

## Commentary on *DPP v. Tiernan*

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### The decision

The decision of the Supreme Court in *Director of Public Prosecutions v Tiernan* [1988] IR 250 reviewed the approach of the Irish courts in imposing a sentence for the crime of rape, and rejected the possibility of handing down general sentencing guidelines. The appeal against conviction was heard in 1986, while the Supreme Court decision was handed down in 1988. This is the rewritten Supreme Court judgment. To set the judgment in context, the extant law on definition of rape was Criminal Law (Rape) Act 1981, section 2 of which provides that a man commits rape if he has unlawful sexual intercourse with a woman who does not consent to it and he knows that she does not consent to the intercourse or he is reckless as to whether she does or does not consent. This is a subjective standard, in that it looks at the actor's knowledge or recklessness, rather than considering a generic objective standard or expectation. To mitigate this somewhat, subsection 2 imposes a "reasonable grounds" standard in assessing his belief in consent. In other words, the jury must have regard to whether his belief was reasonable or not. Moreover, the definition of rape did not include married parties, as the abolition of marital exemption in relation to rape did not arrive until the Criminal Law (Rape) (Amendment) Act, 1990 (section 5). Furthermore, the provision of a corroboration warning was mandatory in all sexual offence trials. Subsequent to the case, section 7 of the Criminal Law (Rape) Act 1990 provided that whether or not a warning was necessary should be left to the discretion of the trial judge.

Nonetheless, there were some movements towards reform. The Rape Crisis Centre in Dublin (endorsed by equivalent centres in Clonmel, Cork, Galway, Limerick and Waterford) made submissions to the Oireachtas Joint Committee on Women's Rights on *Rape Legislation and investigation Procedures* in May 1986, calling for, *inter alia*, a broader definition of rape, criminalisation of rape within marriage, inadmissibility of past sexual history and separate legal representation of complainants. Indeed, in their subsequent fourth report on *Sexual Violence*, the Joint Committee on Women's Rights largely accepted and endorsed those recommendations, including that of a broader concept of "rape": stating "the definition of Rape to be broadened to include oral sex, anal sex and the use of objects to violate the vagina".<sup>1</sup>

As noted in the judgment, this case involved a violent, multiple rape, for which Tiernan was sentenced to 21 years imprisonment. The complainant in this case was raped by numerous men, and was subjected to what the court described as acts of "sexual perversion". Without belittling the gravity of the harm inflicted on the complainant, the

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<sup>1</sup> Joint Committee on Women's Rights, *Sexual Violence: Fourth Report of the Joint Committee on Women's Rights* (1987) 40.

choice of words by the Court is dubious. The notion of “sexual perversion” is seen in contrast to the “norm” or the “natural” in sex, but of course this is loaded with negative normative content.<sup>2</sup> The idea of acts themselves being “perverted” is problematic, and this appraisal generally is hetero-normative, homophobic and ambiguous. It often conveys the particular idea of women’s sexuality as being perverse, and works to stigmatise those whose sexual practices or desires diverge from the socially constructed conception of normality. Furthermore, it demarcates certain sexual acts as not just different but deviant.<sup>3</sup> The wrong in rape lies in the lack of consent and the sheer objectification of the victim;<sup>4</sup> describing some of the harms committed as perversions is superfluous and maintains a patriarchal view of the sexual status quo.

The rather brief judgment of the Supreme Court underlined the gravity of the offence of rape, and described both mitigating and aggravating factors that should be considered in sentencing. Finlay CJ (at 253) rightly stated: “The crime of rape must always be viewed as one of the most serious offences contained in our criminal law even when committed without violence beyond that constituting the act of rape itself.” Various factors were highlighted to emphasise this gravity: “The act of forcible rape not only causes bodily harm but is also inevitably followed by emotional, psychological and psychiatric damage to the victim which can often be of long term, and sometimes of lifelong duration” (253). While the recognition of the multiplicity of harms is to be welcomed, this statement is questionable in a number of respects. First it distinguishes between “types” of rape, classifying and arguably ranking these, with “forcible rape” at the apex. Indeed, once force or threat of force was necessary to the crime of rape.<sup>5</sup> Though this has changed, it seems a *de facto* hierarchy remains.<sup>6</sup> Furthermore, the perceived inevitability of subsequent damage leaves little room for the agency of the victim.<sup>7</sup> A similar concern may be raised about the Court’s view that “rape can distort the victim’s approach to her own sexuality”. All this underlines the presumptions made about the victim, and the sidelining of her capacity and autonomy.<sup>8</sup>

