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Tom O'Malley, BL
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Sentencing & the Prosecutor

SENTENCING AND THE PROSECUTOR

I went home and read my Christmas Humphreys book on Zen
"Curiosity killed the cat"
Kerouac's "Dharma Burns" and "On the Road"

(Van Morrison, *Cleaning Windows*)

I do not claim to have much in common with Van Morrison apart from being irresistibly attractive to exotic women, but when asked to give this paper I went home and read my Christmas Humphreys article on the role of the prosecutor. Humphreys (1901-1983) was an English barrister who prosecuted in some of the more notable criminal trials of the 1940s and 1950s. He secured the conviction (and execution) of Timothy Evans, Derek Bentley, Ruth Ellis and Styllou Christofi among many others.[1] Later, as a judge at the Old Bailey, he was threatened with dismissal after imposing a six-month suspended sentence on a man who admitted raping two women at knifepoint.[2] In addition to all of that, he wrote more than 30 books on Buddhism (which explains his attraction for Van Morrison) and achieved some fame as a Shakespearean scholar (though admittedly because of his persistent claim that all of Shakespeare's works were written by the Earl of Oxford). His relevance to the present topic consists in an article which he contributed to an early issue of the *Criminal Law Review,* and which has been quoted with some reverence ever since. It was entitled "The Duties and Responsibilities of Prosecuting Counsel"[3] and its principal message was that a good prosecutor is the best defender. Humphreys was adamant that a prosecutor was, above all else, a minister of justice who was obliged to assist the defence in every way possible. As to the prosecutor's role at the sentencing stage of a trial, he wrote:

> "When the summing up is reached, the duty of Crown counsel is largely discharged, for in the matter of sentence he will exercise no grain of pressure towards severity, and will leave his opponent to say what he may in the matter of mitigation. At any appeal he acts as a lawyer only and is merely present to assist the Court of Criminal Appeal…. He has only one criterion of success in his own efforts – his standards as a lawyer, advocate and minister of justice."[4]

Some might be so churlish as to query the compatibility of these noble sentiments with their author's participation in the one of the worst miscarriages of justice in modern British history. Timothy Evans, one of those prosecuted by Humphreys, was hanged in 1950 for a murder which he did not commit and for which he was posthumously pardoned in 1966.[5] Granted, the primary responsibility for this event probably rested with the police rather than the prosecutor, but that is a topic for another occasion. Today, let us just enjoy Christmas and his views on sentencing.

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[1] Minkes and Vanstone, "Gender, Race and the Death Penalty: Lessons from Three 1950s Murder Trials" (2006) 45:4 *Howard Journal of Criminal Justice* 403.

[2] *The Times,* June 21, 1975.

[3] [1955] Crim L.R. 739. This appears to reflect Irish practice as well: *Sheedy* [2000] 2 I.R. 184 at 190.

[4] *Ibid.* p. 747. Elsewhere (at p. 740) he wrote: "It is not the duty of prosecuting counsel to secure a conviction, nor should any prosecutor ever feel pride or satisfaction in the mere fact of success".

[5] *R (Westlake) v Criminal Cases Review Commission* [2004]EWHC 2779, *The Times Law Reports,* November 19, 2004.

Those views reflect the well-established convention that prosecutors should refrain from making any representation as to sentence. The practice is said to date back to a time when virtually all felonies carried the death penalty; once a guilty verdict was returned, there was nothing further to be said by either side or by the court itself in regard to sentence.[6] The real action, so to speak, took place afterwards when efforts were made to secure commutation of sentence by way of executive clemency. Those efforts were sometimes supported by the judge who had been obliged to pronounce sentence in the wake of verdict. By the mid-19th century the death penalty had been abolished for most offences. Following the enactment of the Criminal Law Consolidation Acts of 1861,[7] murder was one of the very few remaining capital offences, and the only one commonly prosecuted. From then on, all other offences were punishable at the discretion of the court subject, of course, to any maximum sentence prescribed by statute. Defence lawyers now had a new and important role of attempting to secure, by way of legal and other submissions, the most lenient sentence possible for their clients. Prosecuting counsel appear to have adhered to their previous practice of remaining neutral in this regard. Neutrality must not however be confused with silence. It has long been accepted that prosecuting lawyers must be ready to advise the court on the applicable sentencing law without, at the same time, attempting to influence the court's choice of sentence.

The question now arising is whether prosecuting lawyers should adopt a more active role at sentencing hearings by, for example, drawing the court's attention to the presence of aggravating factors, making submissions as to the location of the particular offence on the overall scale of gravity, or perhaps urging the imposition of a certain level of sentence. What has prompted this debate, rather belatedly in Ireland, is the existence of a prosecution right of appeal against unduly lenient sentences.[8] To ground such an appeal, the trial judge must be shown to have erred in principle and, although Irish appeal courts have been loath to say so directly, it seems that the imposition of a sentence well below the perceived norm is in itself an appealable error. In these circumstances, should prosecuting counsel be permitted to raise before an appeal court matters which they have failed to draw to the trial judge's attention? Should they perhaps be required to indicate the minimum level of sentence which, in accordance with their current instructions, would be necessary to forestall the possibility of a prosecution appeal?

A SUMMARY OF THE ARGUMENT

As the law now stands, it is difficult to deduce any firm rules or principles in relation to the prosecution role at sentencing hearings. It is of course true that the prosecution can often determine the range of the eventual sentence by deciding to charge one offence rather than another and, more importantly, by selecting the mode of trial. That, however, is not particularly germane to the present discussion which is essentially concerned with the submissions, if any, which prosecution lawyers should make regarding the sentencing of persons convicted on indictment. In order to address this more specific issue, we must examine certain key features of the criminal justice process and the sentencing system in

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[6] See commentary by Thomas on *Attorney-General's Reference No. 52 of 2003* [2004] Crim L.R. 306.

[7] 24 & 25 Vict., chaps 94 to 100. The last of these, the Offences Against the Person Act 1861, remains partly in force in Ireland. See Greaves (ed), *The Criminal Law Consolidation and Amendment Acts of the 24 and 24 Vict*. 2nd ed (London, 1862).

