

# **MAGISTRATES' COURTS SENTENCING GUIDELINES**

## **INTRODUCTION AND GENERAL PRINCIPLES**

This compendium of sentencing guidelines for the Magistrates' Courts is an outcome of the Report of the Lord Chief Justice's Sentencing Group ("the Sentencing Group") which recommended that sentencing guidelines should be developed for offences triable summarily as well as those triable on indictment. The purpose of the guidelines is to enhance both transparency of justice and consistency in decision-making by the courts. They have been drafted by a District Judges' subcommittee of the Sentencing Group, agreed by the District Judges (Magistrates' Courts) as a body, and approved by the Sentencing Group. They represent current sentencing practice by the Magistrates' Courts in Northern Ireland.<sup>2</sup> Although the guidelines do not have the force of law, they are relevant to the decision-making exercise undertaken by a Magistrates' Court when sentencing an offender and should, therefore, be taken into consideration by the court. They are also applicable where a County Court is sentencing an offender on appeal from a Magistrates' Court, or where the Crown Court is sentencing an offender for a summary offence joined on indictment. A court may depart from the guidelines where, in the individual circumstances of the offence or the offender, the interests of justice require and will give reasons for so doing. As Lord Lane CJ emphasised in reference to the traditional form of sentencing guidelines produced by the Court of Appeal:

"I say again – we have said it frequently in the past – guidelines are guidelines and they are not meant to be measuring rods to be applied rigidly to every case. They are there for assistance only and not to be used as rulers to every case."<sup>3</sup>

### **General Principles of Sentencing**<sup>4</sup>

The sentence for an individual offender in court is set by the judge hearing the case. The judge will take into account the law, guidelines, expert reports and all the circumstances, to decide what will be the correct sentence for that offender, who committed that offence against that victim, in that situation. The purpose of the sentence is to satisfy retribution and deterrence. That is to say, its aim is to meet the legitimate public desire to punish wrongdoing and also discourage the offender and other members of the public from committing similar offences in the future. In certain circumstances part of the sentence may also be aimed at protecting the public from future offending by the offender.

Where the offence and/or the offences associated with it are serious enough to warrant either a community sentence or a custodial sentence, the court must, save in exceptional circumstances, obtain and consider a report on the offender compiled by

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<sup>2</sup> These guidelines are not applicable to the Youth Court.

<sup>3</sup> R v Nicholas (The Times, 23 April 1986) cited with approval by Hutton LCJ in R v Orr [1990] NI 287

<sup>4</sup> See further B.J.A.C. Valentine, *Criminal Procedure in Northern Ireland*, (2 Ed., SLS, 2010), 18.15-18.36; and Robert Banks, 'Banks on Sentencing' (5 Ed., Banks, 2010), 1.1-1.16

the Probation Board of Northern Ireland.<sup>5</sup> The probation report will outline the offender's life history including any previous offending behaviour, give an assessment of the offender's present attitude to having committed the offence(s) in question, and give an assessment of the offender's likelihood of re-offending and what, if any, risk he poses to the public.<sup>6</sup> The report will also advise as to the suitability of the offender being placed under Probation Board supervision or undertake community service.

The overall sentence imposed by the court will be commensurate with the overall seriousness of offence(s) which the offender has been convicted of, taking into consideration all the circumstances of the offence and the offender.

(a) The Starting Point:

The initial starting point in determining the 'seriousness' of a given offence requires assessment of two elements: culpability and harm.

(i) Culpability

This is the degree of fault or responsibility to be attributed to the offender in committing the offence and will fall into one of four descending categories:

- (a) Intention to cause to harm;
- (b) Reckless as to whether harm is caused;
- (c) Knowledge of specific risk but no intention to cause the harm;
- (d) Negligence

The higher the culpability the more serious the offence.

(ii) Harm

This is the effect or intended effect of the offending. The nature of harm will depend on the personal characteristics and circumstances of the victim(s) and includes the physical, psychological and financial effects of the offending. In some cases the offending may also (or instead) cause harm to the wider community. The greater the harm the more serious the offence.

This initial assessment of culpability and harm will allow the judge to determine the basic 'nature' or 'category' of the offence committed: this is the judge's starting point for assessing the commensurate sentence to be imposed for the offence.

(b) Aggravating Factors:

Having made the initial assessment of the basic seriousness of the offence, a judge will then identify the specific aggravating factors of the offence and the offender (i.e. the individual circumstances of the offence or the offender which cause the offence to be more serious than the basic offence used in calculating the starting point).

