BOOK REVIEW

Graeme Brown, Sentencing Rape - A Comparative Analysis (Hart Publishing 2020), ISBN 9781509917570

Mr Justice John Edwards, Senior Ordinary Judge, Court of Appeal

Sentencing Rape – A Comparative Analysis by Dr Graeme Brown was published by Hart Publishing on the 14th of May 2020.[1] Given the quality and scholarship of that author's earlier major publication,[2] I had high expectations for this latest piece of work and was not disappointed.

In this, his latest monograph, Dr Brown considers a variety of differing approaches towards structuring judicial discretion in sentencing rape. As to the value of such a study, he explains in his introduction, citing Freiberg,[3] that most countries tend to be 'juricentric' in their sentencing practices and their criminal justice systems 'solipsistic', and by way of example alludes to criticisms levelled at the Court of Appeal (Criminal Division) in England and Wales for its apparent unwillingness to consider the sentencing jurisprudence of other jurisdictions in the course of its judgments,[4] and, more generally, for its refusal to engage with academic writings.[5] Lamenting this, he maintains that sentencing is one area of law and social policy that lends itself particularly well to comparative treatment.[6] He acknowledges that comparative scholarship is not always easy in the light of cultural variability in ideas and values, and system difference, but believes that such concerns do not feature to any great extent in a comparative study of sentencing practice for rape.[7] Rape is a universal crime, and Dr Brown has proceeded on the premise that within common law jurisdictions there is a high degree of what Nelken has termed 'functional equivalence' regarding the seriousness with which the courts view, or purport to view, the offence of rape.[8] His book, therefore, compares rape sentencing across several common law jurisdictions, chosen for having similar sentencing traditions and, broadly, similar legal cultures, including England and Wales, Scotland, the Republic of Ireland, New Zealand, and South Africa. For some reason, the

[1] Graeme Brown, *Sentencing Rape - A Comparative Analysis* (Oxford, Hart Publishing 2020).
[2] Graeme Brown, *Criminal Sentencing as Practical Wisdom* (Oxford, Hart Publishing 2017).
[3] Arie Freiberg 'What's it Worth? A Cross-Jurisdictional Comparison of Sentence Severity' in Cyrus Tata and Neil Hutton (eds), *Sentencing and Society – International Perspectives* (Aldershot, Ashgate 2002). 237.
[4] Graeme Brown, 'Sentence Discounting in England and Scotland – Some Observations on the Use of Comparative Authority in Sentence Appeals' 2013 (8) Criminal Law Review 674.
[5] Andrew Ashworth, 'Why Sentencing Matters' (Roger Hood Annual Public Lecture Series, University of Oxford, 23 May 2013). Podcast available at <http://podcasts.ox.ac.uk/people/andrew-ashworth> accessed 24 September 2020.
[6] Graeme Brown (n 1) 3, citing Tom O'Malley, 'Principles of Sentencing: Towards a European Conversation' (Leiden University, Leiden, 23 January 2008). See also Markus D. Dubber, 'Comparative Criminal Law' in Mathias Reimann and Reinhard Zimmerman (eds), *The Oxford Handbook of Comparative Law* (New York, Oxford University Press 2006) 1309; Michael Tonry, 'Foreward' in Cyrus Tata and Neil Hutton (eds), *Sentencing and Society – International Perspectives* (Aldershot, Ashgate 2002) xxvii; Julian V. Roberts, 'The Evolution of Sentencing Guidelines in Minnesota and England and Wales' (2019) 48(1) Crime and Justice 231.
[7] Graeme Brown, (n 1) 4 citing Malcom Davies, Pekka Takala, and Jane Tyrer, 'Sentencing Burglars in England and Finland' in Cyrus Tata, and Neil Hutton, (eds), *Sentencing and Society – International Perspectives* (Aldershot, Ashgate 2002) 273; and David Nelken, 'Comparing Criminal Justice' in Mike Maguire, Rod Morgan, Robert and Reiner (eds) *The Oxford Handbook of Criminology* (6th edn, Oxford, Oxford University Press 2012) 141.
[8] Graeme Brown (n 1) 4, citing David Nelken (n 7) and also David Nelken 'Comparative Sociology of Law' in Reza Banakar, and Max Travers (eds), *An Introduction to Law and Social Theory* (Oxford, Hart Publishing 2002).

review does not encompass Canada or Australia or any of their individual states.[9] This is not a significant criticism, given the existing breadth and depth of the review, and may well have been due to a need to keep the length of the book within manageable proportions.

The study is of immense value to anyone in Ireland interested in the structuring of sentencing discretion, both generally and particularly with respect to rape. The value lies not least in the fact that the review embraces rape sentencing in Ireland, but also in the fact that it covers jurisdictions which all have sentencing guidance in one form or another, and whose individual approaches to guidance differ widely. It is potentially of great help to anyone concerned with framing future sentencing guidance for rape in Ireland to see how it has been approached in other jurisdictions, and how it has fared. Guidance on the exercise of judicial discretion in sentencing in Ireland is at a nascent stage. To the extent that it exists at all (ignoring such limited statutory guidance as exists), it is to be found in a small number of guideline judgments promulgated by the superior (and for the most part the superior appellate) courts. While the Judicial Council Act 2019 ('Act of 2019') has made provision for the establishment of a Sentencing Guidelines and Information Committee ('SGIC'), whose task it is to prepare draft sentencing guidelines for approval by the Judicial Council, the SGIC has only recently been established, so there are as yet no sentencing guidelines issued by the Judicial Council.