[8] Criminal Justice Act 1993, s. 2.

particular. The argument being made here proceeds along the following lines. Adversarial proceedings by their very nature clearly permit prosecution submissions in relation to sentence. Indeed it could be said that an enhanced role for the prosecution at sentencing hearings would be more in keeping with the spirit of the adversarial system than the present prosecutorial reticence. Having said this, the prosecution, being a public authority must comply with certain legal and ethical standards in any role which it undertakes within the criminal process. It follows that any submissions made by the prosecution in regard to sentence must be grounded on established rational principles.

Prosecution appeals against sentence furnish the most compelling reason for a more active prosecution role at the sentencing stage. Some would support such a role on the basis that it is less than fair to trial judges that their sentences should be upset on appeal on grounds which were not argued before them in the first place. However, the fact remains that judges must always impose a sentence which they consider appropriate to the case while taking into account of relevant legal rules and principles. A more compelling reason for requiring prosecution submissions is that prosecution appeals against sentence entrench upon the expectation otherwise legitimately entertained by convicted persons that their initial sentence will remain undisturbed unless they themselves choose to appeal against it. It is primarily for this reason that prosecution appeals are supposed to be undertaken sparingly. In order to reduce the prospects of such an appeal, prosecuting lawyers should do all that is reasonably possible to assist the trial judge to reach a decision which is within the proper scope of his or her discretion. This finally brings us to the question of what kind of assistance is appropriate for this purpose. Lawyers for both sides are already obliged to alert the court to the relevant law and any specific rules applicable case at hand. It is suggested that prosecution lawyers could quite legitimately be required to alert the court to any aggravating factors present in the case, as a failure to take such factors into account might lead to otherwise avoidable prosecution appeals. Obviously, the more difficult question is whether prosecution lawyers should go further by making submissions as to where the particular offence should be located on overall scale of gravity or whether they should perhaps go further and either suggest an appropriate sentence or the lower limits of a sentence which the prosecution would consider acceptable. It is suggested here that while it may well be possible at some time in the future to make submissions as to the ranking of offences, the absence right now of agreed indicia of gravity for particular offences would make such a course of action currently unacceptable. It is further suggested that in any event, prosecution lawyers should not make any submissions to the trial court as to the particular sentence or band of sentence that should be imposed.

IMPACT OF INITIAL PROSECUTION DECISIONS ON SENTENCE

The criminal process is best viewed as a continuum beginning with a report or discovery of an offence and ending with a verdict or, in some cases, with the conclusion of appeal or review proceedings. Along the continuum are several key points at which discretionary decisions are made which either determine or influence everything that follows thereafter. In fact, the process might more accurately be said to begin with the legislative decision to criminalise certain forms of behaviour, a decision that may be just as discretionary as any other. In this country right now, it is an offence to have a dog without a licence but it is not, to the best of my knowledge, an offence to keep a rattlesnake, licensed or otherwise. Yet, a snake could be a greater source of anxiety to one's neighbours than most canine

species. Adultery remains a criminal offence in some common-law jurisdictions[9] but, thankfully, Ireland is not one of them.

Prosecution decisions are clearly of central importance. Most common-law jurisdictions subscribe to the so-called Shawcross doctrine which rejects any notion of a formal obligation to prosecute every detected or reported offence.[10] Police and public prosecutors have considerable discretion in deciding what to investigate or prosecute, as the case may be.[11] When public prosecutors decide to initiate criminal proceedings, they are not, as a rule, under any formal obligation to charge the most serious offence which the evidence may appear to support.[12] To an increasing extent, they often have a choice of proceeding either summarily or on indictment. One of the most significant developments in the Irish criminal justice system over the past half century or so has been the expansion of District Court jurisdiction. This began, rather cautiously, with the Criminal Justice Act 1951 which permitted the District Court to deal summarily with those indictable offences listed in a schedule to the Act itself, provided certain conditions were fulfilled.[13] Then the Criminal Procedure Act 1967[14] permitted the same court to deal with virtually any indictable offence, other than a few very serious ones, provided the accused pleaded guilty and provided the appropriate punishment was within the court's jurisdiction. Next, the Criminal Justice Act 1984 increased to two years the cumulative term of imprisonment which the District Court could impose for a combination of offences, thereby making summary disposal a more attractive option for prosecutors in many cases. Most significant of all perhaps has been the legislative practice of creating so-called hybrid offences which are triable either summarily or on indictment at the election of the prosecution.[15] Examples would include assault causing harm contrary to section 3 of the Non-Fatal Offences Against the Person Act 1997 and the offence of possessing child pornography. Granted, the District Court can (and must) refuse jurisdiction unless satisfied that the offence is a minor one, but this happens relatively rarely. The important point for present purposes is that when the prosecution decides to proceed summarily or consents to such an arrangement, it is effectively predetermining the upper limit of the punishment to which the accused will be subject on conviction.

Then there is the vexed question of plea bargaining, although it is "vexed" only to the extent that some lawyers refuse to acknowledge its existence. The problem appears to be largely definitional, because plea bargaining is no more than a convenient generic term to cover charge bargaining, sentence bargaining and fact bargaining. The practice is most

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9 In *People v Waltonen,* decided in November 2006, the Michigan Court of Appeals warned that adultery was still a criminal offence carrying a heavy penalty, although the last conviction for the offence was in 1971.

10 Sir Hartley Shawcross, then Attorney-General of England and Wales, speaking in the House of Commons on January 29, 1951 (H.C. Debates, Vol. 483, Col. 681). See also Hetherington, *Prosecution and the Public Interest* (London, 1989).

11 On police discretion in relation to the conduct of investigations, see *Fowley v Conroy* [2005] 3 I.R. 480.

12 In *Cronin* [2003] 3 I.R. 377 at 387, the Court of Criminal Appeal said: "The prosecution will normally have complete discretion as to the charges to be brought and the evidence with which to support them. Only unusual circumstances justify interference with this discretion. Equally, only something very unusual could justify the trial judge in interfering with the discretion of defence counsel in the selection and statement of the defence of his client."

13 *Reade v Reilly* [2007] IEHC 76.

