken. The main question to be resolved in *Finn* was the date from which the 28-day period in section 2(2) of the Act should run. This provides that an application (in effect a prosecution appeal) "shall be made, on notice given to the convicted person, within 28 days from the date on which the sentence was imposed". Ordinarily, this should cause little difficulty, assuming it proved possible to serve the required notice on the convicted person. However, in cases such as *Finn* itself, where a reviewable sentence was imposed, it was unclear as to whether a prosecution appeal could be taken within 28

[14] *The People (D.P.P.) v M.* [1994] 3 I.R. 306.

[15] Supreme Court, unreported, Keane C.J., 24 November, 2000.

days of the review decision (as occurred in a few cases) or whether the 28-day period ran from the date of the original sentence.

On 10 December 1996, Mr. Finn had been sentenced by the Central Criminal Court to concurrent terms of seven years' and three years' imprisonment for rape and assault. In view of certain exceptional circumstances, mainly connected with the defendant's background, the trial judge ordered that the case be re-listed before him for review. This review occurred on 22 October 1998 on which date the trial judge released the defendant subject to certain conditions. A further hearing, which took place on 14 April 1999, was ordered by the judge so that he could be informed of the defendant's progress and the supervision he was receiving. On 18 November 1998, that is to say within 28 days of the date on which the review hearing took place, the D.P.P. made an application under section 2 of the Act of 1993 to review the sentence. Following a detailed textual analysis of sections 1 and 2, the Supreme Court concluded that the relevant date was the date on which the original sentence was imposed. It accepted that section 1(1) defines a sentence as including "a sentence of imprisonment and any other order made by a court in dealing with a convicted person…" Read in isolation, this could be interpreted to include an order made following review of sentence. However, the Court referred to section 2(2) which provides that if it appears to the D.P.P. that a sentence imposed by a court "on *conviction*[16] on indictment" was unduly lenient, he may refer it to the Court of Criminal Appeal. The Supreme Court found in this reference to "on conviction" support for its conclusion that the statutory intent was that the twenty-eight day period should run from the date of the original sentence. One might question if the court was justified in attributing this degree of significance to the above-quoted words in section 2(2). The inclusion of those words in the section was more likely intended to convey the message that a prosecution appeal lay only from a sentence

[16] Court's emphasis.

imposed following a conviction on indictment as opposed to a summary conviction.

The Court was on firmer ground, however, when it noted that the power of prosecution appeal introduced by the Act of 1993 was a significant and (in the case of persons convicted on indictment) an unprecedented encroachment on the traditional finality of a sentence favourable to defendant. Hence the importance of a clear limit on the exercise of the D.P.P.'s power. The Court was therefore satisfied that:

> …it would be inconsistent with [the foregoing consideration] to construe s. 2(2) as affording the Director two separate opportunities of applying to the Court of Criminal Appeal, the first arising from the imposition of the sentence containing the review provision and the second when the court actually reviews the sentence in accordance with the first decision. There is nothing in the statutory scheme to suggest that it was the intention of the Oireachtas to permit the DPP to intervene on two separate occasions to obtain a review from the court of what is effectively the same sentence.

The overall policy of the Act and the conclusions reached by courts in other jurisdictions with similar statutory provisions strongly support the more restricted interpretation of section 2(1) favoured by the Supreme Court. Nor does this interpretation place the D.P.P. at any great disadvantage. If the trial judge, when imposing the original sentence, builds in a review clause (which should no longer be done in any event, as we shall see presently), the D.P.P. can make a section 2 application on the ground of undue leniency. Admittedly, it will not be evident at that point, nor possibly at the time of the hearing of the application, how long the defendant will actually serve in custody. But the Court of Criminal Appeal will still be entitled to vary the sentence to a

simple term of imprisonment, without a review clause, as in fact it did in *Finn*. (It varied his overall sentence to an immediate term of six years' imprisonment.)

This last-mentioned possibility is but another illustration of the problems flowing from the judicially-developed practice of imposing reviewable prison sentences. A reviewable sentence is imposed when a judge sentences the defendant to, say, six years but sets a review date for, say, two years into the sentence. It has not been at all uncommon for defendants to be released on their review dates, usually subject to conditions. In *Finn*, for example, it was a condition that he would not return to the county in which he committed the offences for a further period of five years or so. The disadvantages of this form of sentence and the objections to it were set out clearly by Henchy J. in *The People (D.P.P.) v. Cahill*.[17] The first objection was that the trial judge making the order might not necessarily be available to deal with the review when the time came. The second was that it placed the sentenced person at a disadvantage in terms of exercising his right of appeal (or seeking leave to appeal) as he would not know at the close of trial what exactly he was appealing against. The third was that this form of sentence entrenched on the executive function in granting early release. The fourth was that such a sentence was not in accordance with correct principles of penology, as it was desirable that both the prison authorities and the prisoner should be able to plan for the release date, with appropriate rehabilitative procedures put in place. Having enumerated these drawbacks, the Court of Criminal Appeal in *Cahill* said that reviewable sentences should not be imposed.

The question of reviewable and part-suspended sentences was revisited in later cases, notably *The People v. Aylmer*[18] and *O'Brien v. Governor of Limerick Prison*.[19] In

[17] [1980] I.R. 8.

