DU PLOOY v HM ADVOCATE

No 1
3 October 2003

Lord Justice-General (Cullen of Whitekirk),
Lord Maclean and Lord Osborne

DEVONNE DU PLOOY, First Appellant—*Shead, McKenzie*
FRANCIS ROBERT ALDERDICE, Second Appellant—*Scott QC*
WILLIAM CROOKS, Third Appellant—*Bovey QC, Nelson*
DAVID WILLIAM O'NEIL, Fourth Appellant—*Jackson QC, MacKenzie*
HER MAJESTY'S ADVOCATE, Respondent—*Boyd QC (Lord Advocate), McNeill*

Justiciary – Sentencing – Plea of guilty – Basis of allowance in sentence for guilty plea – Form of allowance in sentence for guilty plea – Criminal Procedure (Scotland) Act 1995 (cap 46), sec 196(1)

Section 196(1) of the Criminal Procedure (Scotland) Act 1995 provides that a court in determining the sentence to be passed or the disposal or order to be made in respect of an offender who has pled guilty may take into account the stage in the proceedings at which the offender indicated his intention to plead guilty and the circumstances in which that indication was given.

Held that: (1) in determining the appropriate punishment of an accused who pleads guilty, not only the utilitarian value of the plea of guilty but also the implications of the accused's acceptance of guilt fell to be taken account of (para 14); (2) the relevant provisions applied equally to solemn and summary proceedings (para 15); (3) the relevant factors for which allowance could be made included saving of public money and court time, avoidance of inconvenience to witnesses and in certain types of cases avoiding additional distress being caused to witnesses by their having to give evidence or be further precognosced (para 16); (4) an accused's true contrition demonstrated, *inter alia*, by assistance or information provided to the authorities fell to be taken account of (paras 22, 23); (5) where a plea of guilty and related matters called for an allowance, the sentencer should use a distinct account in the process of arriving at the appropriate sentence and should state in court the extent to which the sentence had been discounted (para 25); (6) such discount should not normally exceed a third of the sentence which would otherwise have been imposed (para 26); and causes *continued* for a consideration of the merits.

Tennie v Munro 1999 SCCR 70 *commented on*.

DEVONNE DU PLOOY, FRANCIS ROBERT ALDERDICE, WILLIAM CROOKS and DAVID WILLIAM O'NEIL appealed against sentences imposed in their respective cases. Each had pled guilty and appealed on the grounds, *inter alia*, that insufficient allowance had been made for the plea of guilty in the sentence that was imposed. The causes called before the High Court of Justiciary, comprising the Lord Justice-General (Cullen of Whitekirk), Lord MacLean and Lord Osborne for a hearing, on 4 June 2003, on the general issue as to the basis of and scope for allowance in sentencing of accused persons in respect of the fact of a guilty plea and the form such an allowance might take.

Cases referred to:
Advocate (HM) v Forrest 1998 SCCR 153
Billam [1986] 1 WLR 349; [1986] 1 All ER 985; (1986) 8 Cr App R (S) 48
Byrne (1997) 1 Cr App R (S) 165
Cameron v R (2002) 187 ALR 65
Cleishman v Carnegie 1999 GWD 36-1764
Costen (1989) 11 Cr App R (S) 182; [1989] Crim LR 601
Docherty v McGlennan 1998 GWD 4-176
March (2002) 2 Cr App R (S) 448; [2002] Crim LR 509
Millberry [2003] 1 WLR 546; [2003] 2 All ER 939; (2003) 1 Cr App R 25
R v Hussain (2002) 2 Cr App R (S) 25
R v Larmour [2001] NIECA 21
R v Thomson; R v Houlton (2000) 49 NSWLR 383

Strawhorn v McLeod 1987 SCCR 413
Tennie v Munro 1999 SCCR 70
Wojciechowski v McLeod 1992 SCCR 563
Young v HM Advocate 1995 SCCR 418

At advising, on 3 October 2003, the opinion of the Court was delivered by the Lord Justice-General (Cullen of Whitekirk)—