Moreover, rape was seen by the Court as imposing on “the victim a deeply distressing fear of sexually transmitted disease and the possibility of a pregnancy and of a birth, whose innocent issue could inspire a distress and even a loathing utterly alien to motherhood.” This observation emphasises the normative interpretation of maternity and

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<sup>2</sup> Linda LeMoncheck, *Loose Women, Lecherous Men: A Feminist Philosophy of Sex* (Oxford University Press 1997) 70 *et seq.*

<sup>3</sup> Ibid. Also see Lauren Rosewarne, *Part-time Perverts: Sex, Pop Culture, and Kink Management* (Connecticut Praeger Publishers 2011).

<sup>4</sup> John Gardner, J and Stephen Shute, ‘The Wrongness of Rape’ in Jeremy Horder (ed), *Oxford Essays in Jurisprudence* (Oxford University Press 2000).

<sup>5</sup> *Cf R v Camplin* (1845) 1 Cox 22.

<sup>6</sup> Indeed it has been shown that juries have similar views of what constitutes rape (and what is part of seduction): Louise Ellison and Vanessa Munro, ‘Of “Normal Sex” and “Real Rape”: Exploring the Use of Socio-sexual Scripts in (Mock) Jury Deliberation’ (2009) 18 *Social and Legal Studies* 291.

<sup>7</sup> See Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton University Press 2008) 346.

<sup>8</sup> See Dorothy Roberts, ‘Rape, Violence, and Women’s Autonomy’ (1993) 69 *Chicago-Kent Law Review* 359; Carine Mardorossian, *Framing the Rape Victim: Gender and Agency Reconsidered* (Rutgers University Press 2014).

the qualities of the ideal mother, linked to the notion of an ideal woman. As Betty Friedan observed, the dominant understanding was that “women could find fulfillment only in sexual passivity, male domination, and nurturing maternal love”.<sup>9</sup> In addition, this observation of the court underlines the absolute innocence of any subsequent birth. This is particularly noteworthy, given the absence of a general right to abortion in Ireland, which limits the ability of the raped woman to control or end her pregnancy.<sup>10</sup>

Despite the recognition that rape constitutes “a gross attack upon the human dignity and the bodily integrity of a woman and a violation of her human and constitutional rights”, and so must attract very severe legal sanctions, the Supreme Court declined to impose any sentencing guidelines. This was predicated on the imperative that sentencing judges impose a sentence which “in their discretion” meets the particular circumstances of the case and of the accused. Thus, Finlay CJ doubted that it would be “appropriate for an appellate court to appear to be laying down any standardisation or tariff of penalty for cases” (254).

It is positive to see the Supreme Court noting that mitigating circumstances in rape are limited (255). The guilty plea was deemed to be the only such circumstance in the current case but was regarded as a “significant mitigating factor”, due to its preventing the “ordeal” of cross-examination. Certainly, there is an argument to be made that a degree of mitigation should be based on an early plea. This is due to the plea possibly denoting acceptance of responsibility, and so as ensuring accountability, which is a key function of the criminal trial. Moreover, victims do not necessarily experience a sense of catharsis from a full contested criminal trial.<sup>11</sup> Nonetheless, the judgment presupposes that the complainant will regard questioning in a negative manner, and does not assess whether a trial, the hearing of evidence and its findings of fact may in fact be valuable, affirming, or cathartic for some complainants.

The Court stated that a lack of premeditation is not a mitigating circumstance, and should be described more aptly as “the absence of aggravating circumstance”. Furthermore, the Court emphasised that neither the victim’s previous sexual experience nor her imprudent self-exposure to the danger of rape could be considered mitigating circumstances. That this even needs to be said is regrettable. Moreover, the choice of the words “imprudence” and “self-exposure” casts judgement on the woman, and undermines the culpability and choice of the offender. Referring to “the danger of rape” reframes the issue as one that seems inexorably occurring, rather than as actions chosen and perpetrated by autonomous men. In seeking to ensure that sexual experience and behaviour do not mitigate, the Court’s unfortunate choice of words still reproaches the victim.

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<sup>9</sup> See Betty Friedan, *The Feminine Mystique* (Penguin, 1965).

