COURT TEASERS

Miles McColl

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Practical Situations Arising in Magistrates' Courts

BY

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All provisions, except s.47, of this Act which are referred to in the text were brought into force on or before July 17 1978.

Any reference in the text to 'an indictable offence dealt with summarily' should be construed as the summary trial of an offence triable either-way.

Any reference to 'indictable offence' means an offence which, if committed by an adult, is triable on indictment, whether it is exclusively so triable or triable either-way. Any reference to a 'summary offence' means an offence which, if committed by an adult, is triable only summarily. 'Offence triable either-way' means an offence which, if committed by an adult, is triable either on indictment or summarily. (C.L.A., 1977, s.64).

PREFACE

Although most magistrates are, by virtue of their office, lay persons, they must at all times be aware of the kind of problems which occur in their courts, in order to do justice to their important judicial appointment.

In this booklet I have tried to set out in question-and-answer form, examples of the types of situation which often give cause for concern in magistrates' courts solely because the words of the relevant statutes or the decisions of the appeal courts are not closely followed.

It is hoped that in addition to serving as a handbook for magistrates it will also be used as a reference book and reminder to court clerks, who should always be aware of the relevant authorities when advising magistrates.

Basically the booklet has been written for use by magistrates and court clerks, but it may also be of some assistance to those members of the legal profession who practise in magistrates' courts, as well as police officers, probation officers and others involved in the court system.

I would like to convey my appreciation to those who have assisted me in this work and would particularly like to thank Mr. Ranson Lawrence, Clerk to the Stockport Justices, Mr. Roger Attwater and Mr. John Pace for their invaluable help.

The law stated is as at 30 August, 1978.

Miles McColl

Leigh.
August, 1978.

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The following abbreviations appear in the text and should be construed as shown:

J.P.A. 1361	Justices of the Peace Act 1361.
O.A.P.A. 1861	Offences against the Person Act 1861.
C.E.A. 1898	Criminal Evidence Act 1898.
C.Y.P.A. 1933	Children and Young Persons Act 1933.
C.J.A. 1948	Criminal Justice Act 1948.
M.C.A. 1952	Magistrates' Courts Act 1952.
M.P.(M.C.)A. 1960	Matrimonial Proceedings (Magistrates' Courts) Act 1960.
C.J.A. 1961	Criminal Justice Act 1961.
C.Y.P.A. 1963	Children and Young Persons Act 1963.
C.J.A. 1967	Criminal Justice Act 1967.
C.A.A. 1968	Criminal Appeal Act 1968.
M.C.R. 1968	Magistrates' Courts Rules 1968.
T.A. 1968	Theft Act 1968.
C.Y.P.A. 1969	Children and Young Persons Act 1969.
J.C.R. 1970	Justices' Clerks Rules 1970.
C.A. 1971	Courts Acts 1971.
G.M.A. 1971	Guardianship of Minors Act 1971.
C.J.A. 1972	Criminal Justice Act 1972.
R.T.A. 1972	Road Traffic Act 1972.
G.A. 1973	Guardianship Act 1973.
P.C.C.A. 1973	Powers of Criminal Courts Act 1973.
B.A. 1976	Bail Act 1976.
C.L.A. 1977	Criminal Law Act 1977.
H.O.C.	Home Office Circular.
S.I.	Statutory Instrument.

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The number shown in brackets after each question number indicates the page on which the relevant answer may be found.

QUESTIONS

A. Criminal Proceedings

1
(17)

Binding-Over – *Powers of justices to make a binding-over order.*

A defendant appears before the court on a charge brought by the police of assault occasioning actual bodily harm and the magistrates are satisfied that he is guilty of the offence. Although they are in agreement over the question of guilt, the justices are convinced that the victim of the assault who is the main prosecution witness is not wholly without blame himself and that the defendant had been provoked by that witness's own unreasonable behaviour. In the circumstances, the justices impose a nominal fine on the defendant and without previous notification to the parties of their intention bind both parties over to keep the peace for 12 months in their own recognizances of £50 each.

Have the justices acted correctly in binding-over both parties in such circumstances?

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Committals to the Crown Court for sentence – *On bail or in custody.*

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3
(20)

Committals to the Crown Court for sentence – *Whether s.28 (for borstal) or s.29 (for sentence) M.C.A., 1952 appropriate.*

A youth, aged 19 years, appears before the court on two separate charges alleging burglaries of shop premises involving stolen property to the total value of £500. He consents to summary trial, pleads guilty to each charge and asks for five similar offences to be taken into consideration. He has previously served a term of borstal training and the magistrates at first feel that he should be committed to the Crown Court under the provisions of M.C.A., 1952, s.28 with a view to his serving another term of borstal training. He has an exceedingly long record for his age and in spite of his solicitor's strong plea in mitigation, the magistrates finally determine to commit him to the Crown Court for sentence.

Having considered the matter in detail, they feel that the better course would be to commit the defendant to the Crown Court for sentence under the provisions of M.C.A., 1952, s.29 as opposed to s.28 of that Act. They feel that if he is committed under s.29 the judge will, in his unlimited discretion, be able to impose a lengthy term of imprisonment in excess of that available to the magistrates, although he could in any event make another borstal training order or any order which the magistrates themselves could have made.

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Compensation – *Some differences in the meaning of "compensation orders" and "restitution orders".*

Four defendants have been convicted of dishonestly obtaining for themselves a pecuniary advantage by deception, contrary to the Theft Act 1968, s.16.

The prosecutor has informed the court that the defendants had each consumed a meal, and whilst the waiter's back was turned, left the premises without payment. All four youths plead guilty and, after addressing the magistrates on the facts, the prosecutor applies to the justices that the sum of £8, the price of the four meals, should be paid to the restaurant.

After allowing the defendants the right to address the magistrates in mitigation and after hearing that they have not previously been convicted by a court the chairman announces:
"You will each be fined £20 and pay restitution of £2 each."

Can any fault be found with the decision of the bench in relation to the order for repayment of the outstanding sum?

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(26)

Conditional Discharges and Probation Orders–*Commission of further offence by person conditionally discharged or probationer.*

A defendant, who is the subject of a current probation order made by a magistrates' court, appears at a later date before the same magistrates' court and is convicted of a further offence. He is dealt with by the magistrates for the original offences for which the probation order was made on the basis that he has committed the further offence during the currency of the probation order. It appears to the court that probation is no longer a suitable method of dealing with him.

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(28)

Conditional Discharges – *i) Considerations when imposing a conditional discharge. ii) Explaining a conditional discharge.*

A defendant appears before the court and is charged with an offence of stealing money from his employers. His solicitor puts to the bench a very forceful plea in mitigation, and suggests that because of his client's previous good character he should be given a conditional discharge. He informs the justices that the offence was out of character and that his client has stated that he will never appear before the court again.

The justices retire to consider the decision and decide to make an order for conditional discharge for two years.

What matters should the court consider before making such an order for conditional discharge, and how should a conditional discharge be explained?

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Conditional Discharges – *Whether court can deal with original offence when conditional or absolute discharge or probation order imposed for subsequent offence.*

The justices adjudicating, having read a social inquiry report relating to the defendant, decide, with his consent, to make him the subject of a probation order for two years. They also fine the

defendant for the commission of an offence during the currency of a conditional discharge imposed at another magistrates' court.

Should the magistrates have dealt with the conditional discharge?

10
(30)

Detention Centre Orders – *Considerations before making a detention centre order.*

A youth, aged 18 years, with no previous convictions appears before the court and pleads guilty to two charges, using threatening behaviour and having an offensive weapon in a public place without lawful authority or reasonable excuse. The magistrates take a very serious view of the circumstances surrounding the offences, and consider that the appropriate sentence is an order for detention centre training for three months on each offence, to run concurrently.

What should the magistrates consider before making a detention centre order?

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(33)

Evidence – *Weight to be given to an unsworn statement made by a defendant from the dock.*

What weight should be given to an unsworn statement from the dock made by a defendant charged with an offence?

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Imprisonment – *Activation of suspended sentence – Whether it should take effect concurrently or consecutively to any other term of imprisonment imposed.*

A defendant, who is the subject of a suspended sentence of imprisonment, is convicted of an offence punishable with imprisonment committed during the operational period of the suspended sentence. The justices wish to activate the suspended sentence.

Should that sentence, in a normal case, be ordered to run consecutively or concurrently to any other term of imprisonment imposed for the subsequent offence(s)?

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(35)

Imprisonment – *(i) Recommendations for treatment. (ii) Sentencing on basis that remission will be granted.*

Having considered the social inquiry and psychiatric reports which

have been submitted to the court, the magistrates decide that a term of imprisonment is the only appropriate sentence for the defendant. They make an order that he be committed forthwith to prison for a term of six months.

In announcing the sentence the chairman states that whilst in prison the defendant should receive medical and psychiatric treatment. In addition he informs the defendant that with remission he will, in fact, serve a total of four months' imprisonment only.

Should the chairman have made these comments?

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(37)

Imprisonment – *Considerations before imposing a sentence of imprisonment on a person under 21 years – Procedure before imposing a suspended sentence.*

A youth aged 18 years appears before a magistrates' court, consents to summary trial, and pleads guilty to a charge of burglary. He has three convictions recorded against him and has previously been to a detention centre. Before hearing the defendant's solicitor address them, the justices read the probation officer's social inquiry report, the last paragraph of which states:

"The defendant would appear to be of average intelligence although he seems to have a slight personality disorder. It is difficult to say at this stage whether he needs treatment or punishment. He has, however, kept out of trouble for three years, so perhaps the imposition of a suspended prison sentence may prove an adequate deterrent against a further offence. I am of the opinion that a probation order would not benefit him."

Having read the report, the justices then listen to the defendant's solicitor who asks the justices to follow the recommendation contained in the report that a suspended sentence of imprisonment be imposed.

The defendant is married with two young children and is at present in regular employment.

What must the justices consider before ordering that a person aged not less than 17 years but under 21 years be sentenced to a term of imprisonment, forthwith or suspended?

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(40)

Imprisonment – *Legal requirements relating to activation and non-activation of suspended sentences.*

The justices adjudicating, having given consideration to putting into effect a suspended sentence previously imposed at the same

court, feel that it would be inappropriate to do so solely because the defendant now appears before the court on a charge of a different nature. The chairman announces that the suspended sentence will not be put into effect, and gives no reasons for taking this course of action.

Is the court's decision lawful and has it been announced correctly?

What should the courts consider before activating a suspended sentence?

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(43)

Justices – *Bias of adjudicating justices.*

What particular course of action should a justice take when, on studying the court list, he feels there is a case in which he could be biased if he were to adjudicate?

Such circumstances may arise, for example, if he knows the defendant personally, or is actively employed in an organization which is party to the case before the court.

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(44)

Justices – *How justices with specialized knowledge should act.*

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(45)

No case to answer – *Submission of no case to answer in criminal proceedings.*

A person charged with the theft of groceries from a supermarket appears before a magistrates' court, represented by a solicitor. A plea of "not guilty" is tendered, and at the end of the prosecution case a submission is made by the defence solicitor that there is no case for the defendant to answer. The justices retire and after discussion agree that the prosecution have made out their case but are not sure that the defendant is guilty of the offence. The chairman, on returning to the court, announces that the prosecution have not proved their case beyond reasonable doubt and accordingly the charge is dismissed.

Have the justices applied the right test in respect of a submission of "no case to answer" in a criminal case?

What should they consider when such a submission is made?

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(46)

Offences taken into consideration – *Circumstances in which offences may be taken into consideration by justices.*

A person appears before the court on a charge of burglary which does not involve obligatory endorsement of a driving licence. He consents to summary trial and pleads guilty. The justices additionally deal with an untried offence of taking a motor vehicle without the consent of the owner, or other lawful authority, which the defendant has asked to be taken into consideration. That offence involves obligatory endorsement of a driving licence.

In what circumstances can justices take offences into consideration when determining sentence?

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(48)

Practice and Procedure – *Announcing decision of court after conviction following 'not guilty' plea.*

A defendant appears before the court and pleads not guilty to two charges of assault occasioning actual bodily harm. All the evidence has been heard by the magistrates and they then retire to consider the decision. They decide the defendant is guilty of each offence and on returning to the court the chairman immediately announces: "We find the cases proved. There will be a fine of £200."

Can the chairman's remarks be faulted?

21
(49)

Practice and Procedure – *Dealing with serious offences summarily.*

Two defendants appear before the court, charged with unlawful and malicious wounding contrary to s.20 O.A.P.A., 1861. They have consented to summary trial and have pleaded guilty. The justices listen carefully to the prosecution case and it becomes obvious to them that the matter is more serious than they had originally thought. They hear that a knife has been used during the incident and serious injuries have been inflicted. They feel that their maximum sentencing powers of six months' imprisonment together with a financial penalty of £400[1] are totally inadequate and, after considering sentence, order that each defendant be committed to the Crown Court for sentence under the provisions of s.29 M.C.A., 1952, having regard only to the serious circumstances of the offence and not to the character and antecedents of the defendants.

[1] C.L.A., 1977, s.28, when in force, will provide a maximum penalty on summary conviction for such an offence of six months' imprisonment and/or £1000 fine.

Should the justices have committed the defendants for sentence to the Crown Court in these circumstances, bearing in mind that neither of the defendants had any previous convictions?

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(51)

Practice and Procedure – *Right of defendant to address court after giving evidence.*

An unrepresented defendant appears before justices, charged with using threatening behaviour with intent to provoke a breach of the peace.

After the justices have heard the evidence for the prosecution, the defendant, having taken the oath, reads out a previously prepared statement which amounts to a denial of the charges, and he is subjected to cross-examination by the prosecutor. He then calls two witnesses who give their evidence in chief and they in turn are cross-examined by the prosecutor.

An application is then made by the defendant to address the court after the evidence for the defence is given, but the justices consider that they have already heard the case in its entirety and reject the application.

Is the defendant automatically entitled to address the court at the conclusion of the evidence in a "not guilty" trial if he has not already done so?

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(52)

Practice and Procedure – *Right to address court during trial.*

After a long, complicated case involving numerous charges to which the defendant has pleaded not guilty, his solicitor, not having previously done so, addresses the court on the facts of the case after the defendant and his witnesses have given their evidence and have been subjected to cross-examination by the prosecutor.

The prosecutor then seeks to address the court again on the facts and is prevented from doing so by the chairman who takes the view, together with his colleagues, that the prosecutor has had ample opportunity to address the court on the facts when opening the case. The case has lasted for a total of eight hours.

Should the chairman have refused the prosecutor the right to address the court a second time?

24
(53)

Practice and Procedure – *"Splitting" the decision of the court.*

A case against a defendant who is summoned for driving without due care and attention, is heard in his absence; the justices, however, having decided to convict, require him to appear at court on a later date because they have in mind imposing a driving disqualification because of the serious circumstances surrounding the offence.

They make an order that he be fined £50 for the speeding offence and also order his licence to be endorsed. They adjourn the decision relating to disqualification for a period of four weeks so that the defendant has an opportunity to attend court in person and give reasons, if any, why he should not be disqualified.

Should the justices have taken this particular course?

25
(54)

Probation orders – *Pressure put on defendant to consent to probation.*

An unrepresented female defendant, aged 19 years, consents to summary trial and pleads guilty to handling goods knowing or believing them to be stolen.

The chairman suggests that she addresses the court in mitigation before the justices read the social inquiry report which has been prepared by a probation officer.

It is clear from the report that the defendant has already expressed to the probation officer her reluctance to being made the subject of a probation order.

The chairman then informs her that the court intends to make a probation order, and he implies that if the probation order is not made, the only alternative would be a custodial sentence.

She agrees to a probation order being made.

Has the chairman acted properly?

26
(55)

Remands – *Maximum periods for remand in custody before and after conviction.*

An adult defendant appears before a magistrates' court on Tuesday, April 1, and the magistrates agree to the prosecutor's application that he should be remanded in custody before conviction for eight clear days.

When must the defendant reappear in court?

What restrictions applicable to remand periods are imposed by law?

27
(57)

Road Traffic – *Circumstances in which a court can consider imposing a disqualification until a driving test is passed.*

R.T.A., 1972, s.93(7) provides that where a person is convicted of an offence involving obligatory or discretionary disqualification, the court may, whether or not the defendant has previously passed a driving test and whether or not the court makes any other order of disqualification, order him to be disqualified until he has, since the date of the order, passed such a test.

In what particular circumstances should justices consider making a disqualification order prior to the passing of a driving test?

28
(58)

Road Traffic – *Concurrent and consecutive driving disqualifications.*

A defendant, who is already disqualified for holding or obtaining a driving licence until January 31, 1978, is convicted on April 1, 1977, of offences of driving whilst disqualified and reckless driving. He is not subject to "totting-up" disqualification and the magistrates wish to make a disqualification order relating to the offences themselves, in view of their serious nature, until January 31, 1980.

To achieve this result the order of the court is that the defendant be disqualified for one year for each of the offences — driving whilst disqualified and reckless driving — to run consecutively to each other and to the existing disqualification. The total disqualification is for a two-year period, to take effect from January 31, 1978.

Are the magistrates correct in making such a disqualification order?

29
(59)

Road Traffic – *Driving with excess blood alcohol – Mandatory driving disqualification–Should 12 months' disqualification always be imposed?*

Should courts consider a period of 12 months as being a "tariff disqualification" for persons convicted of offences of driving with excess blood alcohol?

30
(60)

Road Traffic – *Special reasons for not imposing mandatory disqualification – Misplaced sympathy for defendant.*

An unrepresented defendant appearing before the court pleads guilty to a charge of driving with excess blood alcohol. The justices consider that it would be inappropriate in the circumstances to disqualify him for the minimum mandatory period of 12 months under the provisions of R.T.A., 1972, s.93(1). They feel that there are special reasons for not disqualifying him because he is a married man with four children, a driver by occupation, and the loss of his licence would result in his losing his job. They also feel that the moving traffic offence which led to his being stopped and tested is a trivial one, the laboratory test reading revealing a blood alcohol concentration of 83 milligrammes of alcohol in 100 millilitres of his blood. This is only three milligrammes of alcohol in excess of the prescribed limit. The justices are also satisfied that the defendant is an inexperienced drinker and had miscalculated the amount of alcohol which he could consume and still be within the limits of the law.

Although their clerk has advised otherwise, they feel in all the circumstances that these are special reasons for not disqualifying the defendant for the minimum period of 12 months prescribed by law for such an offence.

Should the justices have taken this particular course?

31
(62)

Road Traffic – *Some differences between "special reasons" and "mitigating circumstances" relating to road traffic offences.*

What basic differences are there between "special reasons" and "mitigating circumstances" as applied to disqualifications and endorsements relating to road traffic offences?

32
(65)

Time to pay – *Allowing time for payment of sums imposed by the court.*

When allowing a defendant time to pay a sum imposed by the court, should magistrates, as a general rule, order payment by instalments or order that the sum be paid within a specified period?

What other points should magistrates consider when imposing fines?

ANSWERS

A. Criminal Proceedings

I

Under J.P.A. 1361 justices have power of their own motion to bind over, with or without sureties, any person appearing before them, to keep the peace and be of good behaviour. They may also make binding-over orders on complaint made by any person. (M.C.A. 1952, s.91).

In this case the justices have acted contrary to the rules of natural justice, so far as the binding-over of the prosecution witness is concerned.

In similar circumstances to this particular case Lord Parker, C.J. in *Sheldon and Another v Bromfield Justices* [1964] 2 All E.R.131 stated:

> "It seems to me to be elementary justice that particularly *a mere witness* before justices should at any rate be told what is passing through the justices' minds and should have an opportunity of dealing with it. In my judgment the respondent justices can be said here to have acted contrary to natural justice, and, accordingly, for my part I would allow this appeal and quash the binding-over order."

However, in the case of *R v Woking Justices, ex parte Gossage* [1973] 2 All E.R. 621; 137 J.P. 565, where a *defendant was acquitted,* of a charge of using insulting behaviour whereby a breach of the peace was likely to be occasioned but was, without previous warning, ordered to enter into a recognizance to keep the peace, Lord Widgery, C.J. said:

> ". . . . it seems to me to be putting it far too high in the case of an acquitted defendant to say that it is a breach of the rules of natural justice not to give him an indication of the prospective binding-over before the binding-over is imposed. That is not to say that it would not be wise, and indeed courteous in these cases for justices to give such a warning. There certainly would be no harm in a case like the present one if the justices, returning to court, had announced they were going to acquit, and had immediately said: 'We are, however, contemplating a binding-over order; what have you got to say?'"