Dr Brown's work deals only with judicial sentencing, but it acknowledges scholarship which views sentencing as a wider process.[10] While strongly focussed on comparative caselaw, guidance and doctrinal sentencing principles, the author considers the nature of the offence of rape, and its medical and psychological effects on victims, through a comprehensive survey of legal, medical and social science research before any of that is discussed. The wrongness of rape from a philosophical perspective is also addressed, as is the role of the victim in sentencing.

Technology Facilitated Sexual Violence

A whole chapter is devoted to technology facilitated sexual violence and image based sexual abuse, involving the filming by perpetrators of rape and sexual assaults using mobile phones or tablets. Disturbingly, this is a phenomenon which the courts in all jurisdictions are increasing encountering. The Court of Appeal in Ireland has recently had to deal with such a case in *The People (Director of Public Prosecutions) v P.K.*,[11] where a sleeping woman was anally penetrated by the perpetrator who simultaneously video recorded the act on his phone.

A further manifestation of image based sexual abuse arises where a child abuser grooms his victim, and as part of the grooming process sends sexually explicit images or video to the

[9] There is discussion of Canadian law on sentencing for the rape of intoxicated victims in the chapter on Scottish rape sentencing law, but no major treatment of Canadian rape sentencing law generally. There is also a reference to Australian law on sentencing methodology and specifically the instinctive synthesis approach, but again, no major treatment of Australian rape sentencing law generally.

[10] Graeme Brown, (n 1) 10, citing Nicola Padfield, 'Reflections on Sentencing in England and Wales' in Andreas Kapardis and David P. Farrington (eds), *The Psychology of Crime, Policing and Courts* (Abingdon, Routledge 2016); and Julius Weitzdörfer, Yuji Shiroshita, and Nicola Padfield, 'Sentencing and Punishment in Japan and England: A Comparative Discussion' in Jianhong Liu and Setsuo Miyazawa (eds), *Crime and Justice in Contemporary Japan*, (Cham, Springer International 2018). Since Dr Brown's book went to press, a further important work in this area has been published, namely Cyrus Tata, *Sentencing: A Social Process: Rethinking Research and Policy* (Cham, Palgrave McMillan 2020).

[11] [2020] IECA 94.

child concerned. In *The People (Director of Public Prosecutions) v D.M.*,[12] another decision of the Court of Appeal in Ireland, an adult abuser was in Skype contact with a child he was grooming and exposed his penis on camera, masturbating himself and inviting and inducing the child to masturbate herself which she did on camera.

Yet another manifestation of image based sexual abuse involves the unauthorised distribution of intimate images or video, for harassment or blackmail purposes, including so-called "revenge pornography".

Given the rising prevalence of these types of cases, something which is perhaps inevitable given the ubiquitous availability of portable high quality video recording technology, Dr Brown's detailed review of the criminological literature around this phenomenon, and his comparative analysis of how image-based abuse cases, particularly those involving rapes, have been dealt with by sentencing judges in the different jurisdictions he surveys, is welcome and likely to prove very useful to lawyers and judges who have to deal with such cases. Citing Sandberg and Ugelvik,[13] he maintains that three cultural trends and offender motivations may be identified in cases where rape and sexual assault have been filmed, namely, to produce (non-consensual) pornography; to further humiliate and hurt the victim; and the compulsion to document a dramatic or extraordinary event. Several cases from both England and Wales, and Scotland, are cited as examples of this. Dr Brown then considers the effect on victims of rape and sexual assault whose ordeals are filmed, before looking at recent appellate decisions dealing with the effect on the victim as a factor in sentencing, in England and Wales, in Scotland, New Zealand, Ireland and Canada. In so far as Ireland is concerned, he discusses one of the earliest cases of image based sexual abuse dealt with in this jurisdiction, namely *The People (Director of Public Prosecutions) v Finn*,[14] a rape case where the appellant's actions in photographing his victim's naked breasts and genitals had been treated as a substantial aggravating factor in sentencing.

The Evolution of Rape Sentencing in England and Wales

In Chapter 3, Dr Brown moves to a consideration of rape sentencing in England and Wales and traces the evolution of sentencing there 'from Guidance to Guidelines'. He points to the slow and essentially reactive way in which sentencing principles had developed in that jurisdiction until their Court of Appeal decided to develop a more active role in that regard from the 1980's through to the 1990's. He describes the first general sentencing guidelines on rape promulgated by the Court of Appeal in 1982 in *R v Roberts and Roberts,*[15] before moving to describe the more extensive guidelines provided in *R v Billam.*[16] He then discusses how the *Billam* Guidelines were in turn developed in the specific context of relationship/marital rape and analyses the decisions in *R v Berry*,[17] *R v Thornton,*[18] and *R v W,*[19] noting and agreeing with the criticisms of Rumney (and others) that the various judicial

