RAPE AND RELATED SEXUAL OFFENCES IN THE CONTEXT OF ABORTION LAW

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The purpose of this presentation is to identify some legal issues that may arise if rape (and perhaps other sexual offences) were accepted as a reason for permitting a termination of pregnancy. I should emphasise at the outset that I am not offering any observations on the policy that should be adopted regarding the availability of abortion within the jurisdiction, a matter on which I claim no expertise. All I can offer is the perspective of a criminal lawyer on some of the relevant issues. Essentially, there are two broad questions to be addressed:

(1) What is meant by "rape" in this context? In other words, which sexual offences, if any, should be accepted as justifying abortion?

(2) What kind or level of proof might be required to show that the offence in question has been committed in order to allow an abortion to proceed?

THE RANGE OF OFFENCES, IF ANY, THAT MIGHT JUSTIFY ABORTION

There are many sexual offences known to Irish law and most are now defined in gender-neutral terms. Here, I shall concentrate solely on those offences involving heterosexual intercourse, as they are the only ones that may result in pregnancy. Rape is clearly such an offence, but by no means the only one. We must also consider:

(1) Sexual intercourse with an underage female;

(2) Sexual intercourse between a person in authority and a female aged between 17 and 18 years;

(3) Sexual intercourse with a female who has a mental disability or learning difficulty;

(4) Incest.

RAPE

Rape is defined by the Criminal Law (Rape) Act 1981 as sexual intercourse by a man with a woman who is not consenting to the intercourse, and where the man either knows that she is not consenting or is reckless as to whether she is or not. As it happens, there is another offence of rape, created by the Criminal Law (Rape) (Amendment) Act 1990, which consists of certain forms of sexual penetration other than penile-vaginal intercourse, but that is immaterial for present purposes. As with all serious criminal offences, in a trial for rape the prosecution must prove all the elements of the offence to the criminal standard of proof, namely, beyond a reasonable doubt. As is clear from the statutory definition, rape has three essential elements, each of which must be proved to the required standard. They are:

(1) That the defendant intentionally had vaginal sexual intercourse with the complainant;
(2) That the complainant was not at the time consenting to the intercourse; and
(3) That the defendant knew that the complainant was not consenting or was reckless as to whether she was or not.

The second and third of these elements require some further analysis.

Consent

The Criminal Law (Sexual Offences) Act 2017, which entered into force in March 2017, provides, for the first time, a statutory definition of consent. Section 48 of the Act states:

> "A person consents to a sexual act if he or she freely and voluntarily agrees to engage in that act."

The same section then lists various situations in a person does not, as a matter of law, consent to a sexual act. These are largely reflective of the pre-existing common law. For example, a person does not consent if she submits because of the application or threat of force, if she is asleep or unconscious, if she is incapable of consenting because of the effect of alcohol or some other drug, if she is mistaken as to the nature and purpose of the act or as to the identity of the other party. This is not intended to be an exhaustive list. Obviously, a person is always entitled to refuse consent to any sexual act. This basic proposition flows from the constitutional right to bodily integrity, and from the more basic value of personal autonomy.

The mental element of rape

As already noted, an essential element of the offence of rape is that the man must have known that the woman was not consenting or have been reckless in that regard. This is known as the mental element of rape or, in traditional legal terms, the *mens rea* ("a guilty mind"). It is sometimes said that a defendant has "a defence" if he can show that he believed that the woman was consenting. This is not, in fact, the case. The man does not have to prove anything (though he can, of course, give evidence in his own defence if he so wishes). It is for the prosecution to prove all the elements of the offence, and that includes proving that the man knew that the woman was not consenting or that he was reckless in that regard. As the law stands, the mental element of rape is governed by a subjective test. The question in each case is whether the accused person actually knew that the complainant was not consenting or was reckless in that regard. That is clear from the terms of the Criminal Law (Rape) Act 1981 and it was confirmed by the Supreme Court last year in *People (DPP) v C. O'R* [2016] IESC 64, although the Court did stress that the accused person's belief must be genuine. In some other jurisdictions, the test is more objective in the sense that the question is whether the accused person reasonably believed that the complainant was consenting or whether a reasonable person in the position of the accused would have so believed. The Law Reform Commission has recently been requested to review this aspect of rape law.