In *R v Hendon Justices, ex parte Gorchein* [1974] 1 All E.R. 168; 138 J.P. 139, Lord Widgery, C.J., stated in relation to the binding-over of *complainants* appearing before the court:

> "For my part I see no real distinction between a complainant and a witness. Neither comes to court expecting to receive any penalty or to be the subject of a binding-over, and Lord Parker's dictum [in *Sheldon and Another -v- Bromfield Justices,* supra], with which the other members of the court agreed, seems to me *to be equally appropriate to someone who is a complainant and witness as someone who is a witness simpliciter."*

He went on to say:

> ". . . . in the end it seems clear to me that the justices here failed in their duty in not warning the applicant that they had a binding-over order in mind. *I think it is high time that this particular error should be eradicated because it is the easiest thing in the world for justices who contemplate binding-over to say what they have in mind and ask the intended recipient what he has to*

say. They ought to observe that rule. If they do not their conclusion is liable to be upset on certiorari, as is the decision of these justices."

Similar observations were made in *R v Keighley Justices, ex parte Stoyles* [1976] Crim. L.R. 573.

The words of Lord Parker, C.J., in *R v Aubrey-Fletcher, ex parte Thompson* [1969] 2 All E.R. 846; 133 J.P. 450, should also be borne in mind in all cases before a binding-over order is made by justices. He said in that case:

"An order under the Act of 1361 can, however, be made at any time during the proceedings, subject of course to an opportunity being given to the applicant or his advisers to argue against it. That was the decision of this court in *Sheldon v Bromfield Justices.* At the same time, as it seems to me there is no jurisdiction to make this order unless, in the course of proceedings, *it emerges that there might be a breach of the peace in the future.*"

In *R v South West London Magistrates' Court, ex parte Brown and Others* [1974] Crim. L.R. 313 it was again emphasized that before a court could exercise the jurisdiction of preventive justice by binding-over, *there had to be material before the court causing it to fear that, unless steps were taken to prevent it, there might be a breach of the peace.* The material, which did not have to be sworn evidence had to be such that, when considered carefully and not capriciously, it justified a conclusion that there was a risk of a breach of the peace unless action was taken to prevent it. If there was no material from which the court could be apprehensive of a breach of the peace, consent by a person to being bound over would not confer jurisdiction on the court to make the order. The effect of the defendant's consent was not to confer jurisdiction on the magistrates to make the orders, but to relieve them of the duty to give the person to be bound over the opportunity to show cause why such an order should not be made.

These last two cases underline the fact that magistrates must always have reasonable grounds before proceeding to consider binding-over any person appearing before them.

Note also

In making a binding-over order the justices should not impose additional conditions such as those which may be inserted when granting bail. (*R v Ayu* (1959), 123 J.P. 76; *Edward Lister v David Healey Morgan* [1978] Crim.L.R.292).

2

The court has a statutory discretion whether to grant bail or remand in custody any defendant committed to the Crown Court for sentence. In such matters, reference must be made to C.J.A., 1967, s.20 as amended by the C.A., 1971, schedule 8, which provides:

"Where a magistrates' court has power to commit an offender to the Crown Court under . . . s.28 or s.29 M.C.A., 1952 (committal for sentence), the court may, instead of committing him in custody, commit him on bail."

This statutory rule serves to underline the discretion given to the court in these circumstances, but in exercising their discretion courts are able to have the advantage of other guidance.

The Bail Act, 1976 creates a statutory presumption in favour of the grant of bail. This Act, however, does *not* apply in cases where a defendant is committed to the Crown Court for sentence.

Where justices order a person's committal to the Crown Court for sentence under s.29 M.C.A., 1952, they must be satisfied that "on obtaining information about his character and antecedents (they are) of opinion that they are such that greater punishment should be inflicted for the offence than the court has power to inflict."

The maximum custodial sentence that the justices can impose for an indictable offence dealt with summarily with the consent of the accused as specified in sch. 1, M.C.A., 1952, is a term of six months' imprisonment or a maximum term of 12 months' imprisonment when two or more indictable offences are dealt with summarily[1] (M.C.A., 1952, s.108(2)). It follows in most cases that the justices must consider that the defendant should serve a lengthy term of imprisonment when such a committal for sentence to the Crown Court is ordered.

With the daunting prospect of a lengthy custodial sentence being imposed, there must, in a normal case, be a strong likelihood of a defendant absconding *or* committing further offences if committed to the Crown Court for sentence on bail. The discretion to grant bail in such cases should be exercised sparingly and with extreme caution, bearing in mind the interests of the public at large.

In this regard the following words of Lord Parker, C.J., in the Court of Appeal (Criminal Division) in the case of *R v Coe* [1969] 1 All E.R. 65; 133 J.P. 103, should serve as a guideline for justices:

> "There is power now to grant bail to an accused committed for sentence under s.29 M.C.A., 1952, but in the opinion of this court the cases must be rare when justices can properly commit for that purpose on bail because the whole purpose of the committal is to have the accused sent to prison, and have him sent to prison for a longer period than the justices could impose."

Prior to 1967 such a committal had to be in custody.

The words of Lord Parker would apply equally to committals to the Crown Court with a view to a sentence of borstal training under M.C.A., 1952, s.28.

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[1] Under C.L.A., 1977, s.14 there will only be three classes of offences (i) offences triable summarily only, (ii) offences triable either way, (iii) offences triable only on indictment.

These provisions are not yet in force. The maximum terms of imprisonment stated will still apply to most offences "triable either way".

3

In considering committals to the Crown Court for sentence it should be remembered that M.C.A., 1952, s.29 and P.C.C.A., 1973, s.42, apply to persons aged 17 years and over and M.C.A., 1952, s.28 and C.J.A., 1948, s.20, apply to persons not less than 15 but under 21 years of age.

P.C.C.A., 1973, s.42 provides:

"Where an offender is committed by a magistrates' court for sentence under s.29 of the M.C.A., 1952, ..., the Crown Court shall inquire into the circumstances of the case and shall have power to deal with the offender in any manner in which it could deal with him if he had just been convicted of the offence on indictment before the court."

C.J.A., 1948, s.20(5), as amended, provides:

"Where an offender is so committed for sentence as aforesaid (that is, s.28, M.C.A., 1952), the following provisions shall have effect, that is to say:–

a) the Crown Court shall inquire into the circumstances of the case and may–

i) if a sentence of borstal training is available in his case . . . sentence him to borstal training; or

ii) in any case, deal with him in any manner in which the court of summary jurisdiction might have dealt with him."

Lord Parker, C.J. presiding in the Court of Criminal Appeal in *R v Dangerfield* [1959] 3 All E.R. 88; 123 J.P. 421 said in relation to committals for sentence:

"I should like to mention one further matter which is often overlooked. In the case of an offender who is 17 years old, as the appellant was, it is often possible for magistrates to commit the offender to quarter sessions for sentence under s.29 of the Act of 1952. That is a general committal, and not merely a committal for a sentence of borstal training, and then, under s.29(3) of the C.J.A., 1948 (now P.C.C.A., 1973, s.42), quarter sessions will have complete power to deal with the matter and are not limited in the way in which they are limited when their powers are derived from s.20 of the Act of 1948.

"Accordingly, as this Court has said before, magistrates should remember that, in the case of an offender of 17 years of age, or over that age, it is simpler to commit him in a proper case under s.29, rather than s.28, of the M.C.A., 1952."

The magistrates in the circumstances outlined in the question have, it would seem, taken the correct course, and have allowed the judge to impose whatever sentence he feels appropriate; they have not inhibited his powers, should he feel that a further term of borstal training is not suitable.

On occasions, justices have committed defendants to the Crown Court under the provisions of s.28 M.C.A., 1952 with a view to a sentence of borstal training, and the judge has been obliged to make an order for borstal training or impose a sentence which the magistrates themselves could have imposed, even though in the judge's own view a lengthy term of imprisonment was appropriate.

Although the remarks of Lord Parker, C.J. in *R v Dangerfield*, supra, still hold good the provisions of C.J.A., 1961, s.3, which came into effect after that case was decided, have had a profound effect on committals for sentence. That section restricts all courts when dealing with a person aged 17 but under 21 years to imposing sentences of imprisonment for a term of six months or less or, where the court has power to pass such a sentence, for a term of three years or more. Where the person has previously served a sentence of imprisonment of six months or more or a sentence of borstal training, the reference to a term of three years' imprisonment or more shall be substituted by a reference to a term of 18 months' imprisonment or more.

The end result of this legislation for this age group is that no sentence of between six months' imprisonment (which in any event in many cases can be imposed by a magistrates' court) and three years (or 18 months, where appropriate) can be imposed by the Crown Court.[1]

It follows, therefore, that in many cases the magistrates may feel there is no reasonable prospect of such a sentence of imprisonment being imposed at the Crown Court and that a committal for sentence under s.29 of the 1952 Act would be a pointless exercise.

In cases of doubt, however, it is suggested that the committal be under s.29 as opposed to s.28 of the Act, for the reasons as set out in *R v Dangerfield.*

4

Section 7(1) M.C.A., 1952 which relates to "conventional" committal proceedings states:

> "Subject to the provisions of this and any other Act relating to the summary trial of indictable offences, if a magistrates' court inquiring into an offence as examining justices, is of opinion, on consideration of the evidence and of any statement of the accused, that there is sufficient evidence to put the accused upon trial by jury for any indictable offence, the court shall commit him for trial, and, if it is not of that opinion, it shall, if he is in custody for no other cause than the offence under inquiry, discharge him."

The function of committal proceedings, it seems, therefore, is purely for the court to decide whether or not sufficient evidence has been submitted to it to enable the court to commit the accused to the Crown Court for trial by jury.

This view was confirmed in *R v Epping and Harlow Justices, ex parte Massaro* [1973] 1 All E.R. 1011; 137 J.P. 373 in which Lord Widgery, C.J., stated:

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[1] Lord Widgery, C.J. referred to this section as a "potent source of injustice" in *R v Harnden* (1978), *The Times,* January 16.

"I think it is clear that the function of committal proceedings is to ensure that no one shall stand his trial unless a prima facie case has been made out. The prosecution have the duty of making out a prima facie case, and if they wish for reasons such as the present not to call one particular witness, even though a very important witness, at the committal proceedings, that, in my judgment is a matter within their discretion, and their failure to do so cannot on any basis be said to be a breach of the rules of natural justice."

In that case the prosecution indicated that they were not anxious to call at committal proceedings as well as at the trial in the Crown Court, a young girl who was alleged to have been the victim of an indecent assault. An order for certiorari to quash an order committing the defendant for trial at the Crown Court was refused by the Queen's Bench Divisional Court.

Lord Widgery in his judgment implied that committal proceedings are not to be used as rehearsal proceedings so as to allow a defence advocate to "test" the prosecution witnesses and to use the information obtained from their cross-examination to advantage in the Crown Court. The sole purpose of the proceedings is to determine whether or not the defendant has a prima facie case to answer at the Crown Court.

5

There are *two* methods a ilable to examining justices for committing accused persons for trial at the Crown Court.

They are committal proceedings without consideration of evidence, under the provisions of C.J.A., 1967, s.1 and the "conventional" form of committal proceedings under the provisions of M.C.A., 1952, s.7 where depositions are taken or written statements of witnesses are read aloud to the court, or a combination of these courses is taken.

Most committal proceedings are without consideration of the evidence. These are commonly known as "Section One committals". In these circumstances the accused must be represented by counsel or a solicitor and the court must have been informed that all the evidence for the prosecution is in the form of written statements, copies of which have been given to the accused.

The effect of agreeing to such a committal is that the accused does not object to any of the prosecution statements being tendered in evidence, does not wish to give evidence himself or call witnesses and does not wish to submit that the prosecution statements disclose insufficient evidence to put the accused on trial by jury for the offence(s). If any of these conditions do not apply, the committal proceedings must take the "conventional" form. (M.C.R., 1968, r.3).

Even though the magistrates in a committal under C.J.A. 1967, s.1 are not entitled to consider the evidence before committing the accused for trial, they are entitled to consider the contents of the statements with a view to deciding upon the appropriate court of

trial, bail and legal aid applications and whether or not witnesses should be conditially bound to attend at the Crown Court. The statements may also be considered to enable the court to determine the costs incurred by the prosecution.

The "conventional" form of committal proceedings can be lengthy as the defence may cross-examine all or some of the prosecution witnesses and the written statements of the remaining witnesses, if any, must then be read aloud in open court. The accused must also be given an opportunity to give evidence himself and to call witnesses. (M.C.R., 1968, r.4(10)). (*R v Horseferry Road Magistrates' Court, ex parte Adams* (1977) *The Times,* June 22).

The magistrates, after considering all the evidence, must decide whether the defendant should stand his trial at the Crown Court on the evidence tendered before them. These are sometimes known as "old style" committal proceedings, and before the C.J.A., 1967 came into force all committal proceedings took this form.

Frequently, the "conventional" form of committal proceedings is wrongly referred to in court as a "Section Two committal". It should be emphasized that there is no such committal as a "Section Two committal". Section 2, C.J.A., 1967, merely relates to written statements tendered in committal proceedings before examining justices. When "Section Two committals" are referred to in court, they should be treated as "conventional" committal proceedings under the provisions of M.C.A., 1952, s.7, even though in some cases only one prosecution witness may be called to give evidence and the remainder of the evidence is heard by way of written statements read aloud to the court. This would also be so if (as sometimes occurs) all the statements are read out to the court and no witnesses are called, the defence solicitor submitting to the court that the prosecution statements disclose insufficient evidence to put the accused on trial by jury for the offence(s).

In relation to the "conventional" form of committal proceedings s.7(1) M.C.A., 1952 states:

> ". . . . on consideration of the evidence and of any statement of the accused, (the examining justices are of opinion) that there is sufficient evidence to put the accused upon trial by jury *for any indictable offence,* the court shall commit him for trial, and, if it is not of that opinion, it shall, if he is in custody for no other cause than the offence under inquiry, discharge him."

Any "indictable offence" means any disclosed in the evidence and not merely the offence(s) originally preferred against the accused. This situation may arise, for example, where an accused was originally charged with an offence of robbery and the examining justices are satisfied no force was used on the victim or some other essential ingredient of the offence of robbery is not present. The justices could in these circumstances commit the defendant to the Crown Court for trial on a charge of *theft only,* having discharged him in

relation to the robbery charge. However, where the court determines to commit the accused for trial in respect of a different offence from that charged, the new charge must be read to him. (M.C.R., 1968, r.4(12)).

Although, frequently, there will be a bench comprised of the usual number of two or more justices, the functions of examining justices in committal proceedings may be discharged by a single justice. (M.C.A., 1952, s.4(1)).

6

This is all too common a mistake made in announcing the sentence of the court.

The Chairman should have stipulated that the defendants "pay *compensation* of £2 each" and no order for restitution should have been made.

It is essential to appreciate the difference between an order for compensation and restitution. One compensates for personal injury, loss or damage, whereas one orders restitution of the original property stolen, etc. by the defendant to the loser, a little difficult in the example given in the question where the food has been consumed.

Compensation

P.C.C.A., 1973, s.35(1), which deals with the powers of courts to make compensation orders against convicted persons, states:

> ". . . a court by or before which a person is convicted of an offence, in addition to dealing with him in any other way, may, on application or otherwise, make an order (in this Act referred to as "a compensation order")[1] requiring him to pay compensation for any personal injury, loss or damage resulting from that offence or any other offence which is taken into consideration by the court in determining sentence."

"Compensation orders", therefore, may be made *without application* by the prosecutor or victim. They may also be made in respect of offences taken into consideration.

There is no power to make a compensation order in respect of loss suffered by the dependants of a person in consequence of his death, and no such order shall be made in respect of injury, loss or damage due to an accident arising out of the presence of a motor vehicle on a road, unless that damage was caused as a result of an offence under the Theft Act. (P.C.C.A., 1973, s.35(3)). A compensation order therefore could be made, for example, where a vehicle is damaged, having been taken without the consent of the owner or other lawful authority, contrary to s.12 of that Act.

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[1] A compensation order can be made up to an amount of £1000 in respect of each offence of which the defendant is convicted. (P.C.C.A., 1973 s.35(5) as amended by C.L.A., 1977, s.60.) Special provisions apply for the calculation of the amount where offences are taken into consideration.

A "compensation order" relates to the payment of a specific sum of money to a victim and may be awarded wherever the circumstances justify it, provided the award is in accordance with the many guidelines relating to compensation orders which have been laid down in the High Court.

In the following situations a "compensation order" could be considered by the court, provided other circumstances such as the defendant's means justify the award. (P.C.C.A., 1973, s.35(4)).
Criminal damage: broken windows, damage to cars and clothes, graffiti on walls or fences, etc.

Theft, etc.: stolen property which is not recovered and stolen property which is recovered but is damaged when it is recovered.

Assaults and other offences of violence: awards of compensation can be made for injuries sustained by the victim of an assault charge.

Fraud: many offences of fraud (for example, forgery, etc.) result in a loss and the loser could suitably be reimbursed by way of a compensation order.

Generally: there are a multitude of criminal offences where loss or damage results and a compensation order can properly be made. The Court of Appeal has, however, questioned whether it is proper to order compensation in respect of offences under the Trade Descriptions Act, 1968. (*R v Lester* [1976] Crim. L.R. 389). The power of the court to order compensation should be used only in cases where this is justified by the character of the offence, for example, a court in exercising its discretion may feel it improper to award compensation where the defendant is charged with a regulatory offence such as a television licence offence.

Restitution

Although an order for compensation can be made where the defendant is convicted of varying degrees of offences under several different Acts, or asks for such offences to be taken into consideration, an order for "restitution" *can only be made under the Theft Act, 1968.*

T.A., 1968, s.28, provides in relation to "restitution orders" that where goods have been stolen or obtained by deception or blackmail, the court convicting a person of any offence with reference to the theft (whether or not the stealing is the gist of his offence) may:

a) order the person in possession or control of the goods to restore them to any person entitled to recover them from him.

or b) on the application of a person entitled to recover the stolen goods order that any other goods directly or indirectly representing the stolen goods be delivered or transferred to that person.

or c) order that a sum not exceeding the value of the goods stolen and found in the defendant's possession on his arrest, be paid to the person entitled to recover the stolen goods.

A combination of orders under (b) and (c) above in respect of the same goods may be made, provided that the person in whose favour the orders are made does not recover more than the value of those goods. (T.A., 1968, s.28(2)).

"Restitution orders" may also be made in respect of offences taken into consideration. (C.J.A., 1972, s.6(3)(4)). Such a power also applies to compensation orders. (see above).

An order for restitution can be made after conviction even though the remainder of the sentence is deferred. (T.A., 1968, s.28(1) as amended by C.L.A., 1977, sch.12). No such power applies to compensation orders.

In many instances the police make arrangements for the goods to be returned to the person entitled to them, without the necessity of a "restitution order" being made by the court.

Great care should be taken before magistrates make a "restitution order".

In this respect the words of Salmon, L.J., in *Stamp v United Dominions Trust (Commercial), Ltd.,* [1967] 1 All E.R. 251; 131 J.P. 177 should be noted:

> "It is only in the simple case where there is no doubt about the ownership of the goods and no question arises under the Hire Purchase Act, 1964 that normally the discretion to make a restitution order can properly be exercised."

Normally, therefore, there are vast differences between "compensation orders" and "restitution orders" and the terms should not be confused. *Orders for compensation are regularly made by the courts but "restitution orders" in practice are rarely made in magistrates' courts.*

It is clear that in the circumstances of the present case an order for restitution would have been quite inappropriate and a compensation order should have been made.

7

When dealing with a defendant who has committed further offence(s) during the currency of a probation order or order for conditional discharge, magistrates should ensure that he is sentenced for each offence for which the original order was made. If a probation order, for example, was made for three separate offences of theft, the defendant, if fined on a future occasion for the original offences, should be ordered to pay separate fines for each of the offences and the court should make it clear what amount is imposed for each offence. An entry to this effect should also be made in the court register.

