

Current Issues in Sentencing

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1. Sentencing Guidelines

The court must “have regard to” definitive guidelines issued by the Sentencing Guidelines Council (s. 172). The court may depart from the guidelines if there is a reason to do so.

Oosthuizen [2005] Crim.L.R. 979; Gisbourne [2006] Crim.L.R.363; Bowering [2006] 2 Cr.App.R.(S.) 10 (p. 80). See also **Whittle [2007] Crim.L.R. 499**

Existing definitive guidelines:

New Sentences: Criminal Justice Act 2003

Overarching Principles: Seriousness

Reduction in Sentence for a Guilty Plea (Revised July 2007)

Manslaughter by reason of Provocation

Robbery

Breach of a protective order.

Domestic Violence

Sexual offences

Prosecuting counsel should draw the court’s attention to the relevant guideline and make appropriate submissions as to its application to the facts of the case: **Attorney General’s References 32, 33 and 34 of 2007 [2007] Crim.L.R. 815.**

2 Dangerous offenders

Chapter 5 of Part 12 establishes a new scheme of sentences for dangerous offenders. ***This scheme applies to offences committed on or after April 4, 2005.*** The earlier provisions (discretionary life sentence, longer than commensurate sentence, extended sentence) will remain in force in respect of pre-commencement offences.

The new scheme provides for life imprisonment, "imprisonment for public protection" and a new form of extended sentence. *Note that the new form of extended sentence is not the same as the form provided by the Powers of Criminal Courts (Sentencing) Act 2000 section 85.*

In order to understand the new scheme, it is necessary to master a new set of definitions set out in section 224. These are "specified offence", "specified violent offence", "specified sexual offence", "serious offence" and "relevant offence."

"Specified violent offence" and "specified sexual offence."

These are offences listed in Schedule 15, Parts 1 and 2 respectively. Each part of the Schedule sets out a long list of offences. The list of specified sexual offences includes offences contrary to the Sexual Offences Act 2003, in addition to offences under the legislation replaced by that Act.

"Serious offence"

If an offence is included in either list, and is punishable either by life imprisonment or imprisonment for ten years or more, it is a "serious offence." (Given the possible survival of the automatic life sentence, it should be noted that "serious offence" in the context of the Powers of Criminal Courts (Sentencing) Act 2000 section 109 is different from "serious offence" in this context.)

Section 225 provides for the new sentence of life imprisonment and the sentence of imprisonment for public protection.

If an offender over eighteen is convicted of a "serious offence" committed after the commencement of this set of provisions, he may qualify for a life sentence or a sentence of imprisonment for public protection. To qualify for a sentence of imprisonment for life, the offence must be punishable with life imprisonment, and the court must be of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences (not necessarily "serious offences.") In such a case, the court must pass a sentence of life imprisonment if it considers that ***"the seriousness of the offence or of the offence and one or more offences associated with it is such as to justify the imposition of a sentence of imprisonment for life."***

To qualify for a sentence of imprisonment for public protection, the offender must have been convicted of a "serious offence" committed after the commencement date of the section, and the court must be of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences. If these conditions are

satisfied, the court must impose a sentence of imprisonment for public protection even though the maximum sentence for the offence is 10 years imprisonment.

In imposing either a sentence of life imprisonment or a sentence of imprisonment for public protection, the court must normally fix a "minimum term" under the Powers of Criminal Courts (Sentencing) Act 2000 section 82A. (This is the effect of section 225(4), and the various amendments made by Schedule 18 to the Crime (Sentences) Act 1997 and the Powers of Criminal Courts (Sentencing) Act 2000 section 82A.) The offender will be released on the direction of the Parole Board, in accordance with the Crime (Sentences) Act 1997 section 28 (as amended).

An offender sentenced to a term of imprisonment for public protection will remain on licence on release for at least the qualifying period of ten years (see sched. 18), after which he may apply to the Parole Board for an order directing that his licence should cease to have effect.

Extended sentence

In addition to the two new forms of sentence, the Act provides in section 227 for a new form of extended sentence. To qualify for such a sentence, the offender must be convicted of a "specified offence" which is not a "serious offence," that is say, a specified offence with a maximum sentence of less than 10 years imprisonment. If the court considers that there is a significant risk that serious harm will be occasioned to members of the public by further specified offences committed by the offender, the court may impose an "extended sentence." (The threshold of risk for the new extended sentence appears to be noticeably higher than for the old extended sentence.) The sentence has two components, the "appropriate custodial term" and the "extension period". The appropriate custodial term is the term which would otherwise be imposed in the normal way as the shortest term which is commensurate with the seriousness of the offence, or 12 months, whichever is the greater. The custodial term must not be increased to provide greater protection for the public. The extension period, the period of licence which follows release from the sentence, must not exceed five years in the case of a violent offence or eight years in the case of a sexual offence. The aggregate length of appropriate custodial term and the extension period must not exceed the maximum term permitted for the offence.

Slightly modified versions of these provisions are applied to offenders under 18 by sections 226 and 228.

Provisions for the release of prisoners serving extended sentences, whether under section 227(those over 18 when convicted) or 228 (those under 18 when convicted) are set out in section 247 as part of the new parole system. An extended sentence prisoner will serve a minimum of one half of the "appropriate custodial term" and will then remain in custody until the Parole Board has directed his release. The Parole Board may not give a direction for his release unless it is satisfied that it is no longer necessary for the protection of the public that he should be confined. As soon as he has served the whole of the appropriate custodial term, (on the assumption that he has not already been released on licence,) he must be released on licence, unless he has previously been released and recalled.

Assessing dangerousness

Section 229 gives guidance on assessing dangerousness. Subsection (2) deals with the case of an offender who has not previously been convicted of a "relevant offence". It obliges the court to take into account all information available to it about the nature and circumstances of the offence, and permits the court to take into account any other information relating to the pattern of behaviour of which the offence forms part and any other information about offender.