Rape within marriage

The Criminal Law (Rape) (Amendment) Act 1990 clarified that there is no so-called spousal rape immunity. A man may be convicted of raping his wife. The definition of rape and the maximum sentence it attracts (life imprisonment) are the same irrespective of whether it occurs within marriage or otherwise.

SEXUAL ACT WITH A PERSON UNDER THE AGE OF 17 YEARS

The offences with which we are concerned under this heading used to be known as "unlawful carnal knowledge" or "statutory rape". However, the definitions of those former offences have undergone significant changes in recent years, mainly as a result of the Supreme Court decision in *C.C. v Ireland* [2006] 4 I.R. 1. They are now governed by sections 16 and 17 of the Criminal Law (Sexual

Offences) Act 2017. The essential characteristic of these offences is that the law recognises, as it has done for centuries, that persons below a certain age do not have the maturity to make an informed decision as to whether to consent to a sexual act. Therefore, the law renders them legally incapable of giving consent until they reach a certain age (which varies from one country to another).

Under s. 16 of the 2017 Act, a person who engages in a sexual act with a child under the age of 15 years is a guilty of an offence which is punishable with a maximum sentence of life imprisonment. A sexual act includes vaginal intercourse. Consent on the part of the young person provides no defence. However, a defendant has a defence if he can prove that he was reasonably mistaken that the young person in question had attained the age of 15 years.

Under s. 17 of the 2017 Act, a person who engages in a sexual act (which, again, includes vaginal intercourse) with a person under the age of 17 years is guilty of an offence. The maximum sentence will depend on a number of factors such as whether the defendant was a person in authority over the young person. As with the previous offence, an accused person has a defence if he can prove that he was reasonably mistaken that the young person had reached the age of 17 years. However, when it comes to the issue of consent, the situation becomes a little more complicated than in the case of a s. 16 offence (where the young person is under 15 years of age). Where a person is charged with a s. 17 offence and where the young person was, at the time of the sexual act, aged between 15 and 17 years, the accused has a defence if the young person consented to the act provided the following conditions are fulfilled: (1) the accused is younger or less than two years older than the young person; (2) he was not at the time a person in authority over the child; and (3) he was not at the time in relationship with the child that was intimidatory or exploitative of the child.

Therefore a 15-year-old male who has sexual intercourse with a 16-year-old female is not guilty of an offence if she consents to the intercourse, because he is younger than her. The same would apply if he were 17 years of age because he is less than two years older than her. However, 19-year-old male who has sexual intercourse with a 16-year-old female is guilty of an offence, even if she consents, because he is more than two years older than her.

SEXUAL ACT BY A PERSON IN AUTHORITY WITH A PERSON AGED BETWEEN 17 AND 18 YEARS

The Criminal Law (Sexual Offences) Act 2017 created an entirely new offence entitled “Offence by person in authority”. As already indicated, 17 years is the

age of consent in this jurisdiction. Ordinarily, once a person reaches this age, he or she is legally capable of consenting to a sexual act. Section 18 of the 2017 now makes it an offence (punishable with up to 10 years' imprisonment) for "a person in authority" to engage in a sexual act (including sexual intercourse) with a young person who has reached the age of 17 years but who is under the age of 18 years. Effectively, the Act increases the age of consent to 18 years for this limited purpose. A "person in authority" is defined elsewhere the Act and includes, for example, a parent or close relative, a guardian, or anyone responsible for the education, supervision, training, care or welfare of the child. (See s. 15 of the 2017 Act). Consent on the part of the young person provides no defence but the accused has a defence if he can prove that he was reasonably mistaken as to the young person's age or as to the fact that he was a person in authority in relation to the young person.