[12] [2019] IECA 147.
[13] Sveinung Sandberg and Thomas Ugelvik, 'Why Do Offenders Tape Their Crimes? Crime and Punishment in the Age of the Selfie' (2017) 57(5) *The British Journal Criminology* 1023.
[14] [2009] IECCA 96.
[15] (1982) 4 Cr App R (S) 8.
[16] (1986) 8 Cr App R (S) 48.
[17] (1988) 10 Cr App R (S) 13.
[18] *Attorney General's Reference (No 7 of 1989) (sub nom R v Thornton)* (1990) 12 Cr App R (S) 1.
[19] (1993) 14 Cr App R (S) 256.

pronouncements on the trauma of non-stranger rape in *Berry*, *Thornton* and *W* took no account of the actual experience of women in these situations.[20]

He then describes a second phase in the aforementioned evolution following the establishment of the Sentencing Advisory Panel (SAP) in 1998. The Court of Appeal, responding to advice from the SAP, handed down revised guidelines for the sentencing of rape in *R v Millberry*.[21] The SAP had identified three 'dimensions' to be used in the assessment of gravity of an individual offence of rape: firstly, the harm to the victim; secondly, the culpability of the offender and; thirdly, the level of risk posed by the offender to society. Importantly, the SAP was of the view that relationship rape was no less traumatic and therefore no less serious, than stranger rape. The resultant *Millberry* Guidelines suggested a starting point of eight years imprisonment where one or more of seven factors was present. Critically, these guidelines exhibited a change in the approach of the Court of Appeal to relationship rape. They expressed general agreement with the SAP's view on that, but qualified their acceptance by expressing the view that there were some cases of relationship rape (eg where a woman is raped by her partner after he had consumed so much alcohol that he 'failed to show the restraint he should have') which it would be 'contrary to common sense' to treat it as being equivalent to stranger rape.[22] Dr Brown considers and reviews the extensive academic commentary which the *Millberry* Guidelines generated and offers the view that the principles in *Millberry* were sufficiently flexible to permit departure and variation when the particular circumstances of a case so demanded.[23] In his view, the guidelines led to a more structured, principled and informed approach to sentencing rape.[24]

Dr Brown then moves to what he identifies as the third phase of the aforementioned evolution, namely the creation of the Sentencing Guidelines Council ('SGC') in 2003, noting the radical changes whereby the SAP no longer advised the Court of Appeal but rather advised the SGC, and the obligation placed on judges to *'have regard to'* any guidelines issued by the SGC which were relevant to an offender's case. That same wording appears in s 92 of our Act of 2019. Subsequent decisions of the Court of Appeal in England and Wales clarified that judges were entitled to disregard SGC guidance if an injustice would follow from it. Again, a similar saver was incorporated in s 92 of our Act of 2019.[25] Dr Brown considers in some detail the SGC's Definitive Guideline on the sentencing of offenders convicted under the Sexual Offences Act 2003, and notes the critique of Cooper, which complained that the approach of the SGC prioritised sentencing the *offence*, rather than the *offender*.[26] It has, of course, long been the law in Ireland that the sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused.[27]

A fourth phase in the evolution is identified in the replacement of the SGC with the Sentencing Council for England and Wales ('SC'), as provided for in the Coroners and Justice

[20] Philip NS Rumney, 'When Rape Isn't Rape: Court of Appeal Sentencing Practice in Cases of Marital and Relationship Rape' (199) 19 Oxford Journal of Legal Studies 243. See also Brown (n 1) 71.
[21] [2003] 2 Cr App R (S) 31.
[22] Brown (n 1) 75.
[23] Brown (n 1) 77.
[24] Brown (n 1) 78.
[25] S 92 states: 'A court shall, in imposing a sentence, have regard to sentencing guidelines relevant to the proceedings before it, unless the court is satisfied that to do so would be contrary to the interests of justice and the reasons it is so satisfied shall be stated by the court in its decision'.
[26] John Cooper, 'The Sentencing Guidelines Council – A Practical Perspective' (2008) 4 Criminal Law Review 277.
[27] *The People* (*Director of Public Prosecutions) v Thomas McCormack* [2000] 4 I.R. 356.

Act 2009. An important change here was that the court's duty to comply with sentencing guidelines was amended. The 2009 Act introduced a requirement that judges *'must follow'* guidance promulgated by the SC, unless satisfied that it would be contrary to the interests of justice to do so. In 2012, the SC published a new and updated Definitive Guideline on Sexual Offences. Dr Brown considers the new Definitive Guideline and regards it as particularly important. He notes that the judge must, as 'step 1', determine the offence category by assessing both the degree of harm and the level of culpability, and that these combinations of harm and culpability generate a matrix. The judge must then proceed to 'step 2' by using the corresponding starting points in the guideline to reach a sentence within the appropriate category range. As part of 'step 2', the judge is also directed to consider a list of aggravating and mitigating factors to either increase or reduce the seriousness of an offence. In the context of relationship rape and abuse of trust under the Definitive Guideline, Dr Brown notes that while the Court of Appeal has stated that rape within a relationship is not sufficient for the offence to represent an abuse of trust, it does, however, constitute 'a gross betrayal' which is itself an aggravating factor. Citing Harris, this conclusion is characterised as somewhat dichotomous.[28]