An original offence should never be taken into consideration in this type of situation.

In *R v Webb* [1953] 1 All E.R. 1156; 117 J.P. 319, Lord Goddard, C.J. in giving the judgment of the Court of Criminal Appeal said:

> "It is, therefore, undesirable and indeed wrong, to take breaches of probation or of conditions of discharge into consideration. They should be separately dealt with and separate sentences passed so that the original offences may rank as convictions . . . . . There may be cases in which a court would think fit to make the sentences for the original and subsequent offences concurrent, but it would seem desirable that this power should only be used exceptionally. It is most important that an offender should be made to realize that discharge, whether on probation or conditionally, is not a mere formality, and that a subsequent offence committed during the operative period of the order will involve punishment for the crime for which he was originally given the benefit of this lenient treatment."

In *R v Stuart* [1964] 3 All E.R. 672; 129 J.P. 35, Hinchcliffe, J. said that in such a situation "the sentence should in general be made consecutive and should be more than a nominal one".

Where a person is dealt with for the original offence(s) for which a probation order or conditional discharge was made, the probation order or conditional discharge will cease to have effect and the defendant will no longer be liable to be dealt with in respect of the original offence(s). (P.C.C.A., 1973, s.5(2) and s.7(4)). Any order for costs or compensation will, however, continue. (*R v Evans* [1961] 1 All E.R. 313; 125 J.P. 134).

Magistrates should act cautiously before dealing with a defendant for an original offence. In some circumstances their powers are limited by statute.

If a person subject to a probation order, or an order for conditional discharge made by the Crown Court, is convicted by a magistrates' court of an offence committed during the relevant period, the magistrates' court may commit him to custody or release him on bail until he can be brought or appear before the Crown Court (P.C.C.A., 1973, s.8(6)). Magistrates have no power to deal with such a breach themselves but may, if they feel it appropriate, commit the defendant to the Crown Court for suitable disposal.

When a defendant subject to a probation order or an order for conditional discharge made by a magistrates' court *is convicted by another magistrates' court* of any offence committed during the operational period of the order, he cannot be dealt with for the original offence(s) *without the consent of the court which made the order, or, in the case of a probation order, with the consent of that court or the supervising court. (P.C.C.A., 1973, s.8(9)).*

Where a person commits an offence during the operational period of a probation order or an order for conditional discharge, then provided the legal requirements have been complied with, *the magistrates have a discretion* as to whether or not they deal with the defendant for the original offence(s) for which the order was made.

If justices decide to deal with a defendant for the original offence(s) for which the order was made, they may deal with him in any manner in which they could deal with him if he had just been convicted by or before that court of that offence(s). (P.C.C.A., 1973, s.8(7)). It should be stressed, however, that before so dealing with a defendant for an offence for which a probation order or conditional discharge was imposed, the court should be as fully acquainted with the circumstances relating to the original offence as it would be if the defendant were appearing before the court for the first time on the original offence. This important point was emphasized in *R v Laval* [1977] Crim. L.R. 627 where the Court of Appeal observed that a six months' prison sentence for original offences for which the defendant had previously been placed on probation, was wholly wrong in principle as there had been no inquiry as to the circumstances of the original offences.

8

It is, of course, human to be swayed by an emotional plea in mitigation, humanity being an essential part of justice. In this particular case, however, and indeed in all matters being dealt with by a criminal court, regard must be paid to the terms of the statute which allows a court to grant an order for conditional or absolute discharge when determining sentence. If all the relevant factors are not present then it is clear that Parliament intends that punishment in one of its many forms should be imposed. The court must also consider that a probation order is not appropriate in the circumstances.

The relevant sub-section which should be considered in its entirety before making an order for conditional or absolute discharge is as follows:

> "Where a court by or before which *a person* is convicted of an offence (not being an offence the sentence for which is fixed by law) is of opinion, having regard to the circumstances including the nature of the offence and the character of the offender, *that it is inexpedient to inflict punishment* and that a probation order is not appropriate, the court may make an order discharging him absolutely, or, if the court thinks fit, discharging him subject to the condition that he commits no offence during such period, not exceeding three years from the date of the order, as may be specified therein." (P.C.C.A., 1973, s.7(1)).

Magistrates should not be tempted into imposing a conditional or absolute discharge where these requirements are not complied with, no matter how strong the plea in mitigation from the defence advocate.

Explaining the order

P.C.C.A., 1973, s.7(3) provides:

> "*Before* making an order for conditional discharge, the court shall explain to the offender in ordinary language that if he commits another offence during the period of conditional discharge he will be liable to be sentenced for the original offence."

Whether the explanation should be given by the chairman or the clerk is a matter of policy for each individual court.

An explanation in the following terms would suffice:

"The court proposes to make an order for conditional discharge for a period of (two years).

"This means that instead of punishing you for this offence the court will discharge you on condition that you do not commit another offence during the next two years.

"If you do commit another offence during that period you will be liable to be sentenced for this offence.

"You will be discharged conditionally for (two years)."

In *R v Wehner* (1977) *The Times*, April 5, the Court of Appeal held that the subsection does not prohibit the court from delegating to, for example, a solicitor or counsel its function of explaining to the defendant the effect of a conditional discharge, always provided the court is satisfied that the explanation has been made and understood *before* the order is made. Their Lordships, however, had no doubt that the subsection embodied the intention of Parliament *that the court should explain personally to the defendant the effect of the order.* It did not, however, follow that Parliament intended to lay down an inflexible rule.

An order for conditional discharge, unlike a probation order which must be made *for not less than six months nor more than three years, can be made for any term up to three years*[1]. The order must take effect from the date it is imposed and cannot run consecutively to an existing order or take effect at some future date.

Where a person who was originally conditionally discharged for an offence is dealt with at a later date for the original offence, the order for conditional discharge ceases to have effect. (P.C.C.A., 1973, s.7(4)).

9

When a defendant for the offence(s) before the court is made the subject of a probation order, or a conditional or absolute discharge, the court cannot consider dealing with the defendant for the breach of any existing probation order or order for conditional discharge.

A conviction of an offence for which such an order is made: "shall be deemed not to be a conviction for any purpose other than the purposes of

[1] C.L.A., 1977, s.57 empowers the Secretary of State to make an order varying the statutory maximum or minimum period relating to probation orders or conditional discharges.

the proceedings in which the order is made[1] and of any subsequent proceedings which may be taken against the offender under the preceding provisions of this Act." (P.C.C.A., 1973, s.13(1)).

These provisions refer, amongst others, to the commission of a further offence during the probation period or period of conditional discharge.

The following words from *Morrison and Hughes on the Criminal Justice Act, 1948*, were quoted with approval in *R v Harris* (1950) 114 J.P. 535 when the effect of such an order was explained by the court.

"The section absolves the offender from legal consequences which otherwise would flow from a conviction."

It follows, therefore, that if a defendant is made the subject of a probation order, or is granted a conditional or absolute discharge for the offence before the court, he cannot be said to have been convicted of an offence during the currency of such an order and cannot, therefore, be dealt with for the original offence. Similarly, where a person who is the subject of a suspended term of imprisonment is convicted of another offence punishable with imprisonment during its operational period, he cannot be dealt with for the suspended sentence if he was made the subject of a probation order, or was conditionally or absolutely discharged for the subsequent offence. (*R v Tarry* [1970] 2 All E.R. 185; 134 J.P. 469).

Additionally, where it is possible to deal with the original offence, it should be noted that the consent of the other magistrates' court must be obtained before justices can deal with the original offence for which a conditional discharge or probation order was imposed by the other court. (P.C.C.A., 1973, s.8(9)).

The clerk will be in a position to inform the bench whether or not this consent has been received. As a general rule, the court will receive a certified extract of conviction from the court register of the court which made the original order and the consent of the other court is frequently endorsed upon the certified extract.

10

Male persons aged 14 to 20 years inclusive, who appear before the court and are convicted of offences punishable with imprisonment in the case of an adult, may in certain circumstances be sentenced to a term of detention centre training.

Consideration must be given to the following:

If the defendant has not previously been sentenced to detention centre training, he must be legally represented unless he has applied

[1] For example, to enable the court to order compensation, costs, etc.

for legal aid and it has been refused on the grounds of means, or, knowing of his right to apply for legal aid and having had the opportunity to do so, has refused or failed to apply. (P.C.C.A., 1973, s.21(1)).

The Secretary of State has recommended that before making a detention centre order, a court should, as a normal practice, consider a social inquiry report by a probation officer. (H.O.C. 188/1968). This has the benefit of assisting the court in identifying any offender who may be unsuitable for detention centre training. This view was also taken in *R v Barton* (1977), Crim. L.R. 435.

The justices are requested to contact the appropriate detention centre through their clerk and ascertain whether any vacancies exist at the detention centre. This assists the warden of the centre in making arrangements for the reception of offenders and helps to prevent unnecessary overcrowding in detention centres. Although it should be accepted as standard practice to contact the centre beforehand, courts are not in fact obliged by law to ensure that a vacancy is available in a detention centre, but merely have to be satisfied that a detention centre is available for the reception from that court of such persons. (C.J.A., 1961, s. 4(3)).

Courts have been advised that if there is no vacancy in the allocated detention centre, the clerk can take steps to contact a representative from the Home Office to ascertain whether any vacancies exist at any other centres.

Restrictions on making Detention Centre Orders

There are certain restrictions relating to those who can be committed to a detention centre.

No detention centre order shall be made in respect of a person who is serving or has served a sentence of imprisonment for a term of not less than six months or a sentence of borstal training, unless it appears to the court that there are special circumstances (whether relating to the offence or the offender) which warrant the making of such an order in his case. (C.J.A., 1961, s.4(4)).

Referring to the imposition of a second term of detention centre training, Sachs, L.J., in the Court of Appeal (Criminal Division) in the case of *R v Moore* [1968] 1 All E.R. 790; 132 J.P. 196 stated:

"This court has said on more than one occasion that it is only in very rare cases that a sentence to a detention centre should be imposed when the accused has already served one such sentence. The reason for that lies in the nature of the discipline at those centres, and the way in which it is expected to have an immediate impact on those serving the sentence."[1]

[1] It is arguable whether or not these words are still effective. In 1968 detention centre training could be described as a "short, sharp shock" but at the present time more emphasis is placed on rehabilitation in detention centres.

The Report of the Advisory Council on the Penal System, published by H.M. Stationery Office in 1970, agreed that it would be difficult to envisage any general value in repeated sentences but recognized that they may be occasionally suitable.

The Report concluded that where courts deal with an offender who has been to approved school as a result of delinquency, they would be well advised to consider whether borstal training might not be more appropriate than detention in a detention centre. The courts took a similar view in *R v Nolan* [1967] Crim. L.R. 117, where on appeal, a sentence of borstal training was substituted for detention centre training.

It was also stated that it would be undesirable to make a detention centre order in respect of an offender who is seriously handicapped physically or mentally, or needs immediate medical treatment. If it appears to the court that it is possible that the offender is so handicapped, the court should ask for a medical report if the information in the social inquiry report is insufficiently detailed to enable a firm conclusion to be reached.

It was stressed in the Report that while detention centres do not provide the ideal solution to the problems of the mentally disturbed young offender, in present circumstances disturbed young people who are not medically or psychiatrically ill can be adequately catered for in detention centres. In cases of doubt the court should obtain a medical report, as indicated above.

A medical report should also be called for, as well as a social inquiry report, where an offender appears to be dependent on drugs.

Advice has also been offered to the effect that if magistrates are not convinced as to a person's physical fitness, they may avoid a lengthy remand by arranging for a doctor to provide a report following an examination of the defendant within the precincts of the court as to the defendant's fitness in relation to detention centre training.

The Report also confirmed that the minimum term of three months' training in a detention centre remains the most effective under the present régime, and suggests that if detention in a detention centre is to be productive, it should be applied before the offender accumulates a long string of previous convictions. Whilst not dissenting from this view, the then Secretary of State suggested that courts should, however, continue to consider other available measures before passing a sentence for detention centre training. Aggregate sentences exceeding six months in total should be avoided.

Provision is made under C.J.A. 1961, sch. 1, that a person subject to a detention centre training order should be subject to supervision for a period of 12 months after his release. The Council found that while this was explained to an offender as a matter of practice at

an early stage of the period in custody, it was not always explained when sentence was passed.

The Secretary of State commended the practice suggested in the Report, that courts, when making a detention centre order, should draw the defendant's attention to the supervision provisions, because if the offender becomes aware only subsequently of what he may regard as an additional penalty, he may harbour a feeling of resentment, harmful to his treatment.

In conclusion it should be mentioned that there are no detention centres for females and there is no power to suspend a detention centre order.

II

It is well known that a person charged with an offence can give sworn evidence from the witness box, in which case he may be cross-examined by the prosecutor, or if he wishes, he may make an unsworn statement from the dock in which case he cannot be cross-examined. He is not obliged to say anything to the court unless he wishes to do so.

In *R v Frost and Hale* (1964) 48 Cr.App.R.284 the Court of Criminal Appeal held that a statement from the dock was more than mere comment but was not evidence in the sense of sworn testimony subjected to cross-examination. It was stated in that case that where a prisoner makes a statement from the dock it would be the proper practice for the judge not necessarily to read the statement out to the jury, but to remind them of its contents and to tell them that it is not sworn evidence which can be cross-examined.

Lord Parker, C.J. said that the jury:

> "can attach to it such weight as they think fit, and should take it into consideration in deciding whether the prosecution have made out their case so that they feel sure that the prisoner is guilty."

Since that case the Court of Appeal in *R v Coughlan* (1976) *The Times*, July 16 has now made it clear that where a person charged with an offence chooses to make an unsworn statement from the dock, although that statement could throw light on other evidence and might influence the jury's (or magistrates') decision, *its potential effect was persuasive rather than evidential.* It could not prove facts not otherwise proved by the evidence, but it might make the jury (or magistrates) see the proved facts and the inferences to be drawn from them in a different light. Insomuch as an unsworn statement might thus influence the decision of the jury or magistrates, they should be invited to consider the content of the statement in relation to the whole of the evidence.

Shaw, L.J., stated that the C.E.A., 1898, expressly preserved the right of a person charged with an offence to make an unsworn statement from the dock (s.1(h)) in addition to allowing him for the

first time to be a witness in his own defence (s.1(g)). Section 1 of the 1898 Act made a clear distinction between the position where an accused person elected to assume the role of a witness in his defence and that where he made an unsworn statement. In the latter case he was not a witness and he did not give evidence.

The court decided that whatever status might be assigned to an unsworn statement, it could hardly vie with sworn evidence in cogency and weight, and it was right, in a trial at the Crown Court, that the jury should be told that a statement not sworn to and not tested by cross-examination had less cogency and weight than sworn evidence. Similar tests should apply in magistrates' courts.

12

Justices have a discretion when putting into effect a previously imposed suspended sentence, to order that the sentence take effect concurrently or consecutively to any other term of imprisonment imposed.

In this respect statute provides:

"Where a court orders that a suspended sentence shall take effect, with or without any variation of the original term, the court may order that that sentence shall take effect immediately or that the term thereof shall commence on the expiration of another term of imprisonment passed on the offender by that or another court." (P.C.C.A., 1973, s.23(2)).

However, Edmund Davies, L.J. in the case of *R v Ithell* [1969] 2 All E.R. 449; 133 J.P. 371 said:

"The proper approach, where a fresh offence has been committed during the period of suspension of an earlier sentence and the accused is brought before the court, is that the court should first sentence him in respect of the fresh offence by punishment appropriate to that offence, and thereafter address itself to the question of the suspended sentence."

He went on to say:

"Furthermore, as Lord Parker, C.J. said in *R v Brown* (1968) *The Times*, November 12 unless there are some quite exceptional circumstances, the suspended sentence should be ordered to run *consecutively* to the sentence given for the current offence."

It must be appreciated that the original bench of justices imposed a sentence of imprisonment for the previous offence, suspended on certain conditions which have since been breached. Unless the bench on the subsequent occasion orders that the suspended term of imprisonment take effect consecutively to any other term of imprisonment imposed, it is in effect (if it is to be implemented), allowing the defendant to "get off" with a nominal sentence for the previous offence(s). Each case, however, must be treated on its individual merits, and there may be cases where a suspended sentence can reasonably be ordered to take effect concurrently to any other term of imprisonment. These circumstances, however, must be exceptional to justify such a course as is shown in *R v Deering* [1976] Crim. L.R. 638.

The circumstances in *R v Deering* were as follows. The defendant, after being in custody for 18 weeks, had previously been sentenced in 1974 to six months' imprisonment suspended for two years for an offence of taking a motor vehicle without the consent of the owner or other lawful authority. In 1975 he was sentenced to two years' imprisonment for further offences and the suspended sentence was ordered to take effect *consecutively*.

It was contended on appeal that the suspended sentence should not have been ordered to take effect consecutively because the 18 weeks spent in custody could not be deducted from the term. (C.J.A., 1967, s.67(1)).

It was held on appeal that the period spent in custody was *no consideration for the court which ordered the suspended sentence to take effect, although it was a relevant consideration for the court which imposed the suspended sentence.* The court, upholding the sentence, decided the term of imprisonment was not excessive, thus indicating that a suspended sentence of imprisonment should properly take effect *consecutively* to any other term, even though the defendant had been in custody for some time prior to the suspended sentence being imposed.

13

In showing one's sympathy to a defendant, who seemingly suffers from psychiatric or other physical or mental disorders, the chairman of the bench and his colleagues must take extreme care not to hold out any hope that he will receive treatment in prison. No reference to any form of treatment should be made in open court in this type of situation.

It may seem to the magistrates that the person appearing before them is in grave need of such treatment but as magistrates are lay persons and the majority have little or no medical knowledge, the matter should be left entirely to the discretion of the prison authorities who have medical advisers to whom they can turn. If the defendant goes to prison in anticipation that medical assistance will be available to him on his arrival, he may, justifiably, feel a sense of grievance when the court's recommendations are not implemented.

A more appropriate course would be for the justices' clerk to communicate in writing with the medical officer of the prison advising him of the information given to the magistrates relating to the defendant's condition and stating what particular course of action, in their view, should be considered. A similar course could also be taken in cases where the magistrates are of the opinion that a person appearing before them has suicidal tendencies. In such a case the prison should be informed as soon as possible and the letter should accompany the person who is escorting the defendant to prison.

If this particular course is taken, the medical authorities in the prison will not need to inform the prisoner that they do not agree with the magistrates' views and no false hopes will be raised in the mind of the prisoner.

It is not appropriate for a court to anticipate that the defendant will receive remission from his prison sentence. To mention this to the defendant would be totally wrong as it is a matter dependent on the discretion of the Home Secretary, and prison authorities, and not the court.

Whether or not a person receives remission from a fixed term prison sentence is, therefore, of little or no concern to the court, even though a one third remission of a prison sentence has in recent years come to be regarded by some as a right rather than a privilege.

"Questions of remission are entirely matters for the discretion of the Home Secretary." (*R v Leeds Prison Governor, ex parte Stafford* [1964] 1 All E.R. 610; 128 J.P. 277).

A court should always impose the sentence it feels appropriate in the circumstances of the particular case. If it feels a term of four months' imprisonment is a suitable sentence, that sentence should be imposed, and not a sentence of six months on the basis that remission will be granted. It should be stressed that no indication will be given on the defendant's record for the guidance of courts dealing with the defendant on subsequent occasions that a sentence of six months' imprisonment was imposed on the basis that he would serve only a term of four months' imprisonment after the grant of remission.

In this respect the High Court has previously advised that references to the possibility of remission and parole are best avoided by courts in imposing fixed term sentences.

In *R v Gisbourne* [1977] Crim. L.R. 490 the trial judge had indicated that a sentence of two years' imprisonment was appropriate. He had, however, anticipated and hoped that parole would be available and, accordingly, imposed a sentence of three and a half years' imprisonment. On appeal the Court of Appeal stated that the trial judge could not predict whether a defendant would be put on parole. It would be wrong for a sentencer to concern himself with possible parole when sentencing. The sentence to be passed should be that which he thought appropriate to the offence. A period of two years' imprisonment was substituted.

It would seem that these remarks would similarly apply to the possibility of remission being granted.