SEXUAL ACT WITH A PROTECTED PERSON

The law has long prohibited certain sexual activities with persons who are vulnerable because of mental disability or illness. The present law is set out in s. 21 of the Criminal Law (Sexual Offences) Act 2017 which creates an offence now known as a "sexual act with a protected person." A protected person is defined as someone who, irrespective of age, by reason of mental or intellectual disability or mental illness is incapable of understanding the nature and reasonably foreseeable consequences of the sexual act, or who is incapable of evaluating the relevant information or who is incapable of communicating consent. Again, a sexual act, for the purposes of this section, includes vaginal intercourse. To be guilty of such an offence, the accused must have known that the other party was a protected person, but this is presumed unless the contrary is shown. This offence can carry a maximum sentence of life imprisonment. There is a separate offence created by s. 22 of the 2017 Act of a sexual act committed with a protected person by a person in authority (defined as before).

INCEST

Incest has been a statutory offence in this country since 1908.[1] Essentially, a man commits incest if he has sexual intercourse with his mother, sister, daughter or granddaughter. A woman, provided she has reached the age of

[1] Punishment of Incest Act 1908.

consent (17 years), commits incest if, with consent, she permits her father, grandfather, brother or son to have sexual intercourse with her. Where a man is charged with incest it is no defence for him to show that the female party consented to the act. Further, there is no upper age limit for the purposes of this offence which means, for example, that a middle-aged brother and sister who have consensual sexual intercourse are both guilty of incest (and even if there is no risk of pregnancy). Incest carries a maximum sentence of life imprisonment when committed by a male and, at present, a maximum of seven years' imprisonment when committed by a woman.

As noted, incest may be committed by persons within the relevant degrees of blood-relationship, irrespective of age or consent. In practice, it is most likely to be charged where it has been committed in the context of an abusive or exploitative relationship between a parent and a child or between an older and a younger sibling. From a prosecution perspective, it has the advantage that there is no need to prove absence of consent. There has been some debate as to whether an offence of incest is needed at all, and whether it is appropriate to criminalise consensual sexual relationships between consenting adults merely because they are closely related to each other. A similar law in Germany was challenged before the European Court of Human Rights in *Stübing v Germany* (2012) 55 E.H.R.R. 24, but the challenge failed. From the terms of the Criminal Law (Sexual Offences) Act 2017, it is clear that, for now, Ireland intends to maintain the existing prohibition on incest.

PREGNANCY FOLLOWING RAPE OR OTHER OFFNCE: SOME LEGAL ISSUES IN CONTEXT OF REQUEST FOR ABORTION

We now come to some practical legal issues that might arise if rape and possibly certain other sexual offences were accepted as a reason for allowing abortion. There is the threshold question of which, if any, of the other sexual offences described above, apart from rape, might also be accepted for this purpose. That question is further addressed below. However, the more difficult question might well transpire to be this: where a woman seeks an abortion on the ground of rape (or a kindred offence), what kind of proof, if any, should be required to show that she has, in fact, been a victim of the offence in question?

Needless to say, all of the issues raised in this section of the presentation are inextricably linked with the broader policy that may eventually be adopted regarding the availability of abortion more generally. If, for example, abortion

were made freely available, perhaps within a certain number of months from the beginning of pregnancy, then the reason for seeking an abortion would presumably be irrelevant. If, however, it were decided that abortion should be available only on certain specified grounds, including rape and/or some similar sexual offence, then consideration would doubtless have to be given to the kind and level of proof that would be required to support an assertion by a woman that she had been the victim of such an offence. The comments that immediately follow are premised on the assumption that some form of *proof* would be required in these circumstances. However, as mentioned in the concluding section, something less than that might be deemed appropriate, but that would be a matter of policy.

