

**An Chúirt Uachtarach****The Supreme Court**

Dunne J  
Charleton J  
O'Malley J  
Woulfe J  
Murray J

Supreme Court appeal number: S:AP:IE:2022:000036  
[2023] IESC 1  
Court of Appeal record number: 155CJA/2021  
[2022] IECA 53  
Circuit Criminal Court bill number: DUDP0557/2018

**Between**

**The People (at the suit of the Director of Public Prosecutions)  
Prosecutor/Respondent**

**- and -**

**Stephen Duffy  
Accused/Appellant**

**Judgment of Mr Justice Charleton delivered on Thursday 19 January 2023**

1. A sentence that did not conform to sentencing precedent was originally imposed on Stephen Duffy in the Dublin Circuit Court on 15 July 2021. On appeal by the Director of Public Prosecutions, the Court of Appeal revised the sentence by judgment dated 8 March 2022. That revision should not be regarded as a precedent. Any such future citation would be at odds with the work on sentencing conformity done by the Court of Criminal Appeal, the Court of Appeal and by this Court. There is the additional danger of extremely serious assaults which cause a fundamental and irreversible change to the physical and mental health of victims not being addressed appropriately.

2. O'Malley J has in the principal judgment, with which this analysis agrees, considered in depth the pull of an offer of compensation from an offender to a victim and how that may distort the sentencing process away from just disposal. That judgment places in context the situation of a victim who, by being attacked by the offender, becomes entitled to civil compensation through a separate tort action but who also, as her analysis makes clear, may benefit either from an informal offer of compensation or may be awarded a form of statutory compensation by the court as part of the process of disposal. In addition, civil remedies which are only of value should the offender be a person of means, which is highly uncertain in the context of crime, and compensation for criminal injury may be available to the victim of a crime. The judgment of O'Malley J comprehensively places the tension as between compensation and finding a just sentence which is not distorted by the payment of money into a context whereby future courts will be guided as to their approach. Our system is not one, as in some continental systems, where a criminal court in sentencing may both award civil compensation and punish the offender criminally. As that judgment states, the availability of money from an offender, presented so often, as here, as indicating deep remorse, may undermine the path to the just disposal of a case. By considering the history and context of compensation in criminal cases, the principal judgment has enabled a focused consideration of what in the past, as the judgment of O'Malley J sets out, has been a source of potential error. It was also a source of error in this case. The purpose of this judgment is to set the sentence within the context of the efforts by the courts to achieve reasonable certainty in sentencing, consistency as to approach and guidance through precedent judgments. This sentence was at variance with what should have been the approach of a sentencing court since the introduction through judicial action of sentencing guidance in written judgments. Since there has been no appeal by the prosecution, what remains an inadequate sentence, and one at variance with the relevant precedent judgments, must remain.

### **Nature of the offence**

3. The assault by Stephen Duffy on the victim was an entirely random event. They did not know each other, they had never spoken and in no way did the victim engage with his assailant or encourage, much less provoke, any contact. Out of nowhere, Stephen Duffy came up to the victim in Tallaght and punched him. He was knocked to the ground and suffered a bleed to his brain which left the victim in a coma for a period of time and could only be stopped by life-saving surgery. This has left him in a state whereby he is unable to engage in work and suffers from the swings in mood and ever-present fear that come with a serious brain injury. In randomly assaulting the victim, Stephen Duffy took his victim's life in his hands for no reason and left his life immeasurably worse. Since judges, like everyone else, live in the community, there is a shared awareness of the phenomenon of random aggression. This has gone on for many years. Complete strangers on the public street may be attacked out of perverted and thought-through nastiness. Often, the result is a horrible physical shock and the undermining of trust in human nature; the polar opposite of the fabled kindness of strangers. Seldom is any more harm than that done but, of itself, random violence to strangers is a vicious assault on the social contract of mutual respect. When more harm than expected or wished for occurs, it is the assailant who has taken that risk. Their victims are left with anything from a nasty shock to broken bones to irrecoverable eye damage to an acquired brain injury which alters their lives in a way that may even be far more serious than losing a limb. Where a person takes another's life into his or her hands, then the responsibility is theirs for the consequences. A group of school bullies may fully intend to hold on to a person they catch and dangle out a top floor by the ankles but if the person slips it is their responsibility because without their actions the situation would never have come about. Recklessness is not necessarily a lesser level of culpability than an intentional wrong. This example illustrates that such a morally culpable assumption of risk, where none existed save for the criminal wrong, is of a grave character. Further, since the Oireachtas has categorised many serious offences,

such as rape, by knowledge/intention or by recklessness with the same attendant sentence, culpability may be judged on that basis.