14

On occasions, suggestions relating to sentencing decisions are made to the bench, and, although the recommendations often seem to be

eminently sensible, the sentence suggested is sometimes one which cannot be imposed by law unless exceptional circumstances prevail.

In this particular case, the youth is only 18 years of age. Before deciding that a sentence of imprisonment should be imposed on a defendant aged seventeen to twenty years, the justices must consider " that no other method of dealing with him is appropriate ". (P.C.C.A., 1973, s.19(2)).

Other methods of dealing with offenders aged not less than 17 years but under 21 years would include, for example, borstal training, detention centre training, community service order, probation order, fine and conditional or absolute discharge. It is important to note that in the majority of cases courts should not impose a sentence of imprisonment forthwith or suspended[1], or any other custodial sentence on a person in this age group without first having had the benefit of a social inquiry report. (*R v Barton* [1977] Crim. L.R. 435; *R v Ampleford* [1975] Crim. L.R. 593).

In this particular case the defendant has previously served a term of detention centre training and it would be unwise in normal circumstances to impose a second term. (*R v Moore* [1968] 1 All E.R. 790; 132 J.P. 196).

The justices, if they are thinking in terms of a custodial sentence, must then consider whether a borstal training order is an appropriate method of dealing with the defendant. If so, they must commit him to the Crown Court for sentence under M.C.A., 1952, s.28[2] in custody or on bail. The justices themselves have no power to make a borstal training order.

The justices may only then consider a sentence of imprisonment immediate or suspended, if they think for some good reason that both detention centre training and borstal training are not appropriate.

Before passing a sentence of imprisonment, forthwith or suspended, magistrates must ensure that a defendant, if he has not previously been sentenced to a term of imprisonment[3] by a court in the United Kingdom, is legally represented unless either (a) he applied for legal aid and the application was refused on the grounds

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[1] When C.L.A., 1977, s.47, comes into force, provision will be made for the imposition of a prison sentence partly served and partly suspended. This section, however, will only apply to persons aged 21 years or over.

[2] But see Court Teaser No. 3 as to whether this section or M.C.A., 1952, s.29, is appropriate.

[3] A previous sentence of imprisonment which has been suspended and which has not taken effect shall be disregarded. (P.C.C.A., 1973, s.21(3)(a))). A sentence of imprisonment served for non-payment of fines, etc., should similarly be disregarded.

that it did not appear his means were such that he required assistance, or (b) having been informed of his right to apply for legal aid and had the opportunity to do so, he refused or failed to apply. (P.C.C.A., 1973, s.21(1)).

It should also be remembered that a sentence of imprisonment shall not be passed on a person aged not less than 17 years but under 21 years except for a term of six months or less or a term of three years or more. However, if a defendant has previously served a sentence of borstal training or a sentence of imprisonment for a term of not less than six months a term of imprisonment of 18 months or more may be imposed instead of a term of three years or more. (C.J.A., 1961, s.3). This is an obscure provision which must be applied by all courts alike. Its effect is that for a person aged not less than 17 years but under 21 years no term of imprisonment may be imposed between six months and three years or between six months and 18 months if the appropriate provisions apply.

Where, however, a court orders a suspended sentence to take effect under the provisions of P.C.C.A., 1973, s.23 and that term is ordered to run consecutively to another term imposed for the further offence, *it is possible* in such circumstances for the otherwise prohibited total term of between six months and three years (or 18 months as appropriate) to be ordered. An order activating a suspended sentence does not constitute the passing of a sentence within the meaning of C.J.A., 1961, s.3(1)(a) and so the restrictive provisions do not apply. (*R v Lamb* [1968] 3 All E.R. 206; 132 J.P. 575: *R v Pike* [1971] 2 All E.R. 1470; 135 J.P. 526). The sentence was passed when it was originally imposed.

The situation, however, is of course different where the defendant is sentenced for an offence for which he was originally made the subject of a probation order. No sentence was passed when the probation order was made as a probation order is made "instead of sentencing" (P.C.C.A., 1973, s.2(1)), but sentence was passed when the offender was subsequently dealt with by the court. (*R v Taylor* [1975] Crim. L.R. 113). The restrictive section applies in this situation.

Where a court imposes an immediate or suspended sentence of imprisonment on a person aged not less than 17 years but under 21 years, it shall state the reason for its opinion that no other method of dealing with him is appropriate, and cause that reason to be specified in the warrant of commitment (that is, the warrant authorizing him to be detained in prison) and to be entered in the court register. (P.C.C.A., 1973, s.19(3)).

Failure by magistrates to announce the reasons for imposing such a sentence in an appropriate case is likely to lead to an order of mandamus being made by the High Court, requiring the magistrates to announce their reasons. Failure to state the reasons, however,

would not affect the validity of the sentence. (*R v Chesterfield Justices, ex parte Hewitt* [1973] Crim. L.R. 181).

Considerable importance should also be attached to P.C.C.A., 1973, s.22(2) which states in relation to suspended terms of imprisonment:

> "A court shall not deal with an offender by means of a suspended sentence unless the case appears to the court to be one in which a sentence of imprisonment would have been appropriate in the absence of any power to suspend such a sentence . . . ."

Accordingly it would be wrong for a magistrate to adopt the following attitude:

> "I don't think this man should go to prison but I am of the opinion that he should receive a suspended sentence as it would do him a lot of good to have the threat of a prison sentence hanging over his head."

In *R v Mark* [1975] Crim. L.R. 112 James, L.J. said that a suspended sentence of imprisonment, whether or not it was ever activated, was a prison sentence. It had certain consequences and it remained on a person's record as a sentence. To say that a person who had a sentence of imprisonment suspended might be getting away with it altogether, was incorrect.

In *R v Trowbridge* [1975] Crim. L.R. 295, it was stated that courts must first consider whether an offence merited imprisonment, and, if so, the length of imprisonment, before considering suspension. The length of sentence must be related to the facts of the offence and the mitigation, whether it is suspended or not. If this approach was not adopted the record might give a quite misleading impression.

The fact that the sentence is suspended is no reason for increasing the length of the term of imprisonment above the term which would be appropriate if the sentence were to take effect immediately. (R v Willis [1977] Crim. L.R. 304).

The steps to be taken before imposing a suspended sentence were clearly set out in *R v O'Keefe* [1969] 1 All E.R. 426; 133 J.P. 160 in which Lord Parker, C.J. said:

> "Therefore, it seems to the court that before one gets to a suspended sentence at all, the court must go through the process of eliminating other possible courses such as absolute discharge, conditional discharge, probation order, fines and then say to itself: This is a case for imprisonment, and the final question, it being a case for imprisonment, is immediate imprisonment required, or can I give a suspended sentence?"

15

The chairman of the bench in this particular case has erred in not giving the court's reasons for not implementing the suspended sentence. In any event, the justices had misdirected themselves in deciding that the suspended sentence should not be put into effect

solely because the subsequent offence was of a different character to the original offence. *R v Saunders* [1970] Crim. L.R. 297).

P.C.C.A., 1973, s.23(1) provides that where an offender is convicted of an offence punishable with imprisonment committed during the operational period of a suspended sentence, then, unless the sentence has already taken effect, the court before which he appears, if it has power to do so, shall consider his case and deal with him by one of the following methods:

(a) The court may order that the suspended sentence shall take effect with the original term unaltered;
(b) It may order that the sentence shall take effect with the substitution of a lesser term for the original term;
(c) It may vary the operational period by substituting a period expiring not later than two years from the date of the variation; or
(d) It may make no order with respect to the suspended sentence.

The court must, however, make an order under paragraph (a) of the above, ordering that the suspended sentence take effect with the original term unaltered, unless it is of the opinion "that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was passed, including the facts of the subsequent offence, and where it is of that opinion the court shall state its reasons".

In the majority of cases where magistrates decide not to implement a suspended sentence, they make no order with respect to the suspended sentence in accordance with paragraph (d) above and the suspended sentence remains in effect until the day of its expiration. It is clear, however, that other courses of action are available to them and these can be taken where the individual circumstances of the case merit such a course and such an order would be within the legal powers of the magistrates.

Whatver the circumstances, if the magistrates do not make an order that the suspended sentence shall take effect with the original term unaltered as in accordance with paragraph (a) they must state their reasons for taking whichever of the courses as set out in paragraph (b), (c) or (d) they think appropriate.

It should be observed, however, that magistrates' powers are restricted with regard to implementing suspended sentences which have originally been imposed by a Crown Court. In such circumstances the magistrates may, if they think it appropriate, commit the defendant in custody or on bail to the Crown Court, or if they deal with the offence before the court summarily and do not commit the defendant to the Crown Court in this manner, they must ensure that written notice of the conviction of the offence committed within the operational period of the suspended sentence is given to the Clerk

of the appropriate Crown Court (P.C.C.A., 1973, s.24(2)) to enable him to take any appropriate action.

The following observations have been made in recent years in relation to suspended sentences of imprisonment:

1) Before activating a suspended sentence the court *may* have to inquire into the circumstances of the offence for which the suspended sentence was imposed. (*R v Munday* [1971] 56 Cr. App. R.220).

2) Where a fresh offence has been committed during the suspension of an earlier sentence, the court before which the offender is brought should first consider the fresh offence and determine the appropriate sentence for it and should then consider the question of bringing into operation the suspended sentence. (*R v Ithell* [1969] 2 All E.R. 449; 133 J.P. 371).

3) In *R v Moylan* [1969] 3 All E.R. 783; 133 J.P. 709, Widgery, L.J. delivering the judgment of the Court of Appeal (Criminal Division) said:

"We think it quite clear that the court may properly consider as unjust the activation of a suspended sentence *where the new offence is a comparatively trivial offence*[1] *and, particularly, where it is in a different category from that for which the suspended sentence was imposed.*"

However, in *R v Saunders,* supra, the court emphasized *the mere fact that the current offence is of a different character from the offence for which the suspended sentence was given, is no ground whatever for not bringing the suspended sentence into effect.* In that case the current offences were driving whilst disqualified, dangerous driving and assaulting a police constable acting in the execution of his duty. The suspended sentence was originally imposed for offences of larceny and false pretences.

The case was distinguished from *R v Moylan* supra where the suspended sentence was imposed for larceny and the defendant subsequently appeared before the court on charges of committing wilful damage amounting to approximately £10, and being drunk and disorderly.

In *R v Stevens* [1971] Crim. L.R. 111 it was submitted on appeal that a suspended sentence ought not to have been put into effect because of the different nature of the subsequent offences from the original offence. The Court of Appeal pointed out that the sooner it was understood that suspended sentences would be brought into operation, even if the new offence was completely different from the old, the better.

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[1] In *R v Gartland* [1978] Crim. L.R.53 it was stated that people who bandied around the word "trivial" with regard to offences might find themselves in difficulty.

4) A suspended sentence cannot be ordered to take effect if a person is convicted of an offence committed during the operational period of the suspended sentence and a probation order or order for conditional or absolute discharge was imposed for the subsequent offence (*R v Tarry* [1970] 2 All E.R. 185; 134 J.P. 469).

5) Unless any of the excepted circumstances apply, the court must implement a suspended sentence if the defendant is convicted of an offence punishable with imprisonment committed during the operational period, even if he is fined for the subsequent offence. (*R v Cobbold* [1971] Crim. L.R. 436).

6) Although the court has power to do so, it should not normally commit a defendant to an immediate term of imprisonment for the subsequent offence and vary the operational period of the original suspended sentence in accordance with P.C.C.A., 1973, s.23(1)(c) above. When sentencing during the operational period of a suspended sentence, suspended and immediate sentences of imprisonment should not as a rule be mixed. (*R v Goodlad* [1973] 2 All E.R. 1200; 137 J.P. 704)[1].

It would be wrong for magistrates not to implement a suspended sentence on the basis of the likely cost involved in keeping the defendant in prison.

Even though a person is subject to a suspended sentence, the court must still consider other methods of dealing with him if he is under 21 years old. In this regard it should be noted that statute provides that where a person who is subsequently sentenced to a term of borstal training is the subject of a suspended sentence of imprisonment, he ceases to be liable to be dealt with in respect of the suspended sentence unless he successfully appeals against the later sentence. (P.C.C.A., 1973, s.22(5)).

The court dealing with the suspended sentence in certain circumstances also has power to convert the term of imprisonment into a term of detention centre training if it does not think imprisonment is appropriate. (P.C.C.A., 1973, s.23(3)(4)).

Where a defendant is convicted by a magistrates' court of an offence punishable with imprisonment committed during the operational period of a suspended sentence imposed by another magistrates' court, *it would be a wise practice, although there is no requirement in law,* if the court were to ascertain from the other court concerned whether or not the suspended sentence has already

[1] When C.L.A., 1977, s.47 comes into force a court when passing sentence may order that after a prisoner has served part of the sentence in prison (provided the term is not less than six months and not more than two years) the remainder of it shall be held in suspense. This section, however, will only apply to persons aged 21 years or over.

been implemented. On occasions in the past, defendants have been committed to prison for breach of a suspended sentence and it has subsequently come to light that the suspended sentence has already been implemented.

It would also be wise to check that a suspended sentence imposed by the same court has not previously been activated.

16

It is a fundamental principle of English justice and natural justice that a person may not be a judge in his own cause. It would be wrong for a magistrate to participate in a case in which he has, or may be suspected to have, an interest. The words of Lord Hewart, C.J. in *R v Sussex Justices, ex parte McCarthy* [1924] 1 K.B. 256; 88 J.P. 3 are clearly relevant in such a case:

> "And justice should not only be done, but be manifestly and undoubtedly seen to be done."

The Queen's Bench Divisional Court held in the case of *R v Altrincham Justices, ex parte Pennington and Another* [1975] 2 All E.R. 78; 139 J.P. 434 that where a magistrate is actively employed in an organization, and is known locally to be so employed, he should take great care to examine the list of cases for his court in advance to see whether that organization is a party to any particular case. Where a magistrate does see that the organization is party to a case or he feels that his decision could possibly be biased in any other way he should bring this fact to the notice of the justices' clerk immediately. Having notified the justices' clerk the magistrate ought, before the case is opened, either to disqualify himself from sitting in the case or, at the very least, bring the matter to the attention of the parties concerned to see if there is any objection to his adjudicating on the case.

In the case referred to, a conviction was quashed where one of the magistrates adjudicating was a co-opted member of the County Council's Education Committee. The defendants, trading as farmers and wholesalers, were convicted of delivering short weight of vegetables to two schools in the area for which one of the magistrates served on the Education Committee.

Lord Widgery, C.J., stated that when application was made to set aside a judgment on the grounds of bias it was unnecessary to prove that the judicial officer concerned was biased. *It was sufficient to show a real likelihood of bias, or at all events that a reasonable person advised of the circumstances might justifiably suspect him of being incapable of producing impartiality and detachment.*

Bridge, J. said that if one visualised almost any kind of association between a magistrate and a private victim of an offence, it would be obvious that it ought to disqualify the justice from sitting on the

case. The same outcome should result from a comparable association between a magistrate and a private commercial undertaking or even a non-commercial undertaking, for example, an Education Authority, which was the victim.

Lord Widgery, C.J., observed, however, in the same case that if the magistrate was a member of a police authority then the situation was wholly different. The police authority concern themselves with the administration of the force not with the rights and wrongs of the individual prosecution. They are not given such an interest merely because the prosecutor was a police officer. The situation is not susceptible to the same test as the case which was before the court.

In addition to the type of situation envisaged above, justices may be disqualified from adjudicating in certain matters for varying reasons. These could include bars imposed by statute, for example, membership of a local authority which is a party to the proceedings, or disqualification on the grounds of having a pecuniary interest in the subject of inquiry. Wherever there is a possibility of bias or disqualification the justice concerned must act with extreme caution and notify the justices' clerk immediately.

17

The Queen's Bench Divisional Court held in *Wetherall v Harrison* (1975), *The Times*, October 31, that it would not be an improper course for a justice who had specialized knowledge of the circumstances forming the background of a particular case to draw on that specialized knowledge in interpreting the evidence which he had heard.

Lord Widgery, C.J., stated that it would be quite wrong, however, if the magistrate were to go on, as it were, to give evidence to himself in contradiction of that which had been heard in court. He was not there to give evidence himself, nor was he there to give evidence to other justices. He could, however, without doubt employ his basic knowledge in considering, weighing up, assessing the evidence given before the court. There was no reason why he should not, certainly if requested by his fellow justices, tell them the way in which his specialized knowledge accorded with the evidence.

It would be in order for a justice with such specialized knowledge, for example, a medical practitioner, to explain and give his own view as to how the case should be decided; but he should not himself give evidence "behind closed doors" which was not available to the parties. He ought to wait until asked by his colleagues to make a contribution on his speciality and he should not, whether or not he has been asked, press his views unduly on the rest of the bench. He should tell them in a temperate and ordinary way what he

thought about the case, if they wished him to do so, and he should leave them to draw their own conclusions from it.

Lord Widgery went on to say that it would be completely improper in any bench of justices for there to be a leader who is so aggressive that he tried to assume responsibility for the decision and exclude the others therefrom, whether he was proceeding on the basis of a specialized subject or not.

18

The justices have not applied the right test.

It is necessary to distinguish between a submission of 'no case to answer', usually made after the evidence for the prosecution, and a final submission made at the conclusion of the proceedings in a criminal case. For a person to be convicted of a criminal offence, the prosecution must prove their case beyond reasonable doubt.

This degree of proof, however, is not required where a submission of no case to answer has been made because the justices at that stage have, as a rule, only heard the prosecution case.

The following guidelines have been laid down by the High Court and should be of assistance to justices in deciding whether or not the defendant has a case to answer.

"Those of us who sit in the Divisional Court have the distinct impression that justices today are being persuaded all too often to uphold a submission of 'no case'. In the result, this court has had on many occasions to send the case back to the justices for the hearing to be continued with inevitable delay and increased expenditure. Without attempting to lay down any principle of law, we think that as a matter of practice, justices should be guided by the following considerations.

"A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it.

"Apart from these two situations, a tribunal should not in general be called upon to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on *whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer.*"

These were the words used by Lord Parker, C.J. in *Practice Direction (Submission of 'No Case')* [1962] 1 W.L.R. 227.

Lord Widgery, C.J., in *Stoneley v Coleman* [1974] Crim. L.R. 254 stated that a submission of 'no case to answer' had in that case been irresponsible. His Lordship went on to say:

"It would be a very good thing if all justices' clerks kept on their tables in court a copy of Practice Direction (Submission of No Case), [1962] and it became a practice, when a submission of 'no case' is made, for the clerk to put that direction before the presiding justice for his guidance."

It is of utmost importance if the bench decides to overrule a submission of 'no case to answer' that the chairman should announce: "We find there is a case to answer" or words to that effect. Announcing that "the case is proved" could cause obvious problems though this kind of error can now be rectified under the provisions of C.J.A., 1972, s.41 without the necessity of an application being made to the Queen's Bench Divisional Court for an order of certiorari to quash the conviction. (*R v Midhurst Justices, ex parte Thompson* [1973] Crim. L.R. 755; 138 J.P. 359).

Further confusion has arisen in magistrates' courts when a submission has been made and it is not clear whether the defence advocate is making a final speech or whether he is making a submission of 'no case to answer' whilst reserving the right to call evidence should the submission fail. In *R v Gravesend Justices, ex parte Sheldon* [1968] 3 All E.R. 466; 132 J.P. 553) Lord Parker, C.J., suggested that the justices (or clerk) should ask the advocate in the following terms so that the matter is perfectly clear:

> "Are you making a final speech, or are you making a submission of 'no case', reserving the right to call evidence thereafter?"

It is interesting to note that in civil proceedings where a submission of 'no case to answer' is made, the court may insist that the defendant elects either to rest his case on his submission or call evidence. There is, however, no question of putting a man to his election in criminal proceedings (*Jones v Metcalfe* [1967] 3 All E.R. 205; 131 J.P. 494). Thus in committal proceedings under M.C.A. 1952, s.7, an unsuccessful submission by a defendant or his advocate of 'no sufficient case to answer' does not bar his calling evidence before the decision is taken whether or not to commit for trial. (*R v Horseferry Road Magistrates' Court, ex parte Adams* (1977) *The Times,* June 22).