OPINION OF THE COURT— [1] For some time it has been apparent that it would be desirable for the court to take the opportunity to give guidance, under reference to sec 118(7) of the Criminal Procedure (Scotland) Act 1995 ('the 1995 Act'), as to the basis of, and scope for, an allowance in the sentencing of an accused in respect of the fact that he has pled guilty, and the form which such an allowance might take. These four appeals against sentence have been selected as typical examples of cases in which the appellant maintains that insufficient allowance was made for his plea of guilty in the sentence which was imposed. The appellants Du Plooy and Alderdice pled guilty to charges on indictments under sec 76 of the 1995 Act. The appellants Crooks and O'Neil pled guilty at their trial diets. At the request of the court written arguments were submitted by each of the appellants and, for the public interest, the respondent. The court was addressed by counsel for the appellants and by the Lord Advocate. We would like to express our gratitude to them for their assistance, which included examining not only the position in Scotland, but also the practice followed in other jurisdictions, and in particular England and Australia.

Section 196(1) of the 1995 Act

[2] It is convenient to take as our starting point the terms of sec 196(1) of the 1995 Act, which states:

> '(1) In determining what sentence to pass on, or what other disposal or order to make in relation to, an offender who has pled guilty to an offence, a court may take into account—
> (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
> (b) the circumstances in which that indication was given'.

This provision is derived from sec 33 of the Criminal Justice (Scotland) Act 1995 (cap 20). The enactment of that section arose out of the decision in the appeal against sentence in *Strawhorn v McLeod*. In that case the appellant had intimated a plea of guilty six days before the trial diet. In his report to the appeal court the sheriff stated:

> 'The sheriffs in this court are of opinion that an early plea of guilty, which obviates the waste of time and expense involved in the unnecessary attendance of witnesses, and in the disruption of their other arrangements, merits in appropriate cases a discount from what would otherwise be the appropriate sentence. In this case the arrangements made for the trial had to be unmade. As far as police witnesses were concerned their countermanding came too late'.

In the circumstances the sheriff declined to make any discount for the fact that the appellant had pled guilty. The practice described by the sheriff was criticised by the appeal court, which reduced the fine which he had imposed on the appellant. In its opinion, which was delivered by the Lord Justice-Clerk (Ross), two main criticisms were stated. The first was that the practice involved a form of plea-bargaining. The court stated (p 415):

> 'In one sense an accused person is being offered an inducement to plead guilty early and in our opinion no such inducement should be offered to accused persons. In this country there is a presumption of innocence and an accused person is entitled to go to trial and leave the Crown to establish his guilt if the Crown can. It is wrong therefore that an accused person should be put in the position of realising that if he pleads guilty early enough he will receive a lower sentence than he would otherwise receive for the offence'.

The second criticism was that the result of the practice 'must necessarily be to disable the sheriff from exercising his discretion fully and freely in a particular case'. On the whole matter the court stated: 'In the present case it is therefore plain that the sheriff, in approaching the matter of sentence, has had regard to an irrelevant consideration, namely that in his view the appellant did not plead guilty as soon as he might have done'.

[3] A number of points may be noted about sec 196(1). First, the subsection indicates that the taking into account of the matters mentioned in paras (a) and (b) may have a bearing, according to the circumstances of the case, not only on the extent of a sentence but also on the type of disposal or order which is made.

