

A REVIEW OF THE JURISPRUDENCE OF THE
COURT OF CRIMINAL APPEAL 2002-2004:
PRINCIPLES AND GENERAL THEMES

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I. INTRODUCTION

The Court of Criminal Appeal (CCA) plays a crucial role in shaping criminal law, criminal procedure and sentencing. The significance of its judgments reaches beyond the courts over which it exercises appellate jurisdiction. In this context, the rulings of the Court on the interpretation of the law and on the principles, policies and methodology of sentencing are as relevant to the District Court as they are to the courts that try indictable offences. In turn, District Judges can properly expect guidance on these matters from the jurisprudence of the CCA.

This paper reviews judgments delivered by the CCA between 1 January 2002 and 31 July 2004. The purpose of the survey is to sketch the general themes in the case law and to identify the principles invoked by the Court. The subject matter of this review is the documented decisions of the CCA in the relevant period, consisting of reserved judgments, approved *ex tempore* judgments and unapproved *ex tempore* judgments.¹ The first two categories of judgment may be cited in court and accordingly they enjoy the authority that is attributed to decisions of the CCA. In general, unapproved *ex tempore* judgments are not cited and they lack any real weight as precedents. Moreover, the manner in which such judgments are recorded is often uneven and hence they are not especially reliable. Nevertheless, for several reasons, it is useful to

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¹ Judgments that were not recorded in written form were not considered. The reasons for undocumented judgments include faulty audio recording of hearings, delays in the receipt of written judgments and judgments missing from the files.

include the unapproved judgments in this review.² First, those judgments form a significant portion of the output of the Court. Second, such judgments provide evidence of the general trends in the jurisprudence. Third, occasionally an unapproved judgment may contain a novel point or judicial pronouncement. In any event, a more complete picture of the work of the Court is provided when the full corpus of available judgments is considered.

The current study reviewed 446 judgments, of which 174 were delivered in 2002, 168 in 2003 and 104 between 1 January and 31 July 2004.³ Reserved judgments were delivered in 82 cases, while 131 approved *ex tempore* judgments and 233 unapproved *ex tempore* judgments were handed down in the review period. Appeals against conviction and appeals against sentence accounted for the majority of cases. Other cases that were dealt with by the Court include appeals by the Director of Public Prosecutions against leniency of sentence, bail applications and applications for section 29 certificates account. Table 1 sets out the details of the judgments that have been reviewed.

² Unapproved *ex tempore* judgments are identified in this paper in the following manner: *People (DPP) v Kelly* 21 March 2002 (*ex temp*).

³ The data presented by the authors in this paper (the UL data) differs from that provided by the Court of Criminal Appeal office (the CCA data). The CCA data discloses that 556 cases were disposed of in 2002 and 2003 (figures for 2004 are currently unavailable): of those cases 226 are recorded as having been abandoned, leaving a total of 330 cases. The UL total for the same period is 342 cases. In the main, the CCA data records inputs (cases initiated) while the UL data reflects outputs (judgments delivered). The principal methodological differences are: (i) CCA practice is to count each applicant/appellant once irrespective of the number of hearings involved in his/her case; the UL data counts each judgment delivered. It is conceivable that four judgments might be delivered in relation to one set of proceedings: the CCA data will record one case while the UL data will record four judgments. (ii) DPP appeals and miscarriage of justice cases are included in the UL data but are excluded from the CCA data.

	2002		2003		Jan-July 2004		Total	
Appeal against conviction	45	(26%)	31	(18%)	30	(28%)	106	(24%)
Appeal against sentence	77	(44%)	89	(53%)	36	(34%)	202	(45%)
Appeal against conviction and sentence	5	(3%)	11	(7%)	8	(8.5%)	24	(5%)
DPP appeal: leniency of sentence	18	(10.5%)	17	(10%)	14	(13%)	49	(11%)
Activated suspended sentences	1	(0.5%)	1	(0.5%)	1	(1%)	3	(0.75%)
Suspension of balance sentence	1	(0.5%)	-	-	-	-	1	(0.25%)
Suspension of conditions	1	(0.5%)	-	-	-	-	1	(0.25%)
Restoration of licence	-	-	1	(0.5%)	-	-	1	(0.25%)
Section 29 certificate	9	(5%)	4	(2%)	7	(7.5%)	20	(4.5%)
Section 9 certificate	2	(1%)	-	-	-	-	2	(0.5%)
New evidence	-	-	-	-	2	(2%)	2	(0.5%)
Bail application pending appeal	15	(9%)	9	(5%)	4	(4%)	28	(6.25%)
Variation of bail conditions	-	-	1	(1%)	-	-	1	(0.25%)
To amend on grounds of appeal	-	-	1	(0.5%)	-	-	1	(0.25%)
Disclosure application	-	-	1	(0.5%)	-	-	1	(0.25%)
Copy/transcript application	-	-	1	(0.5%)	-	-	1	(0.25%)
Application for legal aid	-	-	-	-	1	(1%)	1	(0.25%)
Application for costs	-	-	-	-	1	(1%)	1	(0.25%)
Omitted from judgment	-	-	1	(0.5%)	-	-	1	(0.25%)
Total	174		168		107		446	

Table 1: Judgments of Court of Criminal Appeal Jan 2002-July 2004

Appeals against conviction, appeals against sentence, appeals against both conviction and sentence and DPP appeals accounted for 381 cases. The outcomes of those appeals are listed in Table 2. In all, just short of half of all appeals were successful: appeals were allowed in 47% of the cases reviewed and rejected in 50% of such cases.

	2002	2003	Jan-Jul 2004	Total
Appeal allowed	80 (55%)	66 (45%)	34 (39%)	180 (47%)
Appeal refused	64 (44%)	77 (52%)	50 (57%)	191 (50%)
Other	1 (1%)	5 (3%)	5 (4%)	10 (3%)
Total	145	148	88	381

Table 2: Outcome of Appeals Jan 2002-July 2004

Further analysis reveals that, in general, appeals against conviction were less likely to succeed than appeals against sentence. Appeals against conviction were allowed in 42% of cases and refused in 57% (see Table 3). On the other hand, there was a 49% success rate where appeals against sentence were concerned (see Table 4). The same pattern is reflected in the results of appeals against both conviction and sentence. Appeals were allowed in 42% of these cases, with more appeals against sentence (25%) being successful than appeals against conviction (17%)(See Table 5).

	2002	2003	Jan-July 2004	Total
Appeal allowed	23 (51%)	9 (29%)	12 (40%)	44 (42%)
Appeal refused	22 (49%)	22 (71%)	17 (57%)	61 (57%)
Other	-	-	1 (3%)	1 (1%)
Total	45	31	30	106

Table 3: Appeals Against Conviction Only Jan 2002-July 2004

	2002	2003	Jan-July2004	Total
Appeal allowed	43 (56%)	42 (47%)	13 (36%)	98 (49%)
Appeal refused	34 (44%)	43 (48%)	20 (56%)	97 (48%)
Other	-	4 (4%)	3 (8%)	7 (3%)
Total	77	89	36	202

Table 4: Appeals against Sentence Only Jan 2002-July 2004

	2002	2003	Jan-July 2004	Total
Conviction appeal allowed	1	3	-	4 (17%)
Sentence appeal allowed	2	3	1	6 (25%)
Sub-total: successful appeals	3	6	1	10 (42%)
Refused both appeals	1	4	2	7 (29%)
Conviction appeal refused; to hear sentence later	-	-	4	4 (17%)
Conviction appeal refused; sentence appeal abandoned	-	1	1	2 (8%)
Preliminary issues	1	-	-	1 (4%)
Sub-total: unsuccessful appeals	2	5	7	14 (58%)
Total	5	11	8	24

Table 5: Appeals against Conviction and Sentence Jan 2002-July 2004

In summary, appeals against conviction, appeals against sentence and appeals against conviction and sentence accounted for 332 of the judgments reviewed. Convictions were overturned in 48 cases and sentences were varied in 104 cases, representing a combined success rate of approximately 46%.

Of the 48 successful appeals against conviction, retrials were ordered in 41 cases. The principal grounds on which such appeals were successful are listed in Table 6. Slightly over 50% of those appeals were allowed on the grounds relating to the charge to the jury, with charges relating to corroboration accounting for almost half of that figure.

	2002	2003	Jan-July 2004	Total
Charge on corroboration	8	1	2	11
Charge – other errors	3	3	8	14
Inadmissible evidence	2	1	-	3
New evidence	2	1	1	4
Perverse verdict	1	-	-	1
Breach of D's testamentary shield	3	1	-	4
Errors with indictment	3	-	-	3
Direction wrongly refused	1	-	-	1
Provocation defence wrongly refused	-	-	1	1
Procedural errors	1	5	-	6
Total	24	12	10	48

Table 6: Principal grounds for successful appeals against conviction Jan 2002-July 2004

The outcomes of successful appeals against sentence are listed in Table 7. The preponderance of those cases involved a reduction in sentence of between one and three years or the suspension of all or part of the sentence. It emerges that the difficulties most frequently identified by the CCA were insufficient mitigation, sentences that were disproportionate or offended the totality principle, the appellant's exceptional circumstances and errors in the consecutive element. Table 8 lists the principal grounds on which appeals against sentence were successful.

	2002	2003	Jan-July 2004	Total
Reduced by 12 yrs	-	1 (2%)	-	1 (1%)
Reduced by 10 yrs	-	1 (2%)	-	1 (1%)
Reduced by 8 yrs	-	1 (2%)	-	1 (1%)
Reduced by 6 yrs	-	1 (2%)	2 (14%)	3 (3%)
Reduced by 5 yrs	2 (5%)	-	-	2 (2%)
Reduced by 4 yrs	1 (2%)	3 (5%)	1 (7%)	5 (3%)
Reduced by 3 yrs	3 (7%)	7 (17%)	-	10 (10%)
Reduced by 2 yrs	9 (21%)	8 (17%)	3 (21%)	20 (19%)
Reduced by 1 yr	6 (14%)	6 (15%)	1 (7%)	13 (13%)
Unclear reduction of custodial	2 (2%)	3 (5%)	1 (7%)	6 (6%)
Balance of sentence suspended	7 (12%)	1 (2%)	1 (7%)	9 (9%)
Introduced/varied suspension	10 (23%)	9 (22%)	3 (21%)	22 (21%)
Changed sequence	2 (5%)	2 (5%)	1 (7%)	5 (5%)
Sentence backdated	-	-	1 (7%)	1 (1%)
Disqualified interregnum	1 (2%)	-	-	1 (1%)
Custodial to community service	1 (2%)	-	-	1 (1%)
Custodial to compensation	1 (2%)	-	-	1 (1%)
Reduced fine	-	1 (2%)	-	1 (1%)
Increased 8 yr sentence by 1 day	-	1 (2%)	-	1 (1%)
Total	45	45	14	104

Table 7: Outcome of Successful Sentence Appeals Jan 2002-July 2004

DPP appeals against leniency of sentence accounted for 49 cases. The appeals were allowed in 28 cases, representing a 57% success rate (see Table 9). In the bulk of successful DPP appeals the CCA increased the sentence by between one and two years or altered a suspension imposed by the trial court (see Table 10). The most frequently given reasons for allowing DPP appeals were that the sentence was unduly lenient or that the case warranted a custodial sentence (see Table 11).

	2002	2003	Jan-July 2004	Total
Insufficient mitigation	13	17	5	35
Consecutive element incorrect	3	4	-	7
Opinion evidence wrongly considered	3	-	-	3
Irrelevant considerations	-	1	-	1
D's exceptional circumstances	8	1	-	9
Disproportionate/offending totality	10	10	2	22
Error not suspending part	1	-	-	1
Sentence wrongly set higher as fully suspended			1	1
Error imposing interregnum	1	-	-	1
Sentence not related to co-defendants	2	-	-	2
Reliance on Parole Board review	1	2	-	3
Period of suspension longer than sentence itself	1	-	-	1
Error re manslaughter categories	-	1	4	5
Error re starting point of sentence	-	2	-	2
Error re maximum	-	1	-	1
Miscellaneous	1	5	2	8
No details given	1	1	-	2
Total	45	45	14	104

Table 8: Principal grounds for successful sentence appeals Jan 2002-July 2004

DPP appeals against leniency of sentence accounted for 49 cases. The appeals were allowed in 28 cases, representing a 57% success rate (see Table 9). In the bulk of successful DPP appeals the CCA increased the sentence by between one and two years or altered a suspension imposed by the trial court (see Table 10). The most frequently given reasons for allowing DPP appeals were that the sentence was unduly lenient or that the case warranted a custodial sentence (see Table 11).

	2002	2003	Jan-July 2004	Total
Appeal allowed	11 (61%)	9 (53%)	8 (57%)	28 (57%)
Appeal refused	6 (33%)	7 (41%)	6 (43%)	19 (39%)
Preliminary issue	1 (6%)	1 (6%)	-	2 (4%)
Total	18	17	14	49

Table 9: DPP Appeals Jan 2002-July 2004

	2002	2003	Jan-July 2004	Total
Removed/adjusted suspension	3	5	1	9
Increased sentence by 1-2 yrs	3	1	4	8
Increased sentence by	2	-	-	2
Added consecutive element	1	1	1	3
Re-imposed same sentence	-	1	-	1
Imposed totally different sentence	-	1	-	1
Affirmed sentence, removed review	1	-	-	1
Converted fine to custodial	1	-	-	1
Sentencing adjourned	-	-	1	1
Original sentence unidentified	-	-	1	1
Total	11	9	8	28

Table 10: Outcome of Successful DPP Appeals Jan 2002-July 2004

	2002	2003	Jan-July 2004	Total
Wrongly treated as first offence	-	-	1	1
Incorrect deduction for mitigation	1	-	-	1
Wrongly reduced for consecutivity	-	-	1	1
No account taken of consecutivity	1	1	1	3
Case warranted custodial sentence	-	5	-	5
Aggravating factors unrecognised	3	1	-	4
Insufficient weight to victim impact	-	1	-	1
Generally unduly lenient	6	1	5	12
Total	11	9	8	28

Table 11: Principal grounds for successful DDP appeals Jan 2002-July 2004

The statistics provide an indication of what is happening in the CCA but it is important not to be seduced them. Those data tend to conceal more nuanced patterns of behaviour. In many cases where an appeal is successful, the appellant will have succeeded on one ground only with the Court upholding the trial judge on the other issues that were challenged in the appeal. Moreover, a successful appeal against sentence might involve a comparatively small alteration to the sentences imposed by the trial judge or the suspension of part of a custodial sentence. Indeed, in one case a sentence was increased by one day to ensure that the appellant could avail of an opportunity to apply to the Parole Board.⁴ In another case, the CCA allowed an appeal against sentence on the grounds that the trial judge had applied the wrong methodology. However, when the correct methodology was adopted, a sentence of the same duration was imposed.⁵

Before proceeding to a detailed evaluation of the judgments, some general observations, based on impressions gained from a reading of the judgments rather than a statistical analysis, are warranted. First, it is clear from the judgments that many CCA decisions are primarily based on the particular facts of the case and do not resolve more general issues of law or procedure. A reading of such judgments must take account of this feature and many of the judgments reviewed involve the application of settled law rather than the enunciation of uncertain points of law. This factor is especially relevant in sentencing cases. The CCA has declared that it will intervene only where the appellant has shown that there was an error of principle, but many of the Court's observations in sentencing cases must be interpreted in the context of the particular circumstances that are presented to it.