It seems that the wrong test has been applied in this case and the justices should have heard the defendant's evidence as they were satisfied that a reasonable tribunal might convict on the evidence already laid before it.

Justices must act with extreme caution when considering a submission of 'no case to answer'.

19

Magistrates, when imposing sentence on an offender may, in certain circumstances, take into consideration similar outstanding offences which the defendant admits but of which he has not been convicted[1].

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[1] In *D.P.P. v Anderson* [1978] 2 All E.R. 512, it was stated that the object of the practice was to give the defendant the opportunity, when he had served his sentence, to start with a clean sheet. He must, in respect of each offence, gives his express and unequivocal assent to the course being taken.

This course, however, cannot be taken:

(1) Where a magistrates' court, in any event, would not have jurisdiction to deal with the offence (for example, an offence triable only on indictment). (*R v Warn* [1937] 4 All E.R. 327; 102 J.P. 46: *R v Simons* [1953] 2 All E.R. 599; 117 J.P. 422).

(2) For breaches of a probation order or conditions of a conditional discharge. Such breaches should be dealt with individually and separate sentences should be passed. (*R v Webb* [1953] 1 All E.R. 1156; 117 J.P. 319).

(3) An offence involving endorsement of a driving licence, or disqualification for holding or obtaining a driving licence, should not be taken into consideration where the offence(s) of which the defendant has been convicted do not attract such endorsement or disqualification. (*R v Collins* [1947] 1 All E.R. 147; 111 J.P. 154).

Where the principal offence before the court involves such endorsement or disqualification, a further offence of the same class involving endorsement or disqualification may properly be taken into consideration for sentencing purposes. (*R v Jones* [1970] 3 All E.R. 815; 135 J.P. 36).

(4) Where the outstanding offences are of a purely military nature. (*R v Anderson* (1958) 122 J.P. 282).

The offences to be taken into consideration must be of a similar nature to the offence(s) charged.

In this particular case the court, having convicted the defendant of the burglary charge, should not have taken into consideration the untried offence of taking a motor vehicle without the consent of the owner or other lawful authority, although both offences contravene the Theft Act, 1968.

Lord Goddard, C.J. in *R v Collins*, supra, said:

"So this Court lays it down that, for the future, offences under the Road Traffic Acts for which disqualification or the endorsement of the licence is imposed, are not proper cases to be taken into account when sentence is passed for dishonesty or some other matter."

The Court of Criminal Appeal in *R v Smith* (1921) 85 J.P. 224 made it clear that if a defendant admits other offences which are pending against him and asks that they may be taken into consideration, the court is not only entitled to, but it is practically its duty to take such offences into account in passing sentence, provided that the other offences are similar to those of which the defendant has just been convicted.

In *R v Marquis* (1951), 115 J.P. 329, Lord Goddard, C.J. emphasized what had previously been stated in *R v Davis* (1943) 107 J.P. 75 that the defendant himself and not his counsel should admit the offences and ask that they should be taken into consideration.

He said: "The prisoner should be told what those other offences are, and himself asked whether he admits them and desires them to be taken into consideration. It is not necessary in every case to put the details of each offence, but he may be asked: 'Have you received and signed this list of cases showing the other offences which are outstanding against you?' If he says: 'Yes', he should then be asked: 'Do you admit those offences and wish them to be taken into consideration?' Then he can say 'Yes' or 'No' as the case may be, or he can say: 'Yes, I admit some, and I do not admit others'."

In *R v Nelson* [1967] 1 All E.R. 358; 131 J.P. 229, it was stressed that the defendant should admit the offences of his own free will and there should be no suggestion of any pressure being put on him to ask for the offences to be taken into consideration.

Compensation can now be ordered in respect of offences taken into consideration subject to certain restrictions. (P.C.C.A., 1973, s.35).

20

The chairman should have announced words similar to the following: "Mr. Smith, we find you guilty of each of the two offences before the court". *No reference should have been made at this stage to any sentence which the court had in mind to impose.*

It is important that the verdict of the court is announced in as simple terms as possible. The defendant at the outset of the case is asked, after being informed, if necessary, of his right of trial, whether he wishes to plead 'guilty' or 'not guilty'. It seems logical, therefore, that the verdict of the court should be announced in similar terms capable of being understood by all persons present, particularly the defendant. The defendant should also know the particular offences of which he has been found guilty.

Procedure after finding of guilt.

Having called for any relevant information, for example, any record of previous convictions or available social inquiry reports, the chairman, before announcing sentence, should have allowed the defendant or his solicitor, if so represented, to address the court in mitigation (*R v Southampton Justices, ex parte Atherton* (1973) 137 J.P. 571) and to put forward the means of the defendant, his personal circumstances and any other matters relevant to the case, if he wished to do so. To do otherwise would be a breach of the rules of natural justice. In *R v Billericay Justices, ex parte Rumsey* (1978) L.S.G., March 8, a defendant pleaded 'not guilty' before justices, who after consideration of the evidence recorded a conviction and immediately after giving their judgment sentenced him to a term of three months' imprisonment without giving the defendant's advocate opportunity to put forward any mitigation. An order of certiorari was granted to quash the sentence on the basis that the defendant's advocate had been deprived of an opportunity to address the justices in mitigation before sentence was announced. The High Court, however, did have power to substitute another similar sentence.

The court should then have proceeded to sentence and have imposed a separate penalty for each of the offences before the court, for example, a fine of one hundred pounds for each of the two offences. Any other order of the court, such as the total amount of prosecution costs or witness expenses should also be mentioned where appropriate.

21

Under s.29 M.C.A., 1952, justices may only commit defendants aged 17 years or over to the Crown Court for sentence when they feel that their own sentencing powers are inadequate, having obtained information about the character and antecedents of the defendants.

In this case the justices, having decided to deal with the case summarily[1], then regretted their initial action. They decided to forward the case to the Crown Court for sentence so that each of the defendants could receive custodial sentences in excess of the maximum term of six months' imprisonment permitted in the magistrates' court.

The justices clearly acted outside their legal powers in committing the defendants to the Crown Court for sentence solely with regard to the circumstances of the offence, and it was their duty before agreeing to try these indictable offences summarily (see Footnote 1 page 50) to acquire sufficient information about the circumstances surrounding the case to enable them to be satisfied that it was proper for them to deal with the matter summarily. Since they considered the offences to be of such a serious nature, they could at the outset have ordered the defendants to be committed for trial at the Crown Court where the defendants would be liable to a term of imprisonment up to the maximum of five years and an unlimited fine.

In *R v Hartlepool Justices, ex parte King* [1973] Crim. L.R. 637, Lord Widgery, C.J., emphasized that justices should not commit for sentence to the Crown Court *where only the circumstances of the case* for example, a serious assault, as in this case, *justified a heavier sentence.* He stated:

> "In these days when violence is so common it is particularly important in cases of assault occasioning actual bodily harm that the magistrates should find out the nature of the injuries and violence before they make their decision, because, as in the present case, that can be conclusive of the course which they should follow."

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[1] The procedure for determining mode of trial of offences triable either way under C.L.A., 1977 is presecribed in ss.19–26, when they come into force. In particular s.20(3) is most important. This prescribes the matters to which the court is to have regard before determining the appropriate place of trial. They include, inter alia, "whether the circumstances make the offence one of serious character".

These words would also apply to a charge of unlawful and malicious wounding, as mentioned in the question.

The facts in the case referred to were similar to the present one. An application for an order of certiorari to quash the decision of the justices was granted by the Queen's Bench Divisional Court.

Similar observations were made in *R v Everest* (1968) 53 Cr. App. R.20 and *R v Coe* [1969] 1 All. E.R. 65; 133 JP. 103 where the Court of Appeal criticised prosecutors for suggesting, and magistrates' courts for agreeing to, summary trial where the offences themselves were of a serious nature.

Once magistrates have decided to deal with an indictable offence summarily[1] and the character and antecedents of the defendant do not justify committal for sentence under the provisions of s.29, M.C.A., 1952, and s.42, P.C.C.A., 1973, the court is restricted in most cases to a maximum summary penalty of six months' imprisonment or a fine of £400, or both. (See FOOTNOTE to question 21). In appropriate circumstances it can commit the defendant to the Crown Court with a view to a sentence of borstal training. (s.28, M.C.A., 1952; s.20, C.J.A., 1948).

"Character and antecedents", however, do not necessarily restrict justices to considering only previous convictions of a defendant. A number of offences to be taken into consideration, (*R v Vallett* [1951] 1 All E.R. 231; 115 J.P. 103) or a course of criminal conduct over a period of time, for example, may justify committal to the Crown Court for sentence. (*R v King's Lynn Justices, ex parte Carter* [1968] 3 All E.R. 858; 133 J.P. 83).

If justices, for *any* reason do inquire into a case to see whether or not it is suitable for summary trial, they must appreciate that the defendant's record of previous convictions, if any, is of no concern to them at this stage and only becomes relevant when they announce that summary trial is appropriate.

This point was emphasized in *R v Colchester Justices, ex parte North East Essex Building Co. Ltd.,* [1977] Crim. L.R. 562, where a decision that a corporation should be committed for trial was quashed on appeal as the justices had been informed by the prosecution that the company had a previous conviction for a similar offence.

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[1] Under C.L.A., 1977, s.14 there will only be three classes of offences:
(i) offences triable summarily only,
(ii) offences triable either way,
(iii) offences triable only on indictment.

These provisions are not yet in force. The maximum term of imprisonment stated (six months) will still apply to most offences "triable either way".

The fact that corporations are specifically excluded[1] from the provisions relating to committals for sentence under M.C.A., 1952, s.29 was held to be no reason to weaken the principle.

22

It would be a breach of the rules of natural justice not to allow the defendant to address the court at the conclusion of the defence evidence if he had not already addressed the court before making his statement and calling his evidence.

The fact that he may already have made a submission of 'no case to answer' does not prevent him from exercising this right.

Even though it may appear that the defendant has already said everything he wishes to say in his evidence, he still has the right to address the bench at the conclusion of the defence evidence. There may be some aspects of the case which he particularly wishes to draw to the justices' attention, such as matters of law or weaknesses in the prosecution case.

In *R v Great Marlborough Street Magistrate, ex parte Fraser* [1974] Crim. L.R. 47 an order of certiorari was granted and convictions were quashed in similar circumstances.

M.C.R., 1968, r.13(4) provides:

"At the conclusion of the evidence for the defence, any unsworn statement which the accused may make, and the evidence, if any, in rebuttal, the accused may address the court if he has not already done so."

In *R v Great Marlborough Street Magistrate,* supra, it was held that the defendant's grievance that she had been denied the right to address the court in accordance with the provisions of r.13(4), was not any the less because the question for the stipendiary magistrate concerned was purely one of fact, or because he was a magistrate of great experience. The court stated that although the magistrate's view might not have altered even if he had heard the defendant's address, *the defendant had a right under the rule to address the magistrate and he should not have deprived her of that right.*

In *R v Middlesex Crown Court, ex parte Riddle* [1975] Crim. L.R. 731, an order of certiorari was granted and convictions quashed in similar circumstances.

Lord Widgery, C.J., said in that case that at the Crown Court appeal hearing against convictions ordered by justices, the applicant sat in the well of the court while the prosecution stated their case. He went into the witness box to give evidence without making a preliminary speech. At the end of his evidence he was asked if he

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[1] See M.C.A., 1952 schedule 2, para. 7.

wished to call more evidence. He said he did not wish to do so, and was about to make a speech when the judge said that the appeals were dismissed.

Lord Widgery stressed that there was no clearer example of the requirements of natural justice than that a man should have a fair chance to state his own case in his defence. It would be difficult for the court not to follow the decision in *R v Great Marlborough Street Magistrate,* supra. He continued:

> "However, the impression must not be given that magistrates sat pinioned in their seats while a litigant talked endlessly. Every court reached the stage where a litigant might have to be curbed."

The above cases should, however, be distinguished from *R v Knightsbridge Crown Court, ex parte Martin* [1976] Crim. L.R. 463 where at an appeal hearing at the Crown Court against a magistrates' court decision, the defendant had given evidence and returned to his seat in the well of the court. He wished to address the bench but, observing the judge and lay justices in discussion, did not do so because he thought that they were discussing the allowing of his appeal without calling on him further. However, they arose and retired and, on returning, announced that the appeal was dismissed.

An order for certiorari to quash the convictions was refused on the ground that the facts were so brief and uncomplicated that no serious consequences could follow from the fact that the applicant had not been given the opportunity to address the court concerning the same material which he had already given on oath from the witness box.

The distinguishing feature between this case and *R v Great Marlborough Street Magistrate, ex parte Fraser,* supra, was that in the latter case the defendant made an application to the court to address it but was positively denied that right and, hence, there was a breach of the rules of natural justice. In *R v Knightsbridge Crown Court, ex parte Martin,* supra, the Crown Court had not reacted to the possibility of the applicant wishing to make a speech and the defendant himself had made no reaction. Accordingly, the Queen's Bench Divisional Court held there had been no breach of the rules of natural justice in the latter case, and the application for certiorari was refused.

Although the outcome was different in the above mentioned cases, justices should always ensure that a defendant or his advocate is given the opportunity to address them at the conclusion of the evidence for the defence, if he has not already addressed the court.

23

Usually in a criminal trial in a magistrates' court the prosecutor opens the case, outlining to the justices the circumstances surrounding the incident. At the end of the case, after the defendant and

his witnesses have given evidence, the defence solicitor, or the defendant, provided he has not done so before, addresses the court and sums up the defendant's case.

However, provision is made under M.C.R., 1968, r.13(5) that:

"Either party may, with the leave of the court, address the court a second time, but where the court grants leave to one party it shall not refuse leave to the other."

Rule 13(6) provides:

"Where both parties address the court twice, the prosecutor shall address the court for the second time before the accused does so."

It is a matter entirely for the discretion of the court whether or not the parties address the court a second time, but even if that leave is granted it is always the defendant or his solicitor who is entitled to the last address.

The prosecutor, however, is entitled to address the court a second time with its leave, even though the defendant or his solicitor does not wish to exercise his right.

It seems the justices in this case could not be criticised whether they allowed or refused the second speech of the prosecutor, though the length of the trial could be a reasonable consideration for allowing it.

Although in magistrates' courts the defendant always has the last word in criminal proceedings, the situation is different in proceedings brought by way of complaint, which would include, for example, domestic proceedings. M.C.R., 1968, r.14(6) states in relation to such proceedings:

"Where the defendant obtains leave to address the court for a second time, his second address shall be made before the second address, if any, of the complainant."

These rules relate only to addresses made to the court regarding the *facts* of the case. There is no restriction on the number of submissions on points of *law* that may be made by either party during the course of a trial.

24

Justices should take great care not to "split" sentence in criminal proceedings.

They should, in this case, have adjourned the whole issue for four weeks, when the defendant could have put forward reasons, if any, why he should not be disqualified and the justices could then have considered the matter in its entirety.

"Splitting" a decision in this particular manner is sufficient ground for the disqualification order imposed by the justices to be quashed by the High Court. (*R v Talgarth Justices, ex parte Bithell* [1973] 2 All E.R. 717; 137 J.P. 666).

In that case Lord Widgery, C.J. said:

"It would in any event, in my judgment, be bad sentencing practice to deal on different occasions with different elements in the disposal of a single case. Very often forfeiture or disqualification is related to penalty, and it is dangerous, to say the least, to embark on the disposal of any case without having all the matters available for decision by the same court at the same time."

He went on to say:

"It seems to me that (the justices) were duty-bound, if they were going to consider disqualification, to adjourn the whole question of sentencing and disposal under s.14(3), M.C.A., 1952 and deal with this matter as one matter when the adjourned hearing took place."

It should be noted that when magistrates commit a defendant to the Crown Court for sentence, they have no power to make a compensation or restitution order or any other order subsequent to conviction. This would preclude the court from ordering a driving licence endorsement or making a final order for disqualification for holding or obtaining a driving licence, although provision is made under R.T.A., 1972, s.103(1) for an interim order of disqualification to be imposed pending the defendant's appearance at the Crown Court for sentence.

In *R v Brogan* [1975] 1 All E.R. 879; 139 J.P. 296 Scarman, L.J. said:

"Magistrates must, therefore, be scrupulously careful, when committing for sentence, to leave all questions associated with sentence to the Crown Court."

25

Statute provides:

"Before making a probation order, the court shall explain to the offender in ordinary language the effect of the order . . . . and that if he fails to comply with it or commits another offence he will be liable to be sentenced for the original offence; and the court shall not make the order unless he expresses his willingness to comply with its requirements." (P.C.C.A., 1973, s.2(6)).

A probation order cannot effectively be made unless the probationer expresses his willingness to it and no pressure should be placed upon him to consent to such a course being taken.

In the case of *R v Marquis* [1974] 2 All E.R. 1216; 138 J.P. 679, in circumstances similar to the present situation, the defendant replied in answer to the judge's question:

"I will agree to be put on probation only because the court offers an alternative of a custodial sentence."

On appeal in that case, Lord Widgery, C.J., said:

"The probationer must be given a fair opportunity to make his choice, and if the probationer apparently agrees to comply with the terms of the probation order, but has not really been given a fair chance to choose, that agreement should not be adhered to by the courts, and an opportunity should be taken if possible to have the matter reviewed."

He continued:

"In this case if the appellant thought, as we have no doubt she did think, that the alternatives were a probation order or a custodial sentence, when in fact those were not the only possible alternatives, or even the probable alternatives, we take the view that she was not given a fair chance to decide for herself whether she was willing to be bound by the terms of the order or not, and that accordingly, we should regard the order as having been made without the consent of the probationer."

The appeal was allowed and a conditional discharge was substituted. This was an unusual decision because it is not possible in normal circumstances to appeal against the making of a probation order. (M.C.A., 1952, s.83(3)(a) as amended by the C.A., 1971, sch. 9) (*R v Tucker* [1974] 2 All E.R. 639; 138 J.P. 548).

The chairman has also acted incorrectly by suggesting that the defendant address the magistrates in mitigation before they read the social inquiry report. In *R v Kirkham* [1968] Crim. L.R. 210, the defendant's appeal against sentence following a guilty plea, was allowed after counsel for the defendant had been asked to make his speech in mitigation before the probation officer's report was read and his evidence given. The Court of Appeal emphasized that *a social inquiry report must be read before a speech in mitigation* and if counsel for the defendant desired it, he was entitled to call the probation officer to give evidence first.

The court stated that the practice adopted in the case before them should cease.

The principles in this case would also seem to apply to cases where defendants are unrepresented by solicitor or counsel. It would seem, however, that an advocate may address the court before the report is read, if he wishes to take this course.

26

A magistrates' court has power, provided all other relevant requirements are complied with, to remand an adult person appearing before them *before* conviction, whether the offence is summary or indictable, for a period *not exceeding eight clear days*[1] when the remand is to a prison or a remand centre. (M.C.A., 1952, s.105(4)).

The court may remand a person to police custody provided the remand period does *not exceed three clear days.* (M.C.A., 1952, s.105(5)).

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[1] C.L.A., 1977, s.42, when it comes into force, will provide that a magistrates' court may, subject to certain requirements, remand for a maximum period of 28 clear days when it remands an accused person who is already detained under a custodial sentence. Section 41, when it comes into force, will enable a magistrates' court to order that a person on remand be brought up for any subsequent remand at another court nearer to the prison or remand centre.

The phrase "eight clear days", which includes Sundays and Bank Holidays, means that there must be an interval of eight days between the date of the remand and the date on which the defendant must appear before the court again. The day on which he is committed to custody and the day on which he reappears before the court are not included in the "eight clear days". Thus, if the defendant appears before the court on Tuesday, April 1, he must be brought before the court again by Thursday, April 10, at the latest. This means in practice that the maximum remand period is in effect ten calendar days, for example, from Monday of one week to Wednesday of the next week; from Tuesday of one week to Thursday of the next week, and so on. It is imperative to have regard to local policy when deciding the day on which the remand will expire, for example, rural courts may not sit daily and equally there might not be a Saturday sitting.

The phrase "three clear days" in relation to police custody remands has a similar meaning.

It should be remembered, however, that where a case is adjourned *after* conviction, the defendant can be remanded in custody for a maximum period of three weeks, provided all other relevant requirements are complied with. (M.C.A., 1952, s.14(3)).

