Unduly lenient sentences: A scheme without concern?

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VIDEO TRANSCRIPT

Hello, my name is Professor Julia Fionda and I am the Module Convenor for Civil and Criminal Procedure. Today I am going to talk to you about the Unduly lenient sentence scheme, is this a scheme without concern?

It was announced on the 17th September 2019 that the current scheme for reviewing unduly lenient sentences will now be extended to 14 new offences. This extension, which comes into force on 19th November 2019, is heralded by the Ministry of Justice as ‘…sending a clear message that this government will use every tool at its disposal to make sure justice is done and the public is kept safe.’ The range of new offences covered by the extension includes stalking, harassment, child sex abuse and the recently legislated offence of controlling and coercive behaviour.1 Whilst an extension to the scheme is largely welcome it does once again raise the issue of how, in a world of sentencing guidelines, it is likely that a review of a sentence will be deemed to be unduly lenient and therefore in need of upward adjustment. There is also a more general concern that whilst enabling and extending the range of offences that can be subject to a review may symbolise an opportunity for those who are most affected by a crime, it is crucial to duly manage any expectations flowing from such a request. It is also important for the Court of Appeal to remain vigilant as to the need to avoid any arbitrary adjustments in the face of what is arguably a clear exercise in double jeopardy.

When a sentence has been passed an opportunity to appeal exists for the defendant.2 Having a functioning appeals process has been pronounced as crucial because, in the words of Jacobson, ‘by mistakes we learn’3 but it has also been more prosaically described by Nobles and Schiff as ‘the supervision of inferior decision makers by superior ones, with a view to providing the values of accuracy, fairness, consistency and a mechanism for the generation of rules.’4 Within this context sections 35-36 Criminal Justice Act 1988 introduced a power whereby the Attorney General may refer a case to the Court of Appeal to be reconsidered if they believe a sentence is unduly lenient. Members of the public can ask the Attorney General within 28 days of the sentence being passed to examine the sentence and a referral may follow. Originally the offences which could be reviewed were limited to very serious offences of murder, rape, robbery and serious fraud. An extension to the list took place in 2017 when some terror related offences were added, and, as indicated, the latest extension will come into force later this month. The Court of Appeal then consider all the circumstances of the case and decide whether the sentence is unduly

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1 s76 Serious Crime Act 2015
2 For a summary offence the defendant can appeal against both conviction and sentence under s108 Magistrates’ Court Act 1980 and the defendant can appeal, with leave, against conviction on indictment under s1 Criminal Appeal Act 1968 or appeal against sentence following conviction on indictment under s9 Criminal Appeal Act 1968.
lenient. A sentence is deemed to be unduly lenient in the words of the Court of Appeal in Attorney General's Reference No 4 of 1989:

‘...where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection, regard must of course be had to reported cases and in particular to the guidance given by this Court from time to time in the so-called guideline cases.’

This scheme now operates under Part 41 of the Criminal Procedure Rules 2015 and since its inception there have been a reasonably constant rate of references made by the Attorney General. Whilst the number of sentences considered by the Attorney General’s office has more than doubled since 2010, the actual subsequent sentencing adjustments remains quite small. So, in 2016 there were 837 requests for examination, 190 cases were referred and in 141 of those cases the Court of Appeal increased the sentence. This is in the context of there being around 80,000 Crown Court cases heard every year.

Over the years the scheme has not been without its critics. Firstly, as noted, the system does not apply to all offences and inevitably there will be queries as to why some offences appear on the list, but others do not. It is also the case that the judges in the Court of Appeal will always be reluctant to interfere in the sentencing exercise of a trial judge. The trial judge heard all the evidence and was presented with all the facts and reached a decision on the day in the light of a range of other considerations. The pleas of defence counsel in mitigation or the interventions of the probation service can all influence a sentencer and most of the time judges do pass a correct sentence otherwise far more appeals would succeed. It is also the case that some offences (such as manslaughter) might carry a particularly varied factual scenario where the culpability of the defendant in different cases may differ significantly.

It may also be the case that the outcomes of the successful referrals are not insignificant or always easy to understand. A review of cases in 2017 shows that an offender who was found guilty of raping a child under 13 had their sentence increased from 15 years to 20 years imprisonment. That’s a 25% increase. In addition a much closer examination would be needed to understand why an offender who had sexual activity with a child under 13, had a sentence of 2 years imprisonment suspended for 2 years and that remained unchanged whilst an offence of sexual activity with a child family member saw a 4 years and 6 months imprisonment sentence being adjusted to be 7 years and 6 months imprisonment. The differences here are quite stark and without further details a member of the public may struggle to understand how this difference can be justified even with the scheme in place.

There also exists a concern with the scheme that it endorses a clear exercise of double jeopardy. This means that if the state appears to have got it wrong the first time it is then able to have a second go as a way of ensuring its vision of justice is served. The Crown Prosecution Service are mindful of this and make reference to a ‘double jeopardy discount’ where the court may make a reduction in sentence because the court is sentencing the offender for a second time. This is not consistently applied however injecting yet more uncertainty into the process.

Finally, it is worth remembering that when the scheme was first set up sentencing was a less guided endeavour. Now sentencers are required to work with guidelines. Under s172 Criminal Justice Act 2003, the court has a duty to have regard to any guidelines which are relevant to a particular case. Under s174(2) the court is required to explain in open court the reasons for any

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5 See Statistical data set: 2017 annual ULS statistics on gov.uk website

6 See Unduly Lenient Sentences on “The Crown Prosecution Service” website
departure from the said guideline. Although these guidelines are not tramlines, which can never be departed from, Sir Igor Judge famously stated in *Martin* [2007]:

‘…the sentencing decision requires the judge to balance all the ingredients of the case, whether aggravating or mitigating, in order to produce the appropriate sentence. There is no grid plan. There is no points system. Although consistency of approach is undoubtedly to be encouraged, guidelines…remain guidelines.’

Against this backdrop then the unduly lenient sentencing scheme operates. It does so to correct the most serious errors in sentencing. Whilst we may celebrate the extension of the scheme it remains crucial to remember its limitations and also to ensure that the hopes of victims and families of victims are not naively raised because the number of adjustments is rightly low. As Caroline Goodwin QC, chair of the Criminal Bar Association stated, ‘*Justice needs to be dispensed for the people not by the people.*’ The power to correct an error should only ever be used lightly for fear of undermining the system as a whole.

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7 See [Unduly lenient sentence review scheme extended further](https://www.law.society.org.uk/news/unduly-lenient-sentence-review-scheme-extended-further) on “The Law Society Gazette” website