[4] Secondly, in enabling the sentencer to take into account the stage at which, and the circumstances in which, the accused indicated his intention to plead guilty, the subsection proceeds on the basis that the plea of guilty is relevant in regard to the sentencing of the accused. From the discussion, on 4 April 1995, before the First Scottish Standing Committee in regard to the clause which became sec 33 of the Criminal Justice (Scotland) Act 1995, it can be seen that the clause was intended to remove doubt about the propriety of taking into account the time and circumstances of a plea of guilty. The Minister of State observed that it 'should encourage those who are considering making a plea of guilty to do so timeously. It will not introduce a formal or rigid system of what is commonly known as sentence discounting' (*Hansard* HC, vol 566, col 139). Whatever may have been meant by the latter description, it appears that the enactment was intended to make clear that there was no objection in principle to an accused person being offered the prospect of an allowance in sentence if he tendered a plea of guilty at an early stage in the proceedings. However, as we point out later in this opinion, a provision such as sec 196(1) is not likely to give encouragement to pleas of guilty unless accused persons and their legal representatives have some assurance as to the allowance which the court is likely to make. At the same time it is important to bear in mind that any practice of making an allowance has to be kept within bounds, so as to avoid discouraging, or appearing to discourage, accused persons from exercising the right to put the prosecution to the proof of the charges against them.

[5] Thirdly, it is to be noted that sec 196(1) sets out matters which a court 'may' take into account. In the corresponding enactment in England the wording is identical apart from the use of the word 'shall' (sec 152(1) of the Powers of Criminal Courts (Sentencing) Act 2000 (cap 6), formerly sec 48(1) of the Criminal Justice and Public Order Act 1994 (cap 33)). None of the parties to the discussion in this court was able to give a convincing explanation why 'may', rather than 'shall', was used. One might expect that the sentencer should take these matters into account: they are neutrally expressed. What allowance, if any, the sentencer makes in respect of them is another matter. It may be little or none at all. In the end of the day the parties submitted that there was no practical difference between sec 196(1) and the corresponding English provision. In accordance with existing practice in Scotland the sentencer is expected to explain why an allowance was not given where there was an early plea of guilty (*Cleishman v Carnegie*).

[6] Fourthly, while sec 196(1) contemplates that an allowance may be made in a favourable case, it does not indicate what form it should take, such as a discount, that is to say an identifiable reduction in the sentence which would otherwise be appropriate. It may be noted that, at the time when sec 48(1) of the Criminal Justice and Public Order Act 1994 was enacted in England, it was already a matter of established practice for such discounts to be given by sentencers. Despite the enactment in Scotland of a corresponding provision there has been no discussion in this jurisdiction as to the basis of, or the scope for, any allowance, nor has there been the development of a clear practice as to the form of any allowance. It may be argued that, so far, sec 196(1) has not realised the purposes which it was designed to achieve.

[7] Fifthly, it is not in doubt that whatever allowance, if any, should be made in respect of a plea of guilty is a matter for the discretion of the sentencer. This is the approach which has been followed in Scotland (*HM Advocate v Forrest*; *Docherty v McGlennan*; *Tennie v Munro*) and in England (*R v Hussain*, paras 13, 14).

Rationale of making an allowance in respect of a plea of guilty

[8] Before advancing further into the subject we should consider the rationale for making an allowance, however it is expressed, in respect of a plea of guilty. This has a direct bearing on the scope of the factors which may be relevant in the particular case.

[9] It may be claimed that the making of an allowance involves the penalisation of accused persons who, for whatever reason, elect to go to trial. There is a trace of this objection in the reasoning of the court in *Strawhorn v McLeod*. It is well understood that the fact that an accused elects to go to trial should not operate to his disadvantage. Thus, for example, it does not justify the sentencer declining to backdate the sentence if the accused is ultimately convicted (*Young v HM Advocate*). Likewise it would be wrong for a sentencer to increase the sentence because the accused insisted on a plea of not guilty, so leaving the Crown to prove his guilt. Making an allowance in the case of the accused who tenders a plea of guilty does not affect the sentence of the accused who pleads not guilty but is ultimately convicted. However, the making of the allowance does involve drawing a distinction between them. Section 196(1) authorises the principle of drawing that distinction, leaving it to the sentencer and, if necessary, the appeal court, to ensure that the allowance is made for relevant reasons and is proportionate. As the Lord Advocate submitted, if this distinction were a reason for not making an allowance, there would never be a case for an allowance, no matter what were the time and the circumstances of the plea of guilty or its practical consequences. What then are the considerations which provide a legitimate basis for some form of allowance?