This is obviously a matter requiring careful consideration but one might envisage the various possibilities as arranged along a continuum. At one extreme of that continuum, nothing less than a conviction by a criminal court would suffice as proof that the alleged offence had been committed, and at the other extreme a simple assertion by the woman seeking abortion that she had been a victim of one of the designated sexual offences would suffice.

The first of these options would simply not be viable because of the length of time it takes to process a serious sexual offence case from the making of a complaint until the ultimate disposal of the case by the relevant criminal court. Everyone convicted of such an offence also has a right to appeal against verdict, sentence or both to the Court of Appeal. All rape and aggravated sexual assault cases are dealt with at first instance in the Central Criminal Court. Other serious sexual offences, including those against children, are dealt with in the Circuit Court. According to the most recent Annual Report of the Courts Service, in 2016 the average interval between a return for trial and the final order in the Central Criminal Court was 865 days (almost 2½ years) while the equivalent figure for the Circuit Court was 413 days (well over a year). This is borne out by other sources. Even a cursory survey of judgments delivered during the past few years by the Court of Appeal in serious sexual offence cases will show that there is typically an interval of some years between the offence, the completion of the trial and the determination of an appeal.

All of this, of course, is on the assumption that there is a prosecution and that the trial results in a conviction. It may also result in an acquittal, or the jury may disagree, or the jury may have to be discharged because of some problem that arises during trial. Bear in mind that in such a trial, the prosecution bears the burden of proving each ingredient of the offence charged which means that, in the case of rape, it must satisfy the jury beyond a reasonable doubt that (1) the

accused had sexual intercourse with the complainant; (2) the complainant was not at the time consenting and (3) the accused knew the complainant was not consenting or was reckless in that regard.

Let us therefore consider other possibilities. One might simply require an assertion (sworn or otherwise) from the complainant that she had been raped or had been the victim of one of the other offences described above. There will indeed be some cases where such an assertion will be entirely credible because of the surrounding circumstances. The woman may, for example, have reported the matter to the Gardaí and/or undergone a medical examination or received medical treatment in the immediate aftermath of the rape. This is most likely to happen in the case of a so-called stranger rape or where the rape was accompanied by additional violence. In such a case, it might be argued, there could be little room for reasonable doubt but that the woman in question has been raped. However, many rapes are committed by intimates or acquaintances and may not be reported, if at all, until quite some time after they have occurred.

There most difficult situation, as I see it, is where a woman who is some months pregnant seeks an abortion by asserting that she was raped, even though she had not reported the alleged rape at the time. Of course, I am not suggesting that such assertions will commonly be made or that they are likely to be false. However, when engaging in law reform in this area, possibilities as well as probabilities must always be considered. In the kind of case just mentioned, and bearing in mind the competing interests at stake – those of the woman and those of the unborn child – some kind of inquiry or investigation may be deemed necessary to test the assertion. A criminal trial might well be the optimum form of investigation but, for reasons mentioned earlier, that will not be feasible for reasons of time. One might then envisage some special form of inquiry or adjudication being introduced for this purpose. But if such a procedure were to be established, a number of important questions would arise, including:

1) Who would the adjudicator(s) be?
2) Would the woman bear a burden of proving that she had been raped and, if so, what standard of proof would be required?
3) Should the alleged perpetrator be identified, assuming his identity is known to the woman?
4) Would the alleged perpetrator, if identified, have a right to be heard? (Suppose, for example, he was her husband or partner who was objecting to the requested abortion).

5) Would a woman who claimed or alleged that she had been raped by a named individual be entitled to immunity from any criminal or civil proceedings in respect of that claim?
6) Would evidence of the abortion or the request for an abortion be admissible in any later criminal trial?
7) Is there a possibility, in some cases at least, that an adjudication process of this kind could end up as a criminal trial in everything but name?
8) Should there be in any case an absolute requirement that the alleged rape be reported to the Gardaí?

