



LORD CHIEF JUSTICE
OF ENGLAND AND WALES

**LORD PHILLIPS OF WORTH MATRAVERS
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MITIGATION

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I am happy to be speaking at the launch of this publication for a number of reasons. The first is that it relates to a subject of great practical importance that has been very little researched or written about. The second is that the topic is of particular concern to me as Chairman of the Sentencing Guidelines Council. The third is that because I was asked to speak about it I have had to make time to read this Report whereas, I fear, that it might not have received this priority at what is a particularly frenetic period of the legal year. It is very readable and I urge all of you to make the time to read it.

When I became Lord Chief Justice and had to turn my attention to sentencing after of eight years' remission from criminal law, my first port of call was the 2003 Act. Here I was faced with a novel approach to serious offences by offenders who are dangerous, or presumed to be dangerous – the approach of risk-based sentencing where a period of custody by way of punishment and deterrence is followed by a further indeterminate period of custody. The effect of those sections of the Act dealing with extended and indeterminate sentences are easy to follow.

I did, however, have problems with sections of the Act applicable to offences at the other end of the spectrum. Section 152(2) provides:

“the court must not pass a custodial sentence unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that neither a fine nor a community sentence can be justified for the offence.”

On the face of it this seems a black and white test that focuses exclusively on the seriousness of the offence as the touchstone of whether or not a custodial sentence must be passed. If the offence is so serious that a lesser sentence cannot be justified, then it suggests that the judge can only properly impose a custodial sentence. Where, if at all, does personal mitigation get a look in?

You learn that this is not the correct construction of section 152 when you get to section 166. This provides, among other things, that\;

“(1) Nothing in...section 152 prevents a court from mitigating an offender’s sentence by taking into account any such matters as, in the opinion of the court, are relevant in mitigation of sentence.”

And, in particular:

“Section 152(2) does not prevent the court, after taking into account such matters, from passing a community sentence even though it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that a community sentence could not *normally* be justified for the offence”.

What this means is that, although when you look at the offence in isolation, it is so serious that, without more, it would call for a custodial sentence, that is, it crosses the ‘custody threshold’, personal mitigation can properly lead the court to retreat back across the custody threshold and impose a community sentence instead. Thus, personal mitigation is of critical significance in relation to those offences that are on the cusp between custody and a non-custodial disposal. And yet, there has been little attention paid, to date, to this aspect of the criminal process, which can be of such significance to the defendant. The researchers comment that the Sentencing Guidelines Council has given no guidance in relation to personal mitigation.

This study sets out to analyse the approach to personal mitigation of judges of the Crown Court. Sentences passed on 162 defendants in 132 cases involving 52 sentencers have been considered in 5 different Crown Court centres. 40 of these sentencers were interviewed, including the resident judge of each court.

The researchers have from both discussion and the sentencing remarks, been able to draw some firm conclusions about the attitude of the judges to personal mitigation. As to conclusions from sentencing remarks, I would sound a note of caution. A judge will often note the factors urged by counsel and say that he has had regard to them in his sentencing remarks, even if he does not attach significant weight to some of them. I would place much greater value on the discussion with the sentencers, because it is plain that these discussions have been both full and frank.

The survey does not identify how many of the sentences were imposed after conviction, as opposed to on guilty pleas. The scope for urging personal mitigation is, of course, very much greater in the latter case than the former. The report observes that mitigation plays a greater role if the defendant pleads guilty. This is because many of the mitigating factors, such as remorse and a willingness to address the problems underlying the criminal behaviour, cannot logically proceed from a plea of not guilty”. One judge remarked that the defendant who pleads guilty can not only claim remorse, but also engages the court’s sympathy much more readily.

The researchers comment that as the sentencing guidelines require the discount for a guilty plea to be calculated after any relevant mitigating factors

have been taken into account, this effectively means that the plea permits a double discount on sentence the fairness of which can perhaps be questioned. I can well understand this comment, and it underlines the fact that the discount for a guilty plea is given for pragmatic reasons that reflect the advantages to the administration of justice that flow from such a plea. The discount is not based on any implication that a guilty plea reflects remorse. Very often it does not, although it will often be accompanied by a statement of remorse, which may or may not carry conviction. Where there is clearly genuine remorse it is legitimate to treat this as a mitigating factor, quite apart from the guilty plea, as exemplified in one case where a defendant who had committed a serious breach of trust had himself alerted his employer to what he had done.