Subsection (3) deals with an offender who has been convicted of a "specified offence" and who had been convicted before the day on which that offence was committed of a "relevant offence", which means a "specified offence" or an equivalent offence under the law of Scotland or Northern Ireland. In this case, the court must assume there is a risk of serious harm to the public, unless it considers in the light of all such information as is before it that it would be unreasonable to conclude that there is such a risk. If the court does conclude that there is such a risk, it must pass either a life sentence, a sentence of imprisonment for public protection, or an extended sentence in the case of an adult, or in the case of an offender under 18, a life sentence, a sentence of detention for public protection or an extended sentence of detention.

The scope of this section is much wider than that of the automatic life sentence, as "specified offences" are much more numerous than "serious offences" within the meaning of section 109, and many of them are not punishable with life imprisonment.

Case law on dangerous offenders:

Lang and others November [2006] 2 Cr.App.R.(S.) 3 (p.13)

Johnson and others [2007] Crim.L.R. 177

Extract from judgment

Before analysing the relevant provisions, we should emphasise that even a cursory glance at them makes it plain that the sentence is concerned with *future* risk and public protection. Although punitive in its effect, with far reaching consequences for the offender on whom it is imposed, strictly speaking, it does not represent punishment for past offending. As any such assessment of future risk must be based on the information available to the court when sentence is passed, the potential for distraction from the real issue, is obvious. Nevertheless, when the information before the court is evaluated, for the purposes of this sentence, the decision is directed not to the past, but to the future, and the future protection of the public.

The specific words in the headnote to section 229, "the assessment of dangerousness", do not appear in sections 224-229, and it seems clear that "dangerousness" is intended to represent a convenient shorthand to describe, in the words of section 225(1)(b) those cases where

"The court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission...of further specified offences".

This provision is common to sections 225 to 228. In this judgment therefore, when we speak of dangerousness, we shall use the same convenient shorthand. But it is a

shorthand, and following Lang, we emphasise that there are two distinct requirements to a finding of dangerousness for the purposes of section 225.

Unlike, say, section 225, section 229 does not confirm or create any new sentence. Rather it provides statutory direction on the approach to the assessment of dangerousness which should be adopted by the sentencing court. Section 229(2) is concerned with offenders aged over 18, without previous convictions for specified offences. In reality, this provision adds nothing to the approach which the sentencer would normally take, that is, to consider all the information available to the court. Although the court has what is described as a “discretion” to take into account any information about the “pattern of behaviour” or indeed “any information about the offender”, it is difficult to see how any sentencer, properly forming his judgment, would fail to take all matters of possible relevance into account. What section 229(2) highlights, however, is that it is not a prerequisite to a finding of dangerousness that the offender should be an individual with previous convictions. A man of good character may properly qualify for this sentence.

Section 229(3) addresses the familiar situation of the adult offender with previous convictions for specified offences. Here, the court is directed to approach the dangerousness issue by treating it as established unless that conclusion would be unreasonable. The analysis is for the sentencer. The use of language like “assumption” and “conclusion” and “unreasonable” in a provision directing the method of approach to the assessment of dangerousness does not produce helpful clarity. The decision in Lang explained that sentencers should not allow the language of section 229(3) to obscure the ultimate responsibility of the sentencer to make the necessary assessment. The effect of Lang is that, in the end, the question whether it is unreasonable to make the assumption of dangerousness on the basis of previous convictions for specified offences is left to his judgment. The sentencer is entitled to conclude that, notwithstanding the statutory assumption, the offender with previous convictions, even for specified offences, does not necessarily satisfy the requirements of dangerousness.

Much of the argument in Lang itself, and many of the submissions in grounds of appeal and arguments coming to this court, on the issue of dangerousness were and are

focussed on section 229(3), and whether, and if so in what circumstances the assumption of dangerousness should be disappplied. Lang was particularly focussed on this issue, and nothing in this judgment is intended to undermine the guidance provided by Lang.

We can now address a number of specific issues.

(i) Just as the absence of previous convictions does not preclude a finding of dangerousness, the existence of previous convictions for specified offences does not compel such a finding. There is a presumption that it does so, which may be rebutted.

(ii) If a finding of dangerousness can be made against an offender without previous specified convictions, it also follows that previous offences, not in fact specified for the purposes of section 229, are not disqualified from consideration. Thus, for example, as indeed the statute recognises, a pattern of minor previous offences of gradually escalating seriousness may be significant. In other words, it is not right, as many of the submissions made to us suggested, that unless the previous offences were specified offences they were irrelevant.

(iii) Where the facts of the instant offence, or indeed any specified offences for the purposes of section 229(3) are examined, it may emerge that no harm actually occurred. That may be advantageous to the offender, and some of the cases examined in Lang exemplify the point. Another such example is R v Isa [2006] CLR 356. On the other hand the absence of harm may be entirely fortuitous. A victim cowering away from an armed assailant may avoid direct physical injury or serious psychological harm. Faced with such a case, the sentencer considering dangerousness may wish to reflect, for example, on the likely response of the offender if his victim, instead of surrendering, resolutely defended himself. It does not automatically follow from the absence of actual harm caused by the offender to date, that the risk that he will cause serious harm in the future is negligible.

Nothing in the decision in R v Shaffi (2006) EWCA 418, which was relied on before us, suggests the contrary. Giving the judgment of the court, at paragraph 11, Sir

Richard Curtis summarised the various submissions made on behalf of the appellant. One of them was that the appellant's previous convictions demonstrated that although the appellant was carrying a knife and a screwdriver in two of the cases, no harm was actually occasioned. The court accepted the force of the overall submission made by counsel that the sentencer was wrong to find that there was a risk of *serious* harm, and the court was unable to find significant evidence of such harm caused during the commission of the appellant's previous offences. However the conclusion represented a finding of fact in the particular case. Shaffi is not authority for the proposition that as a matter of law offences which did not result in harm to the victim should be treated as irrelevant. Indeed if that is what Shaffi, decided, it would, in effect, have re-written the statute.