Second, by and large, the CCA tends to support trial judges as far as the management of trials is concerned. Where a ground of appeal rested on a matter that fell within the discretion of the trial judge, the Court, more likely than not, upheld the course of action adopted by the trial judge. There is no explicit pronouncement to this effect, but an implicit acknowledgment that the trial judge is best

⁴ *People (DPP) v Foley* 26 May 2003 (*ex temp*).

⁵ *People (DPP) v WN* 20 November 2003, discussed in text at note 176.

placed to make the array of decisions relating to the conduct of the trial is discernible.

Third, it is evident that the Court is reluctant to admit grounds of appeal based on points not raised at the trial. There are exceptions, but it seems that a general principle, that a point must be raised at the appropriate time in the trial, has found favour with the CCA.

With these remarks in mind, this paper turns to consider the principal developments in detail.

II. CRIMINAL LAW

A. Intoxication

The effect of intoxication on criminal liability is well established in the neighbouring jurisdiction. In *DPP v Majewski*,⁶ the House of Lords held that evidence of intoxication could negate specific intent but that it would not absolve an accused of liability for a crime of basic intent. While that decision has been much criticised and has been departed from in several jurisdictions, the CCA confirmed that it represents Irish law and that a change could only be effected by legislation. In *People (DPP) v Reilly*,⁷ the applicant, who was convicted of manslaughter, had argued that he was in a state of automatism at the time of the killing. Relying on *Majewski*, the trial judge ruled that automatism brought about by the voluntary consumption of alcohol did not afford a defence and that while murder required proof of specific intent, the offence of manslaughter did not. This ruling was approved by the CCA:

If a person by consuming alcohol induces in himself a situation in which his likelihood to commit acts of violence is increased, particularly to the stage where he commits an act which he would not have committed had he not consumed alcohol, then surely the courts would be failing in their obligation to the public if they allowed the cause of his violence, namely the alcohol, to excuse his actions. The

⁶ [1977] A.C. 443.

⁷ [2004] I.E.C.C.A 9

reasoning behind the *Majewski* decision appears to this Court to achieve the balance between the rights of the accused, who is entitled to be acquitted if the jury found automatism which was, in the words of the trial judge ‘free standing’, as against the rights of the public to ensure that the applicant will be held liable for actions which were induced by alcohol voluntarily consumed.

The Court later granted a section 29 certificate, noting that the defence advanced in *Reilly* was rarely raised in Ireland and that the authorities in other common law countries reflected different approaches.⁸

B. Common Design/Joint Enterprise

An accused will frequently contend that the act done or the means employed went beyond the scope of the common design to which he or she was party. In *People (DPP) v Kenny*,⁹ the Court was satisfied with a charge that made it plain to the jury that a party to the common design must have knowledge of what is to occur. In *People (DPP) v Roche*,¹⁰ the applicant was a member of a group that attacked the deceased who died from a blow struck by a ratchet used by one of the group. It was argued by the applicant that the use of the ratchet went beyond the common design and that the jury should have been invited to consider this matter. In upholding the conviction, the CCA approved the charge to the jury that did not take account of this suggestion: the common enterprise was the commission of serious assaults against the deceased and it did not matter that a ratchet rather than some other instrument was used.

In *People (DPP) v Doohan*,¹¹ it was argued that the assailant went beyond the joint enterprise agreed with the appellant. The appellant procured a punishment style beating of the deceased and left the arrangements to his co-accused, but he asked that injury to the victim’s head be avoided. The attack in fact involved the use of a shotgun which resulted in the killing. The CCA was satisfied that

⁸ [2004] I.E.C.C.A 9, *People (DPP) v Reilly* 21 May 2004.

⁹ [2003] 4 I.R. 162.

¹⁰ [2004] I.E.C.C.A 24.

¹¹ 2 December 2002.

there was sufficient evidence to find that the appellant had entered into a joint enterprise to cause serious harm to the deceased and that was sufficient *mens rea* for murder. The fact that the appellant had not expressly agreed to the discharge of the shotgun did not prevent the trial court from concluding that its use was within the scope of the common design.

The decision in *People (DPP) v Rose*¹² is an example of a case where a killing is held to fall outside the common design. The appellant's conviction of assault with intent to rob was upheld, but her conviction for the subsequent murder of the victim was quashed. Reviewing the evidence, the CCA concluded that a direction should have been granted by the trial judge. The Court drew the distinction between being a participant and being a spectator: "If she was not a participator in the crime as part of a joint enterprise but was a mere spectator she had no criminal liability even if she did not express any words or take any steps to prevent what was happening."

C. Burden Of Proof and Defences

The proposition established in *People (DPP) v Davis*,¹³ that the accused bears an evidential burden in relation to provocation, has been extended to cases of self-defence.¹⁴ In reaching this conclusion in *O'Carroll v DPP*,¹⁵ the CCA noted that the evidential burden is not heavy. The burden involves the accused's being able to point to some evidence that suggests the presence of the elements of the defence. The trial judge must be satisfied that "an issue of substance, as distinct from a contrived issue or a vague possibility" has been raised.

On the other hand, in *People (DPP) v John James Kelly*,¹⁶ the Court emphasised that the evidential burden was low: "[t]he threshold for allowing provocation to go to the jury is a low one and has been held to be so in quite a number of earlier cases." The Court found that, while the evidence supporting provocation was not of "a particularly strong variety," it was sufficient to allow the issue go to the jury.

¹² 12 February 2002.

¹³ [2001] 1 I.R. 146.

¹⁴ See also *People (DPP) v Dickey* 7 March 2003 where the Court applied the same principle to the defence of duress.

¹⁵ [2004] I.E.C.C.A 16, 6 July 2004.

¹⁶ 6 February 2004. See also *People (DPP) v Ceka* [2004] I.E.C.C.A 25, discussed in text at notes 20 and 24-25.

D. Self-Defence

The law governing self-defence is now contained exclusively in section 18 of the Non-Fatal Offences Against the Person Act, 1997.¹⁷ The CCA has been presented with several opportunities to consider the application of that provision.

In *People (DPP) v Patrick (Rubber Og) O'Reilly*,¹⁸ the issue of self-defence arose in relation to charges of possession of a firearm for an unlawful purpose and violent disorder. The Court clarified that the test is subjective. The issue was whether the applicant honestly held the belief mentioned in section 18. The jury was to assess this matter having regard to the existence of reasonable grounds for the belief, but the latter point was not the deciding factor and this should have been made clear to the jury by the trial judge. In *People (DPP) v McCormack and others*,¹⁹ the CCA held that it was a wrong to exclude the defence in section 18 from a charge of violent disorder. The Court noted that there was little statutory guidance on the matter, but concluded that section 18 provided additional protection to an accused charged with violent disorder.

In *People (DPP) v Ceka*,²⁰ the deceased attacked the applicant, who had been forewarned of this possibility and had

¹⁷ Section 18 (1) states:

“The use of force by a person for any of the following purposes, if only such as is reasonable in the circumstances as he or she believes them to be, does not constitute an offence—

(a) to protect himself or herself or a member of the family of that person or another from injury, assault or detention caused by a criminal act; or

(b) to protect himself or herself or (with the authority of that other) another from trespass to the person; or

(c) to protect his or her property from appropriation, destruction or damage caused by a criminal act or from trespass or infringement; or

(d) to protect property belonging to another from appropriation, destruction or damage caused by a criminal act or (with the authority of that other) from trespass or infringement; or

(e) to prevent crime or a breach of the peace.”

Section 18(5) and (6) elaborate on the nature of the belief specified in subsection (1):

“(5) For the purposes of this section the question whether the act against which force is used is of a kind mentioned in any of the paragraphs (a) to (e) of subsection (1) shall be determined according to the circumstances as the person using the force believes them to be.

(6) Notwithstanding subsection (1), a person who believes circumstances to exist which would justify or excuse the use of force under that subsection has no defence if he or she knows that the force is used against a member of the Garda Síochána acting in the course of the member's duty or a person so assisting such member, unless he or she believes the force to be immediately necessary to prevent harm to himself or herself or another.”

¹⁸ [2004] I.E.C.C.A 27.

¹⁹ 20 April 2004.

²⁰ [2004] I.E.C.C.A 25.

taken the “precaution” of carrying a concealed knife. Having overcome the attack and knocked the deceased to the ground, the applicant stabbed him several times. The CCA held that it was for the jury to decide whether the applicant’s actions were capable of being committed in self-defence and, on the facts, it concluded that it was open to the jury to conclude that the applicant had not acted in self-defence.

The CCA has also reconsidered the question of the liability of an accused who kills while using excessive force in self-defence, but where the degree of force employed was no more than he or she believed to be reasonably necessary. Many years before the enactment of the 1997 legislation, the Supreme Court held, in *People (AG) v Dwyer*,²¹ that an accused in those circumstances would be guilty of manslaughter, not murder. However, the language of section 18 potentially casts doubt on that ruling and, on a literal interpretation, it invites the conclusion that an accused in a similar case would now be entitled to a full acquittal. This is a matter on which the commentators have expressed different views.²² The CCA’s decision in *O’Carroll v DPP*²³ seems to have resolved the issue when it held that the jury in such a case should be directed along the lines of the *Dwyer* decision:

The jury should have been told to approach the case in the manner authoritatively required by the decision of this Court in *Dwyer*. In other words they should have been told to consider, not only whether there was evidence that a situation of self defence had arisen, but whether the defendant had or had not employed more force in self defence than was reasonably necessary, and whether he had used more force than was reasonably necessary, but no more than he honestly believed to be necessary. In the latter event, they should have been told that the appropriate verdict was manslaughter.

²¹ [1972] I.R. 416.

²² See Charleton, McDermott and Bolger *Criminal Law* (Dublin, Butterworths, 1999), pp 1035-1045; Hanly, *An Introduction to Irish Criminal Law* (Dublin, Gill & Macmillan, 1999) p 101; McAuley and McCutcheon, *Criminal Liability* (Dublin, Round Hall Sweet & Maxwell, 2000) pp 744-746, 764 *et seq.*

²³ [2004] I.E.C.C.A 16

The Court went on to hold that a direction that left the jury with only the options of acquitting or convicting of murder, without an option to convict of manslaughter, was erroneous. However, the Court did not refer to section 18 of the 1997 Act and it remains to be decided whether that provision applies to fatal force, as a literal reading suggests, or whether it is confined to cases of non-fatal violence. The invocation of the decision in *Dwyer* might invite the conclusion that the latter is the case but, given that the point was not raised, it could not be taken to have been decided.

E. Provocation

Provocation was raised as an alternative defence to self-defence in *People (DPP) v Ceka*, the facts of which have been outlined above.²⁴ The CCA held that a direction which expressly reversed the onus of proof in respect of provocation was erroneous. However, the Court applied the proviso in section 3 of the Criminal Procedure Act, 1993,²⁵ being satisfied that the misdirection did not result in a miscarriage of justice. On the evidence, it was satisfied that there was no sufficient case of provocation to justify a finding of manslaughter and the jury's rejection of the alternative defence of self-defence implicitly amounted to a finding that the applicant knew he was using excessive force. Nevertheless, the Court was at pains to reiterate the burden of proof in provocation cases:

From three authoritative decisions, therefore, it emerges indisputably that, while the defence has to satisfy a test of the existence of a body of apparently credible evidence to justify the leaving the matter to the jury, nonetheless, once the issue is left to them by the trial judge, the issue is subject to the orthodox rule regarding the burden of proof. The legal burden remains with the prosecution.

In *People (DPP) v Doyle*,²⁶ the CCA found that the trial judge was correct in refusing to allow the issue of provocation go to

²⁴ See text at note 20. See also *People (DPP) v Maher* 17 May 2004 (*ex temp*).

²⁵ Section 3(1)(a) stipulates that the Court may "affirm the conviction (and may do so, notwithstanding that it is of opinion that a point raised in the appeal might be decided in favour of the appellant, if it considers that no miscarriage of justice has actually occurred)."

²⁶ 22 March 2002.

the jury. The applicant's conduct indicated that there was no sudden or temporary loss of self-control: he embarked on a journey with four others, anticipating a violent confrontation at their destination.²⁷

F. Endangerment

The offence of endangerment is contained in section 13 of the Non-Fatal Offences Against the Person Act, 1997.²⁸ In *People (DPP) v McGrath*,²⁹ the applicant, who was being restrained at the time, exhorted a co-accused to strike the deceased. The latter struck the deceased twice, causing him to fall onto the road where he hit his head again. The deceased died from his head injuries. The CCA adopted the ordinary meaning of the words in section 13 and held that the offence may exist even if no injury occurs: the offence is a general one of endangerment. The Court approved a charge that the jury had to be satisfied that there was intentional or reckless conduct, creating a substantial risk of death or serious harm to another. It also held that the fact that the accused was acquitted of manslaughter was not inconsistent with finding him guilty of endangerment. In the companion case, *People (DPP) v Cagney*,³⁰ where the applicant was the actual assailant, the CCA held that, on the evidence, all the elements of the offence were present and it was a matter for the jury to determine whether the prosecution had established its case. The Court later granted section 29 certificates referring the matter to the Supreme Court.³¹

G. Harassment

In *People (DPP) v Sloane*,³² the Court upheld a conviction for harassment, contrary to section 10 of the Non-Fatal Offences

²⁷ See also *People (DPP) v McDonnell* 22 April 2002 (*ex temp*): CCA held that the issue of provocation should not have gone to the jury but that the trial judge's charge was impeccable.

²⁸ Section 13 defines the offence of harassment: "(1) A person shall be guilty of an offence who intentionally or recklessly engages in conduct which creates a substantial risk of death or serious harm to another."

²⁹ [2004] I.E.C.C.A 11.