<sup>10</sup> A recent example of the impact of this concerned Ms Y, a teenage asylum seeker who had been raped and who discovered she was pregnant on her arrival in Ireland. Though suicidal, her pregnancy was not terminated immediately, rather her baby was delivered by Caesarean section in the third trimester and is in the care of the State.

<sup>11</sup> See Lee Madigan and Nacny Gamble, *The Second Rape: Society’s Continued Betrayal of the Victim* (Lexington Books 1991); Jennifer Temkin, *Rape and the Legal Process* (Oxford University Press 2002) 156.

Crucially, the Court in *Tiernan* examined the possibility of a non-custodial sentence for rape conviction. The Chief Justice stated that while a judge must impose a sentence which meets the particular circumstances of the case and of the accused person, “it is not easy to imagine the circumstance which would justify departure from a substantial immediate custodial sentence for rape”. He stressed that they would be “wholly exceptional.” So, a non-custodial sentence is not precluded, though should be wholly exceptional.

Throughout the judgment a clear retributive leaning is evident, though there is also some rehabilitative rhetoric. Moreover, the underpinning constitutional principle of proportionality requires the sentence to be cognisant of the offence but also the offender’s personal circumstances (*State (Healy) v Donoghue* [1976] IR 325). This permeates the judgment and informs its conclusion.

### **Application of *Tiernan***

Subsequent cases indicate the implications of this decision, in particular the viewing of a guilty plea as a “significant mitigating factor”. For instance, in *DPP v G* [1994] 1 IR 587 the accused pleaded guilty to rape, and was sentenced to twelve concurrent sentences of life imprisonment. The Supreme Court reduced the sentence to one of fifteen years’ imprisonment, referring to *Tiernan* in so doing. *Tiernan* was also applied in *DPP v WC* [1994] ILRM 321, where WC pleaded guilty to the rape of the complainant with whom he had a pre-existing relationship. *Tiernan* ultimately permitted the handing down of a suspended sentence in this instance.

It is worth noting that s29 of the Criminal Justice Act 1999 now provides that a court, in determining what sentence to pass on a person who has pleaded guilty, shall take into account, if it considers it appropriate to do so, the stage at which and the circumstances in which he indicated an intention to plead guilty. This section overturns suggestions in the aforementioned case law that as a matter of principle a discount must be given for an early plea of guilty.

### **The feminist judgment**

The contributions of the feminist judgment are manifold, not least as it would guard against decisions such as *WC*. As is explored more fully below, the key aspects are the foregrounding of the victim and the development of sentencing guidelines. Throughout, the feminist judgment grapples with the tensions that exist between judicial independence and consistency. Indeed, it has been argued that the notion of independence in fact may be a façade for male bias.<sup>12</sup> This issue resonates widely, not just in the Irish context, or in the context of sentencing of sexual offences, but it is particularly pressing in this jurisdiction given the extent to which judicial discretion is protected. Indeed, the Irish system of sentencing has been described as one of the most unstructured in the common-

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<sup>12</sup> Judith Resnik, ‘On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges’ (1988) 61 *South California Law Review* 1877.

law world.<sup>13</sup> The fact that this is not just a feminist issue, but a broader ideological one, underlines the resistance to sentencing guidelines, though this is slowly beginning to change. More recently, in *People (DPP) v Drought*<sup>14</sup> the High Court assessed and categorised rape sentences, looking at “lenient”, “ordinary”, and “severe” punishments. In considering “ordinary punishments”, which were seen to range from three to eight years, Charleton J noted that “In attempting to discover whether there is a normal sentence for rape, my view on this matter is one based on research and is not the establishment of, much less the declaration of, a norm”.<sup>15</sup> moreover, the Court of Criminal Appeal in *People (DPP) v Ryan* interpreted *Tiernan* to permit guidance to be given on appropriate sentence ranges for certain offences, with due allowance made for any exceptional circumstances.<sup>16</sup>

The underpinning value in the feminist judgment is that of the autonomy of the complainant. This foregrounding of autonomy is crucial, as the trial process and in particular a guilty plea can be disempowering. Moreover, the feminist judgment stresses that victims should not be viewed as an homogeneous class or categorisation, and that their experiences, reactions and interests are not uniform or necessarily consistent.<sup>17</sup> A more recent related development is the introduction of separate legal representation for the complainant,<sup>18</sup> which goes some way to meeting these concerns.