## Appraisal

4. The victim's voice needs to be allowed to speak. That is not simply through a victim impact statement admitted through s 5 of the Criminal Justice Act 1993, as amended by s 31 of the Criminal Justice (Victims of Crime) Act 2017. While that process is a central part of sentencing and an entitlement for victims of violence, it is not enough. The victim truly speaks when the courts have shrewd and objective regard to the violation of their human rights through the actions of the perpetrator. While a dreadful wrong has been done both to them and to the social contract through violence, the task of the court is to administer justice. That is not an aspect of private vengeance but the marking of such an offence by an appropriate sentence through a proper consideration of what has been done to them and the degree of wrong engaged by the perpetrator.

5. It is right that every person who pleads guilty to an offence should have an advocate to put before a court all that might be of some influence in mitigation. That process does not silence or lessen the voice of the victim once a realistic appraisal of mitigation factors is made. Here, much was made of two factors. Firstly, it was said that the accused was contrite, that this contrition was marked by the offer of a gift of €5,000 to the victim and (note the conditionality) that another €10,000 would be forthcoming should he be allowed to continue to work (which would require him to not be in custody). Secondly, it was submitted that the accused did not intend the devastating injuries inflicted on the victim.

6. There should be a discriminating approach to claims of regret. In the aftermath of this attack, the accused walked away. After a short time, with his victim lying unconscious on the ground, he returned and put the victim in the standard recovery position. He then disappeared. It was only police work that found CCTV footage, identified distinctive clothing, and followed through with the arrest of Stephen Duffy. During interview, the then suspect could not be obliged to admit his offence, meaning the identity of the assailant on the video images. There is rightly a constitutional prohibition on any coercion towards self-incrimination. But, since his answers were misleading and evasive, it is not possible to identify the onset of any contrition. On being charged, Stephen Duffy did not seek to sign a plea of guilty. Instead, he took an application to the Circuit Court under s 4E of the Criminal Procedure Act 1967, as amended, to dismiss the charges against him. On such an application, the court will dismiss a charge if "it appears to the trial court that there is not a sufficient case to put the accused on trial for any charge to which the application relates". One of the arguments put forward was that assault was not an offence of recklessness. Section 2 of the Non-Fatal Offences Against the Person Act 1997 is the definition: an assault (force to or causing an impact on the body of the victim) may be direct or indirect (examples being hitting someone with a weapon or setting a trap to fall on them) and may be committed "intentionally or recklessly". Intention is to be inferred from actions. Punching someone directly and deliberately does not happen other than purposefully. Examples of reckless assault might include the dropping of an object from a height, thereby taking a culpable risk that someone might be hit. The same mental element engages both assault and where such an assault causes harm under s 3 or serious harm under s 4. The offence carries life imprisonment. This was serious harm on any rational appraisal. Further, the statute says what it says. There was no point in a s 4E application. There, furthermore, had to be two trial dates. One was abandoned because of the Covid-19 pandemic and it was only at the second commencement of trial, when the victim was demonstrably physically present, that the accused took a plea of guilty. There is very little, if any, mitigation from that.

7. It may also be perceptible to look closely at the offer of a gift of money which is presented as contrition but which jars with the course of the criminal proceedings and the multiple opportunities missed to forego a trial through the admission of guilt.