³⁰ [2004] I.E.C.C.A 10.

³¹ *People (DPP) v Cagney* [2004] I.E.C.C.A 21: "Is the offence of endangerment contrary to s 13 of the Non-Fatal Offences Against the Person Act, 1997 capable of being construed so as to cover circumstances such as in the instant case?" The same question was certified in *People (DPP) v McGrath* [2004] I.E.C.C.A 20.

³² 21 January 2002 (*ex temp*).

Against the Person Act, 1997.³³ The complainant was a student who edited a student magazine while the appellant was not a student, but frequented the college campus. The CCA rejected the contention that given that the communications were with a magazine editor, they were not “without lawful authority” since the communications in question contained offensive material. The Court also held that the fact that the magazine itself allegedly contained offensive material was irrelevant.³⁴

H. Affray

The offence of affray, which is now governed by section 16 of the Criminal Justice (Public Order) Act, 1994,³⁵ was considered in *People (DPP) v Reid*; *People (DPP) v Kirwan*.³⁶ The Court noted that affray differs from the offences of riot and unlawful violence, in sections 14 and 15 of 1994 Act respectively, in that it requires that the participants in an affray must demonstrate violence “towards each other.” Thus, where there was no evidence that the applicant had used, or threatened to use, violence against another member of the group allegedly involved in the affray, there is no *prima facie* case and the trial judge should have acceded to a defence request for a direction.

The Court found it unnecessary in *People (DPP) v Reid*; *People (DPP) v Kirwan* to rule on another point raised in the appeal, namely whether section 16 is broad enough to capture the case of a

³³ Harassment is defined in section 10: “(1) Any person who, without lawful authority or reasonable excuse, by any means including by use of the telephone, harasses another by persistently following, watching, pestering, besetting or communicating with him or her, shall be guilty of an offence.

(2) For the purposes of this section a person harasses another where
(a) he or she, by his or her acts intentionally or recklessly, seriously interferes with the other's peace and privacy or causes alarm, distress or harm to the other, and
(b) his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other's peace and privacy or cause alarm, distress or harm to the other.

³⁴ The Court suspended the balance of the applicant's three-year sentence on condition that he did not communicate with the complainant or approach within one kilometre of her residence or place of work.

³⁵ The ingredients of the offence are specified in section 16(1): “Where (a) two or more persons at any place (whether that place is a public place or a private place or both) use or threaten to use violence towards each other, and (b) the violence so used or threatened by one of those persons is unlawful, and (c) the conduct of those persons taken together is such as would cause a person of reasonable firmness present at that place to fear for his or another person's safety, then, each such person who uses or threatens to use unlawful violence shall be guilty of the offence of affray.”

³⁶ [2004] 1 I.R. 392.

person who uses *lawful* violence against another who is engaged in unlawful violence if the conduct of both is such as to put “a person of reasonable firmness in fear of his or another person’s safety.” Were this the case, the Court pointed out, it would “clearly raise questions of a far reaching nature.” Conceivably, a person using lawful force in self-defence or a Garda using reasonable force to effect a lawful arrest could be convicted of affray if the other elements of the offence were present. Resolution of this issue awaits the appropriate case.

I. Offences Against the State

In *People (DPP) v Campbell*,³⁷ the CCA held that the Real IRA was an illegal organisation for the purposes of section 18 of the Offences Against the State Act, 1939. The Court took the view that a suppression order issued in respect of the IRA applied to the Real IRA, but it went on to observe that the latter group would in any event be an illegal organisation in the absence of a suppression.³⁸

J. Section 31 of the Criminal Justice 1994

In *People (DPP) v Meehan*,³⁹ the Court held that section 31⁴⁰ created two offences and, accordingly, a count, charging the appellant with laundering the proceeds of tobacco smuggling and drug trafficking, was bad for duplicity.⁴¹

³⁷ 19 December 2003.

³⁸ The appeal was successful on the different ground that it was prejudicial to the accused to allow cross-examination in relation to a named individual who had previously been before the Special Criminal Court. The CCA also granted a section 29 certificate on the question whether the suppression order applies to the Real IRA. See further text at notes 219-220.

³⁹ 27 June 2002.

⁴⁰ Section 31 stipulates:

“(1) A person shall be guilty of an offence if he—

(a) conceals or disguises any property which is, or in whole or in part directly or indirectly represents, his proceeds of drug trafficking or other criminal activity, or

(b) converts or transfers that property or removes it from the State,

for the purpose of avoiding prosecution for an offence or the making or enforcement in his case of a confiscation order.

(2) A person shall be guilty of an offence if, knowing or believing that any property is, or in whole or in part directly or indirectly represents, another person’s proceeds of drug trafficking or other criminal activity, he—

(a) conceals or disguises that property, or

(b) converts or transfers that property or removes it from the State,

for the purpose of assisting any person to avoid prosecution for an offence or the making or enforcement of a confiscation order.

(3) A person shall be guilty of an offence if he handles any property knowing or believing that such property is, or in whole or in part directly or indirectly represents, another person’s proceeds of drug trafficking or other criminal activity.”

⁴¹ Discussed further in text at note 96.

The ingredients of the offence contained in section 31, namely handling property that represented the proceeds of drug trafficking, were considered in *People (DPP) v McHugh*.⁴² Money found in the accused's possession contained microscopic traces of diamorphine and the accused made a statement to the effect that he believed the money to be derived from drug trafficking. The CCA ruled that the prosecution must prove the criminal provenance of the property in question and that this was not established either by the evidence of drug traces on the banknotes or the accused's admission of his belief of the origin of the money. The latter would, of course, be evidence that the accused had the relevant *mens rea* for the offence: the difficulty was that there was no evidence of a vital element of the *actus reus*, namely the fact that the money was the proceeds of drug trafficking. In effect, the Court acted on the fundamental principle that a guilty mind alone is not sufficient to establish criminal liability.⁴³

III. EVIDENCE

A. Identification evidence

While evidence of informal identification might be admissible at the discretion of the trial judge, the dangers inherent in such evidence were outlined in *People (DPP) v Lee*.⁴⁴ The CCA observed that, in such cases, the process of formal identification should be explained to the jury so that they can contrast it with the informal identification that occurred. The jury should also be reminded of the reasons given by the prosecution for not holding a formal identification parade and of the defence case for challenging the identification evidence presented. Moreover, the Court also stated that trial judge's charge should specify the dangers of relying on informal identification.

The conduct of a formal identification parade was raised in *People (DPP) v Brazil*.⁴⁵ The Court held that the fairness of the identification parade was not affected by the presence of one of the investigating Gardai in the room when the witness made her identification nor by the failure to keep a record of the volunteers'

⁴² 12 February 2002.

⁴³ See McAuley and McCutcheon, *Criminal Liability* (Dublin, Round Hall/Sweet & Maxwell, 2000) pp. 117-118.

⁴⁴ [2004] I.E.C.C.A 18.

⁴⁵ 22 March 2002.

descriptions. However, the Court warned against the practice of showing the witness a Garda photograph of the accused after the witness had selected him.

B. DNA Evidence

The problems associated with DNA evidence were highlighted in *People (DPP) v Allen*.⁴⁶ The Court alluded to the danger that, given its technical nature, a jury might jump to the conclusion that DNA evidence is infallible. In this case, an expert witness testified that the possibility of matching profiles was one in 1,000,000,000, but that a match was “more likely” in the case of siblings. The CCA considered that the lack of actual statistics concerning brothers had the potential to mislead the jury into believing that the increased possibility in the case of brothers was so remote that they could disregard it. In the circumstances, the Court was satisfied that the manner in which the evidence was left rendered the trial unsafe and a retrial was ordered.

C. Accomplice Evidence and Witness Protection Programmes

In *People (DPP) v Gilligan*,⁴⁷ evidence against the applicant was given by accomplices who benefited from the newly established witness protection programme. The CCA observed that the witness protection programme “was badly thought out and [had] almost developed a life of its own.” The Court amplified its concerns:

This was the first time that a witness protection programme had been implemented in this State, and one of the most worrying features is that there never seems to have actually been a programme. There ought to have been clear guidelines from the beginning as to what could or could not be offered to the witnesses. This was not done, and instead there was an ongoing series of demands by the witnesses, most of which, it must be said, were rejected, but the position was kept fluid almost right up to the time when they gave evidence.

⁴⁷ 8 August 2003.

Nevertheless, the Court accepted that, in general, the Gardai and prosecuting authorities were entitled to offer protection to witnesses and their families and that the evidence of such witnesses was not unlawfully obtained for that reason alone. The real issue concerned the benefits that could be offered under the guise of protecting witnesses. Thus, the Court opined that evidence tendered on foot of an agreement to pay the witness to testify in a particular way would be unlawful and could be excluded. In the instant case, the Court was satisfied that no such course of action had occurred.

The Court distinguished Northern Irish authorities which held that the evidence of a “supergrass” is to be treated differently from that of ordinary accomplices.⁴⁸ Instead, the CCA set out the relevant considerations to be taken into account by trial courts: (i) was it recognised by the court of trial that there were dangers in accepting the evidence without corroboration? (ii) were those dangers identified by that court? (iii) in the light of the particular facts relating to the evidence of each accomplice, were those dangers safeguarded against? (iv) with regard to the particular circumstances of each accomplice, were the measures taken and identified to safeguard against the dangers properly applied? (v) if all these matters were properly addressed, could the evidence of the accomplice be reasonably accepted?

The CCA was satisfied that the trial court had been aware of the dangers involved. Noting that corroboration of the accomplice evidence was not mandatory, the Court observed that the trial court had nonetheless sought corroboration in the form of circumstantial evidence or independent testimony. The CCA concluded that the trial court was entitled to find beyond reasonable doubt on the evidence before it that the accused was guilty of the offences with which he was charged.

There was a different outcome in *People (DPP) v Ward*,⁴⁹ where the court overturned the applicant’s conviction for murder based on similar accomplice evidence. The Court acknowledged that the trier of fact should be warned of the danger of convicting on the basis of uncorroborated accomplice evidence, but stated that the general lack of credibility of the accomplice meant that his testimony

⁴⁸ *R v Crumley* [1986] N.I. 66; *R v Steenson* [1986] 17 N.I.J.B. 36.

⁴⁹ 20 March 2002.

must be treated with the “utmost care.”⁵⁰

D. Corroboration

A failure to comply with section 10 of the Criminal Procedure Act, 1993,⁵¹ which requires a warning on the absence of corroboration of confession evidence, was fatal in *People (DPP) v Lindsey*.⁵² Observing that section 10 establishes a mandatory requirement, the CCA held that no particular form of words is required, but that the jury should have their attention drawn to the absence of corroboration, should have its meaning explained to them and they should be instructed to have due regard to its absence.

In *People (DPP) v Connolly*,⁵³ the Court observed that section 10 left a wide margin of discretion to trial judges as to how a jury should be warned. However, it emphasised the importance of making the phrase “due regard to the absence of corroboration” intelligible to the jury by explaining the meaning of corroboration and the factual nature of the prosecution case. In the instant case, the judge had only given a brief one-sentence indication of the meaning of corroboration, which the CCA considered to be inadequate. The Court observed that it would not be unduly burdensome to explain the meaning of corroboration and that it would be useful briefly to explain to the jury the reason why corroboration of confession evidence might be considered desirable. Acknowledging that the precise charge to the jury will depend on the circumstances of the case, the Court nevertheless indicated that something along the lines of the model charge suggested by the Martin Committee might be appropriate.⁵⁴

⁵⁰ See Heffernan, “The Vagaries of Accomplice Evidence” (2003) 38 Ir Jur 369, discussing the *Ward* decision.

⁵¹ Section 10 states:

“(1) Where at a trial of a person on indictment evidence is given of a confession made by that person and that evidence is not corroborated, the judge shall advise the jury to have due regard to the absence of corroboration.

(2) It shall not be necessary for a judge to use any particular form of words under this section.”

⁵² [2004] I.E.C.C.A 6.

⁵³ [2003] 2 I.R. 1.

⁵⁴ “If your verdict as to the guilt of the accused is to depend wholly or substantially on the accused’s inculpatory admission, you should bear in mind that there have been a number of instances in the past where admissions have subsequently been proved to be unreliable; accordingly you should be specially cautious in considering a degree of weight to be attached to the admission, but if after careful consideration of all the circumstances you feel satisfied beyond reasonable doubt that it is safe to rely upon it, then you are at liberty to do so. However in so considering this issue you should have regard to the nature and duration of the custody, and such effect, if any, as you are satisfied it had on the mind of the accused, taking into consideration all such matters as appear to you to be relevant, including age, sex, degree of intelligence and educational attainments.” *Report of the Committee to Enquire into Certain Aspects of Criminal Procedure* (Dublin, Stationery Office, 1990) p 39.

In contrast, a consequence of the abolition, by section 7 of the Criminal Law (Rape)(Amendment) Act, 1990,⁵⁵ of a mandatory warning on corroboration in sexual offence cases, is that the question of whether such a warning should be given lies within the discretion of the trial judge.⁵⁶ However, in *People (DPP) v PJ*,⁵⁷ it was held that if the trial judge chooses to give a corroboration warning, he or she must do so in clear and unmistakable terms. In that case, the warning was considered defective where the judge had failed to explain the meaning of corroboration and how a lack of corroboration might affect the jury's view of the evidence. In *People (DPP) v Gentleman*,⁵⁸ where the trial judge, in a prosecution for a number of counts of indecent assault, chose to give a corroboration warning, it was held that the jury should be informed why the law considers it unsafe to convict on uncorroborated evidence and that they need to exercise caution and special care.

The question of a trial judge identifying the particular items of evidence that could be taken to provide corroboration was discussed in two cases. In *People (DPP) v Slavotic*,⁵⁹ the Court quashed a conviction for rape under section 4 of the Criminal Law (Rape)(Amendment) Act, 1990 on the basis that it was incorrect to direct the jury that a particular item of evidence could be treated as corroboration when that evidence was equally open to an innocent explanation. In *People (DPP) v PC*,⁶⁰ the trial judge's otherwise "impeccable" charge was found erroneous, where he went beyond merely reciting the prosecution argument that an aspect of the complainant's evidence lent credibility to her testimony and directed them that it was capable of amounting to corroboration.

⁵⁵ That provision states:

"(1) Subject to any enactment relating to the corroboration of evidence in criminal proceedings, where at the trial on indictment of a person charged with an offence of a sexual nature evidence is given by the person in relation to whom the offence is alleged to have been committed and, by reason only of the nature of the charge, there would, but for this section, be a requirement that the jury be given a warning about the danger of convicting the person on the uncorroborated evidence of that other person, it shall be for the judge to decide in his discretion, having regard to all the evidence given, whether the jury should be given the warning; and accordingly any rule of law or practice by virtue of which there is such a requirement as aforesaid is hereby abolished.