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<sup>5</sup> Article 8 of the Criminal Justice (NI) Order 1996

<sup>6</sup> Furthermore, before passing a custodial sentence on an offender suffering from a mental disorder the court must obtain and consider a medical report [Article 10 of the Criminal Justice (NI) Order 2008].

Aggravating features which may occur in any offence may include:

- *The offence was committed in the context of 'hostility'*

Article 2 of the Criminal Justice (No.2) (NI) Order 2004 provides that 'hostility' shall be treated as an aggravating factor in relation to the seriousness of the offence. 'Hostility' in this context is defined as:

- (i) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on-
  - (a) the victim's membership (or presumed membership) of a racial group;
  - (b) the victim's membership (or presumed membership) of a religious group;
  - (c) the victim's membership (or presumed membership) of a sexual orientation group;
  - (d) a disability or presumed disability of the victim; or
- (ii) the offence is motivated (wholly or partly) by hostility towards-
  - (a) members of a racial group based on their membership of that group;
  - (b) members of a religious group based on their membership of that group;
  - (c) members of a sexual orientation group based on their membership of that group;
  - (d) persons who have a disability or a particular disability.

- *The offence was committed while the offender was on bail for another offence*

If the offence was committed while the offender was on bail for another offence it shall be treated as an aggravating factor when determining the seriousness of the offence.<sup>7</sup>

- *The offence was committed in the context of domestic violence*

Where an offence is committed in the context of domestic violence it shall be treated as a very grave aggravating factor. Sir Brian Kerr, when Lord Chief Justice of Northern Ireland, said in relation to sentencing in domestic violence cases:

“Often it is only in the context of court proceedings that public expression can be given to the abhorrence of society to this species of despicable crime... Violence in any form is an aberration, but to be assaulted or intimidated in one's own home, where we should feel most safe, by someone close to us, with

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<sup>7</sup> Article 37(2) of the Criminal Justice (NI) Order 1996

whom we should be most secure, represents an appalling breach of trust and warrants the gravest and most condign punishment. Therefore, so far from being a mitigating feature, the fact that violence occurs in the home should be recognised as a substantial aggravating factor ...”<sup>8</sup>

- *The victim was engaged in providing a service to the public*

Persons who are providing a public service can often be in vulnerable positions by the nature of their job. Where an offence is committed against such a person the courts will treat this as a substantial aggravating factor when determining the seriousness of the offence.<sup>9</sup> Persons considered to be providing a public service include, but not limited to:

- (i) Emergency services personnel<sup>10</sup>
- (ii) Doctors, nurses and other hospital staff
- (iii) Teachers and other school staff
- (iv) Taxi drivers and bus drivers
- (v) Traffic wardens
- (vi) Shop staff

- *The offender’s character*

In considering the seriousness of any offence, the court may take into account any previous convictions of the offender or any failure of his to respond to previous sentences. The existence of previous convictions for the same or similar offences may increase the seriousness of the index offence.<sup>11</sup> Moreover, an offender’s previous good character and lack of criminal record should properly be regarded not so much as a mitigating factor but rather the absence of an aggravating factor.<sup>12</sup>

- *The impact on the victim:*

The impact of the offence on the victim, and on society as a whole, will always be a relevant factor in the sentencing process. In R v Turley [2008] NICC 18, Hart J commented:

“When a court comes to sentence an accused for an offence of a violent or sexual nature it is extremely important that the court be provided by the prosecution with as much up to date information as possible about the effect of the offence upon the victim so that

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<sup>8</sup> Speech by The Rt. Hon. Sir Brian Kerr, Lord Chief Justice of Northern Ireland, to the Belfast and Lisburn Women’s Aid Conference, 24 November 2004.

<sup>9</sup> See, for example, R v Alan Jones [2001] NICA 55 and Blackstone’s Criminal Practice (2011) paragraph B2.25

<sup>10</sup> Where the offence is committed against a police officer in the execution of his duty there may be a specific offence which carries a higher maximum sentence. The sentence imposed in such a case will reflect Parliament’s intention that the offence be considered as more serious.

<sup>11</sup> Article 37(1) of the Criminal Justice (NI) Order 1996 and see further R v Larmour [2001] NICA 21.