14 S. 13. See *T.H. v DPP* [2004] IEHC 76.

15 *State (McEvitt) v Delap* [1981] I.R. 125; *State (Comerford) v Kirby*, unreported, High Court, July 23, 1986.

closely associated with the United States and with good reason.[16] Even there, however, it is usually defined as "the process by which the defendant relinquishes his right to go to trial in exchange for a reduction in charge and/or sentence."[17] In other words, a person charged with murder offers to plead guilty to manslaughter and that offer is accepted by the prosecution, or a person charged with several offences offers to plead guilty to some of them in return for the others being dropped. Neither scenario is exactly unknown in this country. In many American jurisdictions, the bargain may include an undertaking from the prosecuting attorney as to the sentence which he or she will seek (and probably get). That element of sentence bargaining is largely alien to our system, but apart from that, plea deals are no less common here than they are elsewhere. Provided certain ethical standards are observed, plea bargaining serves a useful function and is mutually beneficial to both sides. The principal ethical considerations, obviously enough, are that care must be taken to ensure that an innocent person is never compelled or induced to plead guilty and that, in any case, neither the accused nor his legal representatives feel under pressure to enter into a plea bargain. Leading Irish examples of plea bargains in recent years would include *Cotter*[18] and *McAuley*.[19] In *Cotter*, a woman originally found guilty of murdering her husband had her conviction quashed on appeal, though for reasons unconnected with the strength of the evidence. At the beginning of her retrial, a plea of guilty to manslaughter was accepted and she was sentenced to time already served.[20] In *McAuley*, a number of men charged with what was formerly capital murder were re-arraigned on the 14th day of their trial at which point, they pleaded guilty to manslaughter. The defendants in all of these cases received sentences substantially lower than would have been imposed following conviction for the original charges.

THE ADVERSARIAL SYSTEM

The principal hallmark of the adversarial system is that a judge or other decision-maker determines a dispute on the basis of information and submissions presented by the parties. It is the parties who define the ambit of the dispute by limiting and controlling the presentation of evidence and argument.[21] In most civil law systems, on the other hand, the court adopts a more inquisitorial role by actively engaging in investigation and witness interrogation with a view to establishing the entire story. While some relaxation of the ordinary rules of evidence is permitted at sentencing hearings, the adversarial ethos still prevails. This, in turn, means that the parties bear the essential burden of placing before the court relevant information in relation to both law and fact. Evidence placed before the court during a sentencing hearing may be challenged by way of cross-examination or opposing evidence and this applies, for example, to victim impact evidence as well as

[16] Heumann, *Plea Bargaining* (Boston, 1977); Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* (Stanford University Press, 2003); Ma, "Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany and Italy: A Comparative Perspective" (2002) 12 *International Criminal Justice Review* 22; Bibas, "Plea Bargaining Outside the Shadow of the Trial" (2004) 117 Harvard L.R. 2463.

[17] *Black's Law Dictionary,* s.v.

[18] Unreported, Court of Criminal Appeal, June 28, 1999.

[19] [2001] 4 I.R. 160.

[20] *Irish Times*, December 16, 2003.

[21] "The parties compose their stories for and present them to an impartial and passive audience which acts as decision-maker, by assigning criminal liability on the basis of the stories": Goodpaster, "On the Theory of American Adversary Criminal Trial" (1987) 78 *Journal of Criminal Law and Criminology* 118 at 120.

police evidence. Prosecution submissions as to sentence would therefore be quite compatible with the adversarial system. Indeed, the spirit of the system would suggest that *some* such submissions should be made in order to facilitate an informed decision as to sentence. Adversarial proceedings would, however, permit a wide variation in the nature and scope of the submissions that might be made in relation to sentence. This remains essentially a matter of policy which each jurisdiction must decide for itself.

THE PROSECUTOR'S ROLE IN CRIMINAL PROCEEDINGS

One of the classic statements of the prosecutor's role in the criminal trial process was provided by the Supreme Court of Canada in *R v Boucher*[22] where it said:

> "It cannot be overemphasised that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before the jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justice of judicial proceedings."[23]

This statement has achieved something of a canonical status and has frequently been cited with approval in Ireland, Britain and other common-law jurisdictions.[24] In *DPP v Special Criminal Court,* the Supreme Court said that the task of prosecutors was "not just to secure a conviction: rather they must always be ministers of justice."[25]

As to the defence role, on which there are fewer authorities,[26] reference is sometimes made to the following statement by Henry Brougham, later Lord Chancellor:

> "An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments,

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[22] [1954] S.C.R. 16.

[23] 1954] S.C.R. 16 at 23-24, quoted with approval by the Court, *per* Sopinka J., in *R. v. Stinchcombe* [1991] 3 S.C.R. 326 at 333. The United States Supreme Court has said: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocents suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one": *Berger v. United States* 295 U.S. 78 at 88 (1935). See Henning, "Prosecutorial Discretion and Constitutional Remedies" (1999) 77 Washington Univ. L.Q. 713; Ely, "Prosecutorial Discretion as an Ethical Necessity", (2004) 90 Cornell L.R. 237

[24] *People (DPP) v D.O'S.* [2006] 3 I.R. 57 at 59-60 (Supreme Court); *R v H* [2004] 2 A.C. 134, [2004] 2 W.L.R. 335 at [13] (House of Lords).

[25] [1999] 1 I.R. 60 at 87.

[26] *O'Carroll* [2004] 3 I.R. 521.

> the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion."[27]

Admittedly when he spoke these words, Brougham was engaged in the rather delicate, not to say dangerous, task of defending Queen Caroline against a charge of adultery brought against her by her husband, King George IV. But as the Canadian Supreme Court recently remarked, the philosophy underpinning Brougham's statement – loyalty to one's client – is still with us and remains essential to the integrity of the administration of justice. Nowadays, of course, the Brougham principle would have to read in light of the defence advocate's role as an officer of the court and the concomitant obligation not to mislead the court.[28]

These principles are primarily relevant to the role of counsel during the trial proper, but they are also pertinent to the present topic to this extent. The prosecutor must, as the saying goes, act as minister of justice and also in the public interest. This extends to all stages of the trial including sentencing. As a public authority, the Director of Public Prosecutions must take decisions in accordance with basic standards of legality, rationality and coherence. When making a plea in mitigation, defence counsel, subject to the overriding obligation not to mislead the court, may advance whatever arguments will best serve the interests of his or her client. The prosecution is subject to more exacting standards and wider obligations. It should not therefore be expected to make recommendations as to the appropriate location of an offence on the scale of gravity, much less in regard to an appropriate sentence, unless it can point to and rely upon established criteria for that purpose.