(2) If a judge decides, in his discretion, to give such a warning as aforesaid, it shall not be necessary to use any particular form of words to do so."

⁵⁶ *People (DPP) v D O'S* [2004] I.E.C.C.A 12. See also *People (DPP) v Ferris* 10 June 2002 (however, it was stated to be wrong for prosecution counsel to have told the jury that the trial judge chose not to give a warning on corroboration.)

⁵⁷ [2003] 3 I.R. 550.

⁵⁸ 25 February 2002.

⁵⁹ 18 November 2002.

⁶⁰ [2002] 2 I.R. 285.

E. Evidence of Bad Character

The admissibility of evidence of bad character was considered in several cases, the most significant of which is *People (DPP) v Ferris*.⁶¹ The appellant, who was charged with 32 counts of indecent assault, called two aunts to testify, who gave evidence which the prosecution successfully contended amounted to evidence of his good character. Accordingly, the prosecution was permitted by the trial judge to recall the appellant and cross-examine him as to pornographic material of a paedophile nature that was found in his apartment. The CCA observed that, in seeking to cross-examine the accused as to his character, the prosecution had relied exclusively on section 1(f) of the Criminal Justice (Evidence) Act, 1924.⁶² Turning to the statutory provision, the Court concluded that section 1(f) did not apply in the instant case. That provision applies where an accused gives evidence of his good character or where he, or his advocate, cross-examines *prosecution* witnesses with a view to establishing his good character. The sub-section does not govern the circumstances where witnesses *called by the defence* tender evidence of good character.

The situation said to be relevant to the present case is that which occurs when the accused ‘has given evidence of his good character.’ But, assuming the evidence of the aunts to speak to the character of the accused, it was not the accused who gave it. It is true that the situation envisaged earlier in the subparagraph engages the responsibility of the ‘advocate’ of the accused in the event that he seeks to

⁶¹ 10 June 2002. Other cases were *People (DPP) v Kelly* 21 March 2002 (*ex temp*): cross-examination of appellant as to origin of cash found in his possession and how he made his living held to transgress Criminal Justice (Evidence) Act, 1924, section 1(f); *People (DPP) v McGartland* 20 January 2003 (*ex temp*): jury should have been discharged when Garda witness testified that appellant was known to Gardai for some time.

⁶² Section 1(f) provides: “a person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or
 (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or
 (iii) he has given evidence against any other person charged with the same offence.”

establish his good character through cross-examination of the prosecution witnesses. However, there is no provision for the case where the defence calls character witnesses other than the accused.

In the CCA's view, the common law provided the only basis on which the cross-examination could have been allowed. However, as noted above, the prosecution relied exclusively on the statutory provision and it followed that no question of the admissibility of that evidence at common law arose. In any event, the Court expressed the opinion, albeit obiter, that the evidence would not have been admissible at common law as it amounted to evidence of disposition rather than evidence of bad character.⁶³

F. System Evidence and Similar Fact Evidence

The CCA has drawn a distinction between similar fact evidence, which is inadmissible, and system evidence, which is admissible. The latter is described as "evidence of a system of conduct bearing striking resemblance to the acts complained of by the victim." It is a matter for the trial judge to decide, in the exercise of his or her discretion, which side of the line the evidence in a particular case falls. Moreover, a court is not precluded from admitting system evidence from witnesses who were complainants in earlier proceedings in which the accused was acquitted.⁶⁴

G. Prior Inconsistent statements

In *People (DPP) v McArdle*,⁶⁵ the Court confirmed the rule that a prior inconsistent statement goes only to the credibility of the witness and rejected the argument that it could be evidence of the truth.

H. Recent Complaint

It is well established that evidence that the complainant made a complaint to a third party in the absence of the accused as soon as reasonably possible after the event may be admitted in trials for

⁶³ *R v Rowton* (1865) 10 Cox CC 25 applied.

⁶⁴ *People (DPP) v D O'S* [2004] I.E.C.C.A 23

⁶⁵ [2003] 4 I.R. 186.

sexual offences.⁶⁶ This evidence, which is allowed as an exception to the hearsay rule, is admitted to establish consistency on the part of the complainant. In *People (DPP) v A*,⁶⁷ the CCA held that it was a misdirection not to explain the reason why evidence of recent complaint is received and to emphasise that it is not evidence of the facts on which the complaint is based. This was laid down as a mandatory requirement and is not a matter of discretion for the trial judge. The Court also held that the jury should be instructed that evidence of recent complaint is not corroboration in the legal sense of that term.

I. Rebuttal Evidence

In *People (DPP) v Nevin*,⁶⁸ the applicant adduced evidence that her husband, whose murder she had been charged with, was a member of the IRA. The CCA held that the admission of evidence to rebut that assertion was correct. The evidence adduced by the applicant was hearsay but the rebuttal evidence was not. The latter indicated that neither family members nor the Gardai considered the deceased to have been involved with the IRA.

J. Offences Against the State

In *People (DPP) v Gannon*,⁶⁹ the Court considered the position where a Chief Superintendent gives evidence of his or her belief that the accused was a member of an illegal organisation. The Court observed that a failure by the accused to give evidence does not add cogency to the Chief Superintendent's evidence. However, the Special Criminal Court was held entitled to conclude that the unchallenged evidence of the prosecution established the case beyond reasonable doubt. In *People (DPP) v Mulligan*,⁷⁰ the CCA pointed to the significant changes to the law of evidence brought about by the Offences against the State legislation. Nevertheless, the Court concluded that, in the absence of a constitutional challenge, it was obliged to apply that legislation. Consequently, it held that the Special Criminal Court was entitled to draw inference from the applicant's failure to answer questions.

⁶⁶ See e.g. *People (DPP) v Brophy* [1992] I.L.R.M. 709.

⁶⁷ [2002] 2 I.R. 601.

⁶⁸ [2003] 3 I.R. 321.

⁶⁹ 2 April 2003.

⁷⁰ 17 May 2004.

IV. CRIMINAL PROCEDURE

A. *Arrest, detention and questioning*

A person arrested under section 30 of the Offences against the State Act, 1939 must be held in “a garda station, a prison or some other convenient place.” The lawfulness of taking an accused from the station on a car journey was at issue in *People (DPP) v McGrath*.⁷¹ The applicant went voluntarily in the vehicle to show Gardai the location of the gun used in the murder that was under investigation. The CCA held that a temporary absence of the applicant from the Garda station did not render the detention unlawful because it was a continuation of the same detention, rather than a removal of the accused to another place.⁷² The extension of detention by a Chief Superintendent who was supplied false information by the investigating officer was considered in *People (DPP) v Mulligan*.⁷³ In the circumstance, the Chief Superintendent had acted on his independent, *bona fide* belief that the circumstances warranted extension and, accordingly, the Court held that the extended detention was lawful.

In *People (DPP) v O'Brien*,⁷⁴ statements made by the applicant whilst in custody but before he had been granted access to a solicitor were excluded from evidence on the ground that they had been obtained in a conscious and deliberate violation of his constitutional rights. However, further statements that he made after he had been facilitated with a visit from his solicitor were admitted into evidence. The CCA upheld this ruling, taking the view that the defect in the applicant’s detention had been cured once access to a solicitor was provided.

In *People (DPP) v McCowan*,⁷⁵ the appellant made a number of denials during his questioning by the Gardai. The CCA condemned the failure to take sufficient notes as a “serious matter.” The Court took the view that if the Gardai felt it was of sufficient importance to ask a question, then the answer should be recorded. Where the same question is asked a number of times, each reply should be recorded so that the true flavour of the interview is presented.

⁷¹ 2 December 2002.

⁷² *The People (DPP) v Farrell* [1978] I.R. 13 and *The State (Walsh) v Maguire* [1979] I.R. 372 applied.

⁷³ 17 May 2004.

⁷⁴ 17 June 2002.

⁷⁵ [2003] 4 I.R. 349.

In *People (DPP) v Connolly*,⁷⁶ the Court commented on the failure to record interviews of suspects. The Court noted that legislative provision for such recording exists⁷⁷ and that police interviews are recorded as a matter of routine in most “first world common law”⁷⁸ countries, but that it is a rarity in Ireland. The Court hinted that the current state of affairs may have tested the limits of judicial tolerance: “[t]he time cannot be remote that we will hear a submission that, absent extraordinary circumstances (by which we do not mean that a particular Garda station has no audio visual machinery or that the audio visual room was being painted) it is unacceptable to tender in evidence a statement which has not been so recorded.”⁷⁹

In *People (DPP) v Diver*,⁸⁰ the Court expressed its concern at breaches of custody regulations, although it upheld the trial judge’s decision to admit the evidence that had been thereby obtained.⁸¹ In *People (DPP) v McGrath*,⁸² the Court again advanced the view that a breach of custody regulations did not affect the lawfulness of custody or the admissibility of evidence.⁸³ On the other hand, a breach of regulations had drastically different consequences in *People (DPP) v McFadden*.⁸⁴ There, a search that was conducted without informing the appellant of the basis on which it was being done was held to be more than a “trivial or inconsequential” matter and the evidence thereby obtained was excluded.

B. Search

In *People (DPP) v McFadden*, the CCA considered the lawfulness of a search conducted on an arrested person. The Court approved as correct Professor Walsh’s statement of the law:⁸⁵

At common law a member of the Garda Siochana has

⁷⁶ [2003] 2 I.R. 1.

⁷⁷ Criminal Justice Act, 1984, section 27; Criminal Justice Act, 1984 (Electronic Recording of Interviews) Regulations 1997

⁷⁸ [2003] 2 I.R. 1 at 18.

⁷⁹ [2003] 2 I.R. 1 at 18; see *People (DPP) v Freeman* 12 November 2003 (*ex temp*) holding that there was no prejudice to the accused where the video of the applicant’s questioning did not contain any sound.

⁸⁰ 10 April 2002.

⁸¹ An application for a section 29 certificate was successful: see text at note 222.

⁸² 2 December 2002.

⁸³ See also *People (DPP) v Hogan* 12 July 2004: CCA upheld exercise of trial judge’s discretion to admit evidence obtained in breach of custody regulations and Judges’ Rules.

⁸⁴ [2003] 2 I.R. 105.

⁸⁵ *Criminal Procedure* (Dublin, Thomson Round Hall, 2002) p. 196.

the power to search a person whom he or she has arrested. The purpose of this search would appear to be to enable the member to take into possession anything found on the person in the nature of a dangerous weapon or which may be used to facilitate an escape from custody, or any item which may be of evidentiary value. In most cases, therefore, the search will be confined to a body frisk and examination of the suspect's outer garments.

The Court went on to hold that a search is subject to an important precondition: the person being searched must be informed of the nature of the search and the statutory (or common law) power that is being invoked.⁸⁶ A failure to so inform was more than a trivial breach of custody regulations. It violated a "fundamental requirement" of informing the person being searched of the legal justification for interfering with his constitutional rights.

Drugs were seized in a warrantless search of the applicant's parents' house in *People (DPP) v Bowes*.⁸⁷ The applicant did not reside at that address, but stayed there occasionally. The CCA upheld the trial judge's ruling that there was no breach of the applicant's right to inviolability of the dwelling under Article 40.5 of the Constitution: there was ample evidence on which to assess whether or not it was his legal dwelling.

The Court has observed that a Garda Superintendent's power to issue a search warrant under section 8 of the Criminal Justice (Drug Trafficking) Act, 1996 should be considered an exception to the general powers of a District Judge or Peace Commissioner to issue warrants. As such, it is an emergency provision to be used in limited circumstances and the Gardai are not entitled to decide when they will apply to a District Judge or Peace Commissioner for a warrant.⁸⁸

The basis on which a search warrant issued by a District Judge could be challenged was considered in *People (DPP) v Tallant*.⁸⁹ A District Judge issues two warrants based on

⁸⁶ *DPP v Rooney* [1992] 2 I.R. 7, applied.

⁸⁷ 25 February 2002.

⁸⁸ *People (DPP) v Byrne* [2003] 4 I.R. 423, but the conviction was upheld applying section 3(1)(a) of the Criminal Procedure Act, 1993.

⁸⁹ [2003] 4 I.R. 343.

“confidential information received and inquiries carried out” and “information received and inquiries carried out,” respectively. The Judge had asked the two Gardai concerned whether they believed their information and each replied in the affirmative. The CCA was satisfied that the District Judge had acted judicially on evidence that was presented to him. He did not merely “rubber stamp” the applications. The Court observed that a decision to issue a search warrant may be quashed only if “no reasonable District Judge could reasonably have formed the opinion that there was a basis for the suspicion which entitled him to form the opinion which caused the warrant to be issued.”⁹⁰

C. Telephone interceptions

In *People (DPP) v Dillon*,⁹¹ the conduct of an investigating Garda, who answered a call made to a seized mobile telephone, was evaluated in the light of section 98 of the Postal and Telecommunications Services Act, 1983,⁹² which prohibits intercepting telecommunication messages. On answering the call, the Garda engaged in a conversation about drugs transactions with the appellant, who clearly did not realise with whom he was conversing. Section 98(5) defines “interception” as “listening to...any telecommunications message without the agreement of the person on whose behalf that message is transmitted ... and of the person

⁹⁰ *Ibid.*, at 348.

⁹¹ [2003] 1 I.L.R.M. 531.

⁹² The relevant portions of section 98 provide:

“(1) A person who—

(a) intercepts or attempts to intercept, or

(b) authorises, suffers or permits another person to intercept, or

(c) does anything that will enable him or another person to intercept,

telecommunications messages being transmitted by the company or who discloses the existence, substance or purport of any such message which has been intercepted or uses for any purpose any information obtained from any such message shall be guilty of an offence.

(2) Subsection (1) shall not apply to any person who is acting—

(a) (i) for the purpose of an investigation by a member of the Garda Síochána of a suspected offence under section 13 of the Post Office (Amendment) Act, 1951 (which refers to telecommunications messages of an obscene, menacing or similar character) on the complaint of a person claiming to have received such a message, or

(ii) in pursuance of a direction issued by the Minister under *section 110*, or

(iii) under other lawful authority, or

(b) in the course of and to the extent required by his operating duties or duties for or in connection with the installation or maintenance of a line, apparatus or equipment for the transmission of telecommunications messages by the company.

