

SENTENCING GUIDELINES: PRACTICE AND PROCEDURES

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Abstract

The paper focuses on the practice and procedures of sentencing guidelines. We live in a world where the society is yearning for punishment for wrongdoers; this is to ensure citizens conform to stipulated rules and regulation. The general purpose of sentencing is for people to bear the consequences of doing wrong and to deter future crime commission by both the convict and other individuals contemplating a committal of the same crime. The sum total of criminal trial is sentencing. The Administration of Criminal Justice (ACJA) 2015 embodies a method through which sentencing can be applied in Criminal trial aimed at complying with guidelines to avoid disparities. To this end, the Court at the end of trial is empowered to deliver judgment upon the defendant after his conviction and impose sentence on him usually in form of a fine, imprisonment or other punishments. Applying doctrinal method of research, the paper takes a look at the objectives, applicability, practice and procedures of sentencing. It further examines types of sentencing available in Nigeria under the Administration of Criminal Justice Act, 2015. The ACJA has given more life to the prosecution of criminal matters in Nigeria, what is left at the moment is for stakeholders to explore the laudable provisions of the Act by ensuring that justice is effectively served. It is therefore hoped that this article would be able, within the scope of its analysis proffer informed opinion.

Keywords: Criminal Justice; Judgment; Sentence; Trial Court; Culpability; Mitigation; Aggravating.

1. Introduction

The whole essence of civil law generally among others is to compensate the victim of wrongful conduct for injury he has sustained, while criminal law generally seeks inter alia to forbid and prevent conduct that unjustifiably inflicts or threatens substantial harm to individual or public interest. As Karibi-White JSC puts it “the repression of anti-social conduct by means of punishment is the paramount objective of the criminal law.”¹ Consequently, to talk of

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¹ Idem Jacob Udosen & Udofia Nkokom Uyo “*Sentencing and The Administration of Criminal Justice in Nigeria*” *Donnish Journal of Law and Conflict Resolution*. Vol. 4(1), 2018. P1

compensation within the context of criminal law certainly sounds somewhat odd. Criminal law is therefore essentially concerned with the definition, trial and punishment of those acts and omissions which are known as crimes.

Criminal justice embodies a method through which criminal law is administered. It establishes procedures aimed at fair, accurate and expeditious determination of guilt or innocence that do not infringe upon the rights of citizens. Therefore, the aim of the criminal justice system comprises deterrence, atonement and retribution through punishment administered at the instance of the State.² It is against this background that it is always said that the aim of criminal law is to protect the society and the citizens and to pay the wicked for his wrongdoing.

The populace often expresses the view that crimes are punished to demonstrate to those who have broken the law and those who might be contemplating breaking it that the law has teeth and can bite. The intendment of the criminal justice system is to make the community safer by identifying and then removing those who have constituted themselves to be dangerous species, be it a corporation or an individual.³ One distinguishing rule relating to criminal trial is that of the standard of proof; while civil trial rules require that only a person asserting a claim establishes his case on a balance of probabilities, criminal procedure rules require that the prosecution establishes its case beyond reasonable doubt.⁴ More relevant to our discussion in this paper is sentencing which is the sum total of the criminal trial, practice and procedure which the court has to comply with, as it is expected of a criminal trial court to make a pronouncement on the offender in form of sentencing which serves as the punishment at the end of the trial. It is this concept of sentencing that is the concern of this paper.

2. Concept of Sentencing

In all levels of our engagement in the society, we have laid down rules and regulation that guide modes of engagement. It is failure to comply with such codes of conduct that attracts sentences and punishments which the court pronounces at the end of the criminal trial. According to Section 416(1)⁵ “On conviction, a court may sentence the convict to a term of imprisonment as

² Ibid

³ Ibid

⁴ Ibid

⁵ Administration of Criminal Justice Act (2015)

prescribed by the law”; therefore, Sentencing is the judgment that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer⁶

The word “sentence” means a punishment given to a person convicted of a crime. A sentence is ordered by the Judge or Magistrate, based on the verdict of the Judge or Magistrate within the possible punishments set by State Law.⁷ Technically, sentence includes all fines⁸, community service⁹, restitution¹⁰ or other punishment, or terms of probation.¹¹

Abiru J.C.A in **Babaginda Usman v The State**¹² defined Sentencing “as the judicial determination of a legal sanction to be imposed on a person found guilty of an offence. It means the prescription of a particular punishment by a court to someone convicted of a crime. Consequently, Nwosu – Iheme, J.C.A in **Obazee v State**¹³ observed that “Sentencing is a very serious business and the future of a human being at that moment is dependent on the sentencing. Sentencing should therefore be very clear, unambiguous and specific. We who sit in judgment

⁶ Black’s Law Dictionary (10th Edn, 2014) 1569

⁷ Olatunde H. Oshodi, “Sentencing: Practice and Procedure under the Administration of Criminal Justice Act and Criminal Justice Laws” 2019. P. 1-2; - <https://nji.gov.ng/wp-content/uploads/2019/06/Paper-on-sentencing.pdf>

⁸ Section 422 of the Administration of Criminal Justice Act (ACJA) 2015 gives the Court the option to sentence a Defendant to pay fine instead of imprisonment. Fine have various meanings like a sum of money, which, by judgment of a competent jurisdiction, is required to be paid for the punishment of an offence. This is a pecuniary punishment imposed by Court, upon a person convicted of crime or misdemeanor. The purposes of imposing a criminal fine are to punish the offender, help compensate the State for the offence, and deter any future criminal acts.

⁹ See section 460 of the Administration of Criminal Justice Act 2015 - community service, also known as community restitution, refers to a form of sentencing involving an activity that benefits the community to compensate for harm done.

