

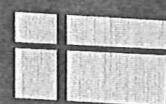
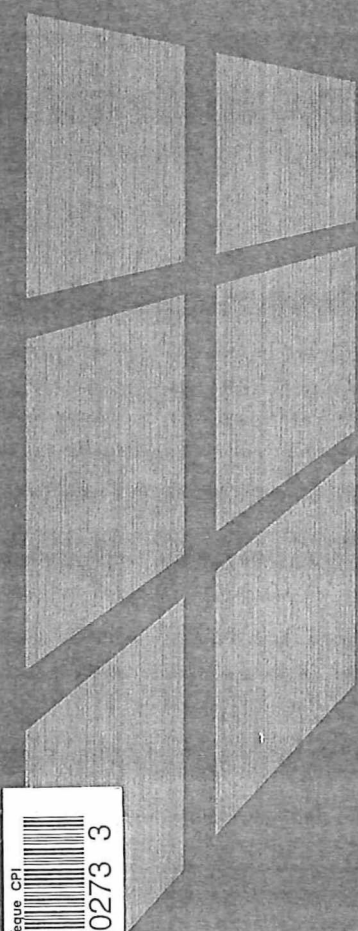
Annexe B3 Publique : Copie des références doctrinales

**MEMOIRE D'APPEL DE LA DEFENSE DE M. FIDELE BABALA WANDU
CONTRE LA SENTENCE PRONONCEE PAR LA CHAMBRE DE PREMIERE
INSTANCE VII (ICC-01/05-01/13-2123-Corr)**

Law in Context

Sentencing and Criminal Justice

ANDREW ASHWORTH



FTH EDITION

CAMBRIDGE

Recurring Patterns

Sentencing and Criminal Justice

Fifth edition

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Pluralism

and Materials

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point, what is the evidence for asserting that those who do occasional good deeds are less likely to reoffend than those who cannot claim such 'social contributions'? In any event, is it a court's proper function to concern itself with these matters? The court is passing sentence for the particular crime(s) committed. It should not be interested in inquiring either into any bad social deeds the offender has been involved in, except previous offences, or into any good social deeds. The only way to support the practice of taking these factors into account is by means of some modified Durkheimian concept of sentencing as a form of moral/social reinforcement, whereby courts which failed to recognize major social contributions of the offender might be taken symbolically to downgrade those contributions, and that might in turn be regarded as weakening instead of strengthening the collective conscience of society. If the public expects account to be taken of positive social contributions, it will have less respect for a system that refuses to do so.

5.4.5 The probable impact of the sentence on the offender

There is scattered support in the Court of Appeal's precedents for mitigation based on such factors as the age or physical or mental condition of the offender, the effect of a sentence on others and the effect of a sentence on the offender's career. These have some similarity with paragraph 5 of Chapter 29 of the Swedish Criminal Code, which provides that:

in determining the punishment, the court shall to a reasonable extent, apart from the penal value, consider:

1. whether the accused as a consequence of the crime has suffered serious bodily harm; ...
5. whether the accused as a consequence of the crime has experienced or is likely to experience discharge from employment or other disability or extraordinary difficulty in the performance of his work or trade;
6. whether a punishment imposed according to the crime's penal value would affect the accused unreasonably severely, due to advanced age or bad health ...

Let us examine the foundations for these supposed mitigating factors.

We saw earlier that serious injury to the offender is recognized as a mitigating factor in the offence of causing death by dangerous driving,¹²¹ and there are other English decisions that accept this as a mitigating factor.¹²² Why is this factor thought relevant? The reasoning may draw upon the kind of 'social accounting' criticized in the previous section, or the argument may be that the sentence will have a greater impact on the offender in view of her or his physical condition (see below). The Swedish approach seems to be that this

¹²¹ SGC, *Causing Death by Driving* (2008), para. 22, cited in part 5.3.1 above; for an example, see *Revell* [2006] 2 Cr App R (S) 622.