The author draws attention to the views of Lord Thomas LCJ, in *R v Thelwall* that the English sentencing system *'now proceeds on the basis of guidelines, not case law',* and his suggestion that citations (in court) of appellate decisions which are simply illustrative of the operation of a sentencing guideline are unlikely to be of assistance.[29] As is pointed out, these views have been criticised by Harris as deeply regrettable, and as disregarding the need for consistency in sentencing and effectively inviting a divergence in practice.[30] Dr Brown then proceeds to an extensive literature review in an effort to assess the SC's Definitive Guideline, and concludes:

> with the Sentencing Council having imposed an 'algorithmic' approach which prioritises consistency or perhaps even 'uniformity', in sentencing (Roberts, 2013:5 and 22 and 2011:1011) [31]; the fact that the Definitive Guideline is presumptively binding on judges; that judges have to justify any departure from the guideline; and, perhaps most importantly, the fact that the judge's assessment of sentence will take place against a background of numerous aggravating factors with correspondingly few mitigating factors, the imposition of constructive disposals in appropriate cases … will, arguably, now be far less likely.[32]

The Scottish Approach

Chapter 4 looks at current rape sentencing in Scotland, which is said to involve a radically different approach. The traditional approach to sentencing in Scotland is outlined, in which there was no question of a 'tariff' and judges exhibited a reticence to issue any form of sentencing guidance, preferring instead to adopt a pragmatic and individualised approach to questions of sentence with cases being decided on their own facts and circumstances, rather than based on any declared principles. Dr Brown then describes the move towards formal

[28] Brown (n 1) 91, citing Lyndon Harris, 'Commentary to *R v DO'* (2015) Criminal Law Review 379.
[29] [2016] EWCA Crim 1755.
[30] Brown (n 1) 92, citing Lyndon Harris, 'Commentary to *R v Thelwall*' (2017) Criminal Law Review 242.
[31] Julian Roberts, 'Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues' (2013) 76 Law & Contemp. Probs. 1., and Julian V Roberts, 'Sentencing Guidelines and Judicial Discretion: Evolution of the Duty of Courts to Comply in England and Wales' (2011) 51(6) British Journal of Criminology 997.
[32] Brown (n 1) 100.

sentencing guidelines in Scotland following upon the enactment of s 118(7) of the Criminal Procedure Scotland Act 1995. He describes the first tentative steps in that regard, and refers to a change in attitude of the senior judiciary towards the desirability of sentencing guidelines.[33] Importantly, he points out that the Scottish Appeal Court has acknowledged that Scottish judges may, in certain circumstances, find reference to English sentencing guidelines useful.[34] The ensuing discussion illustrates that this idea is not uncontroversial, with more recent decisions urging that there should not be 'slavish adherence' to the English guidelines, and that a rigid or mechanistic adherence to those guidelines should be avoided. Brown has himself undertaken the interesting exercise throughout his chapter on Scottish rape sentencing of applying the English Definitive Guideline to the facts of cases decided by the Scottish courts and has found that in many of those cases the indicative sentence that would have resulted from the application of the Definitive Guideline would have been a lot higher than that actually imposed by the relevant Scottish Court.[35]

The author goes on to describe the establishment of the Scottish Sentencing Council ('SCC'), and the issuance by it of its first guideline in 2018 on the *Principles and Purposes of Sentencing.* He notes that its content bears a striking similarity to s 42 of the English Criminal Justice Act 2003 which sets out the purposes of sentencing in England and Wales. Citing O'Malley, he opines that the guideline is of very little practical value since it merely reflects pre-existing sentencing law and fails to offer any guidance as to when one purpose should take precedence over another.[36] To date these are the only formal guidelines issued by the SCC, although its website indicates there are some guidelines in development including guidelines in respect of sexual offences. Moreover, to date, the Scottish appellate courts have only offered very limited guidance on the sentencing of rape and sexual offences in Scotland. Such guidance as has been provided has been *ad hoc* and none of it has been provided within the vehicle of what purports to be a formal guideline judgment. There is, as yet, no formal guideline judgment in this area.

The work then examines early appellate guidance on rape sentencing. The discussion begins with an examination of the decision in *HMA v Shearer*,[37] a case in which the Crown had invited the Appeal Court to provide sentencing guidelines in the case of female rape. The *Shearer* case had involved a young woman who had been raped in a hotel room while she was unconscious or asleep due to the effects of alcohol. The sentencing judge at first instance had imposed a sentence of 18 months' imprisonment, on the basis that it would be absurd to regard the culpability of the offender in a case where the victim was incapable of giving her consent as being the same as in a case where the victim's will and resistance were overcome by the use or threat of force. The Appeal Court substituted a sentence of three and a half years' imprisonment, stating that it demurred *'from the view that the present type of case should be regarded as substantially less serious'.* According to Brown, this represented a marked departure from previous sentencing practice. However, he is critical that the opportunity to provide wider guidance was passed up, at least in so far as so-called 'non-forcible rape' was concerned. Be that as it may, the three-and-a-half-year sentence imposed in *Shearer* became the benchmark or anchoring point for cases involving so-called 'non-forceable' rape. Brown discusses in some detail the *Shearer* benchmark and the intoxicated victim, as well as the