[10] In England it is evident that there are two main justifications for making an allowance in respect of a plea of guilty. The first is the benefit of the plea to the administration of justice. Thus, in delivering the judgment of the Court of Appeal in *Byrne* (p 166), Ognall J pointed out that by pleading guilty an accused saved a considerable amount of public time and expense. To this may be added the sparing of witnesses from having to attend the trial to give evidence (*Hussain*, para 17). This factor is regarded as being of considerable importance in sentencing for sexual offences. In *Billam* Lord Lane LCJ stated (p 351): 'The extra distress which giving evidence can cause to a victim means that a plea of guilty, perhaps more so than in other cases, should normally result in some reduction from what would otherwise be

the appropriate sentence'. In *Millberry*, which was concerned with a case of rape, Lord Woolf LCJ stated (para 27) that the first reason why courts made allowance for a plea of guilty and the stage in the proceedings when this happened was because it was known that victims of rape could find it an extremely distressing experience to give evidence in open court about what had happened to them, even where their identities were protected. He went on to say (para 28):

> 'Obviously the distress which is avoided is greater the earlier the victim is informed so the discount should be reduced if there is not an early plea. There is also the fact that the plea demonstrates that the offender appreciates how wrong his conduct was and regrets it. While it is desirable to avoid taking up the time of the court and incurring expense unnecessarily, this is less important in mitigation than the other two factors we have just mentioned'.

The other justification which is highlighted in the English decisions is the recognition of what is involved in an accused's acceptance of his or her guilt. Thus, in *Byrne* Ognall J (p 166) explained that the reasons for which a discount was traditionally given for a plea of guilty included the following (we omit the factor to which we have already referred):

> '[I]t is generally perceived as being the most cogent token of remorse and regret; secondly, it is reinforced by the view that by pleading guilty a defendant inevitably forfeits whatever prospect he may have, however exiguous, of being acquitted by a jury ... and lastly, he demonstrates by his plea an acceptance of the justification that he should be punished for his wrongdoing'.

[11] In Australia the courts have concentrated on the first of these main justifications in sanctioning an allowance in respect of a plea of guilty. In the decision of the High Court of Australia in *Cameron v R*, Kirby J said (para 65): 'The true foundation for the discount for a plea of guilty is not a reward for remorse or its anticipated consequences but acceptance that it is in the public interest to provide the discount'. In para 66 he described the main features of the public interest as being 'purely utilitarian', illustrating this by reference to a wide range of costs and inconvenience which would be saved by the plea of guilty. In para 67 he observed:

> 'It is in the public interest to facilitate pleas of guilty by those who are guilty and to conserve the trial process substantially to cases where there is a real contest about guilt. Doing this helps ease the congestion in the courts that delay the hearing of such trials as must be held. It also encourages the clear-up-rate for crime and so vindicates public confidence in the processes established to protect the community and uphold its laws. A plea of guilty may also help the victims of crime to put their experience behind them; to receive vindication and support from their families and friends and possibly assistance from the community for injuries they have suffered. Especially in cases of homicide and sexual offences, a plea of guilty may spare the victim or the victim's family and friends the ordeal of having to give evidence'.

These factors appear to us to be relevant also in this jurisdiction.

[12] In the decision of the New South Wales Court of Appeal in *R v Thomson; R v Houlton* it was emphasised by Spigelman CJ, who gave the leading judgment, that 'instinctive synthesis' — which involved consideration of a wide range of 'incommensurable, and sometimes conflicting, objectives' — was the correct approach to sentencing (paras 55, 57). He went on to point out that the benefits of a plea of guilty to the criminal justice system as a whole were concerned with the efficiency and effectiveness of that system. They required acknowledgement

of some character by way of an incentive so that the benefits would in fact be derived by that system. 'The public interest served by encouraging pleas of guilty for their utilitarian value is a distinct interest' (para 122). On the other hand, the element of remorse which was said to be reflected in a guilty plea and the benefits to witnesses, particularly victims, were of a different quality. Remorse was directly concerned with the circumstances of the offender and might have significant implications for other objectives of the sentencing process. The plea of guilty of itself was equivocal with respect to remorse. Much greater weight might be accorded to conduct and statements which demonstrated a position of genuine and deeply felt contrition. It was not desirable to separate out the factor of such a plea as an indication of remorse from other manifestations of remorse (paras 115–118).