### Sentencing structure

8. There have been many judgments of this Court and of the Court of Appeal which have made it clear that part of the task of the courts is to achieve consistency in sentencing. That is done through the analysis of appropriate sentencing precedents and a demonstrative analysis of the trends which these show in setting forth the bands of seriousness and consequent appropriate penalty. There has been considerable application in sentencing hearings of appropriate sentencing guidelines for a wide variety of offences; a process begun with the ruling in *The People (DPP) v WD* [2007] IEHC 310, [2008] 1 IR 308. That was followed by *The People (DPP) v PH* [2007] IEHC 335 which addressed sentencing guidelines in respect of offences carried out “between 10 and 40 years in the past”. Neither case made a sentence prescriptive. Rather, the aim was to provide judicial guidance, through the collection of precedent, a foundational concept in common law, whereby a judge could know what had happened in the past. The sentencing judge could therefore place the sentence relevant to any particular offender “within the parameters of the existing law and practice so that the disposal of this case can be regarded as being consistent with the penal policy of the superior courts”; [2007] IEHC 310 at [5], [2008] 1 IR 308 at 312. The *WD* case and the *PH* case concerned serious sexual violence, rape and aggravated or repeated sexual assaults. But, in the case of non-sexual assault, available to any trial judge are other relevant analyses. The Court of Criminal Appeal set out indicative bands for sentencing in the case of assault causing serious harm and firearms offences; see *The People (DPP) v Fitzgibbon* [2014] IECCA 12, [2014] 2 ILRM 116 and *The People (DPP) v Ryan* [2014] IECCA 11 respectively.

9. That exercise should have been the fundamental basis of sentencing by the trial court in this case since the proper approach was set out by the Court of Criminal Appeal in *Fitzgibbon*. It was important for appellate courts to have the “maximum possible clarity” as to how a sentence was reached and the exercise of gathering and categorising on the basis of principle a range of appropriate prior cases establishes a precedent enabling a rational sentencing approach. Factors relevant to sentencing include the viciousness of the assault, while an exact correspondence with resultant harm may not often be there. Also relevant is the degree of culpability, the court remarking that an entirely unprovoked attack should ordinarily “be regarded more seriously than an assault which arises out of an incident”; [2014] IECCA 12 at [8.13]. The Court of Appeal in *The People (DPP) v McGrath, Dolan and Brazil* [2020] IECA 50 established a starting point of five-year pre-mitigation sentences in the case of s 3 assault causing harm charges. Experience has led to the Court of Appeal revising the bands relevant to serious assault upwards in *The People (DPP) v O’Sullivan* [2019] IECA 250. These precedents are an essential aspect of the certainty of law and are the starting point for the prosecution duty to refer to relevant decisions bearing on sentence.

10. In *The People (DPP) v Flynn* [2020] IECA 294, guidelines were set out in relation to dangerous driving causing serious bodily harm, establishing three indicative bands and a number of aggravating factors to be considered by the Court. The offence of defilement of a child was addressed in *The People (DPP) v JMcD* [2021] IECA 31, and child pornography offence cases and the relevant indicative sentencing guidelines were outlined in *The People (DPP) v Loving* [2006] IECCA 28, [2006] 3 IR 355. The offences of robbery and burglary were considered similarly in *The People (DPP) v O’Sullivan* [2020] IECA 331 and *The People (DPP) v Casey and Casey* [2018] IECA 121, [2018] 2 IR 337 respectively. The case of *People (DPP) v Murray* [2012] IECCA 60, [2012] 2 IR 477 set out some general guidelines in relation to tax and welfare fraud cases, though concern as to a blanket approach in tax cases was expressed in the subsequent case of *The People (DPP) v Begley*

[2013] IECCA 32, [2013] 2 IR 188. This trend of analysis of sentencing for precedent and guidance purposes also embraced another form of assault in *The People (DPP) v Z* [2014] IECCA 13, [2014] 1 IR 613, which referred to exceptional circumstances in which a life sentence may be imposed in cases of child cruelty. In *The People (DPP) v Mahon* [2019] IESC 24, [2019] 3 IR 151, this Court did a comprehensive analysis of the variable nature of manslaughter sentencing; a range which goes from culpable accident to close to murder and from varying degrees of realization of harm. In *The People (DPP) v FE* [2019] IESC 85, [2021] 1 IR 217, this Court analysed rape sentencing a decade after the *WD* case and noted the consistency in terms of circumstances and of judicial approach and the absence of suspended sentences for rape. That case also referred to judge-led analyses of sentencing which were then, or have subsequently been, published. The value of this approach was also underlined by this Court's decision in *The People (DPP) v Molloy* [2021] IESC 44, where there was an analysis of the gradation of sentencing in the general area of the use of menaces and harassment. It remains of central importance to sentencing for appellate courts to continue this trend and to set up cases, by seeking counsel's submissions, where necessary, for the writing of analytical judgments for precedent and guidance purposes.