[18] [1995] 2 I.L.R.M. 624. This case was decided by the Supreme Court in 1986.

the former case, a review clause was inserted in a prison sentence imposed in 1979 and as a result of which the balance of the sentence was suspended in 1982 on condition that the appellant remained of good behaviour. The suspension was revoked two years later when the applicant was convicted of a further offence. When the matter came before the Supreme Court, three members of the Court did not find it necessary to express any view of the propriety of such form of sentence. In effect, the only member to address the matter was Walsh J. who found that the original sentence was valid. The fifth member, McCarthy J., also upheld the sentence but mainly on the basis that the sentencing discretion of trial judges should not ordinarily be interfered with. The reasoning of the various judges in *Aylmer* is described in some detail in *Finn* but in view of the decision reached in the latter case it is unnecessary to recount it here. *O'Brien* was concerned with a part-suspended sentence. The applicant was sentenced to ten years' imprisonment with the final six years suspended subject to certain conditions. The essential issue for the Supreme Court in that case was whether this form of sentence was compatible with the Rules for the Government of Prisons, and in particular with Rule 38(1) which provides for one-quarter remission of sentence. More specifically, the question was whether the remission in this case should be applied to the four years to be served or the total sentence of ten years. The Supreme Court held that remission should be applied to the four-year sentence, as this was the only lawful sentence imposed. However, in *O'Brien*, the Court (*per* O'Flaherty J.) went on to say that had the trial judge imposed a reviewable sentence, he would have acted lawfully as he would have been retaining seisin of the case.

This latter observation in *O'Brien* which was obiter in any event, was always difficult to defend. It did not explain why a judge should retain seisin of case. After all, it has been a longstanding principle that once a judge imposes sentence,

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[19] [1997] 2 I.L.R.M. 349.

he or she is *functus officio*.[20] This, indeed, is the clear implication of Article 13.6 of the Constitution which, read in conjunction with section 23 of the Criminal Justice Act, 1951, vests the power to commute or remit any punishment imposed by a criminal court in the executive branch of government.

The ratio of the *Finn* case was concerned with the date from which the 28-day period specified by section 2 of the Act of 1993 should run and, as noted, the Supreme Court decided that it should run from the date of the original sentence. As the Court acknowledged, what it then had to say about the legality or desirability of reviewable sentences was *obiter*. But it helpfully proceeded to give its views on the matter. It bears mentioning that the doctrine of precedent is often difficult to apply to sentencing cases. Quite commonly, the net issue will be the appropriate sentence for the particular appellant in light of the facts of the case. Most other statements, by way of general guidance or statement of principle, will be, strictly speaking, *obiter*. However, in a judgment such as that in *Finn* which represented the view of a five-judge Supreme Court including the Chief Justice,[21] general observations made on sentencing practice should, in effect, have the force of law. The Court's conclusion on the question of reviewable sentences is clear and unambiguous:

> …it is sufficient to say that the court is satisfied that sentences in this form are undesirable, having regard to the serious legal questions which arise as to their validity, *and the practice of imposing them should be discontinued*.[22]

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[20] As, indeed, the Supreme Court noted in *Finn* at page 31.

[21] The other members of the court were Murphy, McGuinness, Hardiman and Fennelly JJ.

[22] At page 44. Emphasis added.

In reaching this conclusion, the Court was influenced mainly by separation of powers arguments. When a trial court suspends the balance of a prison sentence on the review date, it is essentially exercising the power of commutation or remission which the Oireachtas, acting under the authority of the Constitution, has entrusted exclusively to the executive branch of government under s. 23 of the Criminal Justice Act, 1951. The Court went on to say that "the remission power, despite its essentially judicial character, once vested under the Constitution in an executive organ, cannot without further legislative intervention, be exercised by the courts". Another important factor to which the Court drew attention was that the imposition of a reviewable sentence may effectively deprive a defendant of his right to commence appeal proceedings, as these are subject to time limits running from the close of trial. A person given a reviewable sentence is at a disadvantage in not knowing what his actual sentence will be, and therefore uncertain as to whether he should seek a certificate that his case is fit for appeal.

As the passage quoted in the preceding paragraph makes clear, the Court felt that it was competent for the Oireachtas to vest a reviewing power in the courts as it has done in relation to certain drugs offences under s. 5 of the Criminal Justice Act, 1999. Any legislation extending this power to other offences or, indeed, to all offences would presumably be constitutional. But it would not necessarily be wise. The preferable course of action is to have a parole board mandated to examine systematically the cases of all prisoners serving sentences beyond a certain length. Such a board would have the depth and variety of expertise necessary to assess individual applicants, and to determine if their release would pose a threat to the community at large or any particular member of it. In fact, at the time of writing, such a board is in the process of being established.

Reviewable sentences, as the Court of Criminal Appeal acknowledged in *Sheedy*,[23] could, at times, serve a

[23] Court of Criminal Appeal, unreported, Denham J., 15 October 1999.

useful purpose. But the legal and practical difficulties to which they give rise have now been conclusively identified by the Supreme Court and, except perhaps in occasional drug cases coming within section 5 of the Criminal Justice Act, 1999, they should no longer be imposed.