(iv) We considered arguments based on the inadequacy, suggestibility, or vulnerability of the offender, and how these and similar characteristics may bear on dangerousness. Such characteristics may serve to mitigate the offender's culpability. In the final analysis however they may also serve to produce or reinforce the conclusion that the offender is dangerous. In one of the instant cases it was suggested that the sentence was wrong because an inadequate offender had suffered what was described as an "aberrant moment". But, as experience shows, aberrant moments may be productive of catastrophe. The sentencer is right to be alert to such risks of aberrant moments in the future, and their consequences.

(v) In Lang, Rose LJ suggested that the prosecution should be in a position to describe the facts of previous specified offences. This is plainly desirable, (see also Isa) but this is not always practicable. There is no reason why the prosecution's failure to comply with this good practice, even when it can and should, should either make an adjournment obligatory, or indeed preclude the imposition of the sentence, when appropriate. In any such case, counsel for the defendant should be in a position to explain the circumstances, on the basis of his instructions. If the Crown is not in a position to challenge those instructions, then the court may proceed on the information it has. Equally, there are some situations in which the sentence imposed by the court dealing with earlier specified offences may enable the sentencer to draw inferences about its seriousness, or otherwise. In short, failure to comply with best practice on this

point should be discouraged, but it does not normally preclude the imposition of the sentence.

(vi) The effect of the 2003 Act, and Lang, has been examined in a number of cases. It is not obligatory for the sentencer to spell out all the details of the earlier specified offences. To the extent that a judge is minded to rely upon a disputed fact in reaching a finding of dangerousness, he should not rely on that fact unless the dispute can fairly be resolved adversely to the defendant. In the end, the requirement is that the sentencing remarks should explain the reasoning which has led the sentencer to the conclusion.

Recent cases:

Reynolds [2007] Crim.L.R. 493

Correction of errors. If Crown Court fails to deal with dangerousness, it may rescind sentence within twentyeight day period and then adjourn for however long may be necessary to obtain reports etc.

Harries [2007] Crim.L.R. 820 (October issue)

Section 234 of the Act does not have the effect of applying the dangerous offender provisions to offences committed on a day unknown within a period overlapping April 4, 2005. In such a case, the judge may make a finding whether the offence was committed before or after the date, irrespective of the dates specified in the indictment. If the offences are not shown to have been committed on or after April 4, 2005, the dangerous offender provisions of the 2003 Act do not apply. It seems likely that the dangerous offender provisions of the old law do not apply either.

Considine [2007] Crim. L.R. 824 .(October issue)

In assessing whether an offender is dangerous for the purposes of s. 229, the court may take into account previous offences committed by the offender, even though he has not been convicted of those offences.

Kulah [2007 Crim.L.R. 907 (November issue).

Problems of Goodyear indications in relation to specified offences. Judges are never obliged to give Goodyear indications. If a judge decides to give a Goodyear indication in relation to a specified offence where the assessment of dangerousness has not yet been made, a qualified indication may be given, to the effect that if the offender is judged not to be dangerous, the determinate sentence will not exceed the specified term; if he is found to be dangerous, the notional determinate sentence will not exceed the specified term, or the custodial term of the extended sentence will not exceed the stated term.

4 Early release

Sections 237 to 268

The Act provides a new scheme for the release of "fixed-term prisoners". The distinction between long term and short term prisoners disappears: all fixed term prisoners sentenced to twelve months or more will be released automatically after serving half of their sentence, and will remain on licence for the whole of the remainder of the sentence (not until the end of the third quarter of the sentence as under the previous law). A man sentenced to four years imprisonment will serve two years, and then be released on licence; the licence will remain in force until the end of the sentence.

The new early release provisions are brought into force with effect from April 4, 2005, subject to modifications which have the effect of excluding sentences of less than twelve months from the new scheme. The relevant provisions are modified so as to refer to detention in a young offender institution. Those sentenced to less than twelve months will continue to be dealt with under the Criminal Justice Act 1991. ***The new system applies only to sentences of twelve months or more imposed for offences committed on or after April 4, 2005.*** Offenders sentenced to twelve months or more after April 4, 2005 for offences committed before that date will be subject to the release provisions of the Criminal Justice Act 1991.

The power of the court to order an offender convicted of an offence committed during the second half of his sentence to return to custody to serve the balance of the sentence (under the Powers of Criminal Courts (Sentencing) Act 2000, section 116) is removed. Such offenders will be dealt with by the revocation of their licences.

Courts are given two new powers. A court which imposes a sentence of twelve months or more may recommend particular conditions which should be included in the offender's licence on his release. The Secretary of State is not bound to include these conditions in the licence, but must "have regard" to the recommendations.

Courts are given a new power to order that time spent in custody on remand will count against the sentence. Time spent in custody will no longer be deducted automatically from the sentence.

The home detention curfew scheme continues in existence, allowing the release of prisoners up to 135 days before the half way point of the sentence. The scheme is not restricted to those sentenced to less than four years.

The Parole Board will continue in existence. Its main function will be to review decisions to revoke licences of fixed term prisoners, and to decide on the release of prisoners serving sentences of life imprisonment, imprisonment for public protection and extended sentences.

The relevant provisions make no reference to sentences of detention in a young offender institution, but are amended to make such reference by the Criminal Justice Act 2003 (Sentencing) (Transitory Modifications) Order 2005. .

The new provisions apply to detention under the Powers of Criminal Courts (Sentencing) Act 2000, section 91. They do not apply to detention and training orders.

5. Time in custody on remand

Section 240 requires a court which imposes a term of imprisonment, detention in a young offender institution or detention under the Powers of Criminal Courts (Sentencing) Act 2000 section 91 of any length to deal with the treatment of any time spent by the offender in custody on remand. The power applies to extended sentences or extended terms of detention. It does not apply to sentences of life imprisonment or imprisonment for public protection, or to detention and training orders.

The power applies only to sentences imposed for offences committed after April 4, 2005. The earlier legislation continues to apply to sentences for offences committed before that date. For cases where sentences are imposed for offences committed both before and after April 4, 2005, see below. For offences committed on a day unknown between a date before April 4 and a day after April 4, see s. 240(9).