RELATIONSHIP BETWEEN TRIAL COURTS AND APPEAL COURTS

In a jurisdiction which adheres to discretionary sentencing and which accords primacy to proportionality as a distributive principle, a trial court must always select a sentence appropriate to all the circumstances of the case. It must also of course take account of the governing legislation and any general principles established by the superior courts. Judges must have regard to past decisions of appeal courts in order to identify applicable principles but must never allow their selection of sentence to be determined or influenced by any concern about what an appeal court may do in the future. This principle was recently enunciated by the English Court of Appeal (Criminal Division) in *Krivec*.[29] The sequence of events in that case was, by any standards, unusual but essentially it began with the trial judge indicating, before the jury returned their verdict, that he did not intend to impose a custodial sentence on the accused if convicted. Later, however, on reading the probation report he changed his mind and imposed a sentence of 18-months' detention. Then, immediately afterwards, following consultation in chambers with counsel for both sides, he changed his mind yet again and suspended the sentence in its entirety. His decision to impose a custodial sentence appears to have been influenced by a fear that there might otherwise be a prosecution appeal and his decision to suspend it was taken after he was erroneously informed by both counsel that a prosecution appeal was not

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[27] Quoted in Nightingale, *Trial of Queen Caroline* (1821), Vol. II, Part 1, p. 8.

[28] *R v O'Connell* (1844) 7 Ir. L.R. 261 at 311-312.

[29] *Attorney-General's Reference No. 8 of 2007 (Danielle Krivec)* [2007] EWCA Crim 922, [2008] 1 Cr. App. R. (S) 1.

legally possible in that case. The prosecution did in fact appeal (unsuccessfully as it happened), but the Lord Chief Justice, who presided, took the opportunity to make the following remarks:

> "We wish to make one thing clear. The oath taken by a judge to administer justice "without fear or favour, affection or ill-will" extends to imposing what the judge concludes to be the appropriate sentence, without being deterred by the fear of an Attorney's reference. That is not to say that a judge should not pay careful regard to sentencing guidelines, whether laid down by this Court or by the Sentencing Guidelines Council. But these are only guidelines. There will be cases where there is good reason to depart significantly from the guidelines. In particular, this may be appropriate where the facts of the offence diminish its seriousness in comparison to the norm, or where there is particularly powerful personal mitigation. In such circumstances, it is quite wrong for the judge to refrain from imposing the sentence that he considers appropriate because of apprehension that this may cause the Attorney-General to intervene. We have no doubt that the Attorney-General recognises that a departure from the guidelines, even if it is substantial, is not of itself to justify his intervention. The test for intervention is not leniency, but undue leniency. Leniency, where the facts justify it is to be commended, not condemned."[30]

This approach would doubtless be adopted in Ireland as well and it is, indeed, reflected in the Court of Criminal Appeal judgment in *Keane*. But it still does not answer the question of whether an advocate should be permitted to go to an appeal court and accuse the trial judge of having got something wrong without ever having given him or her the opportunity to get it right. That is precisely what happens when the prosecution remains silent at the sentencing but then launches an appeal on the basis that sentence was unduly lenient because of an error of principle on the part of the trial judge. The key question therefore is whether the introduction of prosecution appeals should be interpreted as having implicitly altered the traditional role of the prosecutor during sentencing hearings.

THE RELEVANCE OF PROSECUTION APPEALS

Although they were first suggested – by judges in fact – as far back as 1892,[31] prosecution appeals against unduly lenient sentences were not introduced in England and Wales until 1988[32] and in Ireland until 1993.[33] They had a much longer history in Australia, having been introduced in New South Wales in 1924.[34] One aspect of the Australian jurisprudence on prosecution appeals is particularly worthy of note because it appears to have influenced the law later introduced in these islands in respect of prosecution appeals. In its early interpretations of the New South Wales provision, the High Court of Australia had adopted quite an expansive approach, saying that an appeal court had unfettered

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[30] [2007] EWCA Crim 922, [2008] 1 Cr. App. R. (S) 1 at [16].

[31] *Report of the Judges to the Lord Chancellor 1892*, cited in Shute, "Prosecution Appeals Against Sentence: The First Five Years" (1994) 57 Mod. L.R. 745.

[32] Criminal Justice Act 1988, s. 36 which also applied to Northern Ireland. A similar system was introduced in Scotland by the Prisoners and Criminal Proceedings (Scotland) Act 1995, s. 42.

[33] Criminal Justice Act 1993, s. 2.

[34] Criminal Appeal Act 1912, s. 5D. See Brignell and Donnelly, *Crown Appeals against Sentence* (Judicial Commission of New South Wales, Sydney, 2005).

discretion in deciding if the original sentence was unduly lenient and, if so, in selecting a different sentence in its place. This was the clear view of the court in *R v Whitaker*[35] where, for example, Gavan Duffy and Starke JJ had said: "There is nothing in the words of the section to limit the exercise of the [Court of Criminal Appeal's] discretion."[36] Fifty years later, in *R v Griffiths*[37] the High Court took a radically different approach, as reflected in the judgment of Barwick C.J. who said:

> "[A]n appeal by the Attorney General should be a rarity, brought only to establish some matter of principle and to afford an opportunity for the Court of Criminal Appeal to perform its proper function in this respect, namely, to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons."[38]

This principle of exceptionality, the validity of which has been questioned by some commentators, has informed prosecution appeals against sentence in other common law countries ever since. It is reflected both in the express language of the Irish and British statutes with their reference to undue leniency, in the parliamentary history of those measures and, indeed, in court judgments.[39]

Another aspect of Australian jurisprudence on prosecution appeals against sentence is even more relevant to the present topic. Several Australian appeal courts, having regard to the so-called double jeopardy element inherent in such appeals, have noted the injustice of permitting an appeal where the prosecution itself may have caused, or allowed to go uncorrected, the error complained of. In *R v Tait and Bartley*,[40] the Federal Court said:

> "It would be unjust to a defendant to expose him to double jeopardy because of an error affecting his sentence, if the Crown's presentation of the case either contributed to the error or led the defendant to refrain from dealing with the some aspect of the case which might have rebutted the suggested error".