(5) In this section, ‘interception’ means listening to, or recording by any means, or acquiring the substance or purport of, any telecommunications message without the agreement of the person on whose behalf that message is transmitted by the company and of the person intended by him to receive that message.”

intended by him to receive that message.” The CCA interpreted that provision in the light of the whole section and the general framework of the Act. The Court concluded that listening to a telephone conversation without the relevant agreements is unlawful and that the onus rests on the party that has to establish that there were such agreements, which, in this case, was the prosecution. The Court further held that the identity of the person whom the caller intended to receive the message is a central feature of the agreement, without which the act of listening is an “interception.” The Court went on to note that the 1983 Act does not distinguish between calls made for a criminal purpose and other calls, nor does it establish an exemption for Gardai. It concluded that the action in this case was not mandated by law. In holding that evidence of the telephone conversation should have been excluded, the Court rejected the argument that the interception involved the breach of a legal right rather than a constitutional right.⁹³

D. Duplicity

The general rule that a count should not charge more than one offence is easily stated, but is more difficult to apply in practice. The dividing line between a duplicitous count and one which charges a single offence by alleging alternate means of commission is often indistinct. The CCA has observed that the matter typically falls to be decided on a case-by-case basis.⁹⁴

Under section 31 of the Criminal Justice Act, 1994, the offence of money laundering consists of a number of defined activities in relation to the “proceeds of drug trafficking or other criminal activity.”⁹⁵ In *People (DPP) v Meehan*,⁹⁶ the appellant faced a series of counts, each charging him with laundering money that was derived initially from cigarette smuggling and later from drug trafficking. The Court was called on to determine whether section 31 creates two distinct offences or merely describes two different means of committing the one offence. An examination of the 1994 Act as a whole, including the definitions adopted and the special regime of confiscation orders following a drug trafficking conviction,

⁹³ *People (DPP) v Kenny* [1990] 2 I.R. 110 applied.

⁹⁴ See e.g. *People (DPP) v Walsh* 11 February 2002 (*ex temp*); *People (DPP) v Fagan* 21 March 2003 (*ex temp*).

⁹⁵ See note 40.

⁹⁶ 27 June 2002.

persuaded the Court that the legislation effectively drew a vital distinction between drug trafficking and other criminal activity. Accordingly, the CCA held that section 31 created two offences, - in effect laundering the proceeds of drug trafficking and laundering the proceeds of other criminal activity. It followed that each of the counts on which the appellant was charged was bad for duplicity.

E. Joinder of charges

In *People (DPP) v Nevin*,⁹⁷ the applicant had been charged with one count of murder and three counts of solicitation of murder. The latter offences were alleged to have involved three different men and to have occurred over a six to seven year period. The trial judge's decision to refuse to sever the solicitation counts from the murder count was upheld by the CCA. The Court stated that the test was whether the charges had a common factual origin and it did not consider the separation in time a bar to the joinder of the charges. The Court concluded that the offences had similar features which established a *prima facie* case for joinder and it was satisfied the trial judge had correctly exercised her discretion not to order that the charges be severed.

E. Separate Trials

The CCA considered the issue of ordering separate trials in *People (DPP) v LG*,⁹⁸ where the accused was charged with sexual offences against his two sisters. The Court held that there is no inflexible rule and observed that the matter lies within the discretion of the trial judge. In cases of this type, it is not unlikely that evidence concerning one complainant will be inadmissible in respect of other complainants. In such circumstances, the Court noted, it is preferable that the trial judge makes a ruling on admissibility at the time of the application for separate trials. In the instant case, no such ruling had been made but, given that the evidence was admissible in respect of both complainants, the Court concluded that the trial judge had properly exercised his discretion. However, the CCA went on to note that it was incumbent on the trial judge to give a clear

⁹⁷ [2003] 3 I.R. 321.

⁹⁸ [2003] 2 I.R. 517.

direction to the jury that they should consider the evidence in respect of the counts relating to the first complainant separately from the evidence relating to the counts concerning the second complainant.

G. Jury

In *People (DPP) v Kenny*,⁹⁹ the Court held that a trial judge enjoys discretion as to how he or she receives communications from members of the jury panel. In empanelling a jury, the judge has a duty to act in “a fair manner and proceed with due process.”¹⁰⁰ In the instant case, the trial judge’s decision to hold private conversations with members of the panel was an appropriate exercise of his discretion. In *People (DPP) v Lindsey*,¹⁰¹ a juror revealed that he recognised the applicant from having seen him around the town. Having assessed the demeanour of the juror and having canvassed the matter with both counsel, the trial judge decided not to discharge the jury. The Court held that, in the circumstances, it would not intervene with the judge’s exercise of discretion.

In *People (DPP) v O’Brien*,¹⁰² it emerged during the trial that a juror was acquainted with an investigating Garda. The prosecution proposed not to call the Garda, who gave evidence (in the absence of the jury) as to the nature of his acquaintance with the juror. Following discussion, the trial judge decided that the appropriate course was to exclude the evidence of that witness and refused a defence request to cross-examine him. The CCA concluded that this course of action had adequately preserved the integrity of the trial and it upheld the decision not to discharge the jury.

*People (DPP) v Price and Stanners*¹⁰³ provides an example of how an unforeseen incident, that might potentially disrupt a trial, can be managed. In that case, a juror complained during the course of the trial that one of the applicants had pulled up alongside her at traffic lights, waved to her and blew smoke at her. While the applicant denied this, defence counsel sought the discharge of the jury on the grounds that the alleged incident would be on the minds of the jury. The trial judge refused to accede to that request. On recalling the jury, he did not indicate the applicant’s denial, but asked

⁹⁹ [2003] 4 I.R. 162.

¹⁰⁰ *Ibid.*, at 173.

¹⁰¹ [2004] I.E.C.C.A. 6.

¹⁰² 17 June 2002.

¹⁰³ [2004] I.E.C.C.A 26

if the foreman wished to say anything. It became clear that the jury had discussed the incident and had requested that their names and addresses should not be read out in court. Noting that the matter must be considered in relation to both the subjective and objective bias of jury members, the CCA concluded that the trial judge had clearly explained the matter to the jury in his charge, thereby negating any possibility of bias.

The conduct of the jury-keepers resulted in a conviction for murder being overturned in *People (DPP) v McDonagh*.¹⁰⁴ It became clear that, having retired overnight to a hotel, the jury-keepers had given the jury advice on how to proceed in their deliberations and subsequently socialised with them. One of the jury-keepers ended up alone in a bedroom with a female juror and there was some physical contact: The juror complained of this conduct to the foreman the following day. The CCA felt that it could not be satisfied that no miscarriage of justice occurred in the circumstances. The test adopted was whether a reasonable and fair-minded observer would consider that there was a possibility that the juror might have been unconsciously influenced by his or her personal experience.

In *People (DPP) v Kenny*,¹⁰⁵ the trial judge recharged the jury, after approximately seven hours deliberation. Within two hours of the recharge, the jury returned a majority verdict. The CCA rejected the contention that the two-hour period specified in section 25(3) of the Criminal Justice Act, 1984¹⁰⁶ should be taken to run from the time of the recharge. Noting that the jury was “robust in its duty,”¹⁰⁷ the Court concluded that a requirement to “reset the clock” could not be read into section 25(3).

H. Charge to Jury

The CCA has emphasised the importance of charging a jury in neutral terms which do not convey any impression that a particular view should be taken of the evidence or the witnesses.¹⁰⁸

¹⁰⁴ [2003] 4 I.R. 417.

¹⁰⁵ [2003] 4 I.R. 162.

¹⁰⁶ Section 25(3) provides:

“The court shall not accept a verdict by virtue of subsection (1) unless it appears to the court that the jury have had such period of time for deliberation as the court thinks reasonable having regard to the nature and complexity of the case; and the court shall not in any event accept such a verdict unless it appears to the court that the jury have had at least two hours for deliberation.”

¹⁰⁷ [2003] 4 I.R. 162 at 176.

¹⁰⁸ See e.g. *People (DPP) v Ahern* 20 March 2003.

The Court accepted that a charge to a jury might be factually and legally correct, but that the tone of the charge and the language used might be such as to render a conviction unsafe. Thus, a trial judge's remarks which appear to give a seal of approval to a crucial witness carry the danger that those words might unduly influence the jury. Equally, the use of language that might be taken to suggest that the accused is a guilty person seeking to avoid the consequences of his or her conduct will render a conviction unsafe.¹⁰⁹

The importance of explaining the presumption of innocence to the jury was central to the decision in *People (DPP) v DO'T*.¹¹⁰ The Court observed that:¹¹¹

[t]he presumption of innocence ... is not only a right in itself: it is the basis of other aspects of a trial in due course of law at common law. The rule that, generally speaking, the prosecution bears the burden of proving all the elements of the offence necessary to establish guilt is a corollary of the presumption. To state the incidence of the burden of proof without indicating its basis in the presumption is to risk understating its importance and perhaps relegating it to the status of a mere technical rule. The presumption is the basis of the rule as to the burden of proof and not merely an alternative way of stating it. The presumption also exists, and has effect, in ways other than simply dictating the incidence of the burden of proof at the trial.

In the Court's view, the presumption should be explained to the jury and the charge should include:¹¹²

"...a statement that the presumption is that every accused person is innocent until a jury is satisfied to the contrary to the appropriate standard and that this presumption is the basic, constitutionally guaranteed, condition of a trial in due course of law [followed by]

¹⁰⁹ *People (DPP) v Hourigan and O'Donovan* [2004] I.E.C.C.A. 8; see also *People (DPP) v Slattery* 4 February 2004 (*ex temp*).

¹¹⁰ [2003] 4 I.R. 286.

¹¹¹ *Ibid.*, at 290.

¹¹² *Ibid.*, at 292.

... instruction as to the onus of proof, described as a consequence of that presumption to which every accused is entitled.”

The Court held that a recharge (the trial judge having omitted to mention the presumption in the original charge) in which the presumption was “no more than mentioned”¹¹³ without being explained and which omitted to elaborate on the relationship between the presumption and the rules of evidence the jury was being asked to apply, was inadequate. It was also held to be erroneous to suggest that the onus of proof lay with the prosecution where there was a “difference” between the parties. Such a statement could be taken to suggest that the burden on the prosecution is limited or that the accused was expected to establish such a difference before the prosecution was called on to prove its case.

In *People (DPP) v DO’S*,¹¹⁴ the Court held that a charge to the jury that omitted express reference to giving the accused the “benefit of the doubt” was not flawed since the jury had been given a full explanation of the principles involved and their role as sole arbiters of fact had been emphasised.¹¹⁵ In *People (DPP) v Price and Stanners*,¹¹⁶ the Court stated that it was “unhelpful” to provide examples to illustrate the meaning of “beyond reasonable doubt.” In the circumstances of the case, the Court allowed the conviction to stand as it concluded that there was no danger that the jury would have been confused.

A point of significant practical importance was considered in *People (DPP) v Reid*; *People (DPP) v Kirwan*,¹¹⁷ where the CCA held to be erroneous a charge to the effect that if two *equal* views of the evidence were open, the one that is more favourable to the accused should be taken. Citing *DPP v Byrne*,¹¹⁸ the CCA observed that the

¹¹³ *Ibid.*, at 293.

¹¹⁴ 28 July 2004. [2004] I.E.C.C.A. 23

¹¹⁵ See also *People (DPP) v McDonnell* 22 April 2002 (*ex temp*); *People (DPP) v O’Connor* 29 July 2002: “[t]he judge does not have to repeat the references to proof beyond a reasonable doubt as a mantra in respect of every part of the case”. On the other hand the CCA has made it clear that the jury must be properly charged in relation to the benefit of doubt and the onus of proof: *People (DPP) v Padden and Padden* 20 March 2002 (*ex temp*).

¹¹⁶ [2004] I.E.C.C.A 26.

¹¹⁷ [2004] 1 I.R. 392.

¹¹⁸ [1974] I.R. 1; see also *DPP v Wallace*, Court of Criminal Appeal, unreported, 30 April 2001. In contrast, in *People (DPP) v Cronin* [2003] 3 I.R. 377 the charge on drawing of inferences was found to be incomplete but this was held not to render the verdict unsafe and the CCA observed that defence counsel has not taken exception to it at the time.

law is that if two views are possible, even where one of them is less probable, the one that is more favourable to the accused should be taken. The Court explained the matter:¹¹⁹

The starting point for the relevant exercise may accurately be described in the phrase ‘if two views are open’ or ‘if two views are possible’ ... The difference [from the phrase ‘if two views are equal’] is quite a stark one: two views may be open, even if one of them is very much less probable than the other. But if the two views must be ‘equal’, that necessarily implies that the inference most favourable to the accused should not be drawn even if it is only slightly less probable than the inference favouring the prosecution. This is to introduce the civil evidential standard at least into some part of the case.

The principles governing the silence of an accused while he or she was in custody were outlined a number of years ago in *People (DPP) v Finnerty*.¹²⁰ In *People (DPP) v McDermott*,¹²¹ the Court, applying the *Finnerty* judgment, held that a trial judge should not have commented to the jury on the fact of the accused’s silence. The force of *Finnerty* was also felt in *People (DPP) v McCowan*,¹²² where the CCA condemned the leading of evidence regarding the appellant’s refusal to answer police questions on the advice of his solicitor. The Court remarked that *Finnerty* is “very simple to observe and [the Court] would be gravely perturbed if it were thought that it could be departed from at the expense of a rebuke or comment by this court but that it would not be taken seriously beyond that.”¹²³

In a relatively straightforward case, it is sufficient for the trial judge to explain the legal principles involved without going into the evidence in detail.¹²⁴ However, in more difficult cases, more might be required, a point that emerges from *People (DPP) v Dickey*.¹²⁵ There, the accused, who was charged with importation and possession of

¹¹⁹ [2004] 1 I.R. 392 at 399.

¹²⁰ [1999] 4 I.R. 364.

¹²¹ 17 June 2002.

¹²² [2003] 4 I.R. 349.

¹²³ *Ibid.*, at 351.

¹²⁴ See e.g. *People (DPP) v Hogan* 12 July 2004.

¹²⁵ 7 March 2003.

drugs, raised a defence of duress. The trial judge's direction consisted principally of reading an extract from the judgment in *People (AG) v Whelan*¹²⁶ by way of explaining the legal principles involved. The applicant took no issue with the charge in relation to the legal definition of duress, but contended that the charge was deficient in that it did not detail the evidence that would support the defence. The CCA agreed, noting that the defence rested on a "difficult point of law." There was a danger that the jury would not have fully understood which matters were to be considered in determining the issue of duress.