11. These cases are there. Many are cited in relevant texts and articles. But, in respect of all of them the approach for sentencing is clear: the prosecution should outline the circumstances of the offence through evidence; any effect on a victim is central to that outline; where appropriate, there should be a victim impact statement; the prosecution should draw relevant cases to the judge's attention or other relevant analyses from a judicial source; the prosecution should submit what level or band their view of the case tends towards; the prosecution should not demand any particular sentence; a headline sentence should first be arrived at by the sentencing judge; any discount to that may occur in consequence of mitigation in the circumstances in which the offence was committed or due to the personal condition of the accused. This is important. It is only through this process and by arriving at a fair sentence that the voice of the victim of crime is truly heard. Further, it may also be noted that in the submissions for the accused the helpful and researched nature of the argument was somewhat undermined by not realising that time has moved. What might have been important before these sentencing judgments has been superseded. By way of illustration, since the *WD* case, there have effectively been no suspended sentences for rape. One is mentioned in *The People (DPP) v ED* [2006] IECCA 3, [2007] 1 IR 484 as not counting, and it is worth recalling that this sentence was in respect of an older man already serving a condign sentence for another offence within the same family. It cannot be regarded as a precedent. But, precedent is important and it is essential to correct the departure from precedent which the sentence in this case represents.

12. In the judgment of the Court of Appeal, a headline sentence (the appropriate sentence prior to any mitigating factors potentially influencing towards a lower tariff) was held to have been correctly identified in the Circuit Court at six years and six months. Since this was an entirely unprovoked attack and resulted in the most catastrophic of injuries, that can be regarded as too low as a matter of fundamental principle. This appeal is not set up as one for the revision of guidelines which, in any event, demonstrate thought and the careful application of precedent. Nor is the appeal one for the revision of a clearly inadequate sentence since the points of general public importance identified relate exclusively to how the views of a victim may influence whether to impose a custodial sentence or the tariff and how the payment over of a sum of money to a victim should be properly regarded.

### **View of the victim**

13. With the centralisation of policing and prosecuting authorities developing over centuries, the role of the victim of crime as the sole prosecutor and advocate for justice has changed as between

the mid-1700s and the late 1800s; Shane Kilcommins, 'The victim in the Irish criminal process: a journey from dispossession towards partial repossession' (2017) 68 NILQ 505. Article 30.3 of the Constitution provides that crimes are to "be prosecuted in the name of the People and at the suit of the Attorney General or some other person authorised . . . to act for that purpose.". The application of the requirement is, however, to prosecutions "in any court constituted under Article 34 of this Constitution other than a court of summary jurisdiction". Hence, the wording confirms that residual powers such as prosecutions by a common informer in the District Court remain part of our law. Such a prosecution, if not of a minor offence triable summarily under Article 38.2, if returned as indictable become the responsibility of the Director of Public Prosecutions. The wording of the Constitution confirms that a crime is an attack on society as well as being an attack on an individual victim. This case is illustrative. The public peace was disturbed through the disporting of random and savage violence, the victim lay on the ground for several minutes alone before the public came to his aid, a public ambulance brought him to a hospital where State-employed medical experts sought to engage in saving his life and his ongoing care, rehabilitation, to the degree that may be possible, and support - all of this was not the responsibility of the Irish people. What Stephen Duffy did is immeasurable as to the harm to his victim, but he has also deprived the Irish population of a responsible working person through rendering him unable to engage in employment by a brain injury. Much of the good which the victim might have done has been taken both from him and from the Irish people.

14. An identifiable danger arises in shifting responsibility away from the constitutionally stated position. Victims who suffer injury of this kind may be vulnerable to blandishments, threats and persuasions; they live in communities where strong views may be put forward as to the character of a perpetrator or the conduct of a victim and which are not the product of logic but rather result from no particular process other than emotion; they may be caught in a family cycle of abuse and disorder. It would be potentially disastrous for those already afflicted by criminal conduct to be put in the position where their communities, their families or an irresponsible media might blame them for the result of a sentencing process which is the exclusive and inalienable responsibility of the courts. This country is a republic. That word eschews any notion that there are people who by birth or blood become a unique or special group of individuals. What is of the State is of the people. What is done by way of violation of rights to the people, any individual victim, is prosecutable by the people and for the benefit of the public peace. The sole decision as to sentence is with the courts. That is the structure under the Constitution.