Time spent in custody on remand includes time spent in custody following a remand or committal by a court, time spent in local authority secure accommodation or a secure training centre following a committal or remand, and spent in hospital following a remand, admission or removal under the Mental Health Act 1983. It does not include time spent in police detention (as under the earlier law).

The court may make an order in respect of time spent on remand in connection with the offence or a "related offence". A "related offence" is an offence "founded on the same facts or evidence" as the offence for which the sentence is imposed. This definition is relatively narrow. It would exclude for instance time spent in custody in connection with one set of offences in respect of which the offender is acquitted, but is then sentenced for different offences for which he has been on "technical bail".

An order may be made notwithstanding that the offender was in custody at the same time in connection with other matters, whether on remand or otherwise, subject to the Rules (below). The rule under the Criminal Justice Act 1967, section 67, that time could count only when the offender was not in custody for any other reason, does not apply, although this may be a factor in the exercise of the court's discretion under subsection 240(4)(b).

In the normal case, **the court must give a direction that the number of days which the offender has spent remanded in custody shall count as part of the sentence. The court must state the number of days which the offender has spent in custody on remand and the number of days in respect of which the direction is given.** ("You have spent one hundred days remanded in custody and the court directs that all of those days [or one hundred days] shall count as time served as part of the sentence.")

Defence advocates must be in a position to inform the court how many days have been spent in custody on remand in a case to which section 240 applies.

"Before and after" cases.

The court need not direct that time spent in custody on remand shall count as part of the sentence if either it does so in accordance with rules made by the Secretary of State under section 240(4)(a), or "it is the opinion of the court just in all the circumstances not to give a direction".

The rules provide as follows:

Section 240(3) of the 2003 Act does not apply in relation to a day for which an offender was remanded in custody -

(a) if on that day he was serving a sentence of imprisonment (and it was not a day on which he was on licence under Chapter 6 of Part 12 of the 2003 Act or Part 2 of the Criminal Justice Act 1991);or

(b) where the term of imprisonment referred to in subsection (1) of that section is ordered to be served consecutively on another term of imprisonment, if the length of that other term falls to be reduced by the same day by virtue of section 67 of the Criminal Justice Act 1967

If the court decides that a direction that the whole number of days spent in custody on remand shall count as part of the sentence should not be made, it may either give no direction at all (in which case none of the days will count), or a direction that a number of days less than the total should count. In either case, it must state in open court either

(a) that the decision not to make a direction, or to make a direction for less than the total number of days, is made in accordance with the rules, or

(b) that it was made because the court considered that it was just in all the circumstances to make the decision not to direct that all the remand days would count, and indicate what were the circumstances which made that decision "just in all the circumstances".

Such circumstances are most likely to be that the offender has already had credit for the time against another sentence (eg. D is committed for trial in custody for offence A; while on remand he is committed for trial in custody for offence B; he is sentenced for offence A and given credit for all the relevant time; he is later sentenced to a consecutive term for offence B, but cannot expect credit against that sentence for the same time.)

If the offender is sentenced to a suspended sentence under the Criminal Justice Act 2003, any order in relation to time spent in custody on remand is to be made by the court which orders the sentence to take effect, not by the court which passes the original sentence.

The section makes no reference to time spent in custody before a community order is made, which is subsequently revoked and replaced by a custodial sentence. There appears to be no restriction on the power of a court which revokes a community order and replaces it with a custodial sentence to make an appropriate order under this section. It will be a matter for the court's discretion whether the fact that the offender has been found to be in breach of the community order, or has committed a further offence while subject to the order, amounts to a circumstance in which it is just not to direct that all the time spent in custody before the community order was made shall count as part of the eventual sentence. A court which imposes a community order on an offender who has spent time in custody on remand may take that time into account in determining the restrictions on liberty to be imposed by the order. The extent to which such time has been taken into account at that stage may be a relevant consideration in determining whether to take it into account at this stage.

In the case of extradited prisoners who have been kept in custody outside the United Kingdom before being returned, time spent in custody abroad is treated as time spent in custody on remand, and the court must make an appropriate direction under the section as if the time had been spent in custody in the United Kingdom (section 243). The court may decline to make a direction, or may make a less than full direction, in the exercise of its discretion, if it considers such a course to be "just in all the circumstances". It may be that this will apply in particular to cases where offenders have prolonged the period of custody by resisting extradition.

Where a direction is given under the section, the number of days specified in the direction must be treated as having been served when determining whether the offender has served a particular proportion of his sentence.

It seems clear that a direction under s. 240(3) that all of the days shall count, or a direction under s. 240(6) that none of the days shall count, or that less than the whole number of days shall count, is "an order made on conviction when dealing with an offender" for the purposes of the Criminal Appeal Act 1968 s. 50, and thus subject to an appeal by the offender or a reference by the Attorney General.

Cases: see **Barton [2006] Crim.L.R. 549**, **Norman [2006] Crim.L.R. 1072**, **Gordon and others [2007] Crim.L.R. 402**

6 Consecutive sentences

Note effect of CJA 2003 s. 265:

“A court sentencing a person to a term of imprisonment may not order or direct that the term is to commence on the expiry of any other sentence of imprisonment from which he has been released early under this Chapter.”

This section is virtually identical to PCC(S)A 2000, s. 84, and applies to a person who has been released on licence, re-offended, and has been recalled to prison following the revocation of his licence so that he is serving the remainder of the earlier sentence when he is sentenced for the latest offence.

Three situations may arise:

- (a) D has been released from a sentence for an offence committed before April 4, 2005, and is currently being sentenced for an offence also committed before April 4, 2005. PCC(S) A s. 84 applies, but court may avoid its practical effect by making an order under PCC(S)A s.116 in respect of the earlier sentence.
- (b) D has been released from a sentence passed for an offence committed before April 4, 2005, and is now being sentenced for an offence committed after that date. Questionable whether either PCC(S)A s. 84 or CJA s. 265 applies, but court may in any event make an order under PCC(S)A s. 116 to avoid practical consequences.
- (c) D has been released from a sentence passed for an offence committed on or after April 4, 2005, and is being sentenced for an offence also committed after that date. CJA s. 265 applies; PCC(S)A s. 116 does not. The new sentence must be concurrent with the remainder of the old sentence. The length of the new sentence may not be inflated to compensate: see **Drewett [2006] Crim.L.R. 770**.