¹⁰ Section 297 (1) of the Administration of Criminal Justice Law of Lagos State, 2015 and section 342 of the Administration of Criminal Justice Act 2015 gives the Court the option to impose probation and other non-custodial sentences instead of imprisonment – section 11 of the Advance Fee Fraud and Other Related Offences Act, Cap A6, Law of the Federation of Nigeria, 2006. Section 11 (1): “In addition to any other penalty prescribed under this Act, the Court Shall order a person convicted of an offence under this Act to make restitution to the victim of the false pretense or fraud by directing that person – (a) where the property involved is money, to pay to the victim an amount equivalent to the loss sustained by the victim; in any other case- (i) to return the property to the victim or to a person designated by him; or (ii) to pay an amount equal to the value of the property, where the return of the property is impossible or impracticable (2) An order of restitution may be enforced by the victim or by the prosecutor on behalf of the victim in the same manner as the judgment in civil action”. From the wordings of the section just reproduced, it will be apparent that it is only the High Court that is conferred with the power to order restitution under that law. It is worthy of mention that in the event a Court wants to impose restitution, and the issue has not been heard during trial, the Court ought to invite parties to address it on it: In the situation where a Court fails to do so, the order of restitution may be set aside on appeal – see Saheed Raji v The State (2012) LPELR – 7968(CA).

¹¹ Sections 453 to 455 of the Administration of Criminal Justice Act 2015 gives the Court the option to impose probation and other non-custodial sentences instead of imprisonment.

¹² (2015) LPELR – 40855 (CA) Pp. 40-41, paras, D – B).

¹³ (2019) LPELR – 48288 (CA) P.12, paras, D-F

over others should therefore take sentencing very serious and give it the maximum attention which it deserves”.

Sentencing generally aims at the protection of the society through prevention of crime or reform of the offender which may be achieved by the means of deterrence, elimination or reformation/rehabilitation of the offender. The justification is that imposing the penalty will reduce the future incidence of such offences, by preventing the offender from re-offending or correcting the offender so that the criminal motivation or inclination is removed or by discouraging or educating other potential offenders. These are known as reductive justification.¹⁴ It is worthy of note that if after the trial, the court in its considered judgment is of the view that the accused is not guilty of the offence charged, the court would acquit the accused of the offence charged and the question of sentencing would not arise. On the other hand, if the accused is found guilty of the offence charged or of any other offence for which the court could lawfully convict the accused, the accused would be duly convicted. After the accused person has been convicted, the next thing the court would do is to pronounce the sentence of the court on him.¹⁵ Where however, the court, after conviction omits to pronounce sentence, it has been held that such omission is an irregularity and not an illegality capable of vitiating the proceedings¹⁶ in such case, the appellate court may impose the sentence. In view of the above, one thing is clear, the defendant or defendants must have been convicted by the Court before the sentence can be imposed; without a conviction, there cannot be a sentence.

3. Objectives of Sentencing

The objectives of Sentencing Guidelines are to:

- i. Establish appropriate standards and guidelines for sentencing in offences against the State, person, public order, morality, homicide, property, corruption, financial crimes and related offences, for the purpose of ensuring reasonable uniformity, proportionality and fairness in sentencing;

¹⁴ Idornigie Obo Paul, *Sentencing & Consequential Orders Under the Administration of Criminal Justice Act (ACJA), 2015*, Being a paper presented at the National Colloquium for Judges and of the Federal High Court on The Administration of Criminal Justice Act, 2015 Organized by Nigeria Institute of Legislative Studies (NIALS), MacArthur Foundation in Collaboration with National Judicial Institute (NJI) at Frazer Suit Abuja, on 26th February, 2022. P.4

¹⁵ Agaba, J.A “Practical Approach to Criminal Litigation”, Bloom Legal Temple, 3rd Edition, 2015. P.918

¹⁶ Azabada V The State (2014) All FWLR (pt. 715) 1610 at 1627

- ii. Establish the requirements and procedures for imposing custodial and non-custodial sentences for the purpose of preventing abuse and ensuring reasonable uniformity and fairness in sentencing; and
- iii. Ensure that congestion in correctional centres is reduced to the barest minimum through the use of non-custodial sentences in line with section 470(2)(c)¹⁷ of the Administration of Criminal Justice Act, 2015 (hereinafter referred to as ‘ACJA’), section 2(1)(b) of the Nigerian Correctional Services Act, 2019 and any other applicable provisions of the law.

4. Applicability and Scope of Sentencing

It is provided that the Practice Directions shall, save to the extent as may otherwise be ordered by the Honourable Chief Judge, apply to:

- i. Federal Capital Territory Courts exercising criminal jurisdiction; and
- ii. Sentencing in offences against the State, the person, public order, morality, homicide, property, corruption, financial crimes and related offences as defined in Order 9 Rule 2 of the FCT Practice Directions.
- iii. These Practice Directions shall not be applied to any person below the age of eighteen (18) years.
- iv. Where there is doubt as to whether the defendant or convict has attained the age of eighteen (18) years, the court shall resolve the doubt in favour of the defendant or convict.¹⁸

5. Purpose and Relevance of Sentencing

The purpose for imposing a sentence on a convict and indeed the purpose of the administration of criminal justice is to exercise social control and assure societal cohesion by means of just punishment (retribution), restitution or restoration, deterrence, rehabilitation, isolation and restraint of the offender, prevention and persuasion against crime, denunciation, community protection, education and enlightenment of the public or a combination of one or more of the foregoing.¹⁹

¹⁷ Congestion in prisons is reduced to the barest minimum.

¹⁸ Order 1 Rule 2 - Federal Capital Territory Courts (Custodial and Non-Custodial Sentencing) Practice Directions, 2020

¹⁹ Samuel E. Idhiarhi ., “Sentencing in Lower Courts: Theory, Practice and Procedure” Being a Paper presented at the All Nigeria Judges' Conference of Lower Courts, held virtually at the National Judicial Institute, Jabi, Abuja, 2020. P.3

6. Types of Sentencing

There are ‘concurrent’ and ‘consecutive’ sentences which can be imposed by the Court. Concurrent sentences are where the Defendant if found guilty for more than one crime serves prison term for all the offences he/she is convicted of at the same time and only lasts as long as the longest term imposed. Consecutive²⁰ sentences are where the Defendant is found guilty for more than one crime and the terms for several crimes are served one after another. See **Willie John v State** (1966) ANLR, 211;²¹ it is worthy of mention that other forms of sentencing include: probation, fines, short-term incarceration, suspended sentences, which only take effect if the convict fails to meet certain conditions, payment of restitution to the victim, community service or drug and alcohol rehabilitation for minor crimes. More serious sentences include long term incarceration, life-in-prison, or the death penalty among others. In all they may be classified as Custodial and Non-Custodial sentencing.