[33] Brown (n 1) 109, citing *Du Ploy and others v HMA* 1 JC 1.
[34] Brown (n 1) 111-116, citing inter alia the views of Lord Gill in *HMA v Roulston* [2005] HCJAC 12; 2006 JC 1, and Lord Carloway in *Geddes v HMA* [2015] HCJAC 43.
[35] Brown (n 1) ch 5 generally.
[36] Brown (n 1) 119, citing Thomas O'Malley, *Sentencing – Towards a Coherent System* (Dublin, Round Hall 2011)
[37] 2003 SCCR 657.

shortcomings of the *Shearer* benchmark, and in doing so compares it with the analogous benchmark adopted in Canadian sentencing practice, namely the *Sandercock* benchmark.[38]

Appellate views on the sentencing of relationship and acquaintance rape are also discussed.[39] Quite apart from intoxicated victims, it was felt by many that there was a real need for such guidance in the case of relationship and acquaintance rape. This was a point acknowledged by the appeal court in *HMA v Cooperwhite,*[40] a case given major treatment in the book. *Cooperwhite* was an important judgment for many reasons, but not least because the Lord Justice Clerk in his judgment observed that the principle in England and Wales was that judges should adopt the same starting point for relationship rape or acquaintance rape as for stranger rape. This, the Lord Justice Clerk noted, was 'radically different' to the approach in Scotland, and this was something that would require to be expressly addressed (by the promulgation of appellate guidance) in any future consideration of the issue. As Dr Brown points out, the majority of Appeal Court would have liked to do just that in *Cooperwhite*, but felt it could not do so as, due to an administrative error, the possibility of the Court issuing such guidelines had not been canvassed in advance with the parties. Lord Eassie, while concurring in the court's decision to refuse the Crown's appeal on the substantive issue, had dissented on the need for guidance and Dr Brown is critical of his views in that regard.[41]

Perhaps the centrepiece of the chapter on rape sentencing in Scotland is the decision by the Scottish Appeal Court in the case of *HMA v SSK.*[42] The facts of the case involved counts of relationship (anal) rape by the respondent inflicted on two former partners. The evidence at trial was that the respondent and both victims were involved in the 'swinging' or 'partner swapping' scene in Glasgow, and all had been sexually promiscuous in that context. The trial judge had imposed a lenient sentence, referring to one victim as being a person who 'acknowledged few if any sexual boundaries' and to the other as being 'sexually confident' and as 'condoning' or 'acquiescing in' the rapes. In allowing the appeal by finding the sentence unduly lenient and substituting an increased sentence, the Appeal Court expressed approval of the approach of the New Zealand Court of Appeal in *R v AM* who had said that '*culpability is not reduced by any sense of entitlement associated with a current or previous relationship*'.[43] Dr Brown believes that the decision in *SSK* is to be welcomed as going a considerable way towards settling the debate in Scottish sentencing jurisprudence as to whether 'relationship' rape should attract the same sentence as 'stranger' rape. While welcoming the Appeal Court's readiness to engage with the sentencing jurisprudence in other jurisdictions, he again laments the lost opportunity for the Court to issue its own sentencing guidelines for rape.

The chapter on Scottish rape sentencing practice also discusses considerations in sentencing oral rape,[44] and sentencing in cases involving sexual offences committed in abuse of a position of trust.[45] The chapter concludes with a detailed review of the sentencing ranges for rape in Scotland, and a discussion of guilty plea discounting in the sentencing of rape in Scotland.

The Position in the Republic of Ireland

[38] Brown (n 1) 126-136.
[39] Expressed in *Ramage v HMA* 1999 SCCR 592 and in *Petrie v HMA* [2011] HCJAC 1.
[40] [2013] HCJAC 88.
[41] Brown (n 1) 141-145.
[42] [2015] HCJAC 114.
[43] [2010] NZCA 114, [61].
[44] *HMA v AB* [2015] HCJAC 106.
[45] *HMA v Collins* [2016] HCJAC 102.

Chapter 6 is of obvious interest to the Irish reader in that it is concerned with rape sentencing in the Republic of Ireland.

Opening with an identification and explanation of the distinction between common law rape and 'section 4' rape, the chapter then moves to a discussion of sentencing practice in rape cases in Ireland. It is observed that we retain a largely discretionary sentencing system, one that is uncodified and which applies the traditional purposes of punishment by virtue of the common law, with each rationale having been recognised by the appellate courts. [46] Although noting that Irish sentencing methodology has been criticised for adhering too closely with the 'instinctive synthesis' approach, Brown considers it to be debatable as to whether Irish judges do sentence by way of pure instinctive synthesis. The two-tier approach commended in *The People (Director of Public Prosecutions) v M*is noted,[47] as are recent decisions of the Court of Appeal which re-iterate that a 'staged approach' is regarded as preferable and as best practice.[48] In Dr Brown's assessment, the Irish approach to sentencing is one based on discretion underpinned by principles established by the appellate courts, and that it is best encapsulated in the notion of '*principled discretion*' as described by O'Malley.[49]

This is followed by an examination into what has been characterised as a 'quiet revolution' in Irish sentencing law and practice,[50] namely the decision of the former Court of Criminal Appeal in 2014 to issue appellate guidance for the first time in the cases of *Ryan* and *Fitzgibbon* respectively,[51] and the subsequent guideline judgments, of its successor the Court of Appeal in *Casey and Casey*,[52] and of the Supreme Court in *Mahon.*[53] None of these, however, relate to rape or sexual offences. It is unfortunate, although a matter outside the control of Dr Brown, that his book had gone to press before the Supreme Court issued its recent guideline judgment on sentencing in rape and sexual assault cases in *The People (Director of Public Prosecutions) v F.E.*[54] Despite this, his chapter on Irish sentencing law is most enlightening and insightful and it may very usefully be read in conjunction with the *F.E.* judgment.