[13] The Lord Advocate and senior counsel for the appellant O'Neil, were broadly in agreement in inviting the court in general to follow the practice in England. Counsel for the appellant Du Plooy invited the court to endorse a practice of giving a discount which was confined to cases proceeding by way of indictment under sec 76 of the 1995 Act. He advocated that, in order to avoid uncertainty, the discount should be fixed in amount. Senior counsel for the appellant Alderdice adopted the same approach, while arguing that no consideration should be given to the fact that witnesses were spared from having to give evidence. She submitted that one third of the sentence which would otherwise be imposed should be taken as a starting point. On the other hand, senior counsel for the appellant Crooks argued for a range of discount depending on the extent of the benefit of the plea of guilty to the criminal justice system.

[14] In our view sec 196(1) implies that, in determining the appropriate punishment of the accused, consideration is to be given to not only the 'utilitarian value' of the plea of guilty but also to the implications of the accused's acceptance of guilt. The relevance of the benefits to the administration of justice is demonstrated by the fact that the court is to consider the stage at which the accused indicated his or her intention to plead guilty. The earlier the stage the greater the benefit to the system is likely to be. Furthermore, the enactment looks to the accused's indication of the intention to plead guilty. If the prosecutor ultimately accepts the plea of the accused to what had been offered but declined at an early stage, the trial judge would be likely to consider that credit should be given for the offer even where it had not in fact been of full benefit to the system. We should add that we have difficulty in seeing why it should be thought that the benefits to witnesses, such as victims, are of no relevance to the criminal justice system, because they are 'incommensurable' (*R v Thomson*, para 115). The same consideration applies to vulnerable witnesses such as children, the elderly and the disabled. We should add that, quite apart from the implication in sec 196(1) that allowance should be made for the benefit of the plea to the administration of justice, the court has a responsibility to do what it reasonably can to secure the efficient and effective conduct of business and avoid the infringement of the rights of other accused.

[15] It does not appear to be appropriate to confine the making of an allowance, such as a discount, to cases which proceed by way of indictment under sec 76 of the 1995 Act. This would imply that sec 196(1) was restricted in its scope to that type of procedure in solemn proceedings. We do not consider that there is any good reason why sec 196(1) should be read in this restricted way.

Factors relevant to an allowance in respect of a plea of guilty

[16] In the light of these considerations we are of the view that sec 196(1) enables the sentencer to make allowance, according to the circumstances of the case, for the fact that the tendering of a plea of guilty is likely to save public money and court time, and in general avoid inconvenience to witnesses or, in certain types of cases, avoid additional distress being caused by their being required to give evidence or be precognosced for that purpose. Section 196(1) also enables the sentencer to make allowance for the acceptance of guilt which is involved in the plea of guilty.

[17] In a number of the English judgments to which we were referred, notably *Costen* and *March*, there was discussion of types of circumstances which may be unfavourable to the allowance in respect of a plea of guilty. According to the judgments they include (i) where the imposition of a long sentence, if necessary the maximum, is considered to be necessary for the protection of the public; (ii) where the seriousness of the offence is such that the public interest requires the imposition of the maximum sentence; (iii) where the plea of guilty is of a tactical nature; and (iv) where the plea is practically inevitable (see *Costen*, pp 184, 185; *March*, para 22).

