

Criminal Justice Notes

In this month's edition of KLS Criminal Justice Notes:

- **The Minister for Prisons has announced that the government is considering abolishing prison sentences of less than six months, seemingly to ease pressure on prisons and enhance public safety.**
- **The Irish Supreme Court has decided by a three to two majority that consent cannot be a defence to assault causing harm where the harm was inflicted for an unlawful purpose.**
- **The Home Secretary has announced an intention to introduce 'knife crime prevention orders' as part of a strategy to combat the reported increase in knife crime in England and Wales.**

Abolishing Short Prison Sentences

A few weeks ago, the Minister for Prisons in England and Wales was reported in the media as announcing that the government was considering "banning prison sentences of less than six months", except in respect of violent or sexual offences. It is not clear how far advanced the government's thinking is, or whether it will publish firm proposals or a consultation paper, on the subject.

The early indications are that the government is motivated by the expectation that a ban on the use of short prison sentences would ease pressure on prisons and by a belief that it would produce safety dividends for the public as a whole. This comes in the wake of the House of Commons Select Committee on Justice recommending a presumption against short custodial sentences in June 2018, and the Secretary of State for Justice saying in May 2018 that sentences

of less than 12 months should be used only as a last resort.

There can be little doubt that even a partial ban on the use of short prison sentences will ease pressure on prisons in England and Wales. Of the 86,000 offenders sentenced to imprisonment there in 2017 alone, more than half were given sentences of less than six months. It is estimated that at least 30,000 prisoners (including petty burglars and shoplifters) would be diverted from prison altogether under a partial ban. Any such move would also have a significant beneficial effect in countering the UK's unenviable reputation of imprisoning a higher percentage of its population than most other EU Member States (8th highest with 140 per 100,000 head of population, as against an average of 120).

Although it may seem counter-intuitive, there is also a sound basis for thinking that banning short prison sentences will actually enhance public safety. It is widely acknowledged that a short prison sentence provides little or no opportunity to

rehabilitate an offender. Typically, he will not be in prison long enough to address substance addictions, lifestyle or mental health issues that may have contributed to his offending. Nor will it be feasible for him to benefit materially from any educational and training facilities that may be available. Indeed, there may not even be sufficient time for the prison authorities to devise a programme to address his needs before his release date comes around.

Conversely, it has long been acknowledged that prisons can function quite smoothly as crime academies for prisoners. Daily engagement with more experienced offenders and the criminal enterprises that are carried on within prisons help to normalise crime for a prisoner and equip him with “skills”, so that he is sent out a more dangerous offender than when he was brought in. To compound the damage, even a short prison sentence of three to four weeks can result in the prisoner losing his house, family, job, friends and reputation. As stated by the Prisons Minister, short prison sentences are “long enough to damage you, but not long enough to heal you.”

Given the experience and consequences of prison, it is hardly surprising that prisoners have a high rate of recidivism. Significantly, there is firm evidence that short prison sentences are particularly ineffective in steering an offender away from crime. Almost two-thirds of prisoners sentenced to terms of less than 12 months in England and Wales re-offend within the year of release. This compares with about one third for prisoners sentenced to terms in excess of 12 months, and 36 percent for offenders receiving community sentences (mostly unpaid work in the community). There are, of course, other possible

explanations for these disparities, but, as stated bluntly by Scotland’s Chief Inspector of Prisons, “[t]he evidence is very clear that if you want to reduce crime then you don’t send people to prison for a short time”. In Scotland, there is already a presumption against prison sentences of less than three months, and it is considered that this may have contributed to re-offending rates there dropping to their lowest levels for nearly two decades. Currently, the Scottish government is considering whether to extend the presumption to sentences of less than 12 months.

The obvious alternative to short prison sentences is the community sentence. Broadly this entails the offender undertaking unpaid work in the community for a specified number of hours in the week for a specified period. Typically, this can include removing graffiti and carrying out environmental works in public facilities. They can also involve home curfews, compulsory addiction rehabilitation, education and/or group work at an “attendance centre” to discuss behaviour such as anger management, domestic violence and drink driving. Critically, they can be designed to ensure that the offender can continue with his education or employment, where applicable. Not only do they allow the offender retain his network of family and community supports, but they also relieve the offender’s family of the onerous personal, financial and instability burdens that inevitably follow from even short prison sentences.