The same principle was spelt out in even stronger terms in *R v Wilton*[41] by King C.J.:

> "It is necessary to consider whether the prosecution should be allowed to raise on appeal the contention that the sentence ought not to have been suspended when that contention was not put in the Court below. The consequences of allowing the prosecution to do so are serious. The respondent has faced the prospect of deprivation of his liberty by way of imprisonment and has been spared, subject to observance of the conditions of the bond. If the prosecution is allowed to raise the

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35 (1928) 41 C.L.R. 230.

36 (1928) 41 C.L.R. 230 at 253. The section itself read: "The Attorney General or Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any sentence by the court of trial in any proceedings to which the Crown was a party and the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as the said court may seem proper." It will be noted that there was no reference to "undue leniency" or any similar concept.

37 (1977) 137 C.L.R. 293.

38 (1977) 137 C.L.R. 293 at 310.

39 *Byrne* [1995] 1 I.L.R.M. 279; *McCormack* [2004] I.R. 356; *Redmond* [2001] 3 I.R. 390 at 401 where the above-mentioned passage from *Griffiths* was quoted with apparent approval.

40 (1979) 24 A.L.R. 473 at 476-477, and approved in several later cases. See Fox and Freiberg, *Sentencing: State and Federal Law in Australia* 2nd ed., (Oxford University Press, 1999), pp. 1075 ff.

41 (1981) 28 SASR 362 at 367-368.

> contention he must again face the prospect of imprisonment. This is what the Federal Court mean in *R v Tait and Bartley* by 'double jeopardy'. In my opinion, this Court should allow the prosecution to put to it, on an appeal against sentence, contentions which were not put to the sentencing Judge, only in exceptional circumstances which appear to justify such a course. I endorse with respect what was said in *Tait and Bartley* as to the duty of prosecuting counsel before the sentencing judge. In particular where a submission is made by counsel for a convicted person that a sentence should be suspended or a possible suspension is mentioned by the judge, and this course is regarded by the prosecution as beyond the proper scope of the judge's discretion, a submission to that effect should be made. Generally speaking, if the submission is not made to the sentencing judge the prosecution should not be able to advance the contention successfully on an appeal by the Attorney-General."

Although this statement was made by a state appeal court, it has been repeatedly endorsed by the High Court of Australia, most notably in *R v Everett.*[42] There a suspended sentence was imposed at first instance but replaced by a sentence of immediate detention following a prosecution appeal to the Tasmania Court of Criminal Appeal. The High Court unanimously set aside the order of the latter court, noting that although the trial judge had clearly indicated that he was minded to impose a suspended sentence, prosecuting counsel had offered no indication whatever that such an order might be beyond the scope of the judge's discretion. Referring to the comments made by King CJ in *Wilton* (above), a majority of the High Court said:

> "They should be applied to an application by the Crown for leave to appeal against such an order if it appears that the Crown was on notice that there was a real possibility that such an order might be made but refrained from submitting that it would be inappropriate and not within the proper exercise of the sentencing discretion."[43]

(The remaining member of the Court, McHugh J. agreed with the conclusion and the general line of reasoning of his colleagues though, as noted below, he was even more emphatic on the prosecution role at the sentencing hearing).

Wilton and *Everett* both involved prosecution appeals against suspended sentences, and this may go some way towards explaining the stance adopted by the High Court and other appeal courts. The so-called double jeopardy element in prosecution appeals hits particularly hard when an offender who has been set at liberty, conditionally or otherwise, by the trial court then finds himself committed to custody following a prosecution appeal. In these circumstances, it seems reasonable to require the prosecution to make appropriate representations to the trial judge if it feels that a suspended or community-based sentence would be so disproportionately lenient as to exceed the judge's discretion. The more difficult question is whether the prosecution has a broader obligation to assist the trial court in avoiding an appealable error in the selection of sentence in all circumstances. In *Everett,* McHugh J., who delivered a separate judgment concurring in the result, strongly suggested that the prosecution bore this wider obligation, saying:

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42 (1994) 181 C.L.R. 295.

43 (1994) 181 C.L.R. 295 at [9].

> "Even where it appears that the sentencing judge has erred in a fundamental way that may affect the administration of justice, fairness to the sentenced person requires that the Crown's concurrence with, or failure to object to, a proposed course of action by the sentencing judge must be weighed in the exercise of discretion. This is particularly so when the convicted person has been given a non-custodial sentence. Private litigants who appeal against judgments and orders are not usually allowed to withdraw concessions made or concurrences expressed in the course of litigation. As a general rule, neither should the Crown be permitted to depart from a course of action that may have induced the sentencing judge to take the course that he or she did."[44]

With regard to the reference by McHugh J. to civil appeals, a more relevant comparison in this jurisdiction might be made with the rules governing appeals against conviction and, in particular, the general prohibition against appealing on grounds which were not raised, by requisition or otherwise, before the trial court.[45] The principle in question was recently re-stated with some emphasis by both the Court of Criminal Appeal and the Supreme Court in *Cronin.*[46] Similar reasoning would suggest that the grounds on which prosecution appeals are brought should, at the very least, have been drawn to the attention of the trial judge. Indeed, the possibility of such an obligation was hinted at by the Court of Criminal Appeal in *Redmond* when it said:

> "Heretofore this point has of course been made in the context of a judge's charge to a jury or a ruling on evidence. The analogy to remarks in sentencing is not a perfect one. But the fact remains that, whatever counsel for the defendant said by way of submission on this point did not evoke contradiction, whereas he was immediately challenged on the point about the composition of the sum of £782,000. Indeed, a witness was recalled after the plea of mitigation to address the latter point. The omission to challenge him on the former point supports the view that what was said in this regard was indeed a submission or characterisation of the evidence, rather than a statement of fact. Prosecuting counsel were properly alert, as far as their instructions permitted, to ensure the accuracy of factual material."[47]

Granted, the issue to which the court was referring in *Redmond* was a factual one, but it is possible that in future the same principle might be applied to submissions and arguments of a more legal nature.