See also **Howell [2006] 2 Cr.App.R.(S.) 115 (p. 773)**; **Jesson [2007] Crim.L.R. 810 (October issue)**.

7 Suspended sentence orders

Section 189 is brought into force with modifications. ***The modified section applies to offences committed on or after April 4, 2005.*** The power to suspend a sentence of imprisonment under the Powers of Criminal Courts (Sentencing) Act 2000 is preserved for pre-commencement offences.

As modified, sections 189 (1) and (2) read as follows:

(1) A court which passes a sentence of imprisonment *or in the case of a person aged at least eighteen but under 21, detention in a young offender institution* for a term of *at least 14 days but not more than twelve months, or in the case of a magistrates' court, at least fourteen days but not more than six months* may-

(a) order the offender to comply during a period specified for the purposes of this paragraph in the order (in this Chapter referred to as "the supervision period") with one or more requirements falling within section 190(1) and specified in the order, and

(b) order that the sentence of imprisonment is not to take effect unless either-

(i) during the supervision period the offender fails to comply with a requirement imposed under paragraph (a), or

(ii) during a period specified in the order for the purposes of this sub-paragraph (in this Chapter referred to as "the operational period") the offender commits in the United Kingdom another offence (whether or not punishable with imprisonment),

and (in either case) a court having power to do so subsequently orders under paragraph 8 of Schedule 12 that the original sentence is to take effect.

(2) Where two or more sentences imposed on the same occasion are to be served consecutively, the power conferred by subsection (1) is not exercisable in relation to any of them unless the aggregate of the terms of the sentences does not exceed *twelve months, or in the case of a magistrates' court, six months*.

(Changes italicised.)

A community requirement must be imposed: See **Lees-Wolfenden [2007] Crim.L.R 393**

The effect of the changes is that the Crown Court may suspend a sentence or group of sentences of imprisonment or detention in a young offender institution passed for post-commencement offences so long as the aggregate does not exceed twelve months without finding exceptional circumstances, but the order must include a community requirement. If the offender is also to be sentenced for a pre-commencement offence, that sentence may be suspended if it is a sentence of imprisonment (not detention in a young offender institution) if there are exceptional circumstances; the aggregate may be up to two years but there is no need for a community requirement.

8 *Assistance to the prosecution.*

Sections 71 to 75 of the **Serious Organised Crime and Police Act 2005** come into force on April 1, 2006. They provide a new scheme for rewarding defendants who assist or agree to assist the investigation or prosecuting authorities.

Section 71 provides for immunity from prosecution. If a "specified prosecutor" thinks that for the purposes of the investigation or prosecution of an offence it is appropriate to offer any person immunity from prosecution, he may give that person a written "immunity notice". If a person is given an immunity notice, no proceedings for an offence of a description specified in the notice may be brought against that person, except in circumstances specified in the notice. The notice ceases to have effect if the person to whom it is given fails to comply with the notice.

Section 72 makes similar provision for a "restricted use undertaking". A specified prosecutor may offer any person an undertaking that information of any description will not be used against the person to whom the undertaking is given in any proceedings to which the section applies. This section applies to criminal proceedings and proceedings under Part 5 of the Proceeds of Crime Act 2002 (civil recovery). The undertaking ceases to have effect if the person to whom it is given fails to comply with any conditions specified in the undertaking.

Section 73 provides for a reduction in sentence where the defendant has assisted or offered to assist an investigator or prosecutor in relation to that or any other offence. This section applies only to defendants who have pleaded guilty in proceedings in the Crown Court, or who are committed to the Crown Court for sentence following a plea of guilty. (Presumably this provision is intended to apply to a person who has indicated an intention to plead guilty in "plea before venue" proceedings under the Magistrates' Courts Act 1980, section 17A, but the section does not say so.) If, in accordance with a written agreement made with a specified prosecutor, the defendant has assisted

or offered to assist the investigator or prosecutor in relation to that or any other offence, the court may take into account the extent and nature of the assistance given or offered in determining what sentence to pass. The extent to which the assistance given offered may affect the sentence is a matter within the discretion of the sentencing court.

If the court passes a sentence which is less than it would otherwise have passed, the court must state in open court that it has passed a lesser sentence than it would otherwise have passed, and what the greater sentence would have been. This obligation does not apply if the court thinks that it would not be in the public interest to disclose that the sentence has been discounted. Where no statement is made in open court, the court must give written notice of the fact that it has passed a lesser sentence, and what the greater sentence would have been, to the prosecutor and to the defendant. Subsection (7) provides that if a court considers that it would not be in the public interest to state in open court that a discount has been given, section 174 of the Criminal Justice Act 2003, (which requires the court to explain the reasons for its sentence) does not apply to the extent that the explanation would disclose that a sentence has been discounted to for this reason. Section 270 of the 2003 Act, which requires the court to give reasons for its choice of a minimum term in a murder case, is similarly qualified.

Provision is made for cases in which the court is required to impose a mandatory or minimum sentence. Section 73 (5) provides that nothing in any a enactment which requires that a "minimum sentence" is passed in respect of any offence or an offence of any description or by reference to the circumstances of any offender affects the power of a court to act under subsection (2), by taking into account the extent and nature of this assistance given or offered.

There may be some uncertainty about what constitutes a "minimum sentence" for this purpose. It seems clear that a mandatory minimum sentence for a third time class A drug dealer under section 110 of the Powers of Criminal Courts(Sentencing) Act 2000, or for a third time residential burglar, under section 111, is a "minimum sentence" for this purpose, as would be a required sentence under the Firearms Act 1968 section 51A of five years in the case of a person convicted of possessing a prohibited weapon. What about an automatic life sentence under the Powers of Criminal Courts (Sentencing) Act 2000, section 109, which survives the repeal of the Act and is preserved for offences committed before April 4, 2005? This may well be a practical issue in many cases, as robbery while in possession of a firearm, and various offences under the Firearms Act 1968, are "serious offences" for the purposes of section 109. It is clear that an automatic life sentence is not a "sentence fixed by law" for which specific provision is made in subsection (5) (b) (see s. 109(4).) Is it a "minimum sentence... passed in respect of any offence by reference to the circumstances of any offender." It is clearly arguable that an automatic life sentence falls within this description and it would follow and that where section applies the court is released from the obligation to pass the automatic life sentence which would otherwise be obligatory.