The community also benefits from a community sentence relative to a short prison sentence. Obviously, the unpaid environmental works constitute a positive benefit that is otherwise lost when the offender is simply locked up. In addition, imprisonment imposes a much heavier financial burden on the State compared

with a community sentence. Estimates of the annual cost of a prisoner range from £35,000 to £50,000, while the range for a community sentence is between £5,000 to £10,000.

Despite the compelling arguments in favour of community sentences over short prison terms, it can be expected that any proposals to “ban” the use of sentences of less than six months will meet stiff opposition. There is an entrenched view in some quarters that a non-custodial sentence is not really a punishment at all. In this view, a person who has committed a heinous crime, or who is a serial offender, needs to serve a period (even a short period) in prison in order to atone for his crime. That view, however, fails to appreciate the demands of a community sentence which, in some respects, can be more onerous than a temporary deprivation of liberty.

When I was doing empirical research on the operation of community sentences in Ireland, I came across cases in which the offenders declined the option of a community sentence in favour of a short prison sentence essentially because they considered the former too onerous. Nevertheless, it would appear that the use of community sentences in England and Wales is on the decline. Arguably, this is due partly to magistrates and judges increasingly taking refuge in the familiarity of custodial sentencing as concerns grow about the effectiveness of community sentences managed by private sector operators.

Despite the media reports that the government is considering a “ban” on the use of person sentences for terms of less than six months, it is highly unlikely that action on this front will take the form of an actual ban. Much more likely is the

enactment of a statutory presumption against such sentences. This would have the effect of steering judges in the direction of community sentences or other forms of non-custodial penalty in cases where they would otherwise have been inclined to impose a short custodial term. It would not, however, preclude the use of the latter in any case where the judge was of the view that there was no practical alternative. Moreover, the Minister’s announcement suggests that the “ban” would not extend to violent or sexual offences. It is not clear why these offences should be excluded entirely, especially if the “ban” merely takes the form of a presumption against a short prison term. While a very serious violent or sexual offence will normally require a custodial sentence to mark the seriousness of the offence and/or to protect the community from the threat posed by the offender, the same cannot always be said for a lesser violent or sexual offence which would attract a sentence of imprisonment for a term of less than six months or less.

It must be said that there is a risk that restrictions on the use of custodial sentences for terms of six months or less could well result in sentence inflation. In some cases, for example, judges may be persuaded to mark the seriousness of the offence by handing down prison terms of more than six months where previously they may have imposed a shorter sentence. It is important, therefore, that any reforms along these lines should be accompanied by statutory provision to the effect that imprisonment should always be used as a last resort, and only where accompanied by clearly expressed reasons. Separately, there is surely a strong case for saying that any presumption against the use of short custodial sentences should extend to terms of less than 12 months, rather than 6, as

the same arguments and factors would apply to the former as the latter. Finally, it must be acknowledged that if any such presumption is introduced, it will severely limit the use of custodial sentences in magistrates' courts.

Consent to Assault Causing Harm

In its decision in *DPP v Brown* [2018] IESC 67, handed down just before Christmas, the Irish Supreme Court addressed the vexed question of when the "victim's" consent to the application of harm can constitute a defence for the person charged with the offence of assault causing harm (broadly, the equivalent of the English offence of assault occasioning actual bodily harm). By a three to two majority, the Court decided that the consent of the victim could not constitute a defence where the harm was inflicted for an unlawful purpose.

As every first-year law student will know, where a person has consented to being subjected to a simple assault or battery by another person, his or her consent will provide a complete defence to the charge of assault or battery. If, however, the assault or battery results in harm that is more than transient or trifling, the consent of the person concerned will not normally provide a defence.

Critically, the common law has recognised certain exceptions for harms suffered in the course of certain activities. These are generally considered to include: regulated contact sports, reasonable surgical operations, ear/body-piercing, tattooing, ritual circumcision, horseplay and dangerous exhibitions, among others. These have been justified on public policy grounds largely on the basis that the

activities in question confer benefits on society in general. By way of contrast, settling a dispute by a consensual fist-fight is not considered to have any social utility sufficient to avoid criminal liability for the resultant harm. Similarly, in *R v BM* (2018) the English Court of Appeal held that consent did not provide a defence for certain body modifications (removal of the visible ear, removal of the nipple and division of the tongue) carried out by a trained (but not medically qualified or regulated) tattooist and body piercer.