The author notes and discusses the recent legislative development in which the Act of 2019 was enacted which makes provision for the previously mentioned SGIC. He notes the requirement for judges to *'have regard to'* guidance promulgated by the Judicial Council, and that it equates to what is required in Scotland but is less onerous than the requirement in England and Wales.

The importance of the principle of proportionality in sentencing in Ireland is then discussed, with detailed reference to leading Irish cases in that regard.[55]

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[46] Retribution, deterrence, rehabilitation, incapacitation and denunciation.
[47] [1994] 3 IR 306.
[48] Brown (n 1) 175-178.
[49] Brown (n 1) 164-167.
[50] Thomas O'Malley, 'A quiet revolution occurred this month: Sentencing Guidelines were introduced' *The Irish Times* (Dublin, 31 March 2014).
[51] *The People (Director of Public Prosecutions) v Ryan* [2014] IECCA 11 and; *The People (Director of Public Prosecutions) v Fitzgibbon* [2014] 2 ILRM 116.
[52] [2018] IECA 121.
[53] [2019] IESC 24.
[54] [2019] IESC 85.
[55] *The People (Attorney General) v O'Driscoll* (1972) 1 Frewen 351; *Lynch and Whelan v Minister for Justice* [2012] 1 IR 1; *The People (Director of Public Prosecutions) v M* (note 46 above), *The People (Director of Public Prosecutions) v McCormack* (n 27), *Gilligan v Ireland* [2013] 2 IR 745, *The People (Director of Public Prosecutions) v GK* [2008] IECCA 110 and *The People (Director of Public Prosecutions) v O'Brien* [2018] IECA 2.

Turning specifically to the sentencing of rape, the 1988 decision of the Supreme Court in *The People (Director of Public Prosecutions) v Tiernan* is discussed in depth.[56] In that case, the Supreme Court expressly declined to issue sentencing guidelines, stating that it considered it inappropriate to lay down any 'standardisation or tariff of penalty'. Finlay C.J. in that judgment referenced the *Billam* Guidelines in England and Wales, as well as a New Zealand guideline judgment, characterising them as 'very helpful' albeit *'delivered in cases in which the structure and matters before the courts were wholly different from instant appeal'*. Dr Brown however contends that the Supreme Court's view *'arguably rested upon a misunderstanding of the nature of the English Court of Appeal's guideline judgments'*. Citing Edwards and Scott (2017),[57] Dr Brown notes that although the decision in *Tiernan* fell short of indicating appropriate ranges of sentence, it nevertheless provided many strands of useful guidance in its pronouncements. Two main principles were established, namely that in cases of rape, (i) there is a general requirement for an immediate and substantial custodial sentence, but (ii) notwithstanding that general requirement, there is an overarching need for individualised justice by imposing a sentence tailored to the facts and circumstances of the case. Brown then looks at how *Tiernan* has been applied in practice, citing *The People (Director of Public Prosecutions) v Keane* as a good example[58].There is detailed discussion of subsequent critiques of *Tiernan*, notably that of Campbell,[59] who criticises the view of the Supreme Court that 'types' of rape are distinguishable, and its ranking of them. She further regards presumptions made by the Supreme Court about the victim of a rape as side-lining the victim's capacity and autonomy. The decision is regarded as being of its time, and in Campbell's view the Supreme Court's 'unfortunate choice of words' still serve to reproach the victim. Also contained in the same chapter is a discussion regarding the re-imagining of the *Tiernan* decision through a feminist lens, as had been undertaken as part of Enright and other's Northern/Irish Feminist Judgment Project.[60] A description is given of a fascinating exercise undertaken by Kennefick and Fennell,[61] in which the *Tiernan* decision was re-written as a modern guideline judgment employing O'Malley's notion of principled discretion and setting out guidance as to the appropriate sentences for cases of rape.[62]

In the context of rape sentencing, the decision of the Central Criminal Court in *The People (Director of Public Prosecutions) v D(W)* was an important one, being (unusually for a guideline judgment) a judgment of a first instance court.[63] This is not overlooked by Dr Brown, who delves into Charleton J's analysis of sentencing decisions in 96 cases and subsequent discernment of an emerging pattern of sentencing bands enabling the classification of rape offending into four discrete categories, namely those attracting (i) lenient punishments, (ii) ordinary punishments, (iii) severe punishments and (iv) condign punishments, which he labelled as such. Lenient punishments in the form of non-custodial disposals or suspended