"Three weeks" in this context has the everyday meaning, for example, from Tuesday, April 1, to Tuesday, April 22, but where the defendant is released on bail the adjournment period can be up to four weeks after conviction.

These restrictions are not applicable where persons are committed in custody or on bail to the Crown Court for trial or sentence.

The same restrictions relating to maximum periods of remand also apply to juveniles appearing before the court in criminal proceedings[1]. With this in mind it must be appreciated that an interim order relates solely to *care proceedings* in the juvenile court and has no place in criminal proceedings. An interim order is a care order expiring within 28 days or within such shorter period as may be specified in the order. (C.Y.P.A., 1969, s.20).

It is submitted that any remand of a juvenile to the care of a local authority, remand centre or prison *after a finding of guilt in criminal proceedings,* must not exceed the maximum period of 21 days or such shorter order as is specified.[1]

Where a court remands or commits a juvenile for trial and he is not released on bail, the court should commit him to the care of

[1] However, a remand to police custody must not exceed 24 hours. (C.Y.P.A., 1969, s.23(5)).

the local authority in whose area he resides or the offence was committed. If the court certifies that a young person (aged from 14 to 16 inclusive) is of so unruly a character[1] that he cannot safely be committed to the care of a local authority, he should be committed to a remand centre, if available, and if not, to a prison. (C.Y.P.A., 1969, s.23(1) and (2)). The courts, however, no longer have power to issue a certificate of unruliness in respect of a girl under the age of fifteen years. If she is considered by the court to be unsuitable for bail, she will become the responsibility on remand of the local authority. (C.Y.P.A., 1969 (Transitional Modifications of Part 1) Order 1977.)

Where a young person aged 15 or 16 years is committed in custody with a view to a sentence of borstal training being imposed at the Crown Court, the committal shall be to a remand centre or a prison if a remand centre is not available. (C.Y.P.A., 1969, s.23(4) and M.C.A., 1952, s.28(4)). He *cannot* be committed to the care of a local authority.

27

Although it is undoubtedly a useful sentencing power which perhaps could be used more often, the court should act with particular caution before making an order for disqualification until the passing of a driving test.

It may be appropriate to consider such an order where the person appearing before the court is elderly or is suffering from some form of disease or disability which could seriously affect his driving. Such an order can properly be made where the circumstances relating to the offence before the court or the defendant's previous driving record indicate that he lacks sufficient skill to be a competent driver.

The court may in addition have regard to such an order where the defendant is disqualified for a substantial period and it is likely that when the disqualification order comes to an end he will not have retained his ability to drive a motor vehicle competently. In such a situation it is also likely that traffic conditions would be more congested at the expiration of the period of disqualification than at the time the order was imposed.

In *R v Guilfoyle* [1973] 2 All E.R. 844; 137 J.P. 568 where the defendant was ordered to be disqualified for four years and was also disqualified until passing a driving test, Lawton, L.J., in giving the judgment of the Court of Appeal (Criminal Division) said:

[1] The Certificates of Unruly Character (Conditions) Order 1977 prescribes the conditions one or more of which must be satisfied before a young person may be certified as too unruly to be safely committed to the care of a local authority.

"In the judgment of this court the order was properly made. The appellant, being only 19, could not have had more than two years' experience on the road and he probably had not had time to develop the intuitive reactions which years of driving inculcate in some drivers. For him an interruption of 12 months in his driving career will be a substantial one and it is in the public interest that his driving skill should be checked before he returns to driving as an occupation. *In general, the longer the period of disqualification the more important it is that there should be a driving test before the driver again obtains a full licence.*"

A defendant who is disqualified until a driving test is passed may obtain a provisional driving licence and be allowed to drive in accordance with the conditions of that licence until he passes the required test, provided he is not disqualified for holding or obtaining a driving licence by any other court order. (R.T.A., 1972, s.98(3)). In *Hunter v Coombs* [1962] 1 All E.R. 904; 126 J.P. 300 it was said that a person who was so disqualified would be guilty of an offence of driving whilst disqualified if he were to drive in breach of the conditions subject to which a provisional licence is granted (for example, driving without 'L' plates).

The Court of Appeal (Criminal Division) recently emphasized in *R v Donnelly* [1975] 1 All E.R. 785; 139 J.P. 293 the kind of circumstances in which such an order should be made.

Talbot, J., stated that the particular subsection concerned was intended for the protection of the public against incompetent drivers. The powers of the court were to be used in respect of people who were growing old or infirm or who showed in the circumstances of the offence some kind of incompetence to drive.

He confirmed that the power to disqualify until the defendant passed a driving test should not be used as a punitive measure.

The order in that case was quashed, where there was no apparent reason for questioning the competence of the appellant to drive.

28

Where driving disqualifications are imposed solely for the offence(s) before the court, and not under the 'totting-up' provisions, the court must make the orders run from the date of conviction and concurrently to any other term of disqualification.

In this case the court should have made an order that the defendant be disqualified on each of the charges before the court until January 31, 1980. Alternatively, the court could make such an order on one charge and make a lesser disqualification term or no disqualification on the other charge, which would in effect have the same result. Both disqualification orders would run concurrently and would take effect from April 1, 1977 until January 31, 1980.

There is no power in law to make driving disqualification orders run either consecutively to each other or to any other disqualification

unless they are of the type of disqualification which comes within the provisions of s.93(3), R.T.A., 1972. This subsection relates to what is now commonly referred to as "totting-up" disqualifications. *"Totting-up" disqualifications must always run consecutively* to any other period of disqualification imposed whether previously or on the same occasion. (R.T.A., 1972, s.93(5)). All disqualifications other than those imposed under the above mentioned subsections take effect from the date on which the order of the court is imposed. (*Taylor v Kenyon* [1952] 2 All E.R. 726; 116 J.P. 599: *R v Phillips* [1955] 3 All E.R. 273; 119 J.P. 499).

29

Where a person is convicted by a court of any of the following offences:

(a) driving or attempting to drive a motor vehicle with blood alcohol concentration above the prescribed limit,
(b) failing to provide a specimen of blood or urine for a laboratory test without reasonable excuse whilst driving or attempting to drive a motor vehicle,
(c) driving or attempting to drive a motor vehicle when unfit to drive through drink or drugs,

the convicting court is obliged to disqualify the defendant for holding or obtaining a driving licence "for such period *not less* than 12 months as the court thinks fit unless the court for special reasons thinks fit to order him to be disqualified for a shorter period or not order him to be disqualified". (R.T.A., 1972, s.93(1)).

Where a person convicted of any of the above mentioned offences involving obligatory disqualification has within the ten years immediately preceding the commission of the offence been convicted of any such offence, the court shall order him to be disqualified for such a period *not less* than three years as the court thinks fit unless the court for special reasons thinks fit to order him to be disqualified for a shorter period or not to order him to be disqualified. (R.T.A., 1972, s.93(4)).

The periods of 12 months, and where appropriate, three years, are *minimum* periods of disqualification and courts should not regard either period as being a "tariff disqualification". The obligatory minimum period of disqualification may be increased if the court is satisfied that there are aggravating features relating to the circumstances of the case. These could include, for example, bad driving and bad behaviour following drink (*Sakhuja v Allen* [1972] 2 All E.R. 311; 136 J.P. 414) or where the alcohol level in a particular case greatly exceeds the limit allowed by law. (*R v Tupa* [1974] R.T.R. 153).

In the case of *R v Mills* [1974] R.T.R. 215 the Court of Appeal (Criminal Division) upheld a disqualification order for two years where the defendant's reading was 118 milligrammes of alcohol in 100 millilitres of blood. The prescribed limits are 80 milligrammes of alcohol in 100 millilitres of blood or 107 milligrammes of alcohol in 100 millilitres of urine.

In giving the judgment of the court in *R v Mills*, supra, Thompson, J., stated:

"The view of this court is that it is quite wrong to talk about the tariff disqualification being 12 months for excess alcohol. It cannot be less than 12 months and it is a matter within the discretion of the court, and a fairly wide discretion, how long a disqualification is imposed. In this case the court sees no reason to say that the imposition of two years' disqualification was excessive or wrong and this appeal is accordingly dismissed."

Similarly, in *R v Sharman* [1974] R.T.R. 213; [1974] Crim. L.R. 129 the court emphasized that 12 months should not be treated as a tariff disqualification in such cases but was merely the minimum disqualification which the law allowed.

In *R v Slade* [1974] R.T.R. 20; [1973] Crim. L.R. 644 a disqualification of 30 months was upheld where the reading was 165 milligrammes of alcohol in 100 millilitres of blood, even though it was claimed that substantial hardship would be caused to the defendant by the disqualification. The Court in that case approved the following remarks of Lord Hailsham, L.C., in *Sakhuja v Allen*, supra:

". . . . drivers who behave in this manner might well expect longer periods of disqualification than the minimum, since it is apparent that not merely have they drunk too much, but that their drink has affected their driving and behaviour to an extent which makes them a danger to the public, and to the police, ... It is just this kind of driver that the Road Safety Act 1967 (now Road Traffic Act 1972) was intended to keep off the roads, and it may well be that circuit judges and recorders will do well to bear in mind that they have a discretion to impose longer periods of disqualification when bad driving and bad behaviour follow the drink. In this way they can differentiate between drivers whose excessive drinking is substantial and has led to actual danger and those where the drinking is only slightly above the limit and has not been accompanied by bad driving or bad behaviour."

In some circumstances, however, an excessively long period of disqualification may do more harm than good, by creating a sense of grievance which makes the offender even more determined to break the law. (*R v Dawtry* [1975] R.T.R. 101).

A long period of disqualification, however, may be appropriate if it is in the public interest and there has been an irresponsible attitude to the use of motor vehicles. (*R v Davitt* [1974] Crim. L.R. 719).

30

Circumstances peculiar to the defendant, such as likely loss of employment, cannot amount to special reasons for not disqualifying him for holding or obtaining a driving licence on conviction of an

offence of driving with excess blood alcohol, which otherwise carries a minimum mandatory period of disqualification of 12 months. *None* of the reasons found in this particular case could amount to a special reason for not disqualifying.

A special reason is one which is special to the facts of the particular case, that is, special to the facts which constitute the offence. A circumstance peculiar to the offender as distinguished from the offence is not a special reason. (*Whittall v Kirby* [1946] 2 All E.R. 552; 111 J.P. 1). (For a further explanation reference can be made to Court Teaser number 31).

The justices were acting outside the law in finding special reasons in this case and at least the *minimum* mandatory period of disqualification should have been imposed.

In the case of *Glendinning v Batty* [1973] Crim. L.R. 763, involving similar facts, the prosecutor's appeal by case stated to the Queen's Bench Divisional Court was allowed, and the case was remitted to the justices with a direction to disqualify the defendant for a minimum period of 12 months. It was stated in that case that justices who tended to strain the law on special reasons out of compassion for a defendant were in fact doing him a disservice.

Where it can be argued that the justices' decision was perverse or otherwise bad in law, the prosecution can appeal against such a decision to the Queen's Bench Divisional Court by way of case stated. This can result in the defendant serving his mandatory disqualification some considerable time after the commission of the offence.

In the case of *Glendinning v Batty*, supra, the appeal was allowed nine months after the proceedings had been heard before the justices. The justices' efforts to help the defendant had resulted in his being kept in suspense for some considerable time, and in a period of disqualification which should have been imposed at the outset.

The fact that decisions of the appeal courts should be strictly adhered to by magistrates' courts was emphasized in *Jones v Nicks* [1977] Crim. L.R. 365. In that case the defendant, who had pleaded guilty to driving in excess of the speed limit, submitted that there were special reasons within s.101, R.T.A. 1972 for not ordering his licence to be endorsed. The clerk, advising the justices properly, stated that special reasons for not endorsing a driving licence had to be peculiar to the facts of the offence and not the circumstances of the offender and the factor of effect on employment was not to be taken into account. The justices, however, chose to ignore the clerk's advice and determined not to order endorsement of the driving licence. The prosecutor appealed by case stated to the Queen's Bench Divisional Court, which allowed the appeal and remitted the case to the justices with a direction to order endorse-

ment of the driving licence. The Divisional Court noted that even after refusing to follow the initial advice of the clerk the justices adhered to their decision despite the fact that the justices' clerk had later written to them drawing their attention to *Whittall v Kirby*, supra, and to their powers of re-opening the case with a view to rectifying what he concluded to be a mistake in law. The powers to re-open a case in such circumstances are governed by the provisions of C.J.A., 1972, s.41.

Lord Widgery, C.J., agreeing with his colleagues in allowing the appeal said that the justices were close to the borderline of being ordered to pay costs. He emphasized that a clerk's advice should be accepted in such circumstances to avoid the waste of time and money in correcting the justices' error.

31

For a person to escape obligatory endorsement of a driving licence or obligatory disqualification for holding or obtaining a driving licence where conviction of the offence in question involves such endorsement or disqualification, the court must be satisfied that there are "special reasons" present enabling it to impose no endorsement or disqualification.

Special Reasons

The definition of *"special reasons"* has long been settled.

In *Whittall v Kirby* [1946] 2 All E.R. 552; 111 J.P. 1, the Court expressly approved the following words in *R v Crossan* [1939] N.I. 106:

> "A 'special reason' within the exception is one which is special to the facts of the particular case, that is, special to the facts which constitute the offence . . . . . A circumstance peculiar to the offender as distinguished from the offence is not a 'special reason' within the exception."

Lord Goddard, C.J., stated in *Whittall v Kirby*, supra:

> "While it is impossible to enumerate or define everything that can amount to a special reason, one may give as an illustration a driver exceeding the speed limit because he has suddenly been called to attend a dying relative or a doctor going to an urgent call."

He continued:

> ". . . . . in my opinion, magistrates both in quarter and petty sessions must take it to be the law that no considerations of financial hardship, or of the offender being before the court for the first time, or that he has driven for a great number of years without complaint, can be regarded as a special reason . . . . . ."

In *R v Wickins* (1958) 42 Cr. App. R. 236, the Court of Criminal Appeal stated that in deciding whether there is a "special reason" the following considerations should apply:

1. It must be a mitigating or extenuating circumstance.
2. It must not amount in law to a defence to the charge.

3. It must be directly connected with the commission of the offence.
4. It must be a matter which the court ought properly to take into consideration when imposing punishment.

In *R v Newton* [1974] Crim. L.R. 321, the court, however, stressed that if something which could be a special reason had been proved, that was not the end of the matter. The final question of whether a driver merited avoiding disqualification must be decided in the light of his conduct and all the circumstances.

In *Hawkins v Roots* and *Hawkins v Smith* [1975] Crim. L.R. 521 which were cases relating to inconsiderate and careless driving, it was held that comparative triviality of the offence and marginal carelessness of the offender could not amount to special reasons. Justices had power to deal with such comparative triviality and marginal carelessness by granting an absolute or conditional discharge or imposing a fine, but could not justify a decision that they amounted to special reasons. The justices should have ordered endorsement in each case and the cases were remitted with directions accordingly.

Mitigating Circumstances

The expression *"mitigating circumstances"* in its application to disqualification from driving *has a wider meaning* than "special reasons". Where a person is subject to the "totting-up" provisions of R.T.A., 1972, s.93(3), the following applies:

> "Where a person convicted of an offence involving obligatory or discretionary disqualification *has within the three years immediately preceding the commission of the offence* been convicted on not less than two occasions of any such offence, and particulars of the convictions have been ordered to be endorsed in accordance with s.101 of this Act, the court shall order him to be disqualified for such period not *less* than six months as the court thinks fit, unless the court is satisfied, having regard to all the circumstances, that there are grounds for mitigating the normal consequences of the conviction and thinks fit to order him to be disqualified for a shorter period or not to order him to be disqualified."

In considering "mitigating circumstances" the court must "have regard to all the circumstances". These will include matters relating to the offender, for example, likelihood of losing his employment if disqualified. The Crown Court has also held that hardship likely to be caused to the public through the defendant's disqualification may also be a mitigating circumstance. (*Cornwall v Coke* [1976] Crim. L.R. 519).

The circumstances of the offence before the court (*Baker v Cole* [1971] 3 All E.R. 680) and the gravity or comparative triviality of the previous offences, though the latter will carry little, if any, weight,may also be considered. (*Lambie v Woodage* [1972] 2 All E.R. 462; 136 J.P. 554).

The fact that the same convictions have been taken into account on a previous occasion when a disqualification has been imposed

under s.93(3) of the Act does not entitle the justices to mitigate the normal consequences of the conviction when the offender has been convicted again of an endorsable offence. (*Fearon v Sydney* [1966] 2 All E.R. 694; 130 J.P. 329).

Complications, of course, are frequently encountered in magistrates' courts where the person before the court is convicted of numerous endorsable offences and is also subject to the "totting-up" provisions. In *R v Sixsmith, ex parte Morris* [1966] 3 All E.R. 473; 130 J.P. 420 James, J., delivering the judgment of the Queen's Bench Divisional Court said:

> "The court will always have regard to the total of the periods of disqualification imposed, as well as to the individual periods of disqualification, in order to ensure that the offender is disqualified for a just and proper period of time. In a case, therefore, where a person is convicted of a number of offences, particularly if the offences arise out of the same driving or the same use of the vehicle in question — each bearing as its consequence an order of disqualification pursuant to subs. 3 (i.e. "totting-up") — the court may have regard to that feature, together with all the other circumstances, as a ground for mitigating the normal consequences and imposing a shorter period of disqualification or not ordering disqualification under subs. 3 in respect of one or some or all of the offences."

It was further stressed that a court when making an order for disqualification under the "totting-up" provisions *should expressly state* that the period of disqualification ordered is a consecutive period.

Although persons can escape disqualification under the "totting-up" provisions, it is important to bear in mind the reasoning for their inclusion in our road traffic laws. In this regard the words of Lord Pearson in the House of Lords case of *Lambie v Woodage*, supra, should be noted:

> "I agree also with the view taken by Lord Widgery as to the general object of the enactment. He said: 'The road traffic legislation contains adequate powers to provide adequate periods of disqualification for those who commit serious traffic offences. I agree with Lord Parker, C.J., in his view that s.5(3) R.T.A., 1962 (now s.93(3) R.T.A., 1972) is primarily concerned with the man who does not commit serious offences but who commits offences very frequently. It is aimed not so much at the gravity of the offences committed but the repetition of those offences during a relatively short period'."

The giving of evidence

As far as the giving of evidence is concerned it would be a wise practice for a court to insist upon evidence being given on oath before deciding that there are mitigating circumstances present allowing the magistrates to exercise their discretion not to disqualify under the "totting-up" procedure.

Any evidence relating to "special reasons" for not imposing obligatory endorsement or disqualification, however, *should be given on oath* as the onus is on the defendant to show special reasons why he should not be disqualified. (*Jones v English* [1951] 2 All E.R.

853; 115 J.P. 609), (*Brown v Dyerson* [1968] 3 All E.R. 39; 132 J.P. 495).

Announcement of reasons

Where a court, because it is satisfied that "special reasons" or "mitigating circumstances" are present, decides not to order any disqualification or endorsement or to order disqualification for a shorter period than would otherwise be required, it must state the grounds for doing so in open court. A note should also be made to this effect in the court register. (R.T.A., 1972, s.105(1)).

Effect of finding that "special reasons" or "mitigating circumstances" are present.

Although not strictly included in the question, it is important to note that even if the court is satisfied that there are grounds for mitigating the normal consequences of the conviction(s), it does not follow that it should automatically order no disqualification. It may make no disqualification order *or* a term of less than six months for each offence. It is, of course, not obliged to take either of these courses and may disqualify in the normal way.

Similarly, if the court finds no "mitigating circumstances" present and decides to disqualify under the "totting-up" provisions, it is obliged, other than in exceptional circumstances, to disqualify for a *minimum* period of six months for each endorsable offence, to run consecutively to each other and to any other disqualification. (R.T.A., 1972, s.93(5)). It should be stressed that the court should disqualify for a *minimum* period of six months for *each* endorsable offence. There is no reason in law why it should not in a suitable case order a disqualification in excess of six months for each endorsable offence before the court.

Similar provisions apply to "special reasons". If the court thinks that because of "special reasons" the mandatory disqualification should not be imposed, it can order disqualification *for a shorter period* or impose no disqualification. (R.T.A., 1972, s.93(1)).