Whether the exceptions extend to the inclusion of pain inflicted in private by consenting adults for their mutual pleasure has been the subject of some conflict. In the 1934 English case of *Donovan* it was held that the defence of consent was not applicable in respect of the caning of a teenage girl on the buttocks by and for the sexual pleasure of the accused. Similarly, in the controversial 1994 English case of *Brown*, the House of Lords decided by a majority that the defence of consent was not applicable in respect of sado-masochistic acts inflicted by a group of men on each other in private for their mutual pleasure. The freedom to engage in such activities was not considered to have any socially beneficial value. In 1996, however, the English Court of Appeal held that consent was available as a defence to a man who branded his initials on the buttocks of his wife in the course of private consensual sexual activity. In the instant *Brown* case, the Irish Supreme Court had to revisit some of the public policy issues underlying this vexed area of the law.

The Irish *Brown* case arose from an incident in prison where the accused prisoner hit the victim (a fellow prisoner) on the head with an improvised weapon, thereby causing a significant injury requiring 12 stitches. The accused claimed that the assault was

carried out pursuant to an arrangement with (and the consent of) the victim with the aim of advancing the victim's application to be moved to another prison. Although not relevant to the legal issue before the Court, it is worth saying that the victim denied giving any such consent or being party to any such arrangement. He was a former member of the Garda Síochána (the Irish police) who had been convicted and sentenced to a term of imprisonment for drug-related offences. The question for the Court was whether, as a matter of law, an accused could rely on the victim's consent as a defence to a charge of assault causing harm in such circumstances.

In Irish law, the old offences of assault, assault occasioning actual bodily harm and wounding/grievous bodily harm, as provided for by common law and the Offences against the Person Act 1861, were replaced and reformulated by sections 2, 3 and 4 of the Non-fatal Offences against the Person Act, 1997. The latter provisions reflect a gradation of seriousness. Section 2 provides for the offence of assault at the lowest level of seriousness. It concerns the application of force to, or causing an impact on, the body of another (or causing another to apprehend the immediate application of such force or impact). It is considered to be the equivalent of the old common law offences of assault and battery.

Section 3 creates the offence of assault causing harm, where harm is defined as causing harm to body or mind and includes pain and unconsciousness. It is considered to be the equivalent of the old offence of assault occasioning actual body harm in section 47 of the 1861 Act. As such, it includes injury and pain associated with cuts and bruises falling short of permanent harm. Section 4 creates the offence of causing serious harm, where serious harm is

defined as injury creating a substantial risk of death, or which causes serious disfigurement or substantial loss or impairment of the mobility of the body or a bodily part or organ. It equates broadly with the old wounding and grievous body harm offences in the 1861 Act.

A significant feature of the definition of the basic assault offence in section 2 is the express inclusion of the requirement that the application (or threat) of force must be without the consent of the victim. This reflects the common law position in which consent is recognised as a complete defence to a charge of simple assault or battery. Accordingly, no offence is committed where two individuals engage in consensual physical interaction which results in nothing more than transient or trifling injury.

Significantly, for the purposes of the instant *Brown* case, the section 3 offence is expressed tersely to the effect that "[a] person who assaults another causing him or her harm shall be guilty of an offence". No further clarification of the definition of "assault" is provided. The obvious assumption is that the definition of assault in section 3 is the same as the definition in the immediately preceding section 2; the essential difference between the two offences being that the former (more serious offence) must result in harm (such as pain or unconsciousness) to the body or mind of the recipient. If that is correct, however, it should also mean that, in a section 3 case, the prosecution would have to prove that the recipient of the harm did not consent to the assault. To put it another way, it would not be an offence to subject another person's body or mind to pain or unconsciousness where that person consents to it.

Applying the ordinary canons of statutory construction, the Supreme Court in *Brown* had no difficulty in deciding unanimously that the word “assault” in section 3 bore the same meaning as in the basic assault offence defined in section 2. In doing so, the Court effectively overruled its own previous decision in *Dolny* where, to the surprise of many commentators, it had accepted that the two offences were entirely separate and unrelated, to the extent that “assault” in section 3 bore a different meaning to “assault” as defined in section 2. Arguably, the *Dolny* case could be distinguished as it concerned the execution of a European arrest warrant for the surrender of a defendant to Poland, as distinct from his prosecution for an offence under section 3.