¹²² E.g. *Barbery* (1975) 62 Cr App R 248, sentence reduced because the offender's hand was severed during the commission of the offence.

should be regarded as a form of 'natural justice', in the sense that the offender has 'already been punished to some extent', by the injuries resulting from the offence. However, it is 'natural' punishment only in a (weak) metaphorical sense. Should courts attempt to regulate the total amount of pain to which an offender is subjected in consequence of an offence, or should they ignore these collateral matters? If they are to do the former, how far should they go – should an offender who is ostracized by the rest of his family after the offence receive a lesser punishment?

The Swedish law indicates that adverse consequences to the offender's employment or employment prospects may properly reduce sentence. The research by Jacobson and Hough suggests that English sentencers are divided on this issue, some regarding a good employment record as strong mitigation and others suggesting that having a steady job could be no mitigation for an acquisitive crime.¹²³ But these reasons are all at a pragmatic level. The question of principle is whether those fortunate enough to be in employment should be favoured by a source of mitigation that is not open to the unemployed. This looks like discrimination, and in principle it is objectionable. It sits alongside kindred principles such as not allowing wealthy offenders to 'buy themselves out of prison' by paying substantial financial penalties when a poorer offender would be sentenced to custody. The SGC has not taken a view on this, but it is an example of an issue of principle that should be tackled in a guideline system in order to foster consistency of approach.

At this point the argument merges into the next issue to be considered: what about the effect of the crime on the offender's career? The English decisions on collateral consequences of this kind seem to fall into two categories. Where the crime is unrelated to the offender's employment, there is sometimes a willingness to take account of such matters as the loss of a job and, with it, the loss of pension rights.¹²⁴ But where the crime arises out of the offender's employment and may be regarded as an abuse of a position of trust, it is well established as a matter of principle that no allowance should be made for these collateral matters.¹²⁵ Thus the definitive guideline on theft in abuse of trust is accompanied by the statement: 'Other than in the most exceptional of cases, loss of employment and any consequential hardship should not constitute personal mitigation.'¹²⁶ The guideline also makes it clear that a suspended sentence is within the permissible range of sentences only in the lowest category of case, involving a £2,000–20,000 loss and not a position of high trust. Guidelines for this particular type of offence appear not to have been followed faithfully in the past: although Lord Lane CJ held that 'it will not usually be appropriate in cases of serious breach of trust to suspend any part of the sentence', the results of

¹²³ Jacobson and Hough (2007), ch. 3.

¹²⁴ E.g. *Stanley* (1981) 3 Cr App R (S) 373, an army sergeant convicted of perjury; *Pearson* (1989) 11 Cr App R (S) 391, a young man hoping to join the army.

¹²⁵ *Barrick* (1985) 7 Cr App R (S) 142, updated in *Clark* [1998] 2 Cr App R (S) 95.

¹²⁶ SGC, *Theft and Burglary other than in a dwelling* (2008), p. 11.

5.4 Personal mitigation

empirical research in the mid-1990s showed that only half of all thefts in breach of trust tried at the Crown Court resulted in immediate custody, and that the proportion of suspended sentences was much higher than for other offences (8 per cent compared with 3 per cent).¹²⁷ How the new guideline fares is a question for research.

Is there any merit in this source of mitigation? Once courts begin to adjust sentences for collateral consequences, is this not a step towards the idea of wider social accounting which was rejected in the previous section? One difference is that we are referring here to collateral consequences of the offence, not to social deeds unconnected with the crime. In many cases one can argue that these collateral consequences are a concomitant of the professional responsibility which the offender undertook. Moreover, there is a discrimination argument here too. If collateral consequences were accepted as a regular mitigating factor, this would operate in favour of members of the professional classes and against 'common thieves' who would be either unemployed or working in jobs where a criminal record is no barrier. It would surely be wrong to support a principle which institutionalized discrimination between employed and unemployed offenders.¹²⁸