<sup>12</sup> R v C [2002] NIJB 254

the sentence can properly reflect this. [...] This often takes the form of a statement from the victim, or it may consist of reports from the relevant medical or allied professionals. These are referred to generically as Victim Impact Reports. On some occasions for a variety of reasons such reports cannot be obtained, or they may be incomplete, perhaps because the effect upon the victim of the events in question cannot yet be finally determined, or because the victim may not wish to undergo further examinations. In such circumstances the court has to rely on such evidence as is available to it, its experience of similar injuries and the facts of the case, and then make the best assessment it can of the effect of the crime upon the victim. If there are reasonable grounds for doubt about the nature and extent of the effect of any injuries then the defendant should be given the benefit of any such doubt.”

Further aggravating factors of general application may include:

- Any additional degradation of the victim (e.g. taking photographs of victim while the offence is being committed)
- Any attempt to conceal or dispose of evidence
- The deliberate targeting of vulnerable victim(s)
- The location of the offence (e.g. in an isolated area)
- The offence caused a physical or psychological effect on the victim even if unintended
- The offence was committed for financial gain (where this is not inherent in the offence itself)
- The offence was committed in connection with, or in support of, terrorism
- The offence was committed while under the influence of alcohol or drugs
- The offence was planned in advance
- The offence yielded a high level of profit
- The offender abused a position of power, a position of trust or a domestic relationship
- The offender had an intention to cause more serious harm than actually resulted from the offence
- The offender was operating as part of a group or gang
- The presence of others during the offence (e.g. the victim’s partner or children)
- The use of a weapon to commit the offence
- The use of deliberate and gratuitous violence or damage to property
- The victim was particularly vulnerable
- There were multiple victims

The weight to be attributed to any such factor, or possibly others, varies depending on the individual circumstances of each case.

(c) Mitigating Factors:

Having identified the aggravating factors of the offence and the offender, the judge will then identify the mitigating factors which exist in relation to the offence or the offender (i.e. the individual circumstances of the offence or the offender which reduces the overall seriousness of the offence).

Mitigating features which may occur in any offence may include:

- *The offender's age*

It is generally considered that an offender's youth shall be viewed as a mitigating factor in any offence. However, in Attorney-General's Reference (No. 3 of 2006) (Gilbert) [2006] NICA 16 the Court of Appeal stated:

“...one may observe that this court has not given significant discount on the basis that the offender was young ... It appears to us that the youth of the offender will have a variable effect on the sentence according to the nature of the crime and the awareness of the individual defendant of the nature of the offending behaviour”

- *The offender has assisted the police with the investigation of related or other unrelated offences*

The courts have long recognised the public interest in giving credit to those offenders who have assisted the police in the investigation of crime, whether by giving information relating to other offences or by giving evidence during his own trial which assisted in the conviction of the co-accused, by viewing the assistance as a form of mitigation when it comes to his sentencing. In the leading case on the subject<sup>13</sup> Roskill LJ said:

“It must therefore be in the public interest that persons who have become involved in gang activities of this kind should be encouraged to give information to the police in order that others may be brought to justice and that, when such information is given and can be acted upon and, as here, has already been in part successfully acted upon, substantial credit should be given upon pleas of guilty especially in cases where there is no other evidence against the accused than the accused's own confession. Unless credit is given in such cases there is no encouragement for others to come forward and give information of invaluable assistance to society and the police which enables these criminals--and these crimes are all too prevalent, not only in East London but throughout the country--to be brought to book. Those are the considerations this Court has to have in mind.”<sup>14</sup>

- *The offender has pleaded guilty to the offence:*

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<sup>13</sup> R v Lowe (1978) 66 Cr.App.R. 122

<sup>14</sup> See also Sections 73 to 76 of the Serious Organised Crime and Police Act 2005

Article 33 of the Criminal Justice (NI) Order 1996 provides that, when sentencing an offender who has pleaded guilty to the offence, the court must take into account the fact the offender has pleaded guilty. However, to benefit from the maximum discount on the penalty appropriate to any specific offence a defendant must have admitted his guilt of that offence at the earliest opportunity. The greatest discount is reserved for those cases where a defendant admits his guilt at the outset.<sup>15</sup>

Further mitigating factors of general application may include:

- The offender has shown genuine remorse in relation to committing the offence
- The offender played only a minor role in the offence
- The offender suffers from chronic ill health
- The offender suffers from mental illness or a mental or physical disability
- The offender was induced to commit the crime by pressure (e.g. from a criminal organisation to which he adhered) but which does not amount to a defence in law
- The offender was provoked into committing the offence
- There has been unreasonable delay in the prosecution process amounting to a breach of the offender's Article 6 ECHR rights
- The offender is the primary caregiver for a child/children.