On the face of it, an immediate consequence of the Supreme Court’s interpretation of the relationship between the section 2 and section 3 offences in *Brown* is that consent would now be a defence not just for low-level common assault or battery, but also for the more serious offence of assault causing harm. This would represent a significant change in the law on consent as a defence. In effect the threshold for consent was being raised so that a person causing pain to another person, with the latter’s consent, would not have to bring himself within one of the limited public policy exceptions to avoid criminal liability for the offence of assault causing harm. He would qualify for the consent defence directly as a matter of law. Consent would only lose its blanket defence status if the accused’s actions caused serious injury amounting to, for example, disfigurement or a substantial risk of death.

It would appear, therefore, that the relevance of the public policy exceptions had been pushed back and confined to a

narrow range comprising the most serious assaults (the old 1861 Act offences of wounding and grievous bodily harm). For all the lesser assaults, including those involving harm that was less than serious (the old 1861 Act offence of assault occasioning actual bodily harm), the consent of the “victim” would always provide a complete defence.

All five judges acknowledged that the effect of their interpretation was to raise the established common law threshold for the application of consent as a defence. It might seem reasonable to suppose, therefore, that the consensual sado-masochistic activities of the defendants in the English *Brown* case would not now constitute an offence in Ireland. Equally, of course, it should mean an offence of assault causing harm would not be made out where non-serious injury was inflicted on one of two protagonists who had agreed to settle a personal dispute by a fist-fight. For the purposes of the instant *Brown* case, it should also mean that the charge of assault causing harm would fail if the prosecution could not prove that the injury was inflicted without the consent of the “victim”. The fact that it was inflicted for an unlawful purpose, or at least to subvert proper prison discipline, would be irrelevant. It was on this aspect that the majority and minority divided.

The minority judges faced the implications of their interpretation of section 3 head on. They accepted that raising the threshold for the consent defence to cover the infliction of pain meant that many activities which would previously have qualified as criminal assaults were effectively decriminalised where the “victim” was consenting. This could include the activities of the defendants in the English *Brown* case, consensual fist-fights and the consensual infliction of pain for an unlawful purpose

separate from the assault itself. So long as they did not entail life threatening or permanent injuries, they should benefit from the consent defence. In the minority's view, the public policy objective, as expressed through the legislation, was to remove these consensual activities from the reach of the criminal law offences against the person. Interestingly, it would appear from the parliamentary debates on the 1997 Bill that the minority's interpretation was in accord with the public policy objectives behind the changes.

It does not follow, of course, that such consensual activities can never entail criminal wrongdoing. The minority judges noted that consensual injury inflicted for an unlawful purpose (separate from the injury itself) is likely to entail the commission of one or more non-assault offences. Settling a dispute through a consensual fist-fight, for example, could entail the commission of one or more public order and criminal damage offences. Similarly, the consensual infliction of injury as a pretext for making a fraudulent insurance claim could amount to one or more theft, fraud or insurance offences. In the instant case, the infliction of pain with a view to securing a prison transfer would likely amount to an offence against prison discipline. So, while the consensual nature of the injury should protect against criminal liability for assault causing harm in these cases, it will afford no protection against liability for other offences that may arise from the activities in question.

The majority judges, by way of contrast, balked at the notion that causing harm for an unlawful purpose would no longer satisfy the offence of assault causing harm. They considered that if the legislature had intended such "a radical change in the law", it would have expressed that intent more explicitly. The majority were of the

view that the legislation did not go that far. They reasoned that consent could only be a defence to an assault offence where the consent itself was valid.

Unquestionably, a consent would not be valid for the purposes of a defence, if it was uninformed or forced, or was the consent of a child who was not old enough to give a lawful consent. The majority, however, went further. Pointing to the requirement that the act causing harm must be committed without lawful excuse, they said that "consideration of what may or may not constitute a lawful excuse will give rise to a consideration of public policy." In determining what the public policy considerations were in this context, they reverted to the common law position that consent could only be a defence to the infliction of harm where the activities in question could be considered beneficial for society in general. There could be no lawful excuse for the infliction of consensual harm where the activities in question carried no such benefit for society at large. In other words, while the threshold for the level of harm that can be consented to has been raised, there has been no change to the public policy limitations on the circumstances in which the consensual harm can be inflicted. It remains the case that a person cannot consent to harm inflicted for an unlawful purpose or, presumably, even for a purpose that carried no social utility in general.