Sexual offences other than rape which result in pregnancy

Finally, under this heading, we must consider some particular issues that may arise where an abortion is sought as a result of the commission of a criminal offence other than rape. If intercourse took place while the pregnant person was under the age of 15, then an offence has, in all probability been committed, as consent is no defence. However, even in these circumstances, a criminal offence will not invariably have been committed. For example, the man in question may have believed on reasonable grounds that the young woman in question had reached the age of 15 years. She might in fact have been just under 15 years of age, but he might reasonably have believed that she was just over 17 years.

Or consider the more difficult question of where the pregnant person was aged between 15 and 17 when intercourse took place. If she had consented, no offence is committed provided the male in question was younger or less than two years older than her. Let us assume, for the sake of argument, that there was no reasonable mistake as to age (though that too is a defence). If the person became pregnant as a result of having consensual intercourse when she was 16 years of age, no offence will have been committed if the man was, say 16 or 17 years. But an offence will have been committed if he was 19 or 20 years of age.

In terms of abortion policy, therefore, should the question be if the pregnancy has resulted from *criminal* conduct (with all the legal complications that such an enquiry would entail)? Or should the policy be to permit abortion in any case where a person has become pregnant while under a specified age (probably 17 years)?

Incest is also accepted in many jurisdictions as a ground for abortion. However, in Ireland, it must be recalled that incest occurs when heterosexual intercourse takes place between persons who are closely related to each other (typically

father and daughter or brother and sister). In many instances, it occurs in the context of an abusive or exploitative relationship and the female party will typically be young. In such cases, it amounts to child sexual abuse and the perpetrator can be prosecuted instead for an offence of committing a sexual act with a child under sections 16 or 17 of the Criminal Law (Sexual Offences) Act 2017 (as described above). Recall, however, that incest is also committed when two persons of any age (perhaps adult siblings) engage in consensual sexual intercourse. Such cases, to the best of my knowledge, are extremely rare. But, for the purposes of abortion policy, should a distinction be drawn between incest which occurs in an abusive or exploitative context and those cases, if one should ever arise, where both parties were (or appear to have been) consenting?

Where a woman of any age becomes pregnant as a result of an offence contrary to section 21 of the Criminal Law (Sexual Offences) Act 2017 – in effect sexual intercourse with a woman who has a mental disability or learning difficulty, other issues may arise. A man charged with such an offence has a defence if he can prove that he did not know that the woman lacked the necessary capacity or that he was not reckless in that regard. If he succeeds in displacing the presumption that he had the requisite knowledge or level of recklessness, no offence has, in law, been committed. Another question, although outside the scope of this paper, might also arise in such a case, namely, who should be permitted to consent to an abortion in such a case.

CONCLUDING COMMENTS

In making these observations, I am not trying to suggest that permitting abortion where pregnancy has resulted from rape or a related criminal offence would pose insuperable legal obstacles. Many countries have legal provisions to that effect. A document published by the Department of Economic and Social Affairs of the United Nations outlining legal grounds for abortion among the UN member states for 2011 shows that a great many of them allow abortion in cases of "rape or incest." Several European countries and individual states of the United States provide for abortion on this ground. It has proved rather difficult to get reliable information on what exactly these jurisdictions require by way of proof or supporting evidence when a woman seeks an abortion on account of rape, incest or other sexual offence. It appears that in some U.S. states the woman is required to submit a police report while others require certification from a doctor. Some European countries seem to require, at a minimum, that the offence be reported to the police. According to the judgment of the European Court of Human Rights in *P & S v Poland* [2012] ECHR 1853,

one of the permissible grounds for abortion under Polish law is that "there are strong grounds for believing that the pregnancy is the result of a criminal act." It seems that what is required for this purpose is a prosecutor's certificate. In that case, for instance, the applicant claimed that she had been raped on 8 April 2008 (when she was just under 15 years of age). On 20 May 2008, the district prosecutor issued a certificate to the effect that the pregnancy had resulted from unlawful sexual intercourse with a minor under 15 years of age. Obviously, the roles and functions of public prosecutors vary from one country to another. In this country, such a function would probably be exercised by an appropriate Garda officer.