6.1 Custodial and Non – Custodial Sentencing

Custodial Sentencing involves placement in a restricted area known as a prison or other such institution. This is the most frequently used penal sanction for crime. While imprisonment is necessary in many cases especially for very serious offences, it has not solved the problem of crime prevention or the social reintegration of offenders.²²

Non – Custodial sentencing – refers to disposition measures that are given to offender that do not involve imprisonment. Depending on the offence, secondary or non-custodial options may be appropriate. They include disqualification, confiscation and compensation (These are used more in sex, drug and trafficking offences). In other words, the sentence is served outside the physical facility designated as a prison or by any agency on behalf of the state.²³ Non – Custodial measures include Suspended sentences²⁴, Community Services²⁵, Fines, Curfews, Parole orders

²⁰ See *Ali v Federal Republic of Nigeria* (L233 of 2015) [2016] NGCA 48 (05 May 2016)

²¹ *Op cit.*, Olatunde H. Oshodi, “Sentencing: Practice and Procedure under the Administration of Criminal Justice Act and Criminal Justice Laws” 2019. P. 1-2; - <https://nji.gov.ng/wp-content/uploads/2019/06/Paper-on-sentencing.pdf>

²² Ezekwem Ugonna, “Exploring Non – Custodial Sentencing in Magistrate Courts” Being a paper presented at the 2017 Orientation Course for Newly Appointed Magistrates. P. 2

²³ *Ibid*

²⁴ Suspended Sentence essentially means the jail or prison term is stopped. The defendant will not be incarcerated right away; while sentencing laws do vary depending on which state you are in, most judges have the discretion to suspend a prison or jail sentence. Suspended sentences can either be conditional or unconditional. Unconditional suspended sentences means there are no conditions or prohibitions attached to the suspension. The conviction will still stand, but the sentence will be stopped. On the other hand, conditional suspended sentences means that

etc.²⁶ Factors to be considered before application of non-custodial sentence include: the nature of the offence, the personality and background of the offender, the purpose of the sentence; and the rights of the victim.

6.2 Factors to be Considered In Sentencing

The laws and practice directions among others providing for sentencing were intentional in setting out the basic rules. The basic rules that a trial court must consider in exercising its discretion in imposing a sentence on a convicted offender are:

- i. Age of the offender
- ii. His being a first offender and;
- iii. His pleading guilty to a charge (may be sustain a plea of mitigation of sentences and vice versa).²⁷
- iv. The nature of the crimes including the gravity and extent thereof; and
- v. The interest of the community²⁸

Furthermore, the fact of previous conviction, the prevalence of the offence, the seriousness of the offence, the non-repentant attitude of the offender and the adverse effect on the victim are all factors that could aggravate a sentence.²⁹ No man is law unto himself hence these considerations.

6.3 Principle of Sentencing

As a fundamental first step in achieving fairness and effectiveness in sentencing, each case should be treated on its own merit. There are certain principles that are universally recognized and expected to guide every sentencing decision. These are³⁰:

the defendant needs to satisfy certain requirements. For example, a defendant may be ordered to complete a rehab treatment. Or, they may be required to retain a clean record and remain crime –free for a set period of time. If the defendant ends up breaking one of the conditions the judge can impose the sentence the suspended-
<https://www.alclocklaw.com/what-does-it-mean-when-a-judge-suspends-a-sentence>. Accessed on 11 March, 2022.

²⁵ S460(2) ACJA

²⁶ Op cit. “Ezekwem Ugonna” p.3

²⁷ Op cit, Idornigie Obo Paul, *Sentencing & Consequential Orders Under the Administration of Criminal Justice Act (ACJA), 2015*, Being a paper presented at the National Colloquium for Judges and of the Federal High Court on The Administration of Criminal Justice Act, 2015 Organized by Nigeria Institute of Legislative Studies (NIALS), MacArthur Foundation in Collaboration with National Judicial Institute (NJI) at Frazer Suit Abuja, on 26th February, 2022. P.11

²⁸ Factors to be considered during sentencing procedure –
<https://www.mbih.co.za/NewsResources/NewArticle.aspx?ArticleD=2981>

²⁹ R Vs Olagaiye (1956) 3 WACA 81; Adeyeye Vs The State (1968); NMLR 87; Kuriakos Vs Board of Customs and Excise (1967) FNLR 1, Yakubu v State (2015) LPELR – 40867 CA

³⁰ Op cit “Samuel E. Idhiarhi” p. 5-6

- i. **Legality:** Primarily, every accused and convicted person is entitled to the rule of law and it follows that every sentence should be in accordance with law in scope and character and must be provided for in a law or deducible from the provisions in a law. In satisfying this requirement, it is imperative that every sentenced person should know the exact nature and extent of the punishment imposed and the court must give reasons for its sentence in open court.
- ii. **Parsimony Principle:** This requires that the sentence must be more severe than is necessary to meet the purposes of sentencing. As an adjunct to this principle, an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances. The ACJA³¹ 2015 provides that sentencing a convict to a term of imprisonment shall apply only to those offenders who should be isolated from society and with whom other forms of punishment have failed or is likely to fail. Similarly, it is on this account that a trial court should not pass the maximum sentence on a first offender.³²
- iii. **Proportionality:** The principle of proportionality in sentencing advocates that the overall punishment imposed as sentence must be proportionate to the gravity of the harm caused and the offending behaviour or personal circumstances of the offender. In other words, a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. It is in this sense and under the earlier principle of parsimony that aggravating and mitigating factors come into play.³³
- iv. **Parity:** sentencing authorities are admonished to ensure that similar sentences should be imposed wherever similar offences are committed by different offender in similar circumstances and should there be a departure, there must be adequate reasons given for such a departure.
- v. **Totality:** this principle requires that where an offender is to serve more than one sentence, the overall sentence must be just and appropriate in the light of the overall offending behaviour. Thus, for instance, where consecutive sentences are imposed the combined sentence should not be unduly long or harsh.