[18] We have reservations about the proposition that the seriousness of a crime should have the effect of eliminating an allowance which otherwise would be appropriate. The seriousness of the crime should be reflected in the sentence which would be imposed if no consideration were given to the plea of guilty. As regards cases in which there is a maximum sentence which can be imposed for the crime or offence, we note that in *Tennie v Munro* the court did not accept that the maximum was a ceiling 'from which there will always have to be some discount, either because of sec 196 or because the crime is less serious than other crimes might have been'. If that is to be understood as meaning that the court may act on the basis that the maximum is inadequate, we must express our disagreement. The imposition of the maximum, without any allowance, where one is otherwise appropriate, would imply that the sentencer is approaching sentence on the basis that he or she could have sentenced the accused to more than the maximum (cf *Wojciechowski v McLeod*), in which the court stated that it would not be open to a sentencer to decline to backdate a sentence on the basis that the maximum sentence was inadequate (p 566).

[19] What we have said in the last paragraph should be understood as subject to the following. Earlier in this opinion we indicated that the 'utilitarian value' of the plea of guilty and the implications of the accused's acceptance of his guilt should be taken into consideration in determining the appropriate punishment of the accused. Thus they should be considered along with matters relevant to punishment, such as the seriousness of the offence and the accused's previous convictions. However, the sentence may also contain an element which is designed to protect the public against the accused's reoffending. In our view the 'utilitarian value' of the plea of guilty and the accused's acceptance of his guilt should not be allowed to detract from the need to protect the public. Accordingly where a sentencer imposes an extended sentence under sec 210A of the 1995 Act, ie where the sentencer takes the view that the period for which the offender would be subject to a licence 'would not be adequate for the purpose of protecting the public from serious harm from the offender', no allowance in respect of a plea of guilty should be made in determining the length of the extension period. Likewise, where the sentencer imposes a determinate sentence which contains an element which is designed to protect the public from the accused's reoffending, the sentence should not, to that extent, be

subject to any allowance in respect of the plea of guilty. Comparison may be made with the fixing of a punishment part of a life sentence under sec 2(2) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (cap 9), as amended, which provides for the taking into account of the matters mentioned in paras (a) and (b) of sec 196(1).

[20] As regards the situation where the plea is of a tactical nature, we have no difficulty in recognising this as an illustration of the type of case where the sentencer might well, in the exercise of his or her discretion, make little, if any, allowance. Such conduct on the part of an accused was graphically described by Sir Robert Carswell LCJ in *R v Larmour* as putting victims 'to the pin of their collar' in the hope that they might not in the end be prepared to give evidence against him (para 23).

[21] Then as to cases in which the plea of guilty might be said to have been 'practically inevitable', it may be said that, where the evidence against an accused is strong, he could hardly have refused to offer such a plea, and that in these circumstances the sentencer should take the view that this lessens the value of the plea to the criminal justice system. However, that view cannot be pressed too far. First, it should not go the length of treating the accused as if he had been compelled to plead guilty. He is entitled, as any accused is entitled, to put the prosecution to the proof of the case. Secondly, it cannot be assumed that a judge is in a position to determine reliably whether as a practical matter it is almost inevitable that the accused would have been convicted. The prosecution of an accused may involve novel or complex issues. Its outcome may depend vitally on questions of credibility and admissibility. Thirdly, the utilitarian benefits to the criminal justice system deriving from a plea of guilty remain real, whatever might have been the strength of the case against the accused.

Related matters

[22] So far, we have confined ourselves to factors specific to the plea of guilty and its consequences for the criminal justice system. However, the plea may not be the only matter relating to the conduct of the accused after the crime — and sometimes from the moment of its commission — which is relied on by the defence in mitigation of sentence. The plea of guilty has been referred to as a token of remorse. However, the accused may have a number of reasons for pleading guilty which have little, if anything, to do with genuine regret or a wish to make amends. On the other hand, there are cases in which, from an early stage, the accused has shown what is claimed to be true contrition. The accused may have taken practical steps to assist the authorities. He may have gone voluntarily to the police or some other person in a position of authority to confess his guilt. By this means the police, and hence the prosecutor, may have been provided with the sole means by which his guilt, or perhaps the commission of a crime, could be established. The accused may have provided the police or other authorities with information pointing to the guilt of others, and may have offered to give evidence in their prosecution. He may express a wish to confess and plead guilty in order to spare the victims the ordeal of giving evidence. These are but illustrations of the conduct which the sentencer may be asked to take into account. The sentencer has to determine what weight should be attached to them in arriving at the appropriate sentence.