Aspects of the majority's reasoning in support of their interpretation are open to question, and they do attract sharp criticism from the minority. It must also be said that the effect of the majority's interpretation is effectively to deprive the consent element in the definition of the section 3 offence of much of its substance. In effect, the public policy constraints on the extent to which consenting adults can inflict personal harm

on each other have been brought in by the backdoor. Raising the threshold level of harm to which they can consent will be of little consequence, if they still have to bring their actions within the exceptional circumstances recognised at common law. As seen in the English *Brown* case, this can have the effect of criminalising adults engaging in the consensual infliction of pain in private for mutual pleasure. Since the infliction of actual bodily harm in the circumstances of that case was considered to be without lawful excuse (as it did not come within the limited public policy exceptions recognised at common law), it is difficult to see how it could come within the limitations imposed by the majority on the application of consent as a defence to a section 3 offence.

It must be said that the majority were primarily concerned to avoid the prospects of consent being used as a defence to the infliction of harm for an ulterior criminal purpose (i.e. for a purpose other than the infliction of the harm itself). However, by adopting the public policy exceptions as the divide between what can, and cannot, be consented to, they cast their net much wider than harm inflicted for an ulterior criminal purpose. Equally, they have not shed any further light on the parameters of the public policy exceptions or underlying principle that might unite them. While they did intimate that the English *Brown* decision might be decided differently in Ireland in view of Constitutional changes and the effects of the 1997 Act itself, they did not elaborate on how that might be so. Indeed, it is not immediately obvious how it could be so, given the majority's retention of the common law public policy approach to the interpretation of section 3.

A further criticism of the majority's decision is that it over-criminalises, or at least it fails to take the opportunity presented by the

reformulation of the assault offences to push back against unnecessary criminalisation. Not only does it retain the threat of penalising the infliction of consensual pain between consenting adults in private in some circumstances, but it also retains assault offences unnecessarily to deal with situations in which the consensual harm is associated with an ulterior criminal purpose. As pointed out by the minority, other criminal offences (associated with the ulterior criminal purpose) are available to deal with such situations. There is no need to double up with the inclusion of assault offences, especially where the price for doing so is to defeat the legislature's apparent attempt to roll back and clarify the scope of the assault offences. The majority judges' dismissal of the alternative offences identified by the minority in this context is not persuasive.

I am indebted to Johanne Thompson, Senior Lecture in Law, for comments on an earlier draft of the above piece and the reference in it to R v BM (2018).

Knife Crime Prevention Orders

The Home Secretary has just announced an intention to introduce "knife crime prevention orders" as part of a broader strategy in response to the recent increase in knife crime. It seems that provision for these orders is being introduced as a last-minute amendment to the Offensive Weapons Bill which is currently in its final stages of the legislative process in the UK parliament. The new measures bear all the hallmarks of a hastily compiled initiative driven by a desire to be seen to be responding to the media generated "crisis", rather than a considered and coherent policy designed to address the social problems provoking the increased

possession of knives by young people. There is a very real risk that the proposed orders will be deployed in an arbitrary and discriminatory manner, thereby fuelling those problems and accentuating the already dangerous levels of alienation prevalent among some disadvantaged and ethnic minority communities. More broadly, they represent yet another significant escalation in the policy of using coercive, criminal-type, measures as a risk management tool for responding to social problems. In the process, the criminal law is being recalibrated to operate through the lower civil standard of proof.

It seems that the orders will be targeted at any person aged 12 or over. Critically, they are not confined to persons who are convicted of unlawful possession of knives, or associated knife crime. They will extend to any person as young as 12 whom the police believe is carrying a knife or whom they suspect of being habitual knife carriers. In any such case, the police can make an application to the court for the issue of a prevention order, and the court can issue such an order on the civil standard of proof. If issued, the order lasts for two years.