In *People (DPP) v Dunne*,¹²⁷ the trial judge did not explain the plea of self-defence even though he had allowed the defence to raise that issue. No requisition had been made by either side, but the CCA, in quashing the conviction, observed that there is an obligation on prosecution counsel to advise the trial judge where there has been such an omission.

I. Delay

In *People (DPP) v PO'C*,¹²⁸ the Court held that where an accused seeks to prevent a trial on grounds of delay, the appropriate remedy is to seek an order of prohibition (if the court of trial is an inferior court) or an injunction restraining the DPP from proceeding with the charges where the case is scheduled for the Central Criminal Court.¹²⁹ The CCA held that a trial judge did not have jurisdiction to quash an indictment on the grounds of excessive delay. As it happened, the Court felt that, even if it was wrong in that conclusion, the applicant's tardiness in raising the issue of delay was fatal.

The decision in *People (DPP) v PO'C* was followed in *People (DPP) v LG*¹³⁰ in which the Court upheld the trial judge's refusal to withdraw the charges on the grounds of delay. However, in the circumstances, the CCA concluded that the jury should have been given adequate warning of the difficulties posed by the delay in question (27 years). In particular, the trial judge should have drawn the jury's attention to the problems faced by the defence in preparing

¹²⁶ [1934] I.R. 518.

¹²⁷ 25 November 2002.

¹²⁸ 27 January 2003.

¹²⁹ *State (O'Connell) v Fawsitt* [1986] I.R. 362 applied.

¹³⁰ [2003] 2 I.R. 517.

for the trial. The Court also held that the warning in relation to delay should be separate from any warning the trial judge chooses to give in relation to corroboration.

J. Adverse Media Publicity

It is sometimes argued that the effect of adverse publicity is such that the accused will not receive a fair trial. This was one of the issues raised in *People (DPP) v Nevin*,¹³¹ where it was contended that the trial judge should have acceded to a defence request to delay proceedings until the effects of adverse media coverage had faded. The CCA accepted that, in some circumstances, such publicity would justify the stopping of a trial, but felt that the matter fell within the discretion of the trial judge. The Court would not interfere unless it were clearly shown that a trial judge wrongly exercised his or her discretion. In the instant case, the trial judge banned press comment on the applicant's appearance and demeanour and the publication of photographs of her. The CCA held that the trial judge had made appropriate rulings and directions and agreed with her assessment that, notwithstanding the conduct of the media, there was no real or serious risk that the applicant would not get a fair trial.

K. Re-trials

In *People (DPP) v GK*,¹³² the Court held that the fundamental constitutional principles of due process and fair procedures demanded that an accused facing a re-trial be provided with a transcript of the previous trial. It is not necessary that the defence show inconsistencies in the evidence of a witness at the time the application for a transcript is made.

L. Appeals: New Evidence

In *People (DPP) v J*,¹³³ the CCA outlined the three conditions that must be satisfied before new evidence may be admitted: (i) it must be relevant; (ii) it must be credible; and (iii) it must have been unavailable at the time of the original trial.

Section 2 of the Criminal Procedure Act, 1993, which

¹³¹ [2003] 3 I.R. 321.

¹³² 6 June 2002.

¹³³ 8 July 2002.

provides for applications to the CCA on the basis on new evidence (“a new fact or a newly discovered fact [showing] that there has been a miscarriage of justice”), has been invoked in several cases. In *People (DPP) v Callan*,¹³⁴ the Court held that the new “fact” must be one that was relevant to the trial and the decision made by the trial court. The applicant’s conduct in presenting a perjured version of events to the court of trial and his decision not to make use of the arguments now being advanced during his first appeal (in 1986) were sufficient to convince the Court that the matter did not come within section 2. There was no reasonable explanation offered by the appellant as to why he did not rely on the facts now being invoked.

In *People (DPP) v Redmond*,¹³⁵ the Court stated that an objective assessment must be made of the new fact with a view to determining whether the conviction was unsafe. In the instant case there was a strong possibility that the new evidence would have raised a reasonable doubt as to the guilt of the appellant in the minds of the jury.

It is clear from the decision in *People (DPP) v Leacy*¹³⁶ that the new fact must satisfy the ordinary criteria of admissibility.¹³⁷ The trial judge granted a certificate that the case was fit for appeal in the light of new evidence that the mother of the child complainant admitted to a third party that the applicant was not guilty of the offences. The new witness was a solicitor who swore an affidavit and it was sought to treat the contents of the affidavit as new facts. The application was refused on the grounds that the new evidence was hearsay and did not amount to a “newly discovered fact.”

On the other hand, in *People (DPP) v McLoughlin*,¹³⁸ the complainant in a rape trial testified that her friend had witnessed an incident during which the applicant had acted aggressively towards her (*i.e.*, the complainant). The friend, who had denied this assertion to the Gardai during the investigation, became aware of the complainant’s evidence after the trial and swore an affidavit

¹³⁴ 9 December 2002.

¹³⁵ [2004] I.E.C.C.A 22.

¹³⁶ 3 July 2002.

¹³⁷ See also *People (DPP) v Shortt (No 1)* [2002] 2 I.R. 686: on an application for a certificate under section 9 of the Criminal Procedure Act, 1993 the CCA refused the DPP’s request to adduce new evidence to the effect that the applicant had committed other offences on the ground that the evidence would be inadmissible by virtue of section 1(f) of the Criminal Justice (Evidence) Act, 1924.

¹³⁸ 24 June 2002.

rebutting that testimony. The Court granted a re-trial on the basis of this new evidence: the matter went to credibility which, in the circumstances, was vital.

It was held in *People (DPP) v Pringle (No 2)*¹³⁹ and *People (DPP) v Meleady and Grogan*¹⁴⁰ that the granting of a certificate of a miscarriage of justice under section 9 does not automatically follow from a successful application under section 2. In *People (DPP) v Shortt (No 2)*,¹⁴¹ an effort was made to confine the earlier decisions to cases where the application was based on a “new fact” rather than a “newly discovered fact.” In the latter instance, it was argued that a section 9 certificate should issue automatically. This contention was rejected by the CCA, which considered itself bound by the principles in *Pringle (No 2)*. However, the Court granted a certificate on the strength of the newly discovered fact that a number of documents, which would have been damaging to the principal prosecution witness, were concealed by two Gardai. This conduct amounted to a grave defect in the administration of justice.

V. SENTENCING

A. General Principles

The general philosophy of sentencing was reiterated by the Court in *People (DPP) v GD*,¹⁴² where it stated:

Each case must depend on its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. 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. The range of possible penalties is dependant on those two factors.

It follows that sentencing judges must enjoy considerable discretion in order properly to balance the factors alluded to by the Court. As a corollary, the CCA has established that it will only alter

¹³⁹ [1997] I.R. 225.

¹⁴⁰ [1995] I.R. 517.

¹⁴¹ [2002] 2 I.R. 696.

¹⁴² [2004] I.E.C.C.A. 17. See also *People (DPP) v RB* 8 April 2003 stating that it is the duty of the trial judge to consider all the circumstances of the crime, the victim and the accused.

a sentence where it is satisfied that there was an error in principle: it will not intervene solely on the ground that it would have been disposed to giving a more lenient sentence.¹⁴³

In *People (DPP) v Cooney*,¹⁴⁴ the Court took the opportunity to spell out several points of principle. First, it stressed the elementary but important point that a criminal trial is a proceeding between the People and an accused person, not between the victims and the accused. This has a relevance to sentencing where the danger of being overly influenced by evidence of the victims must be avoided. Second, the court considered it erroneous to treat stabbing cases as a special category as far as sentencing for manslaughter is concerned. Third, it observed that while a trial judge is under no obligation to provide reasons for the sentence he or she is imposing, it is a desirable practice to state reasons because “[p]ublic confidence in the criminal justice system is enhanced when reasons for sentences are clearly expressed.”¹⁴⁵

B. Evidence of Other Offences

The Court has indicated that a sentence ought to be confined to the offences established against the accused and that it is erroneous to base a sentence on evidence of an accused’s general reputation. In *People (DPP) v McManus*,¹⁴⁶ the Court held that the trial judge erred in admitting general opinion evidence of a Garda witness which indicated that the accused was involved in more serious crime.¹⁴⁷ Similarly, in *People (DPP) v Gilligan*,¹⁴⁸ the Court

¹⁴³ *People (DPP) v Halloran* 21 October 2002. *People (DPP) v GF* 25 May 2004: CCA considered the sentence (10 years for rape under section 4) to be high but not so high as to have been an error of principle. However, in some cases a sentence has been varied even where the CCA concluded that there was no error in principle: see e.g. *People (DPP) v O’Neill* 21 October 2002; *People (DPP) v Cooke* 27 May 2004: no error in principle but sentence backdated to time appellant was taken into custody.

¹⁴⁴ [2004] I.E.C.C.A. 19.

¹⁴⁵ See also *People (DPP) v Dekker* 25 November 2002 (*ex temp*) where the failure of a trial judge to refer to the appellant’s guilty plea was described as “unusual and undesirable”. It was held that there had been an error of principle. But in *People (DPP) v Ji Guang and others* 26 May 2004 (*ex temp*) the CCA rejected the contention that the trial judge should have set out the mitigating factors accepted and indicated the weight being attributed to each: the Court felt disinclined to impose such a requirement on trial judges.

¹⁴⁶ 21 March 2003.

¹⁴⁷ See also *People (DPP) v Furlong* 20 December 2002. The trial judge was held to have erred in acting on opinion evidence that the appellant was believed to be a main supplier of cannabis; *People (DPP) v O’Connell* 17 December 2002; *People (DPP) v O’Loughlin* 17 December 2003. The trial judge erred in acting on Garda opinion that the appellant was associated with major figures in the drugs trade which was not supported by evidence.

¹⁴⁸ 12 November 2003; the appeal against conviction which was rejected by the Court on 8 August 2003 is discussed in text at notes 47-48.

held that the Special Criminal Court erred, in principle, in not confining itself to the individual charges proved against the accused. However, the CCA accepted that evidence of an accused's involvement in other offences might be relevant and in this regard it drew an important distinction:

...in many cases there may be a narrow dividing line between sentencing for offences for which there has been no conviction and taking into account surrounding circumstances, which include evidence of other offences, in determining the proper sentence for offences for which there has been a conviction. It is important that courts should scrupulously respect this dividing line.

In *Gilligan*, the CCA found that a sentence of 28 years' imprisonment for possession of drugs for the purpose of supply was disproportionate to the sentences imposed on the appellant's associates, given the lack of evidence that the appellant was the gang leader.¹⁴⁹

In *People (DPP) v Flaherty*,¹⁵⁰ a Garda witness described the accused, who was convicted on a number of counts of buggery, attempted buggery and indecent assault, as an active paedophile and a danger to the public. In reducing the sentences imposed, (from nine years and four years concurrent to seven years and four years concurrent) the CCA observed that, while it would be permissible to take an accused's bad character and violent disposition into account, undue weight had been attached to that evidence and the sentence had included a preventive element. On the other hand, in *People (DPP) v Healy*,¹⁵¹ the Court held that the trial judge was entitled to take account of psychiatric evidence of the danger that the applicant would re-offend, a view that was reinforced by the fact that the accused committed a similar offence during the Garda investigation.

¹⁴⁹ See also *People (DPP) v O'Donoghue* 15 April 2002. The applicant acknowledged that his possession of drugs had not been an isolated incident and Garda evidence was admitted that he had been dealing in drugs for a longer period than he confessed; CCA held that trial judge was correct to take all the circumstances into consideration, including his admission to Gardai that he had been a courier.

¹⁵⁰ 20 December 2002 (*ex temp*).

¹⁵¹ 19 April 2004.

C. Relevant Factors in Sentencing

Many appeals against sentence were disposed by means of *ex tempore* decisions from which certain broad themes can be identified. In the period under review, the CCA has identified various mitigating factors that should be taken into account in sentencing: prior good character; youth; old age; poor health; mild mental handicap; mental disorder; psychiatric problems; low intelligence; physical disability; the offender's childhood experience; the fact that the accused is a foreign national; an early guilty plea and genuine remorse;¹⁵² degree of co-operation with the Gardai; the payment of compensation; the likelihood of not re-offending; character references; the accused's good conduct in the time between the commission of the offence and the trial; the fact that the accused has taken steps to deal with an alcohol or drug addiction; the fact that the accused was persuaded by his employer to become involved in illegal resistance to a threat of extortion; and the fact that the criminal act was not premeditated.

The sentence imposed on a co-accused might also be relevant, the Court taking the view that equal situations should be treated equally.¹⁵³ The effect that a custodial sentence might have on innocent family members has been cited in judgments and, in one case, the fact that an accused had adopted two Romanian orphans was found to be relevant. The Court also reduced a sentence for arson where the appellant had checked the premises to ensure that nobody was present prior to setting the fire. The Court has also expressed the view that it is not desirable that a sentence be suspended for a longer period than the sentence itself.¹⁵⁴

On the other hand, the Court has held that it is appropriate to take account of an accused's continuing criminal career¹⁵⁵ and of the fact that an accused has not availed of opportunities afforded to him previously.¹⁵⁶ Nevertheless, the CCA has reduced a seven-year sentence to one of five years on the ground that the original sentence represented a "big jump" on the longest sentence of six months that the applicant had previously served.¹⁵⁷

¹⁵² On the other hand the CCA has refused to take a belated acceptance of responsibility into account: see *People (DPP) v Jacobs* 15 December 2003 (*ex temp*).

¹⁵³ See *People (DPP) v Duffy* [2003] 2 I.R. 192.

¹⁵⁴ *People (DPP) v Hogan* 4 March 2002 (*ex temp*).

¹⁵⁵ *People (DPP) v Ryan* 17 December 2002; see also *People (DPP) v O'Donoghue* 27 May 2004.

¹⁵⁶ *People (DPP) v Horgan* 25 May 2004.

¹⁵⁷ *People (DPP) v Dutton* 5 February 2004 (*ex temp*).