What the survey shows, and this is in my view, very satisfactory, is that what really counts with offences that are on the cusp is mitigation that leads the judge to believe that, if he is not sent to prison, the defendant may well not offend again.

The statutory objects of sentencing include the reduction of crime, the reform and rehabilitation of offenders and the protection of the public. Where an offence is on the cusp, perhaps the most critical question is whether the chances of rehabilitation will be better if the defendant is given a community sentence rather than a custodial sentence. It is plain that aspects of mitigation that suggest that the defendant may avoid re-offending have the most significant effect on the sentence.

The most significant single feature is the good character of the offender. Sentencers are very reluctant to send a defendant to prison for a first offence when the offence is not so serious as to make custody inevitable. The 2003 Act directs by section 143 that relevant previous convictions should be treated as factors that aggravate the seriousness of the offence for purposes of sentencing and the Sentencing Guidelines Council's guidelines follow a similar approach. The guidelines relate to first offences and this explains why a number of the guidelines take a non-custodial sentence as the starting point for an offence that has neither aggravating nor mitigating features, where one might have thought that the offence crossed the custody threshold. A judge will often reasonably conclude that there is a good chance that a first offender, who has pleaded guilty and who expresses remorse, will not offend again if given a community sentence.

In this context, the fact that a defendant has faced up to his criminal behaviour is another mitigating factor that was cited frequently by sentencers as justifying a non-custodial sentence, as is a professed willingness to address the problem of drug addiction.

In these respects the survey shows a degree of consistency of approach between sentencers. This is also true of the plea that the defendant has had a deprived, disadvantaged or abused childhood. This factor, when urged in mitigation, cuts little ice with sentencers. The reason for this seems to be that this is a factor that can be invoked in the case of the vast majority of offenders and therefore it does not call for any special treatment.

One sentencer took this to its logical conclusion. He was sentencing a defendant who had been to a public school and who came from a good family background for an offence of fraud, and treated the fact that his background afforded no excuse for his behaviour as an aggravating factor, imposing a custodial sentence. The Court of Appeal reversed this, leaving the sentencer feeling aggrieved – perhaps with some justification.

Perhaps the most significant finding of the survey is that there are some areas where sentencers differ fundamentally in approach to factors urged in mitigation. Some think that the fact that an offence was committed under the influence of drink or drugs is a mitigating factor, others that it is an aggravating factor.

Another area of difference was the approach to the wishes of the victim, or the relatives of the victim, particularly in the case causing death by dangerous driving. Where they beg the court to be merciful to the defendant, some sentencers consider this powerful mitigation and others that this should not affect the sentence.

The researchers make a powerful plea to the Sentencing Guidelines Council to lay down some guidelines in order to produce consistency of approach to factors that should and factors that should not be taken into account by way of mitigation. They suggest the following topics on which guidance would be helpful.

- whether and why securing or retaining employment should be regarded as a mitigating factor
- whether disadvantage and social exclusion should be regarded as mitigating factors, and whether advantage should be regarded as an aggravating factor
- whether and why family and childcare responsibilities should be treated as mitigating factors, and whether fathers should be treated differently from mothers
- whether offender 'sensitivity' to particular punishments should be taken into account, by analogy to the means test applied in unit fine systems to what extent and in what circumstances the possibility of rehabilitation, e.g. through drug treatment, can over-ride the principle of proportionate punishment
- the scope for personal mitigation a) where there is a plea of not guilty, and b) where the offence is so serious as to make custody inevitable.

Well the Chairman of the Council has heard what they say and will give consideration to it. What I can say is that I personally would endorse the following conclusions that the researchers have reached as a result of their survey:

1. if justice is to be achieved, sentencing must be individualised and mitigation is a central element of the sentencing process;
2. Judicial discretion is a prerequisite for justice;

It may well be desirable that the exercise of discretion should be structured, but it must not be over-regimented.

As one of the judges remarked, “if you take away discretion completely then you end up taking the humanity out of sentencing.”
The authors of this review have broken valuable new ground, and we should be grateful to them, to Criminal Policy Research at KCL and to the Prison Reform Trust, for initiating this project and to the Esmee Fairburn Foundation for funding it.