[56] [1988] IR 250.
[57] Edwards, J (2019) 'Sentencing Methodology – Towards Improved Reasoning in Sentencing' 3 *Irish Judicial Studies Journal* 40-54; and Scott, L (2017) 'Developments in Irish Sentencing' 1 *Irish Judicial Studies Journal* 12 – 14 respectively.
[58] [2007] IECCA 119.
[59] Liz Campbell, 'Commentary on DPP v Tiernan' in Mairéad Enright, Julie McCandless and Aoife O'Donoghue, *Northern/Irish Feminist Judgments – Judges' Troubles and the Gendered Politics of Identity* (Oxford: Hart Publishing 2017) 479 - 484.
[60] Mairéad Enright, Julie McCandless and Aoife O'Donoghue, *Northern/Irish Feminist Judgments – Judges' Troubles and the Gendered Politics of Identity* (Oxford: Hart Publishing 2017).
[61] Louise Kennefick and Caroline Fennell, 'The People (at the suit of the Director of Public Prosecutions) v Edward Tiernan' in Mairéad Enright, Julie McCandless and Aoife O'Donoghue, *Northern/Irish Feminist Judgments – Judges' Troubles and the Gendered Politics of Identity* (Oxford: Hart Publishing 2017) 485 - 493.
[62] Brown (n 1) 182-186.
[63] [2008] 1 IR 308.

sentences were to be reserved for cases that were 'completely exceptional'. Ordinary punishments tended to range from three to eight years. Above that, in cases characterised by high levels of violence, particularly serious effects on the victim, multiple offending, and where the accused had previous convictions for rape, severe punishments in the range from nine to fourteen years had typically been applied, with sentences at the higher end of that range being applied in cases involving gross levels of violation; humiliation and degradation of the victim; kidnapping with rape; and rape in the context of burglary. Finally, condign punishments were imposed in cases of gang rape, or involving multiple incidents, multiple victims or both. Brown notes that the aggravating and mitigating factors discussed by Charleton J all accord with the *Billam* Guidance, and that the *Millberry* Guidance is echoed in the view expressed that it is only where there has been consent to sexual intercourse which is withdrawn during the act that anything involving the conduct of the victim can be regarded as relevant. The recent *FE* decision, previously alluded to, updates *D(W)* in a number of important respects but unfortunately was not available prior to the publication of this book.

The chapter on Ireland proceeds with an examination into further appellate recognition of the harm caused by rape. Reference is made to the decision in *The People (Director of Public Prosecutions) v Counihan*in that regard.[64] Consideration is given to the issue of marital and relationship rape, with the elucidation that neither *Tiernan* nor *D(W)* addressed this. It should be pointed out that this lacuna is comprehensively addressed in *FE*, itself a marital rape case. The rest of the chapter covers research on rape sentencing in Ireland by the Judicial Researchers Office, and further looks at the guilty plea discount in the context of rape sentencing under Irish law.

The Practice in New Zealand and South Africa

The remaining chapters in Dr Brown's book concentrate on rape sentencing practice in New Zealand and South Africa. The importance of guideline judgments of the New Zealand Court of Appeal is discussed, as is the significance of the New Zealand Sentencing Act 2002 and the New Zealand Sentencing Council (a body provided for in legislation in 2007 but which was never implemented). The important guideline judgment in *R v AM* is examined in some detail, as are critiques of it by Mathias,[65] O'Malley,[66] and McGovern.[67]

In so far as South Africa is concerned, Dr Brown, citing Terblanche,[68] notes that traditionally South African judges have employed the instinctive synthesis approach as their primary methodology, guided by appellate guideline judgments where available. However, there is no guideline judgment on rape sentencing generally. In this vacuum, the South African legislature intervened in 1997 to enact statutory mandatory and minimum sentences for rape, with departures permitted only 'for substantial and compelling circumstances'. The decision of the South African Supreme Court in *S. v Malgas,*[69] which considered what constitutes substantial and compelling circumstances, is discussed, as is the subsequent decision in *S v*

[64] [2015] IECA 76.
[65] Don Mathias, 'Judging or Calculating?' (Criminal Law Casebook – Developments in Leading Appellate Courts, 10 December 2010) <http://nzcriminallaw.blogspot.co.uk/2010_12_01_archive.html> accessed 19 October 2020.
[66] Thomas O' Malley, *Sexual Offences* (2nd edn, Dublin: Round Hall 2013).
[67] Danica McGovern, 'Assessing Offence Seriousness at Sentencing: New Zealand's Guideline Judgment for Sexual Violation' (2014) 26(2) New Zealand Universities Law Review 243. See Brown (n 1) 205-213.
[68] SS Terblanche, 'The Discretionary Effect of Mitigating and Aggravating Factors: A South African Case Study' in Julian V. Roberts (ed) *Mitigation and Aggravation at Sentencing* (Cambridge: Cambridge University Press 2011); and SS Terblanche, *A Guide to Sentencing in South Africa* (3rd edn, Durban, LexisNexis 2016).
[69] 2013 (1) SACR 409 (SCA).