The Court has indicated, in some decisions, that a custodial sentence is normally warranted for offences involving violence or the threat of violence (such as robbery and assault with intent to rob) and for a vicious and premeditated assault. Thus, in *People (DPP) v Olden*,¹⁵⁸ the Court upheld a three-year sentence for an assault with a knife, committed by the applicant on his girlfriend. The trial judge's initial view had been to impose the maximum sentence of five years, but reduced it to take account of a guilty plea and the CCA found that the sentence was not unduly harsh. These rulings can be contrasted with other decisions where there was less of an emphasis on the custodial dimension.¹⁵⁹

In some assault cases, a suspended sentence was approved in circumstances where compensation was paid to the victim.¹⁶⁰ The jurisdiction to order the payment of compensation was queried in *People (DPP) v Johnson*.¹⁶¹ The appellant was sentenced to three years with the trial judge ordering that compensation, amounting to £4,903 which he had brought to court, be paid to the victim without prejudice to any civil remedy. The CCA did not deal with the point raised but, in reducing the sentence to one year, it held that the trial judge should have given the appellant credit, *inter alia*, for the compensation.¹⁶²

The question of suspending a custodial sentence imposed on an elderly person in poor health has been considered. In *People (DPP) v JM*,¹⁶³ the appellant was sentenced to three year concurrent sentence on 23 counts of indecent assault. The offences were committed in the late 1940s and the appellant was a teacher in, and

¹⁵⁸ 19 December 2002. See also *People (DPP) v Power* 19 January 2004 (*ex temp*): CCA allowed DPP appeal by increasing a two-year sentence for aggravated sexual assault to three years.

¹⁵⁹ See *People (DPP) v NY* [2002] 4 I.R. 309 CCA suspending the balance of concurrent three-year sentences for rape and rape under section 4: the trial judge was said to be in error for having proceeded on the assumption that a custodial sentence was mandatory for all cases of rape. In *People (DPP) v Maher* 18 December 2002 sentences of four and two years for rape and sexual assault, respectively, were reduced to two years, with the last 14 months suspended and one year with the last six months suspended: It was wrong in principle for the trial judge to attach any great weight to *People (DPP) v Tiernan* [1988] I.R. 250, which suggested that a custodial sentence is normally warranted for rape.

¹⁶⁰ See e.g. *People (DPP) v Connolly* 5 February 2002.

¹⁶¹ 17 December 2002.

¹⁶² In *People (DPP) v Garvey* 26 January 2004 (*ex temp*) the CCA upheld a fine of 1,000 for assault causing harm and endangerment: offences were committed during a dispute between two groups in a public house, there were no lasting injuries and the injured party withdrew the complaint.

¹⁶³ 22 February 2002.

later principal of, the school attended by the victims. The CCA considered that the lateness of the complaints and the delay in bringing the case did not support a suspended sentence. The youth of the victims and the position of trust occupied by the appellant explained the delays involved. However, the appellant's advanced age and his physical and mental condition meant that a custodial sentence would amount to a punishment of undue severity and a suspension of the entire term was required. The principles in *JM* were invoked in *People (DPP) v PH*,¹⁶⁴ but, in this case, the CCA found that a three-year sentence with the final year suspended was justified.

The practice of ordering sentence reviews was condemned in the decision of the Supreme Court in *People (DPP) v Finn*.¹⁶⁵ However, the CCA has observed that orders made prior to *Finn* may stand, and upheld a sentence of eight years, with a review after four years, in *People (DPP) v Kelly*.¹⁶⁶ In *People (DPP) v McDonnell*,¹⁶⁷ the Court confirmed that the decision in *Finn* did not deprive sentencing judges of the power to suspend portion of a sentence.

In several cases, the CCA has acknowledged that adverse consequences which result from a conviction do not of themselves justify a lenient sentence. In *People (DPP) v Muldoon*,¹⁶⁸ the applicant, who was convicted of offences under the Child Trafficking and Pornography Act, 1998, was sentenced to two and a half years' imprisonment with post-release supervision for 11 years. The trial court also ordered that he be allowed access to a personal computer and the Internet only under supervision. The CCA accepted that the latter restriction severely curtailed the applicant's right to earn a livelihood (his work involved use of computers), but concluded that he brought this state of affairs upon himself. Moreover, the restraint was considered necessary to protect the public from serious harm. In *People (DPP) v Doherty*,¹⁶⁹ the Court, allowing a DPP appeal against leniency, imposed a custodial sentence on a member of the Garda Síochána found guilty of corruption. The Court observed that the respondent's loss of employment and status and the acute embarrassment to his family were not mitigating factors, but were

¹⁶⁴ 22 February 2002.

¹⁶⁵ [2001] 2 I.R. 25.

¹⁶⁶ 23 July 2002.

¹⁶⁷ 17 December 2002.

¹⁶⁸ 7 July 2003.

¹⁶⁹ 29 April 2003.

the consequences of his conduct. However, in a seemingly contrasting decision, *People (DPP) v O'Meara*,¹⁷⁰ the CCA suspended a custodial sentence on the grounds that the trial judge had not taken sufficient account of the fact that a prison sentence would end the applicant's army career. And in *People (DPP) v Woods*,¹⁷¹ the argument was advanced that the trial court should have taken account of the fact that, being a Garda, the appellant, who was convicted of harassment and telephone offences, would be under greater pressure while imprisoned. The CCA accepted this view and held that, although a custodial sentence was warranted, part of the appellant's sentence should be suspended.

In some cases, the Court has accepted that the original sentence was appropriate, but that events subsequent to the trial warrant a reduction. Thus, the quashing of a murder conviction has been held to put a different light on sentences imposed for other offences.¹⁷² In a similar vein, the fact that a drug addicted accused had since rehabilitated and had resumed residing with her parents was used to justify what would otherwise be considered a lenient sentence.¹⁷³

D. Consecutive Sentences

In *People (DPP) v G McC*,¹⁷⁴ the appellant was sentenced to concurrent sentences of life, 14 years and five years for rape, offences under the Child Trafficking and Pornography Act, 1998 and sexual and indecent assault. In imposing maximum sentences, the trial judge remarked that he was entitled to impose consecutive sentences. The CCA observed that the discretion in favour of consecutive sentences was to be exercised sparingly. In reducing the sentences to concurrent terms of 10 years, eight years, four years and three years, the Court also stated that the totality principle was applicable to ensure that the overall sentence was just.

In *People (DPP) v McKenna (No 2)*,¹⁷⁵ the CCA considered consecutive sentences to be justified. The respondent, who was convicted of a series of indecent assault and sexual assault offences committed against his daughter, received three-year concurrent

¹⁷⁰ 10 March 2003.

¹⁷¹ 19 December 2002.

¹⁷² *People (DPP) v Rose* 13 March 2002 (*ex temp*); *People (DPP) v Ward* 10 October 2002 (*ex temp*).

¹⁷³ *People (DPP) v Comerford* 11 October 2002 (*ex temp*).

¹⁷⁴ [2003] 3 I.R. 609.

¹⁷⁵ [2002] 2 I.R. 345.

sentences. The CCA expressed the view that it would be an injustice to the public not to impose consecutive sentences and that the trial judge ought to have exercised his discretion accordingly. The Court substituted sentences of three years on each count of sexual assault to run consecutively on each count of indecent assault.

In *People (DPP) v WN*,¹⁷⁶ the appellant was sentenced to seven consecutive one-year terms of imprisonment on seven counts of sexual assault, committed against two complainants. The CCA found that, in the circumstances, this was a case where a consecutive sentence would be appropriate: the accused committed the offences against two teenage females over a period of years and his acts had serious consequences. The Court concluded that, considering the totality principle, a seven-year sentence would not be unjust. However, it found that there was an error in the method employed by the trial judge. The Court took the view that the appropriate course was to start with the maximum sentence for the offence (in this case five years) and then to discount for mitigating factors. In the Court's view, the mitigating factors in this case merited a reduction of eighteen months, with the result that the appropriate sentence for the first count was one of three and a half years. Similar sentences, to run concurrently, were imposed in respect of the other counts against the same complainant. The Court also imposed concurrent three and a half year sentences on the remaining two counts in respect of the offences committed against the second complainant. However, the Court was satisfied that it was appropriate to make the latter sentences consecutive to the sentences imposed in respect of the first complainant.¹⁷⁷ The net result was that the total sentence imposed remained the same, albeit that the seven one-year consecutive sentences were replaced by two groups of consecutive sentences of three and a half years each.

Consecutive sentences posed a different problem in *People (DPP) v Whelan*¹⁷⁸ where the appellant was sentenced to 15 years' imprisonment for attempted murder, consecutive on a life sentence for murder. The Court held that, as a matter of law, it was not possible to have a determinate sentence following a life sentence.

¹⁷⁶ 20 November 2003.

¹⁷⁷ *People (DPP) v TB* [1996] I.R. 294 applied.

¹⁷⁸ [2003] 4 I.R. 355.

Reversing the order of the sentences solved the problem in this case.

Section 11 of the Criminal Justice Act, 1984¹⁷⁹ provides for mandatory consecutive sentences for an accused whose offences were committed while he or she was on bail in respect of an earlier charge. In *People (DPP) v Cole*,¹⁸⁰ the Court noted that the obligation to impose consecutive sentences is not cumulative. It also held that for section 11 to apply, the trial court must receive actual evidence of the arrest, charge and release of the accused on bail and that it is the duty of the prosecution to draw the court's attention to this legislative provision. The Court has also applied the principle of totality to sentencing for bail offences.¹⁸¹

In *People (DPP) v Robinson*,¹⁸² the Court was required to consider the meaning of "previous offence" in section 11. The particular problem in this case was that the sequence of dates on which the applicant was sentenced for three groups of offences did not correspond with the order in which they were committed. In fact, the order in which groups 1, 2 and 3 came before the court was 1, 3 and 2. The Court held that "previous offence" means "an offence previous to the offence for which he is being sentenced" and could not be taken to refer to the order in which sentences were imposed. Thus, when the applicant came to be sentenced in the final hearing for offences which were committed on a date prior to those for which he had been previously sentenced, section 11 did not apply. The CCA also rejected the prosecution invitation to alter the sequence in which consecutive sentences would be served, as that option would not have been open to the trial court. In *People (DPP) v Byrne*,¹⁸³ it was held that the statutory obligation to impose consecutive sentences operates only in relation to the offences the accused committed while on bail, not to all offences of which he or she is charged. The CCA also referred to the discretion a sentencing

¹⁷⁹ Section 11 reads: "(1) Any sentence of imprisonment passed on a person for an offence committed after the commencement of this section while he was on bail shall be consecutive on any sentence passed on him for a previous offence or, if he is sentenced in respect of two or more previous offences, on the sentence last due to expire, so however that, where two or more consecutive sentences as required by this section are passed by the District Court, the aggregate term of imprisonment in respect of those consecutive sentences shall not exceed two years."

¹⁸⁰ 31 July 2003.

¹⁸¹ *People (DPP) v Hogan* 17 December 2002. In *People (DPP) v Lundo* 19 April 2004 the CCA, allowing a DPP appeal, imposed a consecutive element for an offence committed while the accused was on bail.

¹⁸² 20 December 2002.

¹⁸³ 23 July 2002.

judge enjoys at common law to order consecutive sentences, but noted that in the instant case there was no indication that the trial judge sought to rely on that power.

An appeal by the DPP against leniency was successful in *People (DPP) v Doyle*.¹⁸⁴ In that case, the offences on counts 2 and 3 (robbery and possession of an imitation firearm, respectively) were committed while the accused was on bail, pending his trial on the first count (attempted robbery). As a result, a consecutive sentence was obligatory on counts 2 and 3. For this reason, the trial judge reduced the sentence he would have otherwise imposed on the first count, from three years' imprisonment to one year, in order to avoid the consequences that would have ensued from consecutive sentences. The CCA held that it was inappropriate to seek to eliminate the consequences of consecutive sentencing, which were mandated by legislation and, accordingly, it restored the three year sentence on the first count.

E. Guilty Pleas and Maximum Sentences

Section 29(2) of the Criminal Justice Act, 1999¹⁸⁵ authorises the imposition of a maximum sentence on an accused who pleads guilty if there are exceptional circumstances which warrant that sentence. The matter was considered in *People (DPP) v CD*,¹⁸⁶ where the applicant had pleaded guilty to ten sample counts of rape and two of sexual assault, there having been 153 counts on the indictment. The offences had been committed over a 20-year period against his four daughters. The case was described as one involving a systematic and brutal pattern of sexual interference by a person in total control. The accused was sentenced to life imprisonment on the

¹⁸⁴ [2004] I.E.C.C.A. 5. In *People (DPP) v Tighe* [2004] I.E.C.C.A. 4, the CCA upheld a three-year sentence on the applicant who had acted as lookout for Doyle: the trial court had been informed of the DPP's intention to appeal the sentences given to the other offenders but the CCA was satisfied that the applicant was sentenced without regard to the sentences imposed on his accomplices and that there was no error in principle.

¹⁸⁵ The relevant provisions in section 29 state:

“(1) In determining what sentence to pass on a person who has pleaded guilty to an offence, other than an offence for which the sentence is fixed by law, a court, if it considers it appropriate to do so, shall take into account—

(a) the stage in the proceedings for the offence at which the person indicated an intention to plead guilty, and

(b) the circumstances in which this indication was given.

(2) To avoid doubt, it is hereby declared that *subsection (1)* shall not preclude a court from passing the maximum sentence prescribed by law for an offence if, notwithstanding the plea of guilty, the court is satisfied that there are exceptional circumstances relating to the offence which warrant the maximum sentence.”

¹⁸⁶ 21 May 2004.

rape charges and five years' imprisonment on the sexual offence charges, the sentences to run concurrently. The CCA upheld the sentences. The Court observed that, although the trial judge had not expressly invoked section 29(2), there was no error in principle in imposing the maximum sentence if the trial judge is satisfied that the relevant exceptional circumstances existed. Moreover, that legislative provision outweighs any suggestion in earlier case law that, as a matter of principle, an accused must be given a discount for a guilty plea. As it happened, the Court observed that the maximum sentence had not been imposed in this case. The life sentences could have been imposed consecutively to the five-year sentences, thereby postponing the applicant's opportunity to avail of the parole procedure.

F. DPP Appeals Against Leniency

In *People (DPP) v GD*,¹⁸⁷ the CCA observed that the DPP bears the onus of establishing that there had been an unduly lenient sentence.¹⁸⁸ The Court would only intervene if there had been a "substantial departure" from what would be regarded as the appropriate sentence.

The operation of the 28 day time limit in section 2(2) of the Criminal Justice Act, 1993 was considered in *People (DPP) v McKenna*.¹⁸⁹ The DPP's office sought to lodge the appeal on the 28th day after the respondent had been sentenced, but the CCA office refused to accept the relevant documents, objecting to their form. The revised documents were lodged the following day. The CCA held that, for the purposes of the time limit, the delivery of notice of application to appeal constituted the making of an application under section 2(2) and, consequently, the appeal was within time.

G. Reactivated Sentences

The Court rejected the argument that a suspended sentence could only be reactivated by the judge who had imposed the original sentence. It also rejected the contention that a sentence could only be partially reactivated.¹⁹⁰ While the Court has indicated that the

¹⁸⁷ [2004] I.E.C.C.A. 17, 13 July 2004.