The nature and dimensions of harm are explained, with pregnancy and disease not going to the gravity of harm. The feminist judgment highlights that there is no distinction between stranger/non-stranger rape, and highlights the paradox that while these are statistically less common cases, they are seen as stereotypical. The Rape Crisis Network Ireland notes that of the people who attended Rape Crisis Centres for counselling and support in 2014, 93% of the perpetrators were known to the victim/survivor.<sup>19</sup>

The most radical component of the feminist judgment is the introduction of sentencing guidelines for rape cases, and the pronouncement that a sentencing court is not precluded from imposing the maximum sentence in respect of a guilty plea. Strict sentencing guidelines would not be constitutional in Ireland, given that the principle of proportionality in sentencing is “a well-established tenet of Irish constitutional law”.<sup>20</sup> Instead, a scheme of principled discretion is advocated in the judgment. The delineation

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<sup>13</sup> Tom O’Malley, *Sentencing Law and Practice* (Round Hall Sweet & Maxwell, 2000) 8. The Law Reform Commission sees sentencing policy in Ireland as “incoherent” and argues that this results in inconsistency and public mistrust of the system. Law Reform Commission, *Consultation Paper on Sentencing* (Law Reform Commission 1993) 61-62.

<sup>14</sup> [2007] IEHC 310.

<sup>15</sup> [2007] IEHC 310 [27].

<sup>16</sup> [2014] IECCA 11. In *Z* [2014] IECCA 13 the Court of Criminal Appeal held that “there is now an obligation on the prosecution to draw to the attention of a sentencing judge any guidance... which touches on the ranges or bands of sentences which may be considered appropriate to any offence under consideration and the factors which are properly, at least in ordinary cases, to be taken into account”.

<sup>17</sup> See Amanda Burgess-Proctor, ‘Intersections of race, class, gender, and crime: Future directions for feminist criminology’ (2006) 1 *Feminist Criminology* 27-47.

<sup>18</sup> See Criminal Law (Rape) Act 1981, s 4A as inserted by Sex Offenders Act 2001, s 34.

<sup>19</sup> Rape Crisis Network Ireland *RCNI National Rape Crisis Statistics 2014*, (RCNI 2014) 20.

<sup>20</sup> *Rock v Ireland* [1997] 3 IR 484 at 500 per Hamilton J.

of some guidelines and the affirmation that imprisonment is the norm is hugely significant, given the communicative function and capacity of the criminal trial and sentencing.<sup>21</sup> This prompts us to reflect on the audience and recipient of the judgment, and also of guidelines. Guidelines are a statement to judges in future sentencing contexts, but also to the community, and to victims. And guidelines in this context represent a statement *about* all of these, insofar as they indicate (how) judges need to be guided; they illustrate how we constitute our community's rules; they recognise this (and other) victim's experiences, and they acknowledge the harm caused to women.

Nonetheless, if feminism is to be true to its critical and radical roots it needs to be sceptical of what the criminal justice system can deliver to victims in terms of accountability. Though the criminal law and the overall process is of great practical and symbolic significance, it is just one component in the societal treatment of victims. The role and possible interventions from victims are limited, and of course much harmful and criminal sexual violence is never detected, not least prosecuted.<sup>22</sup>

Finally, it is striking that the feminist desire for recognition of the harms inherent in and caused by rape through robust punishment sometimes maps onto retributive inclinations. This leads to the co-opting or the compromising of feminism for punitive purposes, in what can be regarded as "carceral feminism".<sup>23</sup> A careful path must be navigated in addressing this tension, lest the progressive and positive aspects of feminism become associated with punitive law and order policies that demand lengthy imprisonment in inappropriate cases. The feminist judgment addresses this concern adeptly, in providing a comprehensive and detailed account to guide the application of principled discretion. And the feminist judgment still imposes a sentence that is longer than average life term. The sentencing guidelines maintain the capacity to mitigate due to the particular circumstances of the offender, and the expression of real remorse with a desire for rehabilitation.

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<sup>21</sup> See Antony Duff, *Punishment, Communication, and Community* (Oxford University Press, 2001).

<sup>22</sup> Conor Hanly, Deirdre Healy and Stacey Scriver, *Rape and Justice in Ireland* (Liffey Press 2009). Please see the accompanying commentary on *CC v Ireland* on the limits of criminal law and carceral feminism.

<sup>23</sup> See e.g. Elizabeth Bernstein, 'Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns' (2010) 36 *Journal of Women in Culture and Society* 45-71.