A more secure basis for mitigation is found in those cases where the normal sentence might have an exceptional impact on the particular offender. This may be relevant when the offender is very young, very old, or suffering from a life-threatening illness, for in such cases a substantial custodial sentence might be especially hard to bear. Insofar as there is a principle that sentences ought to have a roughly equal impact on offenders, this suggests that where an offender is likely to suffer from the sentence to a significantly different degree than most other people, there is a case for reducing its length.¹²⁹ In relation to the very young, the influence of this rationale was evident in the European Court of Human Rights in *T and V v. UK* (2000),¹³⁰ emphasizing that whether a punishment is 'degrading' depends to some extent on 'the sex, age and state of health' of the person. In several cases the Court of Appeal has allowed some reduction in the length of sentences imposed on elderly offenders, particularly if the normally appropriate sentence 'would result in his release when he was well over the age of 80'.¹³¹ A sentence of normal length on a person of such advanced years may take most of his remaining days, but it may be argued that such a sentence on a young man in the flower of youth may be no less catastrophic in a different sense. There may be room for the alternative argument that prison is

¹²⁷ Flood-Page and Mackie (1998), pp. 85–6.

¹²⁸ On the other hand, it is important to ensure that any collateral orders made against white-collar offenders (e.g. disqualification from company directorship) are kept in proportion: see Wasik and von Hirsch (1997).

¹²⁹ Cf. Ashworth and Player (1998) with von Hirsch and Ashworth (2005), Appendix C.

¹³⁰ (2000) 30 EHRR 121, paras. 70 and 99–100.

¹³¹ *W (Sentencing: Age of Defendants)*, *The Times*, 26 October 2000, applied in *Fontes* [2006] 1 Cr App R (S) 401.

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In relation to acute and/or terminal medical conditions, the leading decision of *Bernard* (1997)¹³² yields two general principles. First, a medical condition that might at some unspecified future date either affect life expectancy or the prison authorities' ability to treat the offender satisfactorily is not a reason for a court to interfere with the sentence that would otherwise be appropriate, but it might be a matter which can be brought to the attention of the Home Secretary. Prisoners who are HIV positive fall into this category. Second, a serious medical condition, even when it is difficult to treat in prison, does not entitle the offender to a reduced sentence, although a court might impose a lesser sentence as an act of mercy. The second principle is unsatisfactory, inasmuch as it appears to leave the matter entirely at the discretion of the court.¹³³ The question should be resolved at the level of principle, in favour of such conditions being taken into account, and the degree of adjustment should reflect the nature of the condition and its implications.¹³⁴

A more difficult group of cases is where the probable reaction of other prisoners makes it inevitable that an offender will serve much of the prison sentence in solitary confinement for his own protection, or where the offender has been attacked and victimized by other prisoners. The Court of Appeal has stated that 'a defendant's treatment by other inmates is not generally a factor to which this court can properly have regard', and that the defendant should rather proceed through official complaints procedures or by petitioning the Home Secretary for compassionate early release.¹³⁵

Another group of cases consists of those where another person or persons may suffer abnormally as a result of the sentence imposed on the offender. It is rare for any reduction of sentence to be accorded on the ground that the offender's family will suffer,¹³⁶ because this is regarded as a normal concomitant of imprisonment, but the approach is different where a family member is suffering from a life-threatening disease. There are cases in which the Court of Appeal has reduced sentences on that account 'out of mercy'.¹³⁷ Perhaps the most frequent example of this line of mitigation is that of a mother caring for young children. Although there are some decisions in which mothers have had prison sentences reduced or suspended so as to allow them to care for their young children,¹³⁸ there are many others that take a harder line:

¹³² [1997] 1 Cr App R (S) 135, discussed by Ashworth and Player (1998).

¹³³ In *Stevens* [2003] 1 Cr App R (S) 32 the Court suspended a prison sentence on account of the offender's 'serious heart condition ... with a poor prognosis and the real probability of a custodial sentence causing many problems'.