¹⁸⁸ See also *People (DPP) v Noonan* 28 April 2003; *People (DPP) v Keegan* 28 April 2003: DPP must show either a specific mistake has been made or more generally make the point that the sentence was not long enough for the type of crime and must have argued the point during the trial; *People (DPP) v Connors* 19 April 2004: onus is clearly on DPP to show a substantial departure from the appropriate sentence.

¹⁸⁹ 6 February 2002.

¹⁹⁰ *People (DPP) v Stewart* 12 January 2004.

reactivation is usually a matter for the trial court,¹⁹¹ it has reactivated a suspended sentence on a DPP appeal where the accused breached conditions by committing public order and criminal damage offences.¹⁹²

H. Offences Against the Person

The vexed question of minimum sentences for particular categories of manslaughter was also considered in *People (DPP) v Kelly*.¹⁹³ At sentencing, the trial judge had spoken of a term of 20 years' imprisonment as an appropriate deterrent for violent conduct. When mitigating factors were taken into account, the applicant was sentenced to 14 years' imprisonment. The CCA considered that reference to a minimum sentence for manslaughter involved a departure from established principles of sentencing and it substituted a sentence of eight years' imprisonment.¹⁹⁴

A sentence of eight-and-a-half years' imprisonment for causing serious harm, contrary to section 4 of the Non-Fatal Offences Against the Person Act, 1997, was upheld in *People (DPP) v Osborne*.¹⁹⁵ The applicant had argued that the sentence imposed was as great as that which would have been imposed for manslaughter had the victim died and that, as a matter of principle, a lesser sentence should be imposed where death did not occur. The Court rejected that contention stating:

While this argument is superficially attractive the court is by no means satisfied that it is sound. The sentence appropriate to the permanent destruction of a young man's life may not necessarily in all circumstances be less than the sentence which would have been appropriate for manslaughter if death had resulted from the same crime. The cliché "a fate worse than death" comes to mind.

¹⁹¹ *People (DPP) v Gavin* 15 May 2002 (*ex temp*).

¹⁹² *People (DPP) v Tyndall* 28 January 2002 (*ex temp*).

¹⁹³ [2005] 1 I.L.R.M. 19.

¹⁹⁴ See also the companion case *People (DPP) v Aherne* [2004] I.E.C.C.A 13 where a similar reference to a minimum 20 years' for manslaughter was held to be erroneous in principle. However, in this case the CCA, applying the proper approach, arrived at the same sentence as the trial judge (10 years' imprisonment). See also *People (DPP) v Dillon* 15 December 2003.

¹⁹⁵ 29 May 2003.

I. Section 15A of the Misuse of Drugs Act, 1977

The CCA has considered sentencing for section 15A offences in a number of cases. The general approach to be adopted was outlined in *People (DPP) v Byrne*,¹⁹⁶ where a 10-year sentence was upheld. The CCA rejected the argument that the trial judge had erred in principle in failing to find that there were exceptional and specific circumstances that warranted the mandatory sentence. The Court concluded that the dominant consideration is that the Oireachtas laid down a statutory minimum sentence and that judicial discretion is accordingly circumscribed.¹⁹⁷

The manner in which a trial judge should approach sentencing under section 15A was also at issue in *People (DPP) v Power*.¹⁹⁸ The CCA held that the trial judge should have expressly stated the sentence for the section 15A offences (the applicant had also been convicted of other offences) and should have outlined the benefit the applicant was being afforded for mitigating factors.¹⁹⁹ However, the Court concluded that the seven-year sentence imposed was not inappropriate.²⁰⁰

In *People (DPP) v Galligan*,²⁰¹ it was held that being a first time offender is an “exceptional and specific circumstance” which justifies a departure from the mandatory minimum. The Court also held that account should be taken of the accused’s genuine remorse. In *People (DPP) v Healy*,²⁰² the accused pleaded guilty and had materially assisted the Gardai. The CCA held that insufficient account had been taken of the mitigating circumstances and the mandatory sentence was discounted to seven and a half years, with the final two years suspended on terms to be decided, but to include the appellant’s drug rehabilitation. In *People (DPP) v Atkinson*,²⁰³ the Court, reviewing the evidence, concluded that the trial judge erred in not mitigating for co-operation. There was uncontested

¹⁹⁶ [2003] 4 I.R. 423.

¹⁹⁷ See also *People (DPP) v Rossi and Hellewell* 18 November 2002: CCA observed that courts must have serious regard to the statutory policy; *People (DPP) v Barrett* 12 July 2004 increasing a two-year suspended sentence to one of four years with no suspension.

¹⁹⁸ 8 October 2003.

¹⁹⁹ See also *People (DPP) v O’Loughlin* 17 December 2003: “[i]t is unfortunate that the trial judge did not also set out what credit he was giving for various matters.”

²⁰⁰ See also *People (DPP) v Dunne* [2003] 4 IR 87: in upholding a seven-year sentence the CCA rejected the contention that the trial judge had “undue regard” to the statutory minimum; *People (DPP) v Whelan* 23 July 2002, upholding a sentence of six years.

²⁰¹ 23 July 2003.

²⁰² 8 October 2003.

²⁰³ 19 April 2004.

evidence that the appellant cooperated fully with the Gardai. On the other hand, in *People (DPP) v Henry*,²⁰⁴ the Court increased a four-year sentence to one of six years on the ground that the trial judge had been unduly lenient: the respondent had been given too much credit for his guilty plea which was not entered until the day before the trial. And, in *People (DPP) v Heffernan*,²⁰⁵ the Court allowed a DPP appeal against leniency, increasing a two and a half year sentence to one of four years. In so doing, the Court found that the trial judge had erred in reducing the sentence twice on the basis of the same mitigating factors.

In *People (DPP) v Botha*,²⁰⁶ the applicant was sentenced to five years' imprisonment for possession of €52,000 worth of cannabis. The CCA considered that there had been no error in principle and opined that, if anything, the sentence had been generous. The Court rejected the argument that the trial judge ought to have categorised cannabis possession as less serious than possession of other drugs. In this respect, the Court noted that section 15A does not draw a distinction between cannabis and other drugs.²⁰⁷ In any event, no mitigation could have been afforded to the applicant, as he had been unaware of the nature of the drugs he was carrying.

The CCA dealt with the question of suspending a sentence or part of a sentence on condition that a foreign national leave the jurisdiction in *People (DPP) v Alexiou*.²⁰⁸ In that case, the DPP appealed against a sentence of four years' imprisonment suspended on condition that the accused leave the State immediately, enter a bond of good behaviour and not return to the country. The DPP contended that the sentence was wrong in principle on several grounds: that it could not be reactivated once the respondent left the jurisdiction; that it was unduly lenient and would serve no deterrent purpose; and that requiring a person to leave the country was an executive function which lies beyond the judicial province. The Court rejected these arguments, in particular concluding that the trial judge did not perform an executive act, but applied a condition to a sentence within the limits of judicial discretion. The Court did

²⁰⁴ 15 May 2002.

²⁰⁵ 10 October 2002.

²⁰⁶ [2004] I.E.C.C.A. 1.

²⁰⁷ See also *People (DPP) v Foster* 15 May 2002.

²⁰⁸ [2003] 3 I.R. 513.

observe, however, that the preferred course would have been for the trial judge to prescribe a definite period of time within which the respondent was not to return to the State.²⁰⁹

Relatively lengthy sentences for drug possession have been upheld in a number of *ex tempore* judgments.²¹⁰ On the other hand, the Court reduced a sentence of nine years' imprisonment to one of seven years, where the value of the drugs was marginally over £10,000, stating that it could not be sure there was no error of principle.²¹¹

J. Health and Safety Offences

In *People (DPP) v Oran Pre Cast Ltd*,²¹² the defendant company was fined €500,000 for offences under the Health Safety and Welfare at Work Act, 1989, which resulted in a fatality. In reducing the sentence to a fine of €100,000, the CCA noted that the fine imposed was far greater than that which had been imposed in any similar case.²¹³ It stated that “care and restraint” must be observed when the power to fine is exercised and that the defendant’s degree of fault should be the principal criterion in determining the appropriate fine. The means of the company was also deemed a relevant consideration.

VI. SECTION 29 CERTIFICATES

In *People (DPP) v Kenny*,²¹⁴ the CCA, in refusing a section 29

²⁰⁹ See also; *People (DPP) v Vardacardis* 20 January 2003 where the CCA upheld a sentence of eight years, the last six and a half years of which were suspended on condition that the accused leave the jurisdiction and not return during the suspension period. In contrast, six-year sentences on foreign nationals were upheld in *People (DPP) v Foster* 15 May 2002 and *People (DPP) v Rossi and Hellewell* 18 November 2002, while a 12-year sentence was upheld in *People (DPP) v Chillis* 25 July 2002. *People (DPP) v Benjamin* 14 January 2002 is somewhat different in that deportation was not made a condition of the suspension: ten years was replaced with five years, final four years suspended, with a proviso that in the event of deportation arising, either party could apply to the court during the currency of the suspension period

²¹⁰ *People (DPP) v Peyton* 14 January 2002: 12 years with a review after six years. The appropriateness of incorporating a review into a sentence for a section 15A offence was not considered; in any event the issue is now moot following the discontinuance of sentence reviews in the light of *People (DPP) v Fimm* [2001] 2 I.R. 25; *People (DPP) v Doyle* 8 October 2002 (*ex temp*) eight years and two years for possession and assault occasioning actual bodily harm, respectively); *People (DPP) v Coutts* 4 November 2002 (*ex temp*) (eight years for possession of cannabis worth €250,000);

²¹¹ *People (DPP) v Murphy* 10 October 2002 (*ex temp*).

²¹² 16 December 2003 (*ex temp*).

²¹³ See *People (DPP) v Roseberry Construction Ltd* [2003] 4 I.R. 338 where the CCA upheld a fine of €200,000: the fact that a director of the company was separately fined did not amount to double counting, give their distinct legal personalities.

²¹⁴ [2004] I.E.C.C.A. 2.

certificate, held that the onus rests on the applicant to establish that a point of law of public importance is at issue and that it is desirable, in the public interest, that the issue be referred to the Supreme Court. The Court, drawing an important distinction, held that a matter that is the subject of public debate, is not necessarily a matter of public importance within the meaning of section 29.²¹⁵ The Court also held that an issue that had not been raised during the application for leave to appeal could not be the subject of a section 29 certificate.²¹⁶

In *People (DPP) v K*,²¹⁷ the fact that the accused would not benefit personally from a successful application was crucial. The Court indicated that the point raised by the applicant, namely whether a trial judge's reference at sentencing stage to items in the book of evidence without putting it before the parties, might benefit from judicial clarification. However, as the appeal would not avail the applicant, the Court being satisfied that his sentence was fully justified, the application for a section 29 certificate was dismissed.

In *People (DPP) v Sweetman*,²¹⁸ the Court, in refusing a section 29 application, expressed its surprise that an application was made when the substantive appeal to the CCA had been successful and a retrial ordered. The Court entertained serious doubts as to whether section 29 was intended to operate in such circumstances. Those remarks were considered obiter in *People (DPP) v Campbell*,²¹⁹ where, despite the appeal being successful and a retrial being ordered, the Court granted a section 29 certificate on the question of whether a suppression order made under the Offences Against the State Act, 1939 applies to the Real IRA. The Court took the view that it was in the public interest that the issue be authoritatively decided. It was doubtless considered relevant that the accused's retrial on a charge of membership of an illegal organisation was ordered and the point, therefore, could not be considered moot. As it happens, the Supreme Court refused to entertain the appeal on

²¹⁵ See also *People (DPP) v Lavery* 19 March 2002 refusing an application for a section 29 certificate where the grounds on which it was sought arose out of the details of the case and were not "general questions that are likely to arise again"; *People (DPP) v O'Connor* 25 May 2004 refusing an application for a section 29 certificate where the facts were "unusual and striking" but where the statutory criteria were not met.

²¹⁶ See also *People (DPP) v Hull* 18 February 2002 holding that the Court would not entertain a section 29 application in respect of an issue not raised previously by the applicant.

²¹⁷ 29 July 2002.

²¹⁸ 30 July 2002.

²¹⁹ 23 February 2004.

the grounds that to do so in circumstances where the CCA had allowed an appeal and ordered a retrial would be to exercise a form of consultative jurisdiction.²²⁰

In *People (DPP) v Gilligan*,²²¹ the Court certified two points relating to (i) the admissibility of evidence that may have been obtained from witnesses under the State witness protection programme and (ii) whether corroboration is required in respect of the testimony of such witnesses and, if not, the appropriate test concerning such witnesses.

In *People (DPP) v Diver*,²²² the Court certified a question whether the trial judge had correctly exercised his discretion in admitting a statement that had been taken in breach of custody regulations when the applicant was held under section 4 of the Criminal Justice Act, 1984.

VII. CONCLUSION

Between January 2002 and July 2004, the CCA was required to adjudicate on a broad spectrum of issues relating to criminal law and procedure, evidence and sentencing. Notwithstanding its large caseload and varied composition, it is noteworthy that, despite dark hints to the contrary, the Court has shown a striking degree of consistency, applying general underlying principles with comparative uniformity. This phenomenon might not be obvious at first sight, but on detailed analysis, it emerges as a significant feature of the Court's judgments: what on first glance appears to be chaotic and disordered is on closer scrutiny revealed as being more structured and ordered. Given the professional demands imposed on them, judges and practitioners are not well placed to conduct the exhaustive examination of the CCA's judgments that was undertaken in the preparation of this paper. Instead, the task falls to academics and researchers. To this end, the authors were fortunate in being facilitated with access to the Court's entire corpus of jurisprudence in the review period, but it is acknowledged that few others enjoy that facility.

Improvements in law reporting and the use of electronic

²²⁰ *People (DPP) v Campbell* [2004] 2 I.L.R.M. 412; *Attorney General v Kennedy* [1946] I.R. 517 and *People (DPP) v O'Callaghan* [2004] 1 I.L.R.M. 438 applied.

²²¹ 27 January 2004.

²²² 10 April 2002.

means of disseminating judicial decisions have contributed to a richer body of legal information. However, a considerable portion of the CCA's output remains relatively inaccessible with the result that trial judges and counsel are often required to operate in the dark. In addition, inadequate access to the Court's judgments can only serve to prompt caricatured versions of the Court's decision-making. Better access to CCA judgments, perhaps best achieved by the regular publication of new volumes of *Frewen*, is warranted. Such measures would overcome the current information deficit and coincidentally could be expected to contribute significantly to enhancing the Court's reputation.