[23] Matters such as these are regularly taken into account by sentencers in Scotland. They may be significant in reducing sentence. It was unnecessary for any

legislation to be enacted for this purpose since the propriety of taking them into account was not in question. It may be argued that they should be treated as aspects of general mitigation and should not be included within any distinct allowance for a plea of guilty. However, we are not persuaded that this is the preferable approach in sentencing. First, it is in our view difficult and somewhat unrealistic to draw a line between these matters and the plea of guilty. It may be clear that the plea of guilty is one of a number of steps in the history of the accused's conduct and that they should be taken together as a whole. It is obvious that matters of this type, assuming that they are genuine, may demonstrate not only the attitude of the accused but also a connection with benefits to the criminal justice system. Secondly, there is nothing in sec 196(1) which calls for the making of any allowance which is specifically confined to its terms. For these reasons we consider that it would be preferable to take these matters into account along with the plea of guilty in arriving at an allowance.

Making an allowance in sentence

[24] At present in Scotland some sentencers state when passing sentence the significance which they attach to the plea of guilty and related matters, and, less commonly, the effect which these considerations have on sentence. It is more usual for the sentencer simply to refer to these considerations as having been taken into account along with other factors relating to the crime and the accused's record and circumstances.

[25] In our view it is desirable that, where a plea of guilty and related matters call for some allowance, the sentencer should use a distinct discount in the process of arriving at the appropriate sentence, and should state in court the extent to which he or she has discounted the sentence. The sentencer can do so in a number of ways, such as by indicating what the latter would have been, or by stating the measure of the discount. We appreciate that in Scotland there is no statutory provision corresponding to sec 152(2) of the Powers of Criminal Courts (Sentencing) Act 2000, which requires a sentencer in England to state in court, if it is the case, that the punishment is less severe than it would otherwise have been. However, it is in the interests of the public as well as that of the accused that the extent to which sentences are discounted should be known. Those who represent accused persons should know, at least in general terms, the extent to which a sentence is likely to be reduced in the event of an early plea of guilty, so that they can advise the accused accordingly. Stating the discount which has been applied will also serve the purpose of providing victims and the public with a clear explanation as to how the sentences on a plea of guilty have been arrived at. In indicating that this practice should be adopted, we do not mean to suggest that, as from this time, there should necessarily be a reduction in sentences, but rather that there should be greater transparency in the process by which sentencers explain what has led them to the sentences which they impose.

[26] Since the significance of the timing and circumstances of the tendering of the plea of guilty, the practical consequences of the plea and any related matters will vary, it would not be appropriate for there to be a fixed or 'normal' discount. What should be the discount in the individual case is plainly a matter for the discretion of the sentencer. For the same reason we do not consider it appropriate to indicate a maximum or a minimum discount. However, we consider that the discount should normally not exceed a third of the sentence which would otherwise have been imposed. In any particular case, the discount may well be less than that proportion,

or none at all. There may, on the other hand, be exceptional circumstances which would justify a greater discount.

[27] While what we have said in this opinion has been directed to custodial sentences, it may be taken as broadly applicable to other forms of punishment, where the circumstances are such that the making of a discount would make sense. As we have already pointed out (para 3), the matters mentioned in paras (a) and (b) of sec 196(1) may have a bearing not only on the extent of a sentence but also on the type of disposal or order which is made.

[28] We will continue these appeals for the hearing of their merits to a date to be fixed.

THE COURT continued the appeals for a hearing on the merits.

Adams Whyte – Martin Johnson & Socha – Walker & Sharp – Gilfedder & McInnes
Crown Agent