³¹ s416(2)(k) ACJA

³² s416(2)(d) ACJA

³³ Op cit "Samuel E. Idhiarhi" p.5

Apart from the foregoing principles, every judge performing a sentencing function should acknowledge the need to recognize and take into account the social, environmental and other factors relative to the convict, the institutions of state, the harm in question, etc. Thus, sentencing decisions may take into account, partly at least, various pre-sentence reports, including probation reports, victim impact statements and the results of drug testing. In all, it would be reasonable to suppose that the principles governing the choice of a sentence would, at a minimum, include transparency, accountability, inclusiveness, coherence and fairness.

7. Practice and Procedures in Line With Relevant Laws

The laws regarding sentencing and sentences are found in both substantive law and procedural laws. One notable substantive law is the Penal Code Act. Historically, states in the southern parts of Nigeria had enacted local variants of the Criminal Procedure Act,³⁴ while states in the Northern part of Nigeria enacted or applied the Criminal Procedure Code Law enacted by the legislature of the defunct Northern Nigeria. However, from 2007 there was a paradigm shift³⁵ when Lagos state enacted the Administration of Criminal Justice Law, later succeeded by the Administration of Criminal Justice (Repeal and Re-enactment) Law of Lagos State, 2011³⁶ replacing the Criminal Procedure Law. In 2015, the Administration of Criminal Justice Act, 2015, was enacted as federal legislation.

Sentencing procedure commences immediately after guilt has been pronounced. The procedure to be followed and the factors that may be considered in passing sentences have been captured in ss310 to 313 and s416 of the ACJA.³⁷ In order to guide itself in deciding the appropriate sentence to impose on a convict, the court shall conduct a sentencing hearing immediately after conviction or at any subsequent date as may be determined by the court but not exceeding fourteen (14) days from the date of conviction.³⁸

The guidelines³⁹ provide for some procedural steps to be taken, which are as follows:

³⁴ CPA Cap. C41 LFN 2004, previously applicable at the Federal High Court

³⁵ Op cit "Samuel E. Idhiarhi" p. 9

³⁶ Law No. 10 of 2011 published in Lagos State of Nigeria Official Gazette No. 32, Vol. 44 of 17th August, 2011. Lagos was followed by Ekiti State in 2014.

³⁷ Also see - comparable sections in some ACJLs: ss310-313 (Edo), ss277-280 (Ekiti) and ss384-386 (Imo)

³⁸ Order 1 Rule 6 (1) Federal Capital Territory Courts (Custodial and Non-Custodial Sentencing) Practice Directions, 2020

³⁹ Order 1 Rule 6 Federal Capital Territory Courts (Custodial and Non-Custodial Sentencing) Practice Directions, 2020

- i. After conviction, a convict shall be asked if he wishes to call any witnesses to his character if he has not previously done so;
- ii. After such witnesses have been heard, if any, the convict shall be asked if he desires to make any statement or produce any evidence or information in mitigation of punishment;
- iii. The prosecutor shall thereafter produce evidence of any previous conviction of the convict unless such evidence has already been given;
- iv. The Court may then pass sentence on the convict or adjourn to consider and determine such sentence which shall be announced in open Court; and
- v. The Court shall be guided by the procedural steps specified from Part 2 to Part 8 of the guidelines, different sort of offences are considered and the procedural steps to adopt for sentencing is explained for the different categories of the offence. The schedule of the guidelines contains a chart showing the starting point and the category range for the different offences.

The above procedure is clearly straight forward. However, there are quite a number of issues requiring caution. The side note to s310⁴⁰ states that ‘sentence and sentence hearing’ comes across as the formalization of *allocutus*.⁴¹ Consequently, should the convict ask for an adjournment to enable him produce the information or witnesses or other evidence he requires, he must be granted the adjournment. As a matter of fair hearing, should the prosecution also require an adjournment to produce evidence of previous conviction or other aggravating evidence, they ought to be granted an adjournment though the court should be less indulging. An adjournment may also be at the instance of the court which requires time to consider its sentence. Order 1 Rule 6(2)⁴² provides that pending the sentencing hearing, the convict shall be detained in a correction centre except where imprisonment is not a punishment for the offence or where the convict prior to or while awaiting trial, had been detained on account of the offence for a period longer than the maximum term of imprisonment provided. Order 1 Rule 6(3)⁴³ also provides that: During the sentencing hearing, the convict shall be asked by the court if he wishes to call any witness as to his character or any other fact in mitigation of punishment if such fact had not previously been adduced in evidence at the trial, and any witness called by the convict shall be

⁴⁰ ACJA, 2015

⁴¹Op cit “Samuel E. Idhiarhi” p. 13 – the Imo State laws has both the provisions for allocutus in the CPA (s380 Imo ACJL) and the new provisions for sentence hearing in the ACJA (s384 Imo ACJL)

⁴² Federal Capital Territory Courts (Custodial and Non - Custodial Sentencing) Practice Directions, 2020

⁴³ Ibid

subjected to the general rules of evidence relating to the examination of witnesses including examination-in-chief, cross examination and re-examination.