32

In relation to time allowed for payment of sums ordered by a magistrates' court, M.C.A., 1952, s.63(1) states:

"A magistrates' court by whose conviction or order a sum is adjudged to be paid, may, instead of requiring immediate payment, allow time for payment, or order payment by instalments."[1]

[1] When the appropriate provision under C.L.A., 1977, schedule 12 comes into force, magistrates who have allowed a person time to pay a fine etc, may fix a date in advance for the re-appearance of that person if all, or any part of the fine etc., then remains unpaid. This provision will be embodied in C.J.A., 1967, s.44A.

The section does, therefore, allow a discretion, but, nevertheless, where the court decides not to order immediate payment it is good practice to order payment by instalments as opposed to allowing a long period of time during which the sum should be paid. This at least enables effective enforcement proceedings to be taken upon default in payment of any one instalment.

Section 63(3) provides:

> "Where a court has ordered payment by instalments and default is made in the payment of any one instalment, proceedings may be taken as if the default had been made in the payment of all the instalments then unpaid."

However, where the court does not order payment by instalments, no default arises until expiration of the period allowed for payment of the whole sum. This seriously affects the ability of the justices' clerk to institute enforcement proceedings, particularly where a long period of time such as 12 months, has been allowed for payment.

If, however, for some reason the court feels it more appropriate in a particular case to order that payment be made by a given date (for example, where the defendant is paid monthly or offers to pay within a short period) as opposed to payment by instalments, then it is suggested that magistrates ensure the period is as short as practicably possible having regard to all the circumstances of the case, because there is no power to reduce the period of time allowed for payment, whatever the prevailing circumstances are at the time, for example, the likelihood of an offender leaving the country. On the other hand it is possible for the court, when it has allowed time for payment, under M.C.A., 1952, s.63(2), or the justices' clerk under J.C.R., 1970, on application by or on behalf of the person liable to make the payment, to allow further time for payment, or order payment by instalments.

In some circumstances, magistrates faced with a defendant who already has several outstanding fines, may feel that it would be totally unrealistic to expect him to start paying off the sum imposed by themselves before he has come to terms with the fines already outstanding. In making such an order, justices should ensure its precise terms are made clear to the defendant. The chairman should specify the actual date when the first of the instalments for the sum imposed by the present bench should be paid or the date by which that sum should be paid in full. An ambiguous statement by the chairman ordering that instalments are to commence after payment of another previously imposed sum will often lead to enforcement problems in the justices' clerk's office, particularly if the payments relating to the first order are not made in accordance with the order of the court, as so often happens, or the order was made by another court who are responsible for its enforcement.

It is essential to remember that enforcement proceedings for non-payment may not be taken until there is default in payment

and it is, therefore, most important to ensure that any time allowed for payment is clearly stated and the order is capable of being enforced in practice.

It is also important to ensure when imposing fines or other sums that any inquiry into the defendant's means takes place *before* the fine or other sum is actually imposed. It would be quite improper to fine a person and then inquire into his means solely with a view to assessing what period should be allowed for payment of the fine or other sum. This requirement is laid down by statute and should, therefore, be strictly followed. M.C.A., 1952, s.31(1) provides:

"*In fixing* the amount of a fine, a magistrates' court shall take into consideration, among other things, the means of the person on whom the fine is imposed so far as they *appear* or are *known to the court.*"

In *R v Wright* [1977] Crim. L.R. 236 on appeal against an order for prosecution costs the court stated that it was a correct principle that financial obligations of defendants should be matched with their ability to pay. It was stressed, however, that the court did not have an inquisitional function and there was no duty on it to "dig out" all the information about a defendant's means. Each defendant knew what his means were and was perfectly capable of putting them before the court on his own initiative. If the court was only given meagre details, that was the fault of the defendant or his advocate.

Although the principles laid down in s.31(1) are clearly capable of compliance when a defendant appears before the court, compliance is perhaps more subtle when he does not appear and he is convicted in his absence. If he does not appear and does not contact the court in writing (setting out his means), then presumably the principles contained in the subsection and in the case of *R v Wright*, supra, are met in that there is a personal obligation upon the defendant to inform the court as to his means. If he does not, then the court is entitled to arrive at its own conclusions, having regard to its local knowledge, such as wages and cost of living in the area.

33
(70)

Evidence – *The giving of evidence in domestic proceedings.*

In a matrimonial case, the magistrates have heard the complainant's evidence and that of her witnesses relating to allegations of persistent cruelty, and are satisfied that the defendant husband has a case to answer.

The defendant, who is not represented by a solicitor or counsel, is then advised by the chairman in the following terms:

"Mr. Smith, you now have three choices. You may give evidence on oath, in which case you may be asked questions by your wife's solicitor, you may say nothing at all, or you may give your side of the story without taking the oath in which case you may not be asked any questions by your wife's solicitor.

"It may, of course, be in your own interest that anything you wish to say should be given on oath as your wife and her witnesses have given their evidence on oath and it is likely that such evidence will carry more weight than an unsworn statement. Which course do you wish to take, Mr. Smith?"

Has the chairman acted properly in so advising an unrepresented defendant in a matrimonial case?

34
(70)

Justices – *Same justices throughout in civil case.*

A complaint is brought on the grounds of persistent cruelty and desertion before three justices sitting in the domestic court. After hearing the evidence which has lasted for three hours, the justices decide that each of the complaints has been proved by the complainant on a balance of probabilities, and they then consider to whom the custody of the three children should be granted.

The justices are not satisfied that sufficient information has been given to the court about the parties and their home surroundings, and they therefore call for a welfare report to be produced for the court at an adjourned hearing.

One of the justices finds he is unable to attend the adjourned hearing owing to pressing business reasons and so makes arrangements for a colleague to attend in his place.

Was this a proper course for the magistrate to have taken?

35
(72)

Non-cohabitation clause – *Inclusion of non-cohabitation clause in matrimonial order.*

Application is made to justices by the complainant wife for a matrimonial order against the husband on the grounds of persistent cruelty and wilful neglect to provide reasonable maintenance for the wife and one child of the family.

The solicitor for the defendant husband agrees that such an order should be made and the complainant then formally gives her evidence. The solicitor for the complainant indicates that in addition to a matrimonial order being made on the grounds of complaint, he seeks maintenance for the wife and one child, and an order for custody of the child with reasonable access to be granted to the defendant. Additionally, he asks the justices to insert a non-cohabitation clause in the order.

What should the justices consider before inserting a non-cohabitation clause in a matrimonial order?

36
(73)

"No case to answer" – *Submission of "no case to answer" in domestic proceedings – Points to consider.*

In what circumstances can a submission of no case to answer be properly made and upheld in a matrimonial case?

37
(74)

Practice and Procedure – *Considerations of justices after determining matrimonial complaint made out.*

After lengthy consideration of a matrimonial case the justices decide that neither of the complaints, alleging peristent cruelty or wilful neglect to provide reasonable maintenance for the wife or children, has been proved by the complainant to the required degree. No application is made for costs.

What must the justices consider before concluding the case?

38
(75)

Practice and Procedure – *Power to deal with a matrimonial complaint without hearing evidence.*

In what circumstances can justices make an order in domestic proceedings or proceedings relating to the variation of maintenance payments, without hearing evidence from the parties?

B. Domestic Proceedings

33

Domestic proceedings are civil proceedings and the chairman should not give the defendant options which apply *only* to criminal proceedings.

It must always be remembered, therefore, that proceedings in the domestic court and certain other proceedings which take place in magistrates' courts are governed by the rules of *civil* proceedings.

The basic difference between the two procedures is as follows:

In *criminal proceedings* a defendant who wishes to say something in his defence may either give his evidence on oath, make an unsworn statement, or decide to say nothing.

In *civil proceedings*, on the other hand, the basic rule is that *sworn* evidence must be given. This would always allow the man's wife or her solicitor to cross-examine. The defendant, however, still retains his right to address the court at the conclusion of the evidence for the complainant (M.C.R., 1968, r.14(2)) or at the conclusion of the evidence for himself if he has not already done so (r.14(4)).

In matrimonial cases (as mentioned in the question) one should carefully note what was said in the case of *Aggas v Aggas* [1971] 2 All E.R. 1497; 135 J.P. 484. This case decided that the court in such circumstances has no power to give the defendant the option of making an unsworn statement. The court is concerned only with testimony given on oath.

The chairman, in the particular circumstances in the question, has erred in suggesting to the defendant that he has the three choices available to him.

34

There is no provision relating to civil proceedings, which amongst others, include domestic proceedings whereby a decision can be arrived at by any justices other than those who have heard the case in its entirety.

Justices can, of course, in criminal proceedings determine sentence after conviction even though they were not the original bench of justices who found the defendant guilty, provided an outline is made of the circumstances by the prosecuting solicitor or officer as is sufficient and necessary to fully acquaint the justices of the facts and circumstances of the case. (M.C.A., 1952, s.98(7)).

In civil proceedings the same magistrates must hear the case throughout. However, where three justices commence hearing a domestic case and adjourn to another day or time it is acceptable in law for two of the original three justices to continue the hearing if exceptional circumstances prevent one of their number from attending. One must, however, always bear in mind that under the provisions relating to domestic proceedings, "the court shall be composed of not more than three justices of the peace including, as far as is practicable, a man and a woman". (M.C.A., 1952, s.56(2)).

If, on the other hand, the original bench was constituted of *two* justices the case must, of necessity, be continued by those same two justices.

It would in any case be wrong for a justice to ask one of his colleagues to stand in for him in a case which is "part heard" whether the proceedings are of a criminal or civil nature. The reasons are obvious and many but it will be sufficient to state that in addition to considering the evidence given, a magistrate will have had regard to the demeanour of the parties and of any witnesses and this factor could in itself have an important bearing on the outcome of the case.

In *Bolton v Bolton* [1949] 2 All E.R. 908; 114 J.P. 7, Lord Merriman said in this respect:

"To put the matter at the very lowest, it is a very grave disadvantage to anybody who has to give a decision in such a case not to have been able to judge the demeanour of the complainant wife while she was giving her own story."

Justices were severely criticized by Lord Merriman in *Joseph v Joseph* [1948] 112 J.P. 154. In that case the justices made a separation order in favour of the wife for maintenance and custody of the children without hearing any evidence. Evidence had already been given before a differently constituted bench on a previous occasion when application was made for an interim order.

Lord Merriman said:

"The court was then constituted of the original chairman and two entirely different justices who had not heard one word of the evidence given on the previous occasion. This is a case for plain speaking, and I am bound to say that it passes my comprehension how at this date justices could be so ignorant as to think that they had jurisdiction to give a judgment between any two people when they had not heard one tittle of the evidence."

He went on to say:

"I am sorry to think that such gross irregularities as this case illustrates should be possible at the present day. We have no option but to set this order aside, as being made by a court which had no jurisdiction to make it since, as a court, it had not heard a word of the evidence . . . . ."

In *Bolton v Bolton,* supra, it was decided that where proceedings have been started and evidence given before a judge or magistrate(s) who is judge both of fact and law, it is not proper, *even with the consent of the parties,* to continue the proceedings before another

judge or magistrate(s), especially where there is the slightest risk of any conflict of evidence.

In that case one metropolitan magistrate had heard the whole of the wife's evidence-in-chief, and the hearing was adjourned. Another metropolitan magistrate then heard the case on the date of the resumed hearing and both parties agreed to his dealing with the case. The notes of the wife's evidence in chief were read out; she was cross-examined and the rest of the case was heard by the second metropolitan magistrate.

The magistrate in the situation outlined in the question should have informed the justices' clerk of his difficulties so as to avoid placing his colleagues in a situation analogous to *Bolton v Bolton,* supra.

35

Not infrequently justices are asked in the domestic proceedings court to insert a non-cohabitation clause in a matrimonial order, although advocates give no real reason to the court why such a clause should be included. In some cases it is assumed that such a clause will be included in the order even though no such application is made. It should be stressed that this is not a clause which should be included automatically in an order and it should only be so included if the justices feel it appropriate to do so and certain circumstances prevail.

In *Corton v Corton* [1962] 3 All E.R. 1025; 127 J.P. 46 Sir Jocelyn Simon, the then President of the Probate, Divorce and Admiralty Division of the High Court said:

> " The justices have an *absolute discretion* whether or not to include a non-cohabitation clause. Counsel for the wife propounded that a separation order should in general be made in a case of persistent cruelty. I do not believe that it would be right to put any such clog on the discretion of the justices: *there should be no presumption that such an order should be made even in cases of persistent cruelty.* The justices should specifically direct their minds whether a separation order is called for in the circumstances of the particular case. *It should be the subject of a separate adjudication on their part.*"

He went on to say that in coming to their conclusion the justices would find it helpful if they asked themselves:

(1) Is the inclusion of the non-cohabitation clause in the order really necessary for the protection of the complainant?
(2) Is the case a more than ordinarily serious case?
(3) Is there a reasonable prospect of reconciliation?

The three considerations, he said, were not mutually exclusive. For example, the gravity of the conduct established will affect the question whether a reconciliation can reasonably be looked for; other considerations, such as the age of the parties, the length of the marriage, the joint responsibility for any young children and so on, will also have to be taken into account.

A non-cohabitation clause is inappropriate to a justices' order based on the ground of "simple" desertion or wilful neglect to provide reasonable maintenance for the wife or for any child of the family when there are no other special circumstances which make a separation order necessary. (*Vaughan v Vaughan* [1963] 2 All E.R. 742; 127 J.P. 404; *Jolliffe v Jolliffe* [1963] 3 All E.R. 295). (see also *Chesworth v Chesworth* [1973] Fam. Law 22).

It should be appreciated that a non-cohabitation clause does not require that the parties live apart but merely means that the complainant be no longer bound to cohabit with the defendant. (M.P. (M.C.) A, 1960, s.2(1)(a)). Matrimonial orders containing a non-cohabitation clause are commonly known as "separation orders". While the non-cohabitation clause is in force it has effect in all respects as a decree of judicial separation.

36

At the end of the evidence for the complainant in a matrimonial case the defendant or his advocate may make a submission that the defendant has no case to answer; if such a submission is made, the defendant should be asked by the court whether he intends to rest his case on that submission and call no evidence or whether he proposes to call evidence. (*Alexander v Rayson* [1936] 1 K.B. 169).

Where such a submission is made and the justices are of opinion that there is a case for the defendant to answer, no evidence for the defence can be heard, if he has been put to his election. Nevertheless, if the defence submission of "no case to answer" is rejected by the court, the defendant or his advocate is still entitled to address the magistrates in relation to the facts of the particular case, even though the defendant and any available witnesses cannot be called. (*Disher v Disher* [1963] 3 All E.R. 933).

It is important to note that the general rule is that in matrimonial cases, magistrates should hear evidence from *both sides* (*Clifford v Clifford* (1963) 107 S.J. 515). In *Bond v Bond* [1964] 3 All E.R. 346; 128 J.P. 568 it was stated by Scarman, J.:

> "We wish to say, with all the emphasis at our command, that there are very few matrimonial cases in which justice can be done without hearing both sides. *Magistrates have the power to dismiss a complaint at the conclusion of a complainant's case, but it is a power to be exercised only in exceptional cases;* for example, where no credence can be given to the complainant's evidence, or where it is crystal clear that the complainant has no case in law."

The justices must in any case ensure compliance with the provisions of s.4(1) M.P. (M.C.) A, 1960, which requires the court to consider, before dismissing the complaint, whether or not it should exercise its special powers and duties with respect to children and if so, how those powers should be exercised. Its powers with regard to children are the same as if the matrimonial complaint was proved.

Before dismissing the complainant's case of their own motion or on a submission of "no case to answer" it is important that justices first give the complainant or her advocate the opportunity to address them. (*Mayes v Mayes* [1971] 2 All E.R. 397; 135 J.P. 487).

Although not specifically part of the question, it is important to note that the rule concerning putting a defendant to his election in a submission of 'no case to answer' in domestic and other similar civil cases does *not* apply to criminal cases where there is no corresponding requirement (*Jones v Metcalfe* [1967] 3 All E.R. 205; 131 J.P. 494). The special rules relating to criminal cases are contained in Court Teaser number 18.

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There is a statutory rule that before finally dismissing a complaint brought under M.P.(M.C.)A., 1960, s.1, the court must first consider the welfare of any children of the family named in the complaint and allow the parties an opportunity to make representations as to how the court should exercise its powers.

The relevant section is s.4(1) of the Act. It applies whenever a complaint is brought on one or more of the grounds contained in s.1 (which include persistent cruelty, adultery, desertion, wilful neglect to maintain, etc.) and where the complaint includes children of the family.

It is extremely important to emphasise that even though the court is not satisfied that the grounds of complaint are proved, it must in any event consider the welfare of any children of the family concerned. The magistrates, as has been stated, must not *dismiss* the complaint or for that matter make a final order until they have decided whether or not, and if so how, to exercise their special powers (for example, custody and access) relating to the children.

Even if the justices are satisfied that none of the substantive grounds of complaint are made out to the required degree and they are minded to dismiss the complaint, their powers with regard to the children are exactly the same as if the "matrimonial offence(s)" had in fact been proved.

The principles relating to the grant of custody and access in proceedings brought under the 1960 Act are similar to those which apply under G.M.A., 1971. Section 1 of the Act, as amended by G.A., 1973, sch. 2, states:

> "Where in any proceedings before any court . . . . the custody or upbringing of a minor . . . . is in question, the court, in deciding that question, *shall regard the welfare of the minor as the first and paramount consideration,* and shall not take into consideration whether from any other point of view the claim of the father, in respect of such custody, upbringing . . . . is superior to that of the mother, or the claim of the mother is superior to that of the father."

The same principle applies in all courts seized of such matters and in the case of *W v W* [1976] *The Times,* November 26 the Court emphasized, in allowing the appeal, that the case of *Re L.* [1962] 1 W.L.R. 886 could no longer be relied on. In that case the Court had balanced the welfare of the child against the wishes of the unimpeachable parent.

All cases concerning the grant of custody of children must, therefore, be decided on the basis that the first and paramount (although not the only) consideration is the welfare of the child. This principle was laid down in *J v C* ([1969] 1 All E.R. 788 which was heard by the House of Lords two years before G.M.A., 1971 came into force.

Even though justices must, in considering such an issue, treat the welfare of the minor as the first and paramount consideration, the Family Division of the High Court in *Re T (a minor),* (seeing child in private) [1974] Fam. 48 has made it clear that magistrates should not question a child privately in their retiring room to determine with which parent, if any, the child would prefer to live.

Even where the views of a young child are properly admitted in court, the court should act cautiously. In *M v M* [1977] Fam. Law 17 Sir George Baker observed:

> "The views of a six year old child should be approached with caution. There would be pressures on a child to express a view in favour of the parent with whom living."

38

(75)

The answer is contained in M.C.A., 1952, s.45(2) which provides in relation to the hearing of a complaint:

> "The court, *after hearing the evidence* and the parties shall make the order for which the complaint is made or dismiss the complaint."

Subsection 2 clearly lays down a general rule and requires *evidence* to be heard in the case of a complaint.

Justices are, nevertheless, given a limited right to make an order *without hearing evidence* in certain circumstances in civil proceedings by virtue of subsection 3 of that same section, which states:

> "Where a complaint is for an order for the payment of a sum recoverable summarily as a civil debt, or for the variation of the rate of any periodical payments ordered by a magistrates' court to be made, or for such other matter as may be prescribed, the court may make the order with the consent of the defendant without hearing evidence."

Thus, justices dealing with domestic proceedings or proceedings relating to the variation of maintenance payments are only entitled to make an order without hearing sworn evidence when a complaint is made for the *variation* of the rate of periodical payments of a maintenance order, and there is no power to make an order without hearing evidence in other circumstances. An order for the variation

of the rate of periodical payments, however, can only be made without evidence being heard when the defendant consents to the variation and the proposed amount.