15. The circumstances of this case are a warning. The victim contacted through social media his assailant and a brief correspondence ensued between them. This was not a structured program. As to what a person with a brain injury might be made to say through sadness or fluctuating emotion or what they might be persuaded of needs no comment. Yet, these communications were relied upon as evidence of a forgiving attitude. Rightly, the solicitor for Stephen Duffy told his client to stop the process and the social media channel was blocked. It is definitively not to become a feature of the criminal process in the future that contact, however established, with a victim becomes a source of potential mitigation for an accused. There is a route to communication which is through the Gardaí and by formal victim impact statements under s 5 of the 1993 Act.

16. The question remains as to how a judge may approach sentencing where properly-sourced and proven hope is expressed by a victim that an accused should not go to jail or that he or she is not seeking a condign sentence? As a matter of principle, little weight can be attached to such a pronouncement. The constitutional mandate is not changed. To a degree, the victim may feel that his or her voice may be more represented in the overall process where regard is had to what victims have to say, for good or ill. That is why, whether as a statutorily mandated process or through the presentation of evidence as to loss in the prosecution evidence, a more sagacious appraisal may be

made of the case and assistance provided to the judge in arriving at a just sentence. Judges are persons of experience and will be aware that families often split in the context of sexual assault or incest allegations, that communities may support victims or lurch instead into the worst side of human nature. That is why the nature of justice is detached and objective and a victim's views, for leniency or for condign punishment are not to supplant judicial analysis.

17. But, it follows that if victims' views as to how they have suffered are rightly to be heard, then it may be of relevance to sentencing that there has been a recovery or that people have put the violation of their person into a non-central space in their lives. Even that cannot be a definitive factor and is no more than an influence. As to what sentence victims might like one way or the other should really form no part of our system.

### **Money and sentencing**

18. Money and sentencing are not a good mix. O'Malley J objectively details the history, demonstrated in written judgments, of the tension and potential for error that the pull of payment may have on a sentencing court. But, the instances outlined are part of a wider history that has not been recorded in the rare written judgments touching on this issue. While attitudes may have changed with a more enlightened attitude hopefully prevailing that sexual violence, for example, is a serious civil wrong whereby victims are as much entitled to compensation as those defrauded, experience in the past has demonstrated that issuing civil proceedings may have had a negative effect on the attitude of juries to testimony from those wronged. As seriously, situations of the offer and acceptance of informal compensation within the sentencing process lessening or removing a custodial sentence represent a threat to justice.

19. Where a gift of money is proffered and accepted by a victim, a negative scenario can be predicted where in close to similar cases the accused offering money may achieve a lesser sentence while the impecunious accused who can offer nothing may offer an unfortunate contrast. Were this to occur, not necessarily on the same day or in the same term, the administration of justice might be the subject of rational comment. Sometimes such offers of money are conditional, not just to the victim but to the court: that more may be available should the accused have the chance to work. This case is an example. Judicial discretion in sentencing is to be guided by the painstaking work done on categorising wrong and appropriate punishment and may be influenced by a myriad of factors, such as parenting responsibilities, but bringing money into the equation is a demonstrable danger in compromise of the disposal of justice.

20. The tendency towards accepting a gift of money is strengthened in the criminal sentencing process by two factors: firstly, that the accused is almost never insurable against acts of deliberate malice; and, secondly, that crimes of violence are often prosecuted against a background of the accused not being of means. Since almost nothing is available, consequently, in the way of compensation for bodily hurt through tort liability, a judge must be aware of the draw towards accepting a gift from a dubious source and how that may be used in consequence of victims rarely having any other option. The Law Reform Commission in its Consultation Paper on 'Compensating Victims of Crime' (LRC-CP-67-2022) noted that the uneasy relationship between compensation and the criminal process was highlighted in *The People (DPP) v McCabe (No 2)* [2005] IECCA 90. The Law Reform Commission at [7.25] stated that it can be "highly problematic, even inappropriate" to connect compensation in criminal proceedings to the sentencing process but warned that preventing victims from engaging in the compensation process could be viewed as a means of denying them agency. But these are only thoughts, though really valuable, towards a considered position on law reform.