Order 1 Rule 6 (4) after such witness, if any, has been called, the convict shall be asked if he desire to make any statement or produce any evidence or information for mitigation of punishment; The prosecutor shall, where desirable, call witnesses or produce evidence including evidence of previous convictions in rebuttal of any fact or evidence adduced by or on behalf of the convict in mitigation of punishment unless such evidence had already been given, and any witness called by the prosecution shall be subject to the general rule of evidence relating to the examination of witness including examination-in-chief, cross examination and re-examination.⁴⁴

Order 1 Rule 6(6)⁴⁵ the Court may then pass sentence on the convict or adjourn to consider and determine such sentence which shall be pronounced in open court and a reason given for the sentence. Order 1 Rule 6 (7),⁴⁶ states that:

where a convict has been provided the opportunity to adduce further mitigating evidence as provided under Sub-Rule (2) and (3) of this Rule and he declines or fails to take advantage of such opportunity, the court may proceed to sentence the convict in accordance with these Practice Directions based on the evidence already adduced during trial.

Consequently, any sentence pronounced shall be determined after consideration of and in accordance with the nine procedural steps specified in the relevant Order of these Practice Directions applicable to that offence namely: Order 2 Rule 1 to 9 for offences against the state, Order 3 Rules 1 to 9 for offences against the person, Order 4 Rules 1 to 9 for offences against public order, Order 5 Rules 1 to 9 for offences against morality, Order 6 Rule 1 – 9 for homicide related offences, Order 7 Rules 1 to 9 for offences against property, and Order 8 Rules 1 to 9 for corruption, financial crimes and related offences.⁴⁷

In considering a sentence in offences that fall under two or more Orders or classes of offences, for example, robbery which contain elements of offences against property and offences against person, the court in classifying the offence should take into account the prevalent elements and

⁴⁴ Oder 1 Rule (5) - Federal Capital Territory Courts (Custodial and Non-Custodial Sentencing) Practice Directions, 2020

⁴⁵ Federal Capital Territory Courts (Custodial and Non – Custodial Sentencing) Practice Directions, 2020

⁴⁶ Ibid

⁴⁷ See- Oder 1 Rule (8) - Federal Capital Territory Courts (Custodial and Non-Custodial Sentencing) Practice Directions, 2020

other circumstances surrounding; the commission of the offence as well as ensure that the Order applied in sentencing is one that contains adequate provisions for imposing appropriate sentence for the offence.⁴⁸

8. Evaluation – Determining the Offence Category for Offences Against the State (Culpability and Harm Categories)

It is worthy of note that offences may vary from offences against State;⁴⁹ Offences against the Person;⁵⁰ offence against Public Order;⁵¹ offences against Morality;⁵² Homicide Related Offences;⁵³ and Offence against Property among others.⁵⁴ The concentration of this paper will be on offences against the State.

Determining whether discretionary or non-discretionary punishment is required in the offence against the state; Order 2 Rule 1⁵⁵ provides that: The court shall determine whether the statute allows exercise of discretion in sentencing for the offence under consideration; where the statute does not permit the exercise of discretion, the court shall apply the punishment prescribed by the statute and proceed to Rules 7 and 9 of this Order; where the statute permits the exercise of discretion in sentencing, the court shall proceed to Rule 2 to Rule 9 of this Order.

In **Amoshina v The State**,⁵⁶ the court held that “where a statute prescribes a mandatory sentence in clear terms, the Courts are without jurisdiction to impose anything less than the mandatory⁵⁷ sentence as no discretion exist to be exercised in the matter”, the reason being that in criminal action, the Court can only impose the sentence a Defendant is charged with. However, in cases where a sentence is not mandatory, discretion must be exercised judiciously and judicially. The courts have also been advised that in exercising discretion in the matter of sentencing, the reasons or factors that influenced the Judge’s decision should be stated. **Agbanyi v State**⁵⁸ is

⁴⁸ See - Oder 1 Rule (9) - Federal Capital Territory Courts (Custodial and Non-Custodial Sentencing) Practice Directions, 2020

⁴⁹ Order 2 – Federal Capital Territory Courts (Custodial and Non - Custodial Sentencing) Practice Directions, 2020

⁵⁰ Order 3 – Federal Capital Territory Courts (Custodial and Non – Custodial Sentencing) Practice Directions, 2020

⁵¹ Order 4 – Federal Capital Territory Courts (Custodial and Non – Custodial Sentencing) Practice Directions, 2020

⁵² Order 5 – Federal Capital Territory Courts (Custodial and Non – Custodial Sentencing) Practice Directions, 2020

⁵³ Order 6 – Federal Capital Territory Courts (Custodial and Non – Custodial Sentencing) Practice Directions, 2020

⁵⁴ Order 7 – Federal Capital Territory Courts (Custodial and Non – Custodial Sentencing) Practice Directions, 2020

⁵⁵ Federal capital Territory Courts (Custodial and Non – Custodial Sentencing) Practice Directions, 2020

⁵⁶ (2011) Vol. 6. Pt.II, MJSC, P.1 @ 18 para D-E

⁵⁷ See - AMANCHUKWU V STATE (2007) 6 NWLR (1029) 1 @ 23 where the position was restated specifically that where a mandatory sentence of life imprisonment is prescribed by law for offences, the Court cannot impose a lesser sentence.

⁵⁸ (1994) LPELR – 14108 (CA)

instructive in this regard. In handing a sentence on a defendant, the essence of the sentence should be religiously and judiciously followed. It must however, be noted, that sentence should not be passed in anger or pity.⁵⁹ It should be passed with the aim of doing justice.