The weight to be attributed to any such factor, or possibly others, varies depending on the individual circumstances of each case.

#### (d) Sentencing Options

For any given offence there is a range of possible sentencing options which may be imposed by the court, subject to the maximum sentence and any conditions-precedent or thresholds laid down by Parliament. Normally a Magistrates' Court will impose one or more of the following sentences:

- Absolute or Conditional Discharge
- Fine
- Community Order<sup>16</sup>
- Suspended Determinate Custodial Sentence or Suspended Detention in the Young Offenders' Centre
- Determinate Custodial Sentence or Detention in the Young Offenders' Centre

The above sentences are listed in order of progressive seriousness. The sentence imposed by the court will be commensurate with the overall seriousness of offence(s).

Details of the above sentencing orders, including conditions-precedent and thresholds, can be found in Appendix A.

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<sup>15</sup> See further Attorney General's Reference (No.1 of 2006) (McDonald and Others) [2006] NICA 4 and Attorney General's Reference (No.10 and 11 of 2009) (Vokes) [2009] NICA 63.

<sup>16</sup> This is the collective term for Probation Orders, Community Service Orders and Combination Orders

### (e) The Principle of Totality:

Where a court is sentencing an offender for several offences which have been tried together, the over-riding concern must be that the total global sentence, whether made up of concurrent or consecutive sentences, is appropriate. In some cases a judge may achieve this result more satisfactorily by imposing consecutive sentences. In other cases he may achieve it more satisfactorily by imposing concurrent sentences. Whether the sentences are concurrent or consecutive, the over-riding and important consideration is that the total global sentence should be just and appropriate.<sup>17</sup>

### (f) Ancillary Orders

In addition to the sentence imposed the court may (or in some cases, must) impose further obligations on the offender. This may take the form of paying the victim compensation or restitution for injury, loss or damage suffered as a result of the offender committing the offence; in driving offences it may take the form of imposing penalty points on the offender's driving licence or, alternatively, disqualifying him from driving; and in sexual offences it may mean imposing a Sexual Offences Prevention Order or the offender may be made subject to the sexual offences notification requirements (the "sex offenders' register"). The following is a non-exhaustive list of the most common ancillary orders made<sup>18</sup>:

- Anti-social behaviour orders upon conviction
- Children and Vulnerable Adults Barring Lists notification
- Compensation or Restitution orders
- Deportation recommendations
- Driving licence penalty points or disqualification from driving
- Forfeiture orders
- Restitution orders
- Restraining orders
- Sexual offences notification
- Sexual offences prevention orders

### **Format of Guidelines:**

Each guideline in this compendium sets out examples of the nature of the activity which may constitute the offence and provides a 'Starting Point' for determining the sentence for a first time adult offender convicted after a contested hearing. The guideline also identifies the 'Sentencing Range' within which, subject to the interests of justice, the sentence should normally fall. There are also lists of examples of aggravating and mitigating factors which may be relevant to the particular offence (although it must be stressed that these lists are merely examples and are not intended to be exhaustive). Examples of aggravating and mitigating factors which are generic to all offences can be found above.

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<sup>17</sup> See further Attorney General's Reference (No. 1 of 1991) [1991] NI 218 and Attorney General's Reference (No. of 2006) (McGonigle) [2007] NICA 16.

<sup>18</sup> See further B.J.A.C. Valentine, *Criminal Procedure in Northern Ireland*, (2 Ed., SLS, 2010), 18.125-18.158



When taking a relevant guideline into consideration as part of the sentencing process, the judge should:

1. Identify the category of seriousness for the individual offence and the relevant starting point;
2. Identify the general sentencing principles which are relevant;
3. Identify the aggravating and mitigating factors relating to the individual circumstances of the offence (omitting any factor already relied upon to determine the category of seriousness, to avoid “double counting”);
4. Identify the aggravating and mitigating factors relating to the individual circumstances of the offender (omitting any factor already relied upon to determine the category of seriousness to avoid “double counting”);
5. If appropriate, determine, having regard to all the factors, whether the offence is serious enough to warrant the imposition of a community sentence or, as the case may be, is serious enough to justify the imposition of a custodial sentence;
6. If appropriate, determine the financial means of the offender and ability to pay a fine;
7. If appropriate, have regard to the principle of totality;
8. Identify any ancillary orders to be imposed and, if appropriate, determine the financial means of the offender to pay a compensation order or a restitution order;
9. If appropriate, give reasons why the interests of justice require the imposition of a sentence falling outside the ‘sentencing range’ identified in the guideline.