¹³⁴ See also Piper (2007).

¹³⁵ *Nall-Cain (Lord Brocket)* [1998] 2 Cr App R (S) 145, at p. 150; see further Piper (2007), pp. 144–5.

¹³⁶ Cf. *Grant* (1990) 12 Cr App R (S) 441.

¹³⁷ E.g. *Haleth* (1982) 4 Cr App R (S) 178, son suffering from kidney disease.

¹³⁸ E.g. *Whitehead* [1996] 1 Cr App R (S) 1, *Bowden* [1998] 2 Cr App R (S) 7.

5.4 Personal mitigation

This Court is always most reluctant to see a mother of young children sentenced to a term of imprisonment. Unhappily it is sometimes inevitable ... No one can fail to be moved by the children's plight but sadly the picture painted is all too familiar in cases where a young mother becomes involved in serious criminal activity. The circumstances which have been described to us are in no way exceptional.¹³⁹

Recent decisions indicate that, for an offence serious enough to merit 9–12 months' imprisonment, the courts are unlikely to suspend the sentence or to impose a community sentence out of compassion for the offender's children.¹⁴⁰ Courts have sometimes been willing to avoid a custodial sentence where the offender is pregnant,¹⁴¹ but, again, this may be regarded as impossible where the crime is regarded as serious. Here as elsewhere, the courts tend to prefer the language of 'showing mercy' when the matter should be resolved at the level of principle. There is a strong argument that consequences of this kind should be alleviated by other means, and that departures from proportionate sentencing should not be permitted for reasons of this kind: as Susan Easton puts it, 'impact mitigation strikes at the heart of retributive theory'.¹⁴² However, if it is thought that for pragmatic reasons the sentencing court should make some reduction on one of these grounds, or if one takes the view that the principle of equal impact can be accommodated within a retributive framework,¹⁴³ the questions should be faced squarely, without drifting into the blanchmange of mercy.

One case which demonstrates unusual concern for the effects on third parties is *Olliver and Olliver* (1989),¹⁴⁴ where two brothers convicted of moderately serious offences of violence received suspended sentences and fines, rather than immediate imprisonment, largely on the basis that the livelihoods of some 23 employees in their carpentry business depended on their continued liberty. This, surely, is not a matter of mitigation of sentence properly so called; it is rather a case of adjusting the sentence so as to minimize the harmful consequences to uninvolved third parties. For the offender, it is a windfall. In *Attorney General's Reference No. 86 of 2006*¹⁴⁵ the Court of Appeal disallowed mitigation based on the effects on the job prospects of employees, since the offence involved the manslaughter of an employee by gross negligence through failure to take appropriate safety precautions.

¹³⁹ *Smith* [2002] 1 Cr App R (S) 258 at p. 261, upholding 12 months' imprisonment for conspiracy to evade customs duty of some £70,000. It is notable that a Home Office White Paper stated, under the heading 'What is not working', that 'prison can break up families ... 125,000 children are affected by the imprisonment of a parent each year': Home Office (2002), p. 85.

¹⁴⁰ *C* [2007] 1 Cr App R (S) 357, at para. 25; *Seepersad* [2007] 2 Cr App R (S) 34, at para. 7.

¹⁴¹ E.g. *Beaumont* (1987) 9 Cr App R (S) 342; the judges in the survey by Jacobson and Hough (2007, ch. 3) were divided in their approach to this issue.

¹⁴² Easton (2008), p. 116. See pp. 112–14 for the argument that it would be preferable to deal with the problem of imprisoning parents and carers by improving social support and prison conditions rather than by moving away from the appropriate sentence.

¹⁴³ Ashworth and Player (1998). ¹⁴⁴ (1989) 11 Cr App R (S) 10.

¹⁴⁵ [2007] 1 Cr App R (S) 621, at para. 36.

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