THE VALUES PROTECTED BY THE "AUSTRALIAN" PRINCIPLES

Earlier in this paper reference was made to the possible injustice of allowing the prosecution to allege on appeal that a trial judge had made certain errors even though it had failed draw those errors to the judge's attention during the sentencing hearing itself. This line of reasoning might, of course, be attacked on two grounds. First, the same might be said to apply to defence appeals and secondly, it might be argued that since the central purpose of criminal proceedings is to do justice to the accused, any potential embarrassment or unfairness to the trial judge is, at best, a matter of secondary

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[44] (1994) 181 C.L.R. 295 at [6] of concurring judgment.

[45] *Coughlan* (1968) 1 Frewen 325; *Moloney* unreported, Court of Criminal Appeal, March 2, 1992; *Noonan* [1998] 2 I.R. 439; *Dundon* [2008] IECCA 14.

[46] [2003] 3 I.R. 377 (CCA), [2006] 4 I.R. 329 (SC).

[47] [2001] 3 I.R. 390 at 401.

importance. It will be noted, however, all of the Australian judgments mentioned earlier were primarily concerned with justice to the accused. It is for this reason that the underlying policy in regard to the very idea of a prosecution appeal is centrally important. If such appeals are seen as a limitation on the right of accused persons to feel secure in the knowledge that their initial sentence will remain undisturbed unless they choose to appeal against it themselves, it follows that every reasonable step should be taken to preserve that (presumably) reasonable expectation. In *Everett*, for example, the High Court noted that a prosecution appeal "has long been accepted in this country as cutting across the time-honoured concepts of criminal administration by putting in jeopardy for a second time the freedom beyond the sentence imposed".[48] Statements to the same effect are to be found in the Irish jurisprudence on prosecution appeals. Viewed in this light the imposition of a formal obligation on the prosecution to take all reasonable steps to protect the accused from this possibility of "double jeopardy" may be viewed essentially as a due process requirement rather than (or in addition to) being a duty owed to the trial court itself.

THE SELECTION AND CONSTRUCTION OF SENTENCE

The selection of sentence, when there is a selection to be made, is exclusively a judicial task. This principle was firmly established in the leading case of *Deaton v Attorney General and Revenue Commissioners,*[49] a decision which is widely accepted and quoted only here in Ireland but throughout most of the common-law world. When reaching a decision in any case, a judge is entitled to full assistance from the parties and their legal representatives and a sentencing decision is no different from any other in this respect. In fact, as a general rule, a court or a judge should not arrive at a decision on the basis of information or legal considerations which the parties have had not the opportunity to contest or, at least, to comment upon. The sentencing decision-making process is also well established following the judgment of the Supreme Court, *per* Egan J in *M*[50] and the subsequent confirmation of that approach in later appeal cases, notably *Kelly.*[51] In *M,* Egan J had said:

> "It must be remembered also that a reduction in mitigation is not always to be calculated in direct regard to the maximum sentence applicable. One should look first at the range of penalties applicable to the offence and then decide whereabouts on the range the particular case should lie. The mitigating circumstances should then be looked at and an appropriate reduction made."[52]

Applying this principle in *Kelly,* the Court of Criminal Appeal, *per* Hardiman J.said:

> "The court has very seriously considered that paragraph since it is effectively the whole of the case put forward by the prosecutor on this issue. We are quite unable to see how the passage supports the approach which was taken in this case and we are quite unable to see the basis on which the prosecutor might consider that it did. Egan J. is saying a number of things. He is saying first of all that one does not simply apply the mitigating factors to the maximum sentence and come up as a

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48 (1994) 181 C.L.R. 295 at [6].
49 [1963] I.R. 170.
50 [1994] 3 I.R. 306.
51 [2005] 2 I.R. 321.
52 [1993] 3 I.R. 306 at 315.

> result with the appropriate sentence. On the contrary, he says, one looks first at the range of penalties and locates where on the range the particular case should lie and one *then* applies the mitigating factors after having performed that exercise. Now the exercise described there seems to us quite clearly to be inconsistent with the approach which was taken in this case. In this case no attempt was made, logically having regard to what the trial judge considered the right approach, to find the whereabouts on the range of penalties this particular case lay before applying the mitigating circumstances."[53]

The requirement that the offence of conviction must first be located on the overall scale of gravity would seem to support if not require the elaboration of settled criteria for this purpose. As argued below, if such criteria were developed (and there are several ways in which that could be done), the idea of prosecution recommendations on the ranking of offences would be much more feasible.

THE PROSECUTOR'S ROLE AT THE SENTENCING HEARING

When approaching the question of any enhanced role for the prosecution at sentencing hearings, a distinction must be drawn between advice and advocacy. Prosecuting lawyers are already expected to be in a position to advise the court as to legal matters such as the maximum sentence and any statutory provisions which happen to be relevant to the case (e.g. any requirement that sentences be ordered to run consecutively, the non-availability of a probation order, the necessity to impose or consider the imposition of some ancillary measure such as confiscation). Needless to say, formal sentencing guidelines, where they exist would also come within the category of matters upon which counsel for both sides might offer advice to the sentencing court. In short, therefore, there can no real objection to the tendering of advice. In this regard, it is presumably significant that the Bar Council Code of Conduct states that prosecuting barristers "shall not attempt *by advocacy* to influence the court in regard to sentence."[54] Whether drawing the court's attention to aggravating factors would constitute advice or advocacy is a matter of opinion. The Bar Council Code of Conduct does permit prosecuting counsel to draw the court's attention to mitigating factors in the case of an unrepresented defendant, and does so in terms which suggest that this might be treated as advocacy. However, for the reasons already mentioned in relation to prosecution appeals, and in particular the suggested obligation on prosecuting counsel to take reasonable steps to remove the need for a prosecution appeal where possible, there can be little objection to those counsel drawing the court's attention to aggravating factors, even though this might require a revision of the barristers' Code of Conduct. This is obviously a matter which requires further consideration and discussion and, as in the case of offence ranking discussed further below, problems might occasionally arise as to what should be considered an aggravating factor. A number of empirical studies have shown that the same factor, e.g. unemployment or intoxication, may be either aggravating or mitigating, depending on the circumstances.[55] However, any such problem would of course be mitigated by the undoubted right of the defence to challenge any submissions made in this regard by the prosecution. The decision ultimately, of course, will rest with the judge. Finally, we come to the question of whether

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53 [2005] 3 I.R. 321 at 324.