9. Determining the Offence Category for Offences Against the State (Culpability and Harm Categories)

The court shall categorise the offence committed in accordance with the level of culpability of the convict and severity of harm caused by the offence, after considering their respective qualifying factors set out in Sub-Rule 2(2) and (3) of this Order. In the case of offences against the State, culpability shall be determined as follows –

- a) Category 1 – High culpability, is demonstrated by one or more of the following:
 - i. Prolonged activity
 - ii. The use of weapon
 - iii. Type of weapon used,
 - iv. Injury to person(s),
 - v. Damage to property
 - vi. Grave risk of death to person(s)
 - vii. Grave risk to national security,
 - viii. A significant degree of premeditation,
 - ix. Leading role in the commission of the offence,
 - x. Death resulting from act
 - xi. Significant impact on the people
 - xii. Rampant nature of the offence,
 - xiii. Target of vulnerable persons,
 - xiv. Intimidation of potential witnesses; and
 - xv. Caused an explosion or used, developed or was in possession of explosive device
- b) Category 2 – Low culpability, is demonstrated by one or more of the following:
 - i. Subordinate role in the commission of the offence,
 - ii. Lack of premeditation
 - iii. Severe mental or emotional disturbance,

⁵⁹ Op cit “Olatunde H. Oshodi” p. 20

- iv. Impaired capacity where convict was under duress, regardless of whether the capacity was so impaired as to constitute a defence to the charge,
- v. Voluntary disclosure of the offence,
- vi. Willingness to assist in arresting and prosecuting other convicts, and
- vii. The offence was occasioned by the grossly offensive behavior of some other person

Determination of harm are classified into three (3) category⁶⁰ –

- a. Category 1 – Serious Harm, is demonstrated by any one or more of the following: (i) the convict caused serious injury to another person during the commission of the offence, (ii) where the convict in commission of the offence created a grave risk of death to another, (iii) in the commission of the offence, the convict knowingly created grave risk of substantial danger to the national security or public infrastructure.
- b. Category 2 – Substantial harm, is demonstrated by any one or more of the following: (i) serious but not permanent injury (ii) impact of crime on national security or infrastructure not substantial
- c. Category 3 – Limited harm is demonstrated by any one or more of the following: (i) injury caused in the commission of the act is less serious in the content of the offence; (ii) the act has no impact on the peace and security of the State.

Starting Point and Category Range

After determining the categories of culpability of the convict and severity of harm caused, the court shall apply the corresponding starting points of sentencing within the table of starting point and category range specified in the First Schedule⁶¹. Consequently, the existence of only one factor demonstrating low culpability and one factor demonstrating limited harm with or without a mitigating factor, shall be sufficient to impose the starting point of 25% of the prescribed sentence which may be increased up to a maximum of 30% of the prescribed sentence if there is presence of other aggravating factors or reduced down to 1 % if there is presence of mitigating factors⁶².

⁶⁰ Order 2 Rule 3 - of the Federal Capital Territory Courts (Custodial and Non – Custodial Sentencing) Practice Directions, 2020

⁶¹ Order 2 Rule 3(1) of the Federal Capital Territory Courts (Custodial and Non – Custodial Sentencing) Practice Directions, 2020

⁶² Order 2 Rule 3(2) of the Federal Capital Territory Courts (Custodial and Non – Custodial Sentencing) Practice Directions, 2020

It is worthy of note that the court shall not impose a non-custodial sentence on a convict except where the offence has been categorized as low culpability offence and limited harm offence in accordance with the provisions of Rule 2 of Order 3.⁶³ The court may, where the circumstances are compelling, impose a non-custodial sentence where there is at least one factor demonstrating low culpability and one factor demonstrating limited harm and at least one mitigating factor⁶⁴ and the plea⁶⁵ of guilty will equally serve as a mitigating factor. Where the offence prescribes a minimum sentence, the court shall not impose less than that minimum sentence irrespective of the starting point set out in the First Schedule to the 2020 Federal Capital Practice Directions⁶⁶.

The starting point shall apply to all convicts notwithstanding the plea of guilt or records of previous convictions. It is also provided that where the level of culpability of a convict is qualified by multiple features of culpability set out in Rule 2 (2) of this Order, an upward adjustment from the starting point may be made, before further adjustment for aggravating or mitigating features set out in Rule 4 of this Order;⁶⁷ and where a particular circumstance is listed for determining both culpability/harm categories and aggravating/mitigating factors and that circumstance is taken into account in categorizing the offence under culpability/harm categories, the same circumstance/factor should not be subsequently considered in determining the aggravating and mitigating factor.⁶⁸

10. Adjustment Based on Aggravating and Mitigating Factors for Offences against the State

At this point, based on evidence before it, the court may consider the aggravating and mitigating factors including those respectively listed under Sub-Rules (2) and (3) of the FCT Rule and decide whether any combination of these or other relevant factors, shall result in an upward or downward adjustment from the starting point set out in the First Schedule to Federal Capital Territory Courts (Custodial and Non-Custodial Sentencing) Practice Directions, 2020.

⁶³ Federal Capital Territory Courts (custodial and Non – Custodial Sentencing) Practice Directions, 2020

⁶⁴ Order 2 Rule 3(4) of the Federal Capital Territory Courts (Custodial and Non – Custodial Sentencing) Practice Directions, 2020

⁶⁵ Order 2 Rule 3(5) the court shall impose a non-custodial sentence in any case where there are two or more factors demonstrating low culpability and limited harm and in addition, there are two or more mitigating factors or presence of plea of guilt by the convict.

⁶⁶ Order 2 Rule 3(6) of the Federal Capital Territory Courts (Custodial and Non – Custodial Sentencing) Practice Directions, 2020

⁶⁷ Order 2 Rule 3 (8) of the Federal Capital Territory Courts (Custodial and Non – Custodial Sentencing) Practice Directions, 2020

⁶⁸ Order 2 Rule 3 (9)

The court shall consider the following circumstances as aggravating factors in sentencing in cases of offences against the State – (i) previous conviction, having regard to the nature of the offence to which the conviction relates, its relevance to the current offence and the time that has elapsed since the conviction, (ii) causing death, (iii) prior treason offence – the convict has previously been convicted of an offence involving treason for which a sentence of either life imprisonment or death was authorized by law, (iv) higher position in the society among others’⁶⁹