Similar questions arise in connection with the life sentences and sentences of imprisonment for public protection which courts are required to pass by the Criminal Justice Act 2003, section 225. The obligation arises where the court finds that a person convicted of a "serious specified offence" within the meaning of that Act represents a significant risk of serious harm to the public from future specified offences. It could be said that either form of a sentence is a "minimum sentence" which is passed in respect of "an offence of any description" and "by reference to the circumstances of any offender."

If this is correct, the effect of the section is to release the court from the obligation to impose either a life sentence or a sentence of imprisonment for public protection where the defendant has entered

into an agreement to assist or offer to assist the investigator or prosecutor. Alternatively, there seems to be no reason why a court, faced with such an agreement in a case where it would otherwise be obliged to impose a sentence of imprisonment for public protection, should not "take into account the extent and nature of the assistance given or offered" by reducing the minimum term which it would specify under the Powers of Criminal Courts (Sentencing) Act 2000, section 82 A.

Specific provision is made for cases of murder by subsection (5) (b). This provides that in a case where the sentence is fixed by law, nothing in any enactment which requires the court to take into account "certain matters" for the purposes of making an order which determines or has the effect of determining the minimum period of imprisonment which the offender must serve affects the power of the court to take into account the extent and nature of the assistance given or offered. The effect of this provision may require some disentangling in the Court of Appeal in due course. In broad terms, it seems to mean that where a court is fixing the minimum term to be served by an offender sentenced to a mandatory life sentence on conviction for murder, the court may reduce the minimum term to reflect the fact that the offender has given or offered assistance in connection with other matters. In particular, the section appears to indicate that the court may depart from the statutory starting points specified in Schedule 21 in such a case.

The fact that a court has taken into account the nature and extent of the assistance given or offered by a defendant and has for that reason reduced either the sentence, or the minimum term in the case of a mandatory life sentence, does not prevent the court from taking account of any other matter "which it is entitled by virtue of any other enactment to take account of" (s. 75(6).) This subsection clearly refers to the various mitigating and aggravating factors mentioned in the Criminal Justice Act 2003, Schedule 21, paragraphs 10 and 11, the offender's culpability in committing the offence

(Criminal Justice Act 2003, section 143), his previous convictions (section 143 (2)) the fact that he has pleaded guilty (section 144). Statutory aggravating factors, such as racial or religious aggravation, and aggravation relating to disability or sexual orientation, may also be taken into account. What about other factors which are commonly taken into account in sentencing which are not covered by these statutory provisions? It could be argued that all mitigating factors are covered by the word "culpability" in section 143 (1), but this expression would not normally be taken to cover personal mitigating factors not connected with the offence. These factors appear to be covered by section 166 (1) of the 2003 Act, which preserves the power of a court to mitigate a sentence "by taking into account any such matters as in the opinion of the court, are relevant in mitigation of sentence."

Section 74 provides for the review of a sentence which has been passed following such an agreement where the defendant has not kept his side of the bargain. The section applies where the defendant has been sentenced in the Crown Court, and has received a discounted sentence as a consequence of having made a written agreement to give assistance to the prosecutor or investigator of an offence, but has knowingly failed "to any extent" to give assistance in accordance with the agreement. In this case a specified prosecutor may refer the case back to the court if the person concerned is still serving his sentence, and the prosecutor thinks that it is in the interest of justice to do so. The case so referred must if possible be heard by the judge who passed the original sentence. If the court is "satisfied" that a person whose sentence has been discounted has "knowingly failed to give the assistance, " it may substitute for the sentence which has been referred "such greater sentence" as it thinks appropriate, provided that the new sentence does not exceed the sentence which it would have passed if the agreement had not been made. (The sentence which would have been passed apart from the agreement should have been specified, in open court or in writing, at the time the discounted sentence was passed.)

The section also permits a reference where the defendant has given or promised further assistance after sentence has been passed. It applies where the defendant has received a discounted sentence in consequence of having entered a written agreement to give assistance, and having given the assistance in accordance with the original agreement makes a further written agreement to give further assistance. The section also covers the case where the defendant has not made an agreement before sentence, and has accordingly received a sentence which is not discounted, but in pursuance of a written agreement made subsequently to the imposition of sentence, gives or offers to give assistance to the prosecutor or investigator. In either of these cases, provided that the defendant is still serving the sentence and the prosecutor thinks it is in the interests of justice to do so, the case may be referred to the court which imposed the sentence, and if possible heard by the judge who passed the sentence. On such a reference, the court may take into account the extent and nature of the assistance given or offered, and substitute for the original sentence "such lesser sentence as it thinks appropriate."

A reference may not be made in the case of a person convicted of murder who did not plead guilty (s. 74(13)), who offers or gives assistance after sentence, but it seems to follow that where an offender who did not plead guilty and was thereafter convicted of some other offence, subsequently offers or gives assistance, his case may be referred if the prosecutor chooses to do so. The section would also apply to a person who did plead guilty to murder.

On the hearing of a reference, or any other proceedings arising in consequence of a reference, the court may exclude from the proceedings anyone other than an officer of the court, a party to the proceedings or legal representatives of the parties, and may give such directions as it thinks appropriate prohibiting the publication of any matter relating to the proceedings, including the fact

that the reference has been made. Such an order may be made only to the extent that it is necessary to do so to protect the safety of any person, and is in the interests of justice.

Provision is made for appeals following a reference to the Crown Court. Either the defendant or the prosecutor may appeal to the Court of Appeal, with leave of the court. There is no need for the matter to be considered by the Attorney General.