As indicated earlier, the extent to which any of this may become an issue in Ireland will depend on the more general legislative proposals that are made regarding the availability of abortion or the restrictions that are to be placed on its availability. If, however, it was proposed to make abortion available on certain limited grounds only, including rape (or a related offence), and if it were further intended that some proof of the commission of the alleged offence should be furnished by the person seeking abortion, it might well be advisable to seek the views of a specially appointed expert group as to the best way forward.

ANNEX

SENTENCING FOR RAPE AND OTHER SERIOUS SEXUAL OFFENCES

When I was addressing the Citizens' Assembly earlier this year, I was asked to include in the presentation a section on the sentencing of rape and related offences. There will not be time to address this in my presentation to this Committee, but I attach here by way of annex the text of remarks I made about sentencing when addressing the Assembly.

Ireland's sentencing system remains largely discretionary. For the vast majority of offences, including all sexual offences, a maximum sentence is specified by statute, leaving it to the courts to decide on the penalty to be imposed in each specific case. Ireland does not have sentencing guidelines, except in respect of two offences (serious assaults and possession of firearms in suspicious circumstances) for which the Court of Criminal Appeal indicated sentence

ranges in 2014. There are no similar guidelines for any sexual offence. However, there are some important judicial statements on the proper approach to the sentencing of rape and these also apply to other serious sexual offences. In *People (DPP) v Tiernan* [1988] I.R. 250 the Supreme Court held that, save in the most exceptional circumstances, rape should attract an immediate and substantial custodial sentence. This has been reaffirmed by appeal courts several times over the past 30 years. It is rare in the extreme for a suspended sentence to be imposed for rape or any other serious sexual offence. When considering the sentencing of sex offences regard must be had to the wide range of circumstances in which they are committed. Some cases involve a single isolated offence of rape, while others will involve rape and one or more other offences such as assault, robbery or false imprisonment. The most difficult cases of all are those involving serial sexual abuse of one or more children over a long period, typically over a period of years. Life imprisonment has been imposed in a number of such cases while in most others the sentence will range from 10 to 14 years or even higher. The most fundamental principle of sentencing in Irish law is that a sentence must always be proportionate to the gravity of the offence and the personal circumstances of the offender. Two sets of factors must always, therefore, be taken into account. The first is the gravity of the offence which is measured according to the harm caused by the offence including the impact on the victim and the offender's culpability at the time of the offence. The second set of factors are the offender's personal circumstances at the time of sentence. In cases of so-called historic child abuse in particular, where a long period of time has elapsed since the offences were committed, the offender's circumstances may have changed, sometimes quite radically, as a result of old age, ill-health, disability or infirmity. All of these factors must be taken into account.

The punishment of criminal offenders can in general be justified on a number of grounds such as retribution (or just deserts), deterrence, rehabilitation and incapacitation. Imprisonment certainly serves to advance the goals of retribution and incapacitation and it may, though not necessarily will, have a deterrent or rehabilitative effect as well. The deterrent impact of penalties is very often over-estimated. Certainly, the threat of severe punishment has some deterrent effect.in the sense that more people might commit crime were it not for fear of the penalties they would suffer. But punishment, no matter how severe, can never be guaranteed to deter, and experience shows that it does not. What research has shown is that increasing penalty levels has no more than a marginal impact at best on the incidence of crime. The risk of being caught or detected tends to have a greater deterrent impact than the punishment that is likely to be

imposed in the event of conviction, no matter how heavy that punishment may be. Sexual offences already attract heavy penalties. If a sentence seems unduly lenient, the DPP can apply to have it reviewed by the Court of Appeal which, in turn, can increase the sentence if it considers it unduly lenient. But as matters stand, there is no reason to believe that a general increase in the levels of sentence imposed for sexual offences would have any appreciable deterrent effect.