Bailey,[70] which restated the importance in South African sentencing law of judicial discretion in sentencing. The chapter concludes with a consideration of the merits of guideline judgments versus mandatory and minimum sentences, and Dr Brown comes down firmly in favour of the former. He endorses the view of Baehr that '*not all sexual offences are the same and judges do not take kindly to a binary system that does not allow them to provide a range of sentences for a range of offences*'. [71]

The Balance of Rigidity and Flexibility in Sentencing Scholarship – Rational v Judicial-Defensive Traditions

In his final chapter, Dr Brown discusses the previously mentioned notion of 'principled discretion' in the context of rape sentencing. It should be recorded that in an important work also published this summer, but post-dating the publication of Dr Brown's book, Prof Cyrus Tata maintains that there are two giants of sentencing thought in perpetual combat, namely those belonging to the 'legal-rational tradition' of sentencing scholarship and reform and those who belong to the 'judicial-defensive tradition'. [72] The former strongly supports limiting, or at least corralling, discretionary power in sentencing by means of guidance in various forms to ensure structured, open and rational decision making in sentencing, better consistency and predictability, and transparency. The latter strongly emphasises the 'wisdom' and pragmatic good sense of individual judges as opposed to abstract principles and evidence, and that each individual case is truly unique such that one case cannot be truly compared with another. The judicial defensive tradition contends that sentencing should therefore involve an 'instinctive' or 'intuitive synthesis', and that open explication of sentencing is not required. Dr Brown's writings indicate that his sympathies broadly lie with the judicial-defensive tradition,[73] but as his latest work makes clear, his position is a nuanced one.

Dr Brown favours O'Malley's notion of 'principled discretion' resulting in 'informed judgment',[74] namely a method of structuring sentencing discretion that ensures procedural fairness, equality and adherence to the rule of law (which are values espoused by the legal-rational tradition) by permitting judges to retain a high level of discretion, while ensuring that this discretion is exercised in accordance with settled principles. Individualised justice (the touchstone of the judicial-defensive tradition) remains possible because, as he puts it: '*…the principles operate at a higher level of generality than rules and are sufficiently flexible to permit departure and variation when the particular circumstances of the case so demand.*'[75]

The result is a sentencing discretion that is underpinned by principles, rather than hemmed in by rules.[76] He regards the issuing of guideline judgments as key to achieving this. As to formal sentencing guidelines by a sentencing council or commission, he favours the less rigid

[70] [2012] ZASCA 154 2013 (2) SACR 533 (SCA).
[71] Kristina S. Baehr, 'Mandatory Minimums Making Minimal Difference: Ten Years of Sentencing Sex Offenders in South Africa' (2008) 20(1) Yale Journal of Law & Feminism 213.
[72] Cyrus Tata, *Sentencing: A Social Process: Rethinking Research and Policy* (Cham, Palgrave McMillan 2020).
[73] Brown (2017) (n 2); Graeme Brown, 'Practical Wisdom? A Reconstruction of the Sentencing Task' (PhD Thesis, Edinburgh, University of Edinburgh 2014).
[74] Thomas O'Malley, *Sentencing – Towards a Coherent System* (Dublin, Round Hall 2011) 5.
[75] Brown, (n 1) 252, citing Thomas O'Malley T, *Sexual Offences* (2nd edn, Dublin: Round Hall 2013) and Thomas O'Malley, *Sentencing – Towards a Coherent System* (Dublin, Round Hall 2011) 5.
[76] Brown (n 1) 252, citing Ian O'Donnell, 'Publication Review – Sentencing: Towards a Coherent System (Thomas O'Malley)' (2012) 47 Irish Jurist 255; and Brown (n 2) 168-171).

approaches provided by the legislation in Scotland, Ireland and New Zealand over what he characterises as the 'system orientated, abstract and objective' approach that is favoured in England and Wales. In his view the Scottish, Irish and New Zealand approaches are more case orientated, concrete and intuitive.

He examines what lessons may be drawn from the jurisdictions currently without formal guidelines on rape and sexual assault (as opposed to guideline judgments) (i.e., Scotland, Ireland, New Zealand and South Africa). The Scottish experience suggests that appellate courts should, in drafting guideline judgments, make full use of comparative material from other jurisdictions. The experiences in both Ireland and New Zealand place emphasis on the discretion vested in the sentencing judge. Guidance from guideline judgments is not to be slavishly applied, and rigid or mathematical approaches to sentencing are not appropriate. Departure from such guidance may be warranted on the facts of a particular case. Even in the South African system the importance of retention of the flexibility to do individualised justice has been recognised. Accordingly, Dr Brown argues that sentencing reform measures in non-guideline jurisdictions are only likely to succeed if they leave adequate scope for the continued exercise of discretion where it is needed. In that regard he recommends the adoption of a guideline judgment in the same or similar terms as the decision of the New Zealand Court of Appeal in *R v AM*.

Concluding Thoughts

In conclusion, *Sentencing Rape - A Comparative Analysis* is a scholarly work, incorporating a very extensive review of comparative case law and academic commentary. It comprises an immensely valuable analysis of the different ways in which guidance has been deployed to sentencing judges in rape cases in the jurisdictions surveyed, and the author's comparative analysis of the differing sentencing policy positions in those jurisdictions is erudite and impressive. The author's writing style is clear and easily accessible, and without hesitation, I commend this work to anyone interested in sentencing law and policy generally, and specifically with respect to rape offences.