54 Para. 10.23, emphasis added.

55 Tata, "Sentencing as Craftwork and the Binary Epistemologies of the Discretionary Decision Process" (2007) 16:3 *Social and Legal Studies* 425 at 436.

prosecuting counsel should be prepared to go further and make submissions as to the appropriate ranking of the particular offence and/or the appropriate range of sentence. Before discussing these matters further, it may be useful to make one further visit back to Australia in order to consider a recent decision of the Victoria Court of Appeal on this topic.

In *R v S,*[56] the appellant had been sentenced to six years' imprisonment with an order that he serve at least three years and nine months for a drug-related offence to which he pleaded guilty. One of his grounds of appeal was that the trial judge had given undue weight to a submission on behalf of the prosecution as to the appropriate sentence. The appellant's counsel had sought a fully suspended sentence, but the prosecutor made the following submission in reply:

> "It's a very difficult position for Your Honour since this is the first case in relation to a large commercial quantity. Accordingly, I've taken the unusual course, Your Honour, of seeking instructions from the Chief Crown Prosecutor as to a figure. And it is submitted for the Crown that a sentence of – a head sentence of less than five years would be inadequate."

Rejecting this and all other grounds of appeal, the court said:

> "One of the functions and duties of a prosecutor is to assist the court to avoid error in the conduct of criminal proceedings, whether at trial or on sentencing. In a sentencing hearing a prosecutor should be read to assist the court by drawing attention to any statutory maximum penalty applicable and to any particular sentencing options available or unavailable in the particular case. In addition, the prosecutor should be ready to make submissions about the sentencing range applicable to the offence(s) for which the person is to be sentenced.
>
> …properly formulated and neutrally-expressed submissions by the Crown as to matters of sentencing are to be encouraged. They should include, where appropriate, submissions as to the applicable range outside which a sentence would constitute sentencing error. For counsel to indicate the limits of the sentencing range is conducive to consistency of sentencing, which is a matter of fundamental importance to the sentencing system.
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> Submissions of that kind can be of great assistance to a sentencing court. They can be contradicted appropriately in submissions by defence counsel and thus contribute to the attainment of a just result in the proceedings. Such submissions should not urge the imposition of any particular sentence, and above all should not convey any implication that rejection of the submissions might trigger a Crown appeal against sentence. The submission in the present case, we should add, conveyed no such implication."

It is difficult to follow some the reasoning in this passage. On the one hand, the court says that the prosecution should not urge the imposition of any particular sentence or indicate that a prosecution appeal might follow in the event that a particular recommendation were rejected. Yet, in the case itself, the prosecutor had effectively recommended a head

[56] [2006] VSCA 134 (June 26, 2006); Supreme Court of Victoria, Court of Appeal.

sentence of at least five years (which the trial court obviously accepted) and had, moreover, indicated that anything less would be "inadequate" from the prosecution's perspective. Admittedly, he had not expressly threatened an appeal, but contrary to what the appeal court said, there was surely an implication that any lesser sentence *might* result in a prosecution appeal. Then there are the references by the appeal court to the applicable "sentencing range". This would probably be acceptable enough in a jurisdiction which had sentencing guidelines or tariffs of some kind. Suppose, for example, the jurisdiction in question had a guideline judgement similar to that in *R v Billam*[57] in which the English Court of Appeal (Criminal Division) set out some benchmarks for rape sentencing. It had indicated starting points of five years, eight years, 15 years and life in contested cases depending on the presence or absence of certain factors. In those circumstances, there could be little objection to the prosecution indicating that a particular case seemed to come within the range to which one or other of these starting points applied. This, after all, would amount to little more than drawing the court's attention to a relevant legal authority which is one of the prosecution's well-accepted functions.

In Ireland, it is suggested, the furthest prosecuting counsel might go is to make representations as to the location of the specific offence on the overall scale of gravity but right now this would be quite a hazardous task.

THE PROBLEM OF RANKING

Any finding or submission that the offence of conviction should be ranked at a particular point on the overall scale of gravity presupposes the existence of some settled criteria for the comparative evaluation of different manifestations of the same offence. If, for instance, it is claimed that a particular robbery is towards the top of the scale of gravity, it must follow that there are certain agreed indicia of gravity for the offence of robbery in general. These might include the level of violence used, the use of a firearm or other weapon, the amount of property taken and so forth. In reality, of course, there are no formally agreed criteria of this kind in Ireland, so individuals called upon to make submissions or decisions in this regard may well differ as to the factors they consider most important. Offence ranking, if it is to be taken seriously, must be informed by a principle of universality and also by uniformity of approach. In other words, it must be undertaken in respect of all offences prosecuted on indictment (or, at least those more commonly prosecuted) because a sentence imposed for any such offence is liable to a prosecution appeal. Care must be taken not to extrapolate too much from the experience of the Central Criminal Court. Without in any way diminishing the importance of this, the highest criminal trial court, it must be recalled that the number of offences within its exclusive jurisdiction which carry discretionary sentences is miniscule. Furthermore, the number of judges who preside over the court with any degree of frequency is quite small and, indeed, the number of counsel who routinely appear before it is also relatively small. In these circumstances, it would scarcely be surprising if an informal, and perhaps reasonably accurate, consensus emerged as to the appropriate sentences for different manifestations of the few offences with which the court deals. Different considerations apply to the Circuit Court which is responsible for the vast bulk of sentences imposed following conviction on indictment. The numbers of judges and counsel involved are much higher and, even more importantly, the court is organised on a regional basis which means that different "going rates" may apply in

[57] [1986] 1 W.L.R. 349; [1986] 1 All E.R. 988; 82 Cr. App. R. 347.

different parts of the country. The principle of universality would require that any practice of assessing the comparative gravity of offences should apply across the board in all courts, irrespective of their location or level. It would be strange, after all, if counsel were expected to make submissions as to the ranking of a manslaughter offence in the Central Criminal Court, but not in the Circuit Court, although both courts may find themselves having to impose sentence for this offence. Over the years prosecution appeals against sentence have been brought in respect of a reasonably wide range of offences, including sex offences,[58] drug offences,[59] tax offences,[60] assault and theft,[61] robbery,[62] various road traffic offences,[63] explosives offences,[64] and manslaughter.[65] Many of these are within the exclusive jurisdiction of the Circuit Court (though in some cases transferred to the Special Criminal Court).