How far does the new statutory procedure differ from the familiar practice of the courts laid down in decisions over the last 30 years or so since *Lowe* (1977) 66 Cr.App.R. 122? The new procedure requires a formal written agreement before the assistance is given or offered. Defendants who give or offer such assistance without a such an agreement cannot benefit from the new statutory scheme. It seems that a written agreement made after the assistance has been given will not count for this purpose. Presumably the normal procedure will be for the defendant, either on his own initiative or otherwise, to offer to assist, and for that assistance to be recorded in a written agreement, and then for the assistance to be given. It seems essential that the written agreement should be precise as to the nature of the assistance which is to be given. If the terms of the agreement are ambiguous and the defendant gives the assistance which he thought he was offering to give, but it falls short of what the prosecution understood to be involved, the defendant may find that a his discounted sentence is brought back before the Crown Court for review on the ground that he has knowingly failed to give assistance in accordance with the agreement (s 74 (2).)

The new statutory scheme applies to assistance given before sentence by a defendant who has or who intends to plead guilty to the charges against him. It departs from the accepted current practice in allowing a sentence to be discounted following a reference by the prosecution in the case of a defendant who has been convicted by the jury, in a case other than murder, and who provides or offers to provide relevant assistance subsequently to sentence. This is possible only if the

prosecutor agrees to refer the case to the Crown Court under section 74(2)(c). Suppose such a defendant offers assistance, but the prosecutor refuses to refer the case to the Crown Court. Is the decision of the prosecutor subject to judicial review, or can the defendant in such a position seek leave to appeal against his sentence under the normal appeal procedure? The new appeal provided by section 74(8) applies only where a reference has been made by the prosecutor.

How many times can a sentence be referred under section 74? Suppose that the defendant has pleaded guilty and received a discounted sentence in return for giving assistance. Some time later he enters a second agreement to give further assistance, and his already discounted sentence is referred to the Crown Court under section 74(2)(b). On the basis of the promise of further assistance, his sentence is discounted a second time. The assistance actually given under the second agreement falls short of what the prosecutor expected. Can the case be referred a second time for the second discount to be reduced? It may be better, where assistance is promised after sentence has been imposed, to wait to see what assistance is actually given before hearing the reference.

The extent of the discount to be given in any particular case remains firmly (at least for the time being) within the discretion of the sentencing judge. Decided cases under the old practice will continue to be relevant for this purpose. It remains to be decided whether the discount for giving assistance will be in addition to the discount given in relation to a plea of guilty. The matter is now governed to some extent by statutory provisions, in particular section 144 of the Criminal Justice Act 2003, and the guidelines issued by the Sentencing Guidelines Council, which do not deal with this issue. Although under the old practice it was not customary to calculate two separate discounts, it seems that under the new provisions it will probably be necessary to do so. The Sentencing Council Guidelines require that the sentencing court should “usually” state what the sentence would have been in the absence of a plea. Section 73 requires the court to state what sentence it

would have passed apart from the assistance given or offered by the defendant. Assuming that the public interest exception to this provision does not apply, it seems that the court should indicate (1) what sentence it would have passed on conviction by a jury without any assistance given or offered (to comply with the guideline on discount for guilty pleas) (2) what sentence it would have passed following a plea of guilty but without the assistance given or offered (this is "the greater sentence" for the purposes of section 73 (3)(b)) , and (3) what the sentence actually is. Failure to state what "the greater sentence" is, either in open court or by written notice in accordance with section 73 (4), will impede any reference of the sentence after the event if the assistance does not match the prosecution's expectations. There may be some difficulty in explaining a sentence where there is a double discount – for a plea and for assistance given – but where the sentencing judge does not wish to mention in open court the fact that assistance has been given.

The importance of separating out the two discounts is emphasised by the possibility of a reference if the assistance given is not satisfactory. A defendant who pleads guilty and offers assistance should not lose the discount for his plea of guilty if his assistance is disappointing, although he may reasonably lose all or part of the discount given in return for his assistance.

How much if any of the former practice survives the introduction of the new statutory scheme? Suppose a defendant is willing to provide assistance, but is unwilling to enter into a written agreement to do so. In this situation, can the old procedure be followed and the court be told in an appropriate way of the assistance that has been given or promised? Apart from what may be a natural reluctance on the part of defendants to enter into written agreements in this context, a defendant may prefer to avoid the possibility of a subsequent reference of the sentence back to the Crown Court if his performance is disappointing to the prosecution.

Neither the Act itself nor the commencement order gives any clear indication whether the legislation will apply retrospectively. Paragraph 5 (1) of the Commencement Order states simply that the relevant sections "shall come into force on 1st April, 2006." Presumably, no agreement made before that date can satisfy the requirements of the Act, but is it permissible to make an agreement after that date in relation to an offence committed before that date, for which the defendant has not yet been sentenced? There seems to be nothing in the Act to prevent this from happening. What about the case of a defendant who was sentenced under the old scheme, and whose sentence was discounted as a result of assistance given to the authorities at the time. If such a defendant now makes an offer of further assistance, and is prepared to enter a written agreement to that effect, can his case be referred by the prosecution to the Crown Court with a view to a further discount under section 74? This may be a matter of statutory interpretation, but it seems that his case cannot be referred. Section 74 (2) deals with a defendant who has received a discounted sentence "in consequence of his having offered in pursuance of a written agreement" to give assistance. What about the case of a defendant whose sentence, passed before April 1, 2006, was not discounted but who is now willing to give or offer to give assistance. If he makes, after 1st April, an appropriate written agreement, can his case be referred to the Crown Court under section 74(2)(c)? It seems that it can. Paragraph (2) (c) deals with a person who "receives a sentence which is not discounted." The defendant is such a person.