21. Hence, money gifted from a wrongdoer to the wronged can never be a decisive factor. Under s 6 of the Criminal Justice Act 1993 a court may, instead of or in addition to, any other penalty, unless there is reason to the contrary, make a compensation order requiring the guilty party to pay compensation in respect of any personal injury or loss resulting from the offence. This may be full tort compensation, but the offender may be unlikely to be in a position to pay the full amount that would be awarded in civil proceedings. The order may not exceed the amount of damages that the injured party would be entitled to recover in a civil action against the convicted person in respect of the injury or loss. A victim of crime is entitled to civil compensation; every assault is a civil wrong, a tort, in law compensated for by damages just like a traffic or work accident. Some may wonder if the criminal sentencing process is the place for such compensation where the offence is one of violence. It may be different where merely physical damage was suffered, as in mindless violence to a shop window where the offender and their family try to make good the wrong. In *The People (DPP) v McLaughlin* [2005] IECCA 91, [2005] 3 IR 198 the dangers of gifts in supposed compensation for physical and mental harm are warned against: that a judge should never “be drawn into any form of proactive role in determining or negotiating the amount of any compensation which an accused person may offer with a view to mitigating his sentence.” If money has been offered and accepted it remains “entirely a matter for the court to determine the appropriate sentence having regard to all the multiple considerations which must be borne in mind in this context”. Money may be a context but it can never be a determinative factor. It is one to be sceptically assessed and the overall duty to publicly do justice remains the core imperative. As to s 6 of the 1993 Act, none of the judges on the bench at this hearing or the practitioners could remember it being used in a case.

22. Criminal injuries compensation is not constitutionally mandated. It is a matter for government decision as to whether legislation or administrative scheme should provide for assistance to those out of pocket or physically and mentally damaged through breaches of the social order. The Criminal Injuries Compensation Scheme was introduced first by administrative decision on a non-statutory basis in 1974. The scheme depended on the proof of malice, a now outmoded concept but one requiring the accused to have acted with intention or recklessness or criminal recklessness, depending on the offence causing the wrong; *Doyle v Wicklow County Council* [1974] IR 55 is an example. In 1986, the scheme of compensation was changed from personal damage so that only out of pocket loss was to be compensated. This may include the loss of wages or the ability to work as well as such commonplaces as replacing a burnt-out car or a house destroyed by arson or a plate glass window through which a brick was thrown.

## Conclusion

23. The admission of this case to appeal does not admit of a revision of the inadequate sentence. In summary, the notion of mitigation was not properly assessed. The offer of money in the context of the damage suffered by the victim was derisory. The attitude of the victim needs careful assessment by the sentencing court since it is all too susceptible to manipulation, especially where serious wrong has been suffered by a victim of brain injury. The serious work done by this Court and by the Court of Appeal and its predecessor is the foundation of good sentencing practice. That was not referenced, and it should have been.

24. This case is a warning against reversing all of that work. The sentence was not appropriate; neither at trial or on appeal. The principles to be borne in mind in addition to the sterling analysis offered by appellate courts as to bands in various kinds of cases remain those stated by Denham J in *The People (DPP) v M* [1994] 3 IR 306. As she said, “nature of the crime, and the personal circumstances of the appellant, are the kernel issues to be considered and applied in accordance



with the principles of sentencing...". This approach she described as "the essence of the discretionary nature of sentencing". Thereafter, these are these principles to be taken into account:

- the fundamental principle of proportionality; the sentence should be proportionate to the crime committed but also to the personal circumstances of the accused;
- the general impact on victims is a factor to be considered by the court in sentencing;
- a grave offence should attract a severe sentence but attention must also be paid to individual factors such as remorse, which may in principle reduce the sentence;
- in considering the sentence it is appropriate to consider the offence and the circumstances of the accused but not in order to determine whether the accused should be incarcerated to prevent future offending.

25. But a misapplication of these principles, or the bypassing of guideline precedents, requires correction.