Uniformity of approach is a more difficult proposition, but not the less essential. What it means is that all parties called upon to suggest or decide the location of a particular offence on the overall scale of gravity should be able to draw upon settled criteria for that purpose. No doubt such criteria can be established as the experience of the Sentencing Advisory Panel and the Sentencing Guidelines Council of England and Wales clearly shows.[66] But as the experience of these bodies also shows, a great deal of effort and resources are required in order to generate the necessary data and the eventual criteria. The problems to be surmounted and the choices made in order to derive such criteria would include the following.

First and foremost, clarification is needed as to what precisely is meant by locating an offence on the scale of gravity. As noted earlier, the Court of Criminal Appeal is leaning distinctly towards the two-tier approach to sentencing which means that the comparative gravity of the offence must first be determined and a notional sentence identified before appropriate adjustments are made for mitigating (or perhaps aggravating) factors. It may not always be entirely clear which factor is relevant to which stage of the decision-making process. Take a case of rape committed by a person who broke into the victim's dwelling in order to commit the offence. Intrusion into the victim's dwelling is widely accepted as an aggravating factor, but is it to be included in the initial assessment of gravity or is it something to be "added on" by way of aggravation at the second stage? (For what it's worth, I would favour the first of these approaches as the intrusion was a circumstance of the offence rather than a characteristic of the offender). Or take the vexed issue of intoxication which, it well accepted, may be a mitigating, an aggravating or a neutral factor depending on the circumstances. Courts have occasionally remarked that an

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[58] E.g. *McLaughlin* [2005] 3 I.R. 198; *Finn* [2001] 2 I.R. 25; *McCormack* [2000] 4 I.R. 356; *Heeney* [2001] 1 I.R. 736.

[59] E.g. *Alexiou* [2003] 3 I.R. 513; *McGinty* [2007] 1 I.R. 633.

[60] *Redmond* [2001] 3 I.R. 390.

[61] *Dwyer* [2007] IECCA 1.

[62] *Doyle* [2004] IECCA 5.

[63] *Shinnors* [2007] IECCA 50; *O'Reilly* [2007] IECCA 118.

[64] *Fee* [2006] IECCA 102.

[65] *McAuley* [2001] 4 I.R. 160.

[66] All of the Sentencing Advisory Panel's documents and those of the Sentencing Guidelines Council established under the Criminal Justice Act 2003 are available at Hwww.sentencing-guidelines.gov.ukH and are of great value even in jurisdictions which eschew the notion of guidelines. On the operation of the Panel and the Council, see Ashworth, "English Sentencing Guidelines in their Public and Political Context" in Freiberg and Gelb, *Penal Populisim, Sentencing Councils and Sentencing Policy* (Willan Publishing, Cullompton, Devon, 2008).

offender's drunken state, especially when committing an offence such as an assault or robbery, may add greatly to the fear and trauma experienced by the victim and that this should be reflected in the sentence. But should drunkenness in these circumstances be treated as an offence or an offender characteristic?

Secondly, it must be accepted that some offences are easier to rank than others. Robbery, and burglary would probably be among the more manageable offences for this purpose.[67] Non-violent property offences, including theft, pose far greater difficulties. The quantum of loss might seem an obvious criterion of gravity and it will often be easy to assess.[68] Yet, on close examination, other factors may assume greater significance. These might include the level of hardship caused to the victim (the loss of a small amount of money might cause far greater hardship to one victim that the loss of a far greater amount to another) or the extent to which the offence amounted to a breach of trust. Similar problems may arise in drug-related offences. Under our misuse of drugs legislation, it is the estimated street value of the drugs that triggers a presumptive or mandatory ten-year sentence. Elsewhere, the emphasis is usually placed on the nature and quantity of the drugs involved. However, in drug trafficking offences, the offender's level of participation in other overall enterprise is surely a matter deserving at least as much attention as the amount or estimated street value of the drugs in question.

Whatever the difficulties inherent in assessing the gravity of acquisitive and drug-related offences, they are not entirely insurmountable. Other offences pose even greater difficulties. How, for example, should one go about identifying the degrees of gravity of an offence such as soliciting to murder or making a threat to kill? That there is a spectrum of gravity of both of these offences is beyond doubt, as both carry maximum sentences of 10 years imprisonment and the latter offence may be prosecuted either summarily or on indictment. Determining levels of gravity for such offences would certainly be possible, but it would call for a good deal of thought and a careful examination of decided cases.

In short, any movement towards a formal requirement that prosecutors make representations or submissions as to the ranking of offences must be preceded by a fairly elaborate exercise in which the key indicia for gravity for most offences commonly prosecuted on indictment are established. Such an exercise is, of course, necessary in any event in order to generate a rational and consistent sentencing system. Irrespective of the involvement of prosecutors, the courts themselves need to have such information in order to develop a consistency of approach towards sentencing.

It is, however, suggested that, even with the availability of this information, the furthest prosecuting lawyers should be expected to go would be to make submissions as to where an offence should be ranked on the overall scale of gravity. The selection of sentence, as the Supreme Court cleared stated in *Deaton*[69] is exclusively a judicial task and any danger that prosecution recommendations as to sentence might routinely be accepted must rigorously be avoided.

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[67] On the sentencing of robbery in England and Wales, see Ashworth, "Robbery Re-Assessed" [2002] Crim L.R. 851.

[68] On the difficulties associated with the concept of loss in the sentencing of white-collar crime, see Harris and Kaminska, "Defending the White Collar Case at Sentencing" (2008) 20:3 *Federal Sentencing Reporter* 153.

[69] [1963] I.R. 170.