How does the new procedure applied to offenders serving life sentences for murder passed before April 1st, 2006? Section 74 (13) precludes any reference in such a case if the defendant did not plead guilty to the offence. If the offender did plead guilty, he may be eligible under section 74 (2) (c) for a reference of his minimum term, in the light of a section 73 (5) (b), which allows the minimum term to be reduced in order to take account of assistance given or promised. Eligible offenders (and there will not be many of them) may have had their minimum terms fixed by a judge

of the Crown Court at the time of sentence. In such cases, any reference will be to the Crown Court, and if possible to the judge who passed the sentence. Other eligible offenders will have had their terms fixed by a judge of the High Court under the Criminal Justice Act 2003, schedule 22. The sentence (the mandatory life sentence) was passed by the Crown Court, but the minimum term was fixed by a judge of the High Court sitting in that capacity.

KEY POINTS:

The defendant must be sentenced in the Crown Court following a plea of guilty:

There must be a written agreement;

The court may avoid a minimum mandatory sentence;

If the defendant does not deliver, he may be taken back to the Crown Court for his sentence discount to be removed;

A defendant who has already been sentenced may offer more assistance, or offer assistance, and may have his sentence referred back to the Crown Court;

A defendant who was convicted by the jury (other than of murder) and whose sentence was not discounted) may have his sentence referred to the Crown Court at the discretion of the prosecutor.

9 Financial reporting orders

The Serious Organised Crime and Police Act 2005 (Commencement No. 5 and Transitional and Transitory provisions and Savings) Order 2006 also brought into force on April 1, 2006, sections 76 to 80 dealing with financial reporting orders. (The Commencement Order is set out in a confusing way. Sections 76 and 78 are brought into effect by virtue of the Schedule to the Commencement Order, which is given effect by Article 4 (1) of the order. Sections 79 to 81, which deal with the effect of an order, are brought into force by Article 6 of the Commencement Order.)

An order can be made in the case of an offender convicted of a limited range of offences. These are offences of obtaining property by deception, obtaining a money transfer by deception, obtaining a pecuniary advantage by deception, procuring the execution of a valuable security by deception, obtaining services by deception, obtaining the evasion of liability by deception, or any offence specified in Schedule 2 to the Proceeds of Crime Act 2002. This Schedule lists among other matters drug trafficking offences, money-laundering offences contrary to the Proceeds of Crime Act 2002, assisting illegal entry, counterfeiting, various offences under the Copyright Designs and Patents Act 1988 the Trade Marks Act 1994, various offences in connection with prostitution, blackmail and offences of attempting, conspiring or inciting the commission of an offence specified in the Schedule. The list has now been expanded.

If the offender is convicted of one of these offences, the court may make a "financial reporting order" if it is satisfied that the risk of the persons committing another offence mentioned in the list is sufficiently high to justify the making of the order. The order comes into force immediately and has effect for the period specified in the order. An order made by a magistrates court must not exceed five years, otherwise the maximum period of the order is 15 years, except in the case of a person sentenced to imprisonment for life, in which case the maximum period of the order is 20 years. (None of the offences specifically listed in section 76 (3) are punishable with life imprisonment, it but some the offences listed in Schedule 2 of the Proceeds of Crime Act 2002 are.)

Where a financial reporting order is made, the offender must make a report in respect of each period specified in the order, giving such particulars of his financial affairs as maybe specified. He must include any specified documents with the report and the report must be made to the specified person within the specified period after the end of the period for which the report is made. A person

who fails to comply with the report will be guilty of a summary offence. The Act makes provision for variation of the order by the court which made the order.

10 Surcharges

A new mandatory sentencing provision comes into on 1st April, 2007. Section 161A of the Criminal Justice Act 2003, inserted into the act by virtue of section 14 of the Domestic Violence, Crime and Victims Act 2004, requires a court when dealing with an offender for one or more offences to order him to pay a surcharge. The obligation does not apply in such cases as may be prescribed by an order made by the Secretary of State. The Secretary of State has made an order (the Criminal Justice Act 2003 (Surcharge) (Number 2) Order 2007) which prescribes those cases in which the duty to order payment of the surcharge does not apply. Those cases are those in which the court deals with a person for one or more offences and does not impose a fine. The upshot of this convoluted provision is that a court which deals with offender by means of a fine must order the offender to pay the surcharge, whether or not the defendant is also sentenced in other ways. costs. The surcharge does not apply were the court deals with the offender by means of a compensation order alone, without a fine .

If the court considers that it would be appropriate to make a compensation order but that the offender has insufficient means to pay both the surcharge and the appropriate compensation, the court must reduce the surcharge accordingly. Similarly, a court may reduce the amount fine if it finds that the offender has insufficient means to pay both the appropriate fine and the surcharge (new section 164 (4A) of the Criminal Justice Act 2003).

The amount of the surcharge is fixed by the Secretary of State, and he has fixed the amount of the surcharge by the Criminal Justice Act 2003 (Surcharge) (Number 2) Order 2007 in the amount of £15. It seems that the surcharge is calculated by appearance, and not by the number of offences concerned. An offender who appears before a magistrates court and is fined on each of five informations will be liable to a surcharge of a total of £15.

The surcharge does not appear to vary according to the amount of the fine. It is the same whether the fine is a modest one imposed on someone convicted of a summary offence by a magistrates' court, or a fine of many millions imposed on a large company for breaches of health and safety legislation.

The new power applies only to offences committed on or after 1st April, 2007 (see the Domestic Violence, Crime and Victims Act 2004, Schedule 12, para. 7.) A surcharge is enforceable as a fine imposed on summary conviction (see section 14(3), amending the Administration of Justice Act 1970, Schedule 9, to include a reference to surcharges.)

11 Required minimum sentences (Firearms Act 1968, section 51A)

Amendments are made to this section so as to widen its application. The Violent Crime Reduction Act 2006 extends the obligation to impose a minimum sentence (five years for those over eighteen, three years for those between sixteen and eighteen, to offences contrary to sections 16, 16A, 17, 18, 19 and 20(1), involving the kinds of prohibited weapons to which s. 51A applies, committed on or after April 6, 2007.

The anomaly relating to sentences of detention in a young offender institution is removed by the Firearms (Sentencing) (Transitory Provisions) Order 2007, with reference to offences committed on or after May 28, 2007.