The court will consider the following circumstances as mitigating factors in sentencing in cases of offences against the state: (i) absence of previous conviction, the convict being first convict, (ii) where the offence was committed under significant coercion or provocation, (iii) convict’s conduct resulted from a significant lack of capacity for judgment, (iv) guilty pleas, (v) assisting the police to apprehend other convicts, (vi) an offer to make amends or apology to the State, (vii) any remorse shown by the convict, (viii) severe illness or age which will likely result to death of the convict before release, (ix) where convict suffers from any form of disability which may

⁶⁹ Order 2 Rule 4 (2)(v) – where the convict exploited some other person’s vulnerable position or other person’s special difficulties in protecting himself, (vi) where the convict induced another person to take part in the crime by coercion, deceit or misuse of the person’s youthfulness, lack of understanding or convict status, (vii) where the motive for the crime was to aggrieve a person, ethnic group or some other similar group of people by reason of race, colour, national or ethnic origin, religious belief or other similar circumstances, (viii) where the convict was motivated by remuneration or any pecuniary gain (ix) in the commission of the offence, the convict knowingly created a grave risk of substantial danger to the national peace and security, (x) in the commission of the offence, the convict knowingly created a grave risk of death to another person, (xi) disruption of governmental functions, (xi) disruption of governmental functions, (xii) extreme conduct, (xiii) extreme psychological injury inflicted on the victim(s), (xiv) property damage or loss, (xv) commission of the offence while wearing or displaying unauthorized or counterfeit insignia or uniform, (xvi) no remorse shown, (xvii) post offence bad conduct, (xiii) nature of the articles, (xix) vile remarks by the convict, (xx) that the offence involved actual or threatened violence or the actual or threatened use of a weapon (xxi) that the offence involved unlawful entry into, or unlawful presence in a dwelling place (xxii) that the offence was committed while the convict was on bail or still subject to a sentence, (xxiii) the extent of any loss, damage, or harm resulting from the offence, (xxiv) particular cruelty in the commission of the offence, (xxv) that the convict was abusing a position of trust or authority in relation to the victim, (xxvi) that the victim was a military, police, immigration, or Correction Officer, or other law enforcement officers acting in the course of his duty, (xxvii) that the victim was an emergency health or fire services provider acting in the course of his duty at the scene of an emergency, (xxiii) that the victim was particularly vulnerable because of his age or health or because of any other factor known to the convict, (xxix) that the convict committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristics such as race, colour, nationality, religion, gender identity, sexual orientation, age or disability, (xxx) premeditation on the part of the convict and, if so, the level of premeditation involved, (xxxi) the number, seriousness, date, relevance, and nature of any previous convictions of the convict and of any convictions for which the convict is being sentenced or otherwise dealt with at the same time, (xxxii) any failure by the convict personally or failure by the convict’s lawyer arising out of the convict’s instructions to, or failure or refusal to co-operate with his lawyer to comply with a procedural requirement that, in the court’s opinion, has done either or both of the following: (a) caused a delay in the disposition of the proceedings; or (b) had an adverse effect on a victim or witness; or (xxxiii) fund acquired through illegal means.

mean that imprisonment is an extraordinary hardship among others.⁷⁰ In **Ubiaru V FRN**,⁷¹ the court held that “sentencing is the guiding principles, this is so in order to prevent the flaunting of unrestricted whims and caprices of the various individual human beings who man the Courts at that level. First and foremost it is to be noted that the issue of sentencing or sentence is at the discretion of the Courts of trial which discretion must both be exercised judicially and judiciously”.

In the exercise of such discretion the trial Courts are enjoined to be conscious of the bounds within which they are kept by the law and must therefore not exceed same. The trial Courts must not, and will never pass any sentence in excess of the terms of years or amount of fine stipulated by the law. However, trial courts can pass sentences lesser in terms than those stipulated in the statutes regard being had to the facts and circumstances of each case, being mindful of stating the factors which influence the exercise of their discretions;⁷² where a statute prescribes a mandatory sentence the trial Courts are without jurisdiction to go out of the provisions either above or below the mandatory prescription. This can be gleaned from Section 1(2) of the Robbery and Firearms (Special Provision) Act, 2004.

11. Sentencing in Multiple Offences (Totality Principle)

Order 2 Rule 6⁷³ provides that: “when sentencing a convict for more than one offence, or where the convict is already serving a sentence, the court shall consider whether the total sentence is just and proportionate to the offending behaviour or prohibited conduct; (2) in the case of conviction for multiple offences arising from the same transaction, the sentence shall run concurrently; and (3) in the case of conviction for multiple offences not arising from the same transaction, the court shall consider and make pronouncement on whether the sentence shall run concurrently or consecutively”.

The totality principle is applied more commonly in custodial sentences but applies as well to non-custodial sentences. In every sentencing decision, there must be coherence or effective interaction between the principles of sentencing and the objectives of sentencing. In other words, the sentence imposed must be justifiable. Thus, the court passing any sentence is obliged to give

⁷⁰ Order 2 Rule 4 (3)(I) – (xx) of the Federal Capital Territory Courts (Custodial and Non – Custodial Sentencing) Practice Directions, 2020

⁷¹ (2019) LPELR - 482252

⁷² Ibid

⁷³ of the Federal Capital Territory Courts (Custodial and Non – Custodial Sentencing) Practice Directions, 2020

reason for its sentence in the particular case.⁷⁴ Such a requirement facilitates appellate review of sentences and is also in the interests of the administration of justice.

12. Compensation, Restitution, Restoration and Ancillary Orders

In all cases, the court shall consider whether to make compensation, restitution, restoration, rehabilitation and treatment of victim and other ancillary orders in accordance with the provisions of Part 32 or any other relevant provision of the ACJA or any other applicable law.⁷⁵

Consequently, where the offence has resulted in loss or damage, the court shall make an order or restitution in accordance with the provisions of Part 32 or any other relevant provision of the ACJA or any other applicable law.⁷⁶ The court in sentencing a convict is also obligated to take into consideration the period spent by the convict while awaiting or undergoing trial; and the reason for imposing the sentence shall be given by the court.