Significantly, an order will not necessarily be confined to a prohibition on knife carrying. It can impose much more extensive and intrusive restrictions on the freedom of the targeted person, including: curfews, geographical restrictions on movement and limits on the use of social media. Given the importance of social media in the lives of young people today, that last restriction can be particularly onerous. Breach of the order, or any of the restrictions attaching to it is a criminal offence carrying a maximum sentence of two years imprisonment.

It is critically important to appreciate that the orders are applicable to persons who have not committed a criminal offence of any type, let alone an offence associated with knives. Yet they will be dragged into the criminal net if they cannot manage to stay within the terms of an order which, as noted above, can be so wide as to require then to desist from their normal lawful everyday pursuits. Particularly heinous is the fact that the civil process for the issue of an order typically will be triggered on the basis of nothing more than police suspicion. In effect, this represents the criminalisation of a whole class of mostly young people by suspicion. Moreover, they are being criminalised without being afforded the normal checks and balances of the criminal process.

The centrality of police suspicion introduces the reality of racism in the application of the knife crime prevention regime. The current data on the police use of stop and search powers on suspicion reveals that a black person is eight times more likely to be stopped and searched than a white person. There is simply no objective justification for that disparity other than racial discrimination. Not only are these stops and searches largely unproductive in the discovery of stolen goods or knives, or in follow on arrests, but they are also less likely to be so in the case of black persons stopped and searched.

The data also shows that police stop and search operations are primarily concentrated on disadvantaged and ethnic minority areas. Since the prevention orders will also be triggered simply on the basis of a police suspicion of knife possession, it seems reasonable to expect that they will reflect the same grossly disproportionate emphasis on young black people and disadvantaged communities. A whole generation of young black people, from

the age of 12, and mostly from disadvantaged communities, are at risk of being criminalised and further alienated. Yet these are the very people that the State needs to engage, establish and sustain communications with and ultimately help chart a path through life that does not entail dependence on gang culture and the possession of knives for survival. Instead of reducing the apparent increase in knife possession, it seems that the prevention order regime is more likely to accentuate some of the problems that is fuelling such possession.

A further depressing feature of these knife prevention orders is that they represent another addition to the already large and rapidly expanding complex of coercive measures addressing the risk of crime or behaviour which is deemed to threaten the social norms of 'middle England'. A distinctive feature is that that they impose the essence of criminal sanctions on persons who have not necessarily committed a crime. The aim is to safeguard society by making it less likely that the targeted persons will commit crime or engage in unacceptable behaviour.

As with the knife prevention orders, this form of coercion and de facto punishment is achieved through a civil process which dispenses with the normal checks and balances of the criminal process. The best-known example, perhaps, is the asbo (anti-social behaviour order), but it has been joined, most notably, by the asset recovery order and the gang injunction. Other variants, mostly imposed on conviction for another offence, include: the criminal behaviour order, the serious crime prevention order, the domestic violence protection order, the non-molestation order, the sexual offence prevention order, the sexual harm prevention order and the confiscation of assets order.

Not only are these measures obscuring the traditional and well-understood divide between the civil and criminal processes, but they (or at least some of them) are also helping to generate a more fundamental divide in society between the 'haves' and the 'have nots'. Increasingly, the latter are being designated as a criminal underclass and subjected to close supervision and control through the complex of 'civil' orders which are now set to be expanded by the knife prevention orders.

It is easy to appreciate why the government feel compelled to be seen to be responding vigorously to the phenomenon of knife crime. Media coverage of the deplorable fatal stabbings in London and elsewhere, and on the latest published statistics showing a dramatic increase in 'knife crime', seem to be fuelling the emergence of a 'moral panic' over the threat of knife crime among young people, especially in London. Ironically, as the police focus more on knife crime, detections for the unlawful possession of knives will increase thereby fuelling the 'moral panic' even further.

The real issue, however, is that there is no firm evidence that draconian coercive measures are an effective remedy. Published crime statistics show periodic rises and falls for violent crime which seem to be unaffected by changes in the criminal law or the introduction of control orders. If the government is really serious about changing the culture around knives and young people in disadvantaged urban areas, it should be focusing its attention and resources on addressing the social problems that are sucking young people into that culture. Commendably the government has made significant moves in that direction with aspects of its "Serious Violence Strategy" published in April 2018, followed by a package of measures

in October 2018. It is submitted that these reflect a more positive and potentially productive path, rather than the negative and divisive strategy reflected in the knife crime prevention orders.