In the case of *Jones v Jones* (1975), 5 Fam. Law 194 the Family Division of the High Court held that where a complaint is brought under M.P.(M.C.)A., 1960 on one of the grounds listed in s.1 of that Act, for example, persistent cruelty, desertion, or wilful neglect to provide reasonable maintenance for the wife or for any child of the family, *although agreements between spouses* as to the amount of maintenance to be paid by the defendant *are a relevant circumstance to be taken into account, magistrates are not entitled to give approval to such agreements without hearing the appropriate evidence.*

In that case the wife was, in fact, in receipt of supplementary benefit payments of £11·60 pence per week and her husband earned £40·50 pence per week gross from his job as a colliery mason. The parties, who were both legally represented, agreed at the court hearing that the husband would admit the "matrimonial offence" of wilful neglect to provide reasonable maintenance for his wife and would pay her six pounds per week for her maintenance. The magistrates, however, after formal evidence had been given and the husband had been examined by the magistrates as to his means, disregarded this agreement and made an order for maintenance of £11·50 per week.

The husband appealed to the Family Division of the High Court alleging that he was not warned of the magistrates' intention to make the higher order they made, and he was not given an opportunity to reconsider or to withdraw his offer.

Dunn, J. said that the operation of s.45, M.C.A., 1952, and r.14 M.C.R., 1968, required justices to receive evidence before making an order. Magistrates had no power simply to approve an agreement put before them as to do so would be contrary to the express provisions of the statute. That being so, it was implicit that the justices might make a different order and there was no need to warn the husband of their intention to do so.

Sir George Baker, President of the Family Division, delivered a concurring judgment and said that the case served to bring home to legal advisers the point that justices were never allowed to accept or reject a compromise. Justices were bound to reach a judicial decision on the evidence put before them.

The court upheld the original order made by the magistrates of £11·50 per week.

DOMESTIC PROCEEDINGS

Domestic Proceedings and Magistrates' Courts Act, 1978 ("the 1978 Act")

The 1978 Act received the Royal Assent on June 30, 1978. When the appropriate rules have been made and the Act takes effect it will alter considerably the law and practice relating to matrimonial proceedings in magistrates' courts.

The main purpose of the Act is to bring matrimonial law administered in the magistrates' courts more closely into line with divorce proceedings in the higher courts.

The Act provides new grounds for seeking a matrimonial order. Instead of the existing nine grounds for an order there will be four. There will no longer be an obligation upon the complainant to show that a 'matrimonial offence' has been committed.

Other important changes include the power to make personal protection orders, exclusion orders and lump sum payments. Each spouse will be equally liable to maintain the other and there will be provision to make orders for payments which have been agreed by the parties. These are only a few of the changes brought about by the Act.

The 1978 Act will repeal the whole of the Matrimonial Proceedings (Magistrates' Courts) Act, 1960 on which questions and answers 33 to 38 inclusive are based.

Listed below is an outline of the law relevant to answers 33 to 38 when the Act comes into force. 'No change' indicates that the original answer will apply.

ANSWER 33

No change — but different grounds than previously exist for the making of an order for financial provision under the 1978 Act. (See Answer 34 below).

A person may affirm instead of taking the oath and an affirmation shall have the same force and effect as an oath.

ANSWER 34

Under s.1 of the 1978 Act either party to a marriage may apply to a magistrates' court for an order for financial provision under s.2 *only* on the ground that the other party to the marriage

a) has failed to provide reasonable maintenance for the applicant; or

b) has failed to provide, or to make a proper contribution towards, reasonable maintenance for any child of the family; or

c) has behaved in such a way that the applicant cannot reasonably be expected to live with the other party; or

d) has deserted the applicant.

Section 31 of the 1978 Act provides that where the hearing of an application under s.1 is adjourned after the court has decided that it is satisfied of any of the above mentioned grounds, the court which resumes the hearing of the application may include justices who were not sitting when the hearing began if the parties to the proceedings agree and at least one of the justices composing the court which resumes the hearing was sitting when the hearing of the application began.

If there are any justices who were not sitting when the hearing of the application began the court must inquire into the facts and circumstances of the case so as to enable the justices who were not sitting when the hearing began to be fully acquainted with the facts and circumstances. The situation, therefore, is unlike that existing under the Matrimonial Proceedings (Magistrates' Courts) Act 1960.

The 1978 Act will provide for domestic proceedings to be heard only by magistrates who are members of specially appointed domestic court panels. (s.80).

ANSWER 35

Either party to a marriage may apply to a magistrates' court for an order for financial provision under s.2 of the 1978 Act *only* on certain grounds. (See ANSWER 34 above).

There will no longer be power for the court to insert a non-cohabitation clause in an order when the 1978 Act takes effect. The court will be able, however, on application by either party (whether or not an application is made by that party for an order under s.2), to make a 'personal protection order', ie. an order that the other party shall not use, or threaten to use, violence against the person of the applicant or a child of the family.

Before making such an order the court must be satisfied that the other party has used, or has threatened to use, violence against the person of the applicant or child of the family, and such an order is necessary for the protection of that person.

The court will also be able to make an 'exclusion order' on appropriate application (as above), ie. an order requiring the other party to leave the matrimonial home or an order prohibiting him from entering the matrimonial home. The court may also make a further order requiring the other party to permit the applicant to enter and remain in the matrimonial home.

Before making such an order the court must be satisfied that the other party has used violence against the person of the applicant or a child of the family or he has threatened to use violence against

such a person and has used violence against some other person. Such an order may also be made where the other party has disobeyed a personal protection order by threatening to use violence against the person of the applicant or a child of the family. The court must also be satisfied that the applicant or a child of the family is in danger of being physically injured by the other party or would be in such danger if the applicant or child were to enter the matrimonial home. (s.16).

ANSWER 36

No change. — References to M.P.(M.C.)A., 1960, s.4(1) should be construed as being references to the 1978 Act s.8. (See Answer 37 below).

ANSWER 37

Either party to a marriage may apply to a magistrates' court for an order for financial provision under s.2 of the 1978 Act *only* on certain grounds. (See ANSWER 34 above).

Section 8 of the 1978 Act provides that where an application is made by a party to a marriage for an order under s.2, s.6 (orders for payments which have been agreed by the parties) or s.7 (powers of court where parties are living apart by agreement), then, if there is a child of the family who is under 18 years, the court shall not dismiss or make a final order on the application until it has decided whether to exercise its powers under the section and, if so, in what manner. These powers relate to the legal custody of the child and access to any such child by either of the parties to the marriage or any other person who is a parent of that child. The court will have power to make such an order as it thinks fit, whether or not it makes an order under ss. 2, 6 or 7. (The answer will then read the same as from fifth paragraph on original ANSWER 37).

ANSWER 38

Section 6 of the 1978 Act will allow a magistrates' court to make an order for payments which have been agreed by the parties without the need for any inquiry as to the grounds upon which the application is founded.

Either party may apply for such an order on the ground that the other party to the marriage has agreed to make such financial provision as may be specified in the application. The court, however, before ordering that the respondent shall make such financial provision must be satisfied that he has agreed to make the provision and the court has no reason to think that it would be contrary to the interests of justice to exercise these powers. Thus, the court will be able to refuse a consent order if it thinks appropriate. "Financial provision" is defined in the section and includes the

making of periodical or lump sum payments to the applicant or to a child of the family or to the applicant for the benefit of such a child.

Where the respondent is not present or is not legally represented the court shall not make a consent order unless evidence of the financial resources of the respondent and his consent to the making of the order are produced to the court.

The limited right previously conferred on justices to make an order without hearing evidence under M.C.A., 1952, s.45(3) will continue to apply.

C. JUVENILES

39
(82)

Juveniles appearing with adults – *Juvenile offenders appearing in adult court.*

A juvenile offender, aged 15 years, with a long record of previous findings of guilt appears before the adult court on charges alleging that he took a motor vehicle without the consent of the owner or other lawful authority, and other motoring offences. An adult, aged nineteen years, is also charged with the same offences. Both defendants admit the offences in the adult court and the justices decide that the adult should be fined, but are reluctant to deal with the juvenile.

When should juveniles appear in the magistrates' court with adults?

In what circumstances should juveniles be remitted to the juvenile court after a finding of guilt in an adult court?

40
(85)

Supervision Orders – *Some differences between "supervision orders" made in the juvenile court and "probation orders" made in the adult court.*

A boy, aged 16 years, appears before the juvenile court on a charge of entering shop premises as a trespasser and stealing therein property to the value of one hundred pounds. His record reveals that he is already the subject of a supervision order to the Probation Service made by the same juvenile court and the offence has been committed during the currency of that order.

The magistrates decide to fine him for the offence before the court and also wish to impose a fine for the original offence because the offence before the court has been committed during the currency of the supervision order.

Can the magistrates impose a fine for the original offence in such circumstances?

What basic differences are there between supervision orders and probation orders?

C. JUVENILES

39

Clearly an adult court has original jurisdiction to deal with a juvenile in certain circumstances.

The law requires that a charge made jointly against a child (i.e. 10–13 years inclusive) or young person (i.e. 14–16 years inclusive) and a person who has attained the age of seventeen years *shall* be heard by the adult court. (C.Y.P.A., 1933, s.46(1)(a)[1]. This is the type of situation disclosed in the question.

The same subsection also provides that where a child or young person is charged with an offence, the charge *may* be heard by an adult court if a person who has attained the age of 17 years is charged at the same time with aiding, abetting, causing, procuring, allowing or permitting that offence.

An adult court similarly *may* hear a case against a child or young person who is charged with aiding, abetting, causing, procuring, allowing or permitting an offence with which an adult is charged at the same time. It *may* also hear an information against such a person if he is charged with an offence arising out of circumstances which are the same as or connected with those giving rise to an offence with which an adult is charged at the same time. (C.Y.P.A., 1963, s.18).

No doubt the magistrates referred to in this question considered whether to deal with the adult summarily or commit him for trial, and then gave the adult a right of trial by jury, together with the appropriate caution. Clearly the adult consented to being dealt with summarily. Their decision concerning the adult as to summary trial was very important to the juvenile for the following reasons:

Where a person under the age of 17 years appears before a magistrates' court charged with an indictable offence, other than homicide, he must be tried summarily except where the following circumstances apply.

(a) He is a young person and the offence is one punishable on conviction, in the case of an adult, with a maximum term of imprisonment of 14 years or more and the court considers if he is found guilty of the offence it ought to be possible to sentence him to be detained for such period not exceeding the maximum term of imprisonment which an adult would be liable to serve.

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[1] C.L.A., 1977, s.34, when in force, will amend this provision allowing the adult court a discretion to remit a juveniie not yet found guilty to a juvenile court, when either the adult pleads guilty or the court proceeds on enquiry in his case, and in either event the juvenile denies the allegations.

(b) He is charged jointly with an adult[1] (i.e. aged 17 years or more) and the court considers it necessary in the interests of justice to commit them both for trial.

Where either of the above provisions (a) or (b) apply, the court shall commit the accused for trial if either it is of opinion that there is sufficient evidence to put him on trial or it has power under s.1, C.J.A., 1967 so to commit him without consideration of the evidence. (C.Y.P.A., 1969, s.6(1)).[2]

The first part of the answer has dealt with jurisdiction to hear the plea and determine guilt. What must now be considered is the right of the adult court to impose a sentence upon the juvenile or make an order against him. One must first refer to the important section restricting the power of an adult court to deal finally with juveniles.

C.Y.P.A., 1933, s.56(1) states inter alia:

"Any court by or before which a child or young person is found guilty of an offence other than homicide, *may, and, if it is not a juvenile court, shall unless satisfied that it would be undesirable to do so, remit the case to a juvenile court* . . . . . acting either for the same place as the remitting court or for the place where the offender habitually resides and, where any such case is so remitted, ... that court may deal with him in any way in which it might have dealt with him if he had been tried and found guilty by that court."

Applying the tests laid down by the subsection clearly the adult court in these circumstances should not proceed to sentence this juvenile but should remit him to the juvenile court to be further dealt with according to law. It will only be necessary to mention two methods of disposal open to the juvenile court but not available to the adult court — care order and supervision order — to make it clear that remission to the juvenile court in this case is essential.

In applying the statutory tests set out above in s.56, the methods of disposal available to adult and juvenile courts in *criminal matters* concerning juveniles are obviously of great importance although not the sole consideration. The methods of disposal are as follows: (All orders mentioned may be made in respect of children and young persons unless otherwise specified).

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[1] C.L.A. 1977, s.35, when in force, will provide that an adult magistrates' court may also commit him, in such a case, for any other indictable offence with which he is charged at the same time (whether jointly with an adult or not), if that other offence arises out of circumstances which are the same as or are connected with those giving rise to the first offence.

[2] C.L.A. 1977, s.25, when in force, will allow a court which has commenced committal proceedings on the grounds that the offence falls within s.6(1)(a) or (b) above to change to summary trial if it thinks appropriate. The reverse situation will also apply.

1. ADULT COURT

(a) An order discharging him absolutely or conditionally.

(b) An order for payment of a fine. (Maximum of £50[1] for each offence in the case of a young person and a maximum of £10[2] for each offence in the case of a child).

(c) An order requiring his parent or guardian to enter into a recognizance to take proper care of him and exercise proper control over him. — maximum sum of £50[1] for up to three years or until juvenile attains eighteen years of age if that period is less. (C.Y.P.A., 1969, s.7(8)).

2. *JUVENILE COURT*

(a) An order discharging him absolutely or conditionally.

(b) An order for the payment of a fine (as in 1(b) above).

(c) An order requiring his parent or guardian to enter into a recognizance (as in 1(c) above).

(d) Care Order (where offence punishable by imprisonment in case of adult) — usually until 18 years.

(e) Supervision Order — maximum period of three years.

(f) Hospital or Guardianship Order (where offence punishable by imprisonment in case of adult).

(g) Attendance Centre Order (where offence punishable by imprisonment in case of adult).

(h) Detention Centre Order (where offence punishable by imprisonment in case of adult — male young persons only).

With any of the above mentioned orders the court has power to include an order relating, for example, to compensation, endorsement of driving licence, or disqualification for holding or obtaining a driving licence, where appropriate.

(i) Committal to Crown Court with a view to borstal training (where offence punishable by imprisonment in case of adult — 15 and 16 year olds only).

NOTE ALSO:

Notwithstanding the special rules relating to juveniles, *any* justice or justices may entertain an application for bail or for a remand relating to a juvenile appearing on his own, and may hear such evidence as may be necessary for that purpose. (C.Y.P.A., 1933, s.46(2)).

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[1] When C.L.A., 1977, s.58 comes into force, £200 should be substituted for £50.

[2] When C.L.A., 1977, s.58 comes into force, £50 should be substituted for £10.

CONTINUED

1 OF 2

In general terms a supervision order is a "sentence" of the court which made the order. *There is no power vested in the juvenile court to fine the juvenile subsequently for the offence for which he was placed under supervision.* This is unlike the power of the adult court when dealing with an adult probationer in similar circumstances. The supervising officer has, of course, power (in his own discretion) to apply for a care order to be substituted for the supervision order if the statutory circumstances apply.[1]

Probation and supervision, although vastly different in concept and application, have, nevertheless, sufficient similarity to cause confusion.

It is, therefore, necessary to mention some of the differences and similarities between a supervision order (made in the juvenile court in either criminal or care proceedings) and a probation order (which can only be made in the adult court in criminal proceedings).

Probation orders can only be made in respect of a person 17 years of age or older. Supervision orders can generally only be made where defendant is *under* 17 years of age.

Normally a supervision order may be made without the consent of the defendant, although there are exceptions, for example, where a requirement is inserted in the order that the defendant submits to treatment for a mental condition and he has attained the age of fourteen years. (C.Y.P.A., 1969, s.12(4)(5)). The making of a probation order requires the defendant's consent.

Probation orders and supervision orders must operate from the day on which the order is made, (*R v Evans* [1958] 3 All E.R. 673; 123 J.P. 128), and there is no power in law to order them to take effect at some future date, for example, after a defendant's release from a detention centre order imposed at the same time (*R v Evans*, supra) or at the termination of an existing order.

A supervision order shall be effective for three years, *or such shorter period as may be specified by the court* but where the order is not made in criminal proceedings, it may not expire later than the supervised person's eighteenth birthday. (C.Y.P.A., 1969, s.17). A probation order may be made for any period *not less* than six months

[1] When C.L.A. 1977, s.37 comes into force the supervisor will have power to bring back a person under the age of 18 years to the court *for a breach of supervision requirements.* If the breach is proved the court may order the supervised person to pay a fine of up to £50, or make (in the case of a boy) an attendance centre order. Such powers will be available to the court whether or not it varies or discharges the supervision order. This provision will only apply to supervision orders made following criminal proceedings and will be restricted to orders made after the provision comes into force.

nor more than three years[1] (P.C.C.A., 1973, s.2(1)) and must require the probationer to be under the supervision of a probation officer. On the other hand, the supervisor for a supervision order must be either a local authority designated by the order or, in appropriate cases, a probation officer (C.Y.P.A., 1969, s.11).

The court has power to designate a local authority as supervisor in all cases where it makes a supervision order, whatever the age of the child. C.Y.P.A., 1969, s.13(2), however, provides that a probation officer may be designated only if:

(a) the supervised person has attained a specified age, which at present is 13 years. (C.Y.P.A., 1969, s.34(1)(a), S.I. 1970, No. 1882, S.I. 1973, No. 485 and S.I. 1974, No. 1083).

(b) where the child is under 13 years and the local authority request a probation officer to supervise him and a probation officer is already exercising or has exercised statutory duties in relation to some other member of the household to which the child belongs.

Generally speaking, the same set of conditions can be inserted in both probation and supervision orders. Certain conditions, however, such as a requirement to undergo intermediate treatment are peculiar to supervision orders.

A further difference between probation and supervision orders is in relation to their subsequent legal effects.

It is provided in P.C.C.A., 1973, s.13(1) that a probation order: ". . . . shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made and any subsequent proceedings which may be taken against the offender under the preceding provisions of this Act". The "preceding provisions of this Act" refer, amongst others, to the commission of a further offence committed during the period of probation.

One important effect of this section is that it affects the court's powers on subsequent occasions; for example, a defendant placed on probation for an offence committed during the currency of a suspended sentence of imprisonment is not liable to be dealt with for the suspended sentence because he has not been *convicted* of a further offence. A further example is *there is no right of appeal* to the Crown Court against conviction following a guilty plea or sentence because a probation order does not rank as either a conviction or a sentence.

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[1] C.L.A., 1977, s.57 empowers the Secretary of State to make an order varying the statutory maximum or minimum period relating to probation orders or conditional discharges.

A supervision order made under C.Y.P.A., 1969, however, unlike a probation order which is made "instead of sentencing" (P.C.C.A., 1973, s.2(1)) does come within the definition of "sentence" in M.C.A., 1952, s.83 and C.A.A., 1968, s.50. Accordingly, *there is a right of appeal* against a supervision order made in the juvenile court after a finding of guilt to the charge.

The further important effect of a supervision order being an actual sentence (rather than a postponement of sentence subject to conditions) is that the supervised person cannot be dealt with specifically for committing an offence during period of the supervision order as would be the case with a probation order. What steps then can the court take in the circumstances set out in the question? The answer is none, but it is left to the discretion of the supervisor (as has been stated above) to take action with a view to the substitution of a care order for the supervision order, if he thinks fit.[1] In the case of a probation order the probationer can, of course, be dealt with for the original offence if he commits another offence during its operational period. (P.C.C.A., 1973, s.8). In such circumstances the original probation order ceases to have effect. (P.C.C.A., 1973, s.5(2)).

When a supervision order is in force and the supervised person has not attained the age of eighteen years, the supervisor may take proceedings under C.Y.P.A., 1969, s.15, with a view to the court varying or discharging the supervision order. On discharging the supervision order the court may make a care order provided it is satisfied that the supervised person is unlikely to receive the care or control he needs unless the court makes the order. (C.Y.P.A., 1969, s.16(6)). "Care" in this context includes protection and guidance and "control" includes discipline. (C.Y.P.A., 1969, s.70).

It can also be noted that certain sanctions are available to the court for dealing with a person who is the subject of a supervision order in criminal proceedings, *who has attained 17 years* and has failed to comply with the requirements of the order. These include the power, if the court discharges the supervision order, to deal with the now adult supervised person in any way as if it had then convicted him of the offence for which he was placed under supervision.

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[1] See Footnote 1 on page 85 for other powers included in C.L.A. 1977, s.37, when it comes into force.

END