Each case shall be treated on its own merit and while doing so, the interest of the victim, the convict and the community shall be considered. The guidelines also permit for the consideration of the appropriateness of non-custodial sentence or treatment in lieu of imprisonment in each case. The range of offences the guidelines is applicable, when considering sentencing are as reproduced above. All Courts with criminal jurisdiction in the State are required to apply the guidelines and the guidelines do not derogate from the statutory and inherent discretion conferred on a Court to determine and impose sentences.

From Part 2 to Part 8 of the Federal Capital Territory Courts (Custodial and Non-Custodial Sentencing) Directions, 2020 guidelines provides for different categories of offences. The procedural steps to adopt for sentencing are explained for the different categories of the offence. The schedule of the guidelines contains a chart showing the starting point and the category range for the different offences.

For example the starting point and category range for offences against The State is as follows: if the level of harm is serious, for High culpability the starting point is 90%, while the range is between 80% - 100% and Low culpability the starting point is 70%, while the range is between 50% - 80%. It ought to be stated that criminal justice on the other hand embodies a method through which administration of criminal law establishes procedures aimed at fair, accurate and

⁷⁴ S318(1) CFRN (1999) (as amended)

⁷⁵ Order 2 Rule 7 of Federal Capital Territory Courts (Custodial and Non-Custodial Sentencing) Practice Directions, 2020.

⁷⁶ Ibid

expeditious determination of guilt or innocence that do not infringe upon the rights of citizens and aim to provide enlightenment but effective system of punishment for those found guilty. Therefore, the chief aim of the entire criminal justice system comprises deterrence, atonement and retribution through punishment administered at the instance of the State.

Accordingly, it is always said that the aim of criminal law is to protect the society and the citizens and to pay the wicked for his wrongdoing.⁷⁷ In short, the enterprise of criminal justice system is to make the community safer by identifying and then removing (or at least watching) those who have shown themselves to be dangerous, be it a corporation or an individual.

Calculation

FIRST SCHEDULE

Order 2 Rules 3(1) and (2) & 4(1)

TABLE 1 – STARTING POINT AND CATEGORY RANGE FOR OFFENCES AGAINST THE STATE:

Level of Harm	High Culpability	Low Culpability
Serious harm	Starting point- 90% Range -80% - 100%	Starting point – 70% Range – 50% - 80%
Substantial harm	Starting point – 80% Range – 60% - 90%	Starting point – 60% Range – 40% - 70%
Limited harm	Starting point- 70% Range- 50% - 80%	Starting point- 25% Range option of fine or other non-custodial sentence – 30%

Note: two examples for calculating percentages of sentences

90% of 10years sentence is $0.9 \times 10\text{years}$ sentence is $0.9 \times 10\text{years} = 9\text{years}$

60% of a 7years sentence is $0.6 \times 7\text{years} = 4.2$. The 4.2years can be rounded up

⁷⁷Op cit., Olatunde H. Oshodi, p.19

SECOND SCHEDULE

Order 3 Rules 3(1) and (2) & 4(1)

TABLE 2 – STARTING POINT AND CATEGORY RANGE FOR OFFENCES AGAINST PERSON

Level of Harm	High Culpability	Low Culpability
Serious harm	Starting point- 90% Range -80% - 100%	Starting point – 50% Range – 40% - 60%
Substantial harm	Starting point – 80% Range – 60% - 90%	Starting point – 40% Range – 30% - 50%
Limited harm	Starting point- 50% Range- 40% - 60%	Starting point- 25% Range option of fine or other non-custodial sentence – 30%

Note: two examples for calculating percentages of sentences

90% of 10years sentence is $0.9 \times 10\text{years} = 9\text{years}$

60% of a 7years sentence is $0.6 \times 7\text{years} = 4.2$. The 4.2years can be rounded up

THIRD SCHEDULE

TABLE 3- STARTING POINT AND CATEGORY RANGE FOR OFFENCES AGAINST PUBLIC ORDER

Level of Harm	High Culpability	Low Culpability
Severe harm	Starting point- 90% Range -80% - 100%	Starting point – 70% Range – 50% - 80%
Substantial harm	Starting point – 80% Range – 60% - 90%	Starting point – 60% Range – 40% - 70%
Limited harm	Starting point- 70% Range- 50% - 80%	Starting point- 25% Range option of fine or other non-custodial sentence – 30%

Note: two examples for calculating percentages of sentences

90% of 10years sentence is $0.9 \times 10\text{years}$ sentence is $0.9 \times 10\text{years} = 9\text{years}$

60% of a 7years sentence is $0.6 \times 7\text{years} = 4.2$. The 4.2years can be rounded up

13. Recommendation

The global best practices in sentencing is that the aim of sentencing should not only be punishment, but to preserve harmony in the society, reform the offender, and pacify the victim; while adopting any measures that would serve the purpose; cases should be treated on its merits.

It is recommended that these global standards be adopted in drawing up sentencing guidelines for the various courts that are yet to come up with one.

14. Conclusion

It is gratifying to note that sentencing is one of the most important steps in the trial process. It is during sentencing that the fate of the offender is decided and any decision taken weighs heavily on the integrity of the individual, judge and the judiciary. It is for this reason that judicial officers should treat each case on its merit, while complying with the guidelines and the applicable laws. As stated above, the aim of criminal law is to discourage unacceptable behaviours and punish the offenders. Little is usually said about the victims of crime under the criminal law. The trend is however changing to accommodate the place of victims of crime in our criminal jurisprudence known as restorative justice.

There is no doubt, that the ACJA made tremendous provisions as it relates to sentencing. To this end, Judicial Officers who have ACJL and Sentencing Guidelines already passed in their States are urged to find innovative ways to take advantage of the laudable provisions. It will be cautious on me having stated all the above to observe that all the forms of sentencing discussed above though not exhaustive, can only be imposed by the court once the law provides for it and the law also gives the Court a discretion to so impose. The court is in charge of the proceedings and is in the best position to know what is proper in any given case.