



Neutral Citation Number: [2005] EWCA Crim 888

Case No: 200404097 A0

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROWN COURT AT DONCASTER
HIS HONOUR JUDGE JACK

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/04/2005

Before :

LORD CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE JUDGE
DEPUTY CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE TREACY
MR JUSTICE WAKERLEY
and
MR JUSTICE CALVERT-SMITH

Between :

R
- v -
KARL GOODYEAR

Mr Nigel Godsmark QC for the Prosecution
Mr Martin Sharpe for the Appellant

Judgment Approved by the court
for handing down
(subject to editorial corrections)

Lord Woolf, Chief Justice:

1. This is the judgment of the Court prepared by the Deputy Chief Justice, Lord Justice Judge.
2. On first analysis this is an unremarkable appeal against sentence by Karl Goodyear following his plea of guilty to an offence of corruption on 19th April 2004 at the Crown Court at Doncaster before His Honour Judge Jack.
3. In reality, the appeal raises important questions about the continuing applicability of the practice promulgated in R v Turner [1970] 2 QB 321, as underlined and applied in subsequent cases, which, save in the most exceptional circumstances, effectively prohibited the judge from giving any indication of sentence in advance of a guilty plea by the defendant. Accordingly, following the procedure adopted in Attorney General's Reference (No. 1 of 2004) 1 WLR 2111 and R v Simpson [2004] QB 118, a five-judge court, presided over by the Lord Chief Justice, was convened to consider whether what we shall compendiously summarise as the Turner rule of practice may now properly be modified, and if so, to what extent.

The Proceedings

4. Before the trial began, a meeting took place in the judge's chambers between the judge and counsel for the appellant and counsel for two co-defendants, and counsel for the prosecution. The fourth defendant, Stones, had already pleaded guilty. The discussion culminated in the judge saying to counsel for the appellant "I do take the view, by contra distinction to the case of Mr Stones who was a public servant and may be in a rather different position, but I do take the view that this is not a custody case".
5. Counsel returned to court. Goodyear was re-arraigned: so were the remaining two defendants. In the result all three defendants pleaded guilty. Sentence was adjourned for the preparation of pre-sentence reports.
6. By 24th June, a pre-sentence report had been prepared for the appellant. It concluded that neither a custodial sentence nor a community rehabilitation order would be appropriate. A financial penalty was recommended. No reports for Daniels and Green were available. When the issue was raised before the judge he then indicated that he was considering suspended sentences on these three defendants. After an adjournment for instructions to be taken, counsel for both Daniels and Green indicated that their clients were content to be sentenced without the benefit of pre-sentence reports. Counsel for the appellant submitted that given the earlier indication by the judge on 19th April, it would be wrong in principle for a suspended sentence of imprisonment to be imposed.
7. The antecedent histories showed that the appellant was forty years old, without relevant previous convictions. Stones was sixty-three. Apart from the conviction for driving with excess alcohol which led to his earlier disqualification, he was a man of good character. Daniels was sixty-two and Green sixty-six. Both were of previous good character.

8. The appellant was sentenced to six months' imprisonment suspended for two years, and ordered to pay a fine of £1,000 within twelve months. Stones was sentenced to nine months' imprisonment, suspended for two years. Green and Daniels were sentenced to three months' imprisonment, also suspended for two years.

The Facts

9. These can be briefly summarised. In the mid-1990s Doncaster Metropolitan Council turned its attention to the renovation and improvement of an area known as the Stainforth Estate. Some of the property on this estate was Council-owned, and some privately-owned, usually former council houses purchased under the well-known "Right to Buy" provisions. The privately-owned houses were eligible for grant aid.
10. Stones was responsible for allocating work between various contractors, who were already appointed to undertake grant-aided work on private houses. He was also responsible for checking that the work was done to an appropriate standard, and for authorising payment. He was aptly described by counsel for the prosecution opening the facts before the judge, as someone who was "in a position to smile upon the building contractors, or to make life difficult for them ... he was in a position to be awkward, and he could, from time to time, in fact, be awkward."
11. Daniels and Green were partners in a firm working on the estate. Their earnings from this work kept their business afloat between 1992 and 1998. They received just over £750,000 by way of grant aid.
12. The appellant was a sub-contractor, responsible for external rendering, the only sub-contractor authorised to undertake this kind of work. Between 1992 and 1998 he was paid just over £600,000 for the work done by him on private houses and overseen by Stones.
13. The relationship between Green and Daniels and Stones, and the appellant and Stones was corrupt. The appellant paid Stones £3200, and carried out rendering work to Stones' home, without payment. This work was valued at about £2500. Daniels and Green also worked at Stones' home, making a staircase and working on kitchen work tops. The Crown valued this work at £3000, the defence contending that it was worth much less. In addition, at a time when Stones was disqualified from driving, Daniels and Green arranged unpaid transport for Stones from the Stainforth Estate to his home.
14. The intention was clear, and again summarised by counsel for the Crown, "This work was done and these payments made to Mr Stones effectively to keep him sweet, to stay in with him, in the hope that he would smile upon them, and would show less of a tendency to be difficult with them."
15. It was accepted by the prosecution that neither the appellant, nor Green nor Daniels, obtained any additional work or contracts as a result of these corrupt transactions. The purpose was to encourage Stones to look kindly on them when exercising his responsibilities for the administration of the contracts. The objective was summarised by one defendant in his interview: "It was all about 'sweetening' Stonesey".

16. The four defendants were arrested. When interviewed, Stones said that he could not remember receiving any cheque from the appellant, and claimed that he had paid for the rendering work done by him. In later interviews he made no comment about payments from him. The appellant on the other hand accepted that he had made payments to Stones, claiming that it was part of an arrangement described by him as “business consultancy”. The payments were given for business advice and some quantity surveying work, and the rendering was set off against consultancy fees.
17. Daniels and Green accepted that they had made the stairs for Stones and helped with the kitchen work tops as a favour. They never asked Stones for payment, and they did the work in order to remain in his favour.

Grounds of Appeal

18. The essential ground of appeal arises from the fact that the judge did not abide by his indication, given on 19th April, that a custodial sentence would not be imposed on Goodyear. It is submitted that in the light of his indication, at that date at any rate, he could not have been satisfied that the offence was so serious that only a custodial sentence could be justified (s 79(2)(a) the Powers of Criminal Courts (Sentencing) Act 2000). Moreover, a suspended sentence was inappropriate because there was nothing exceptional about the circumstances (s 118(4)(a) and (b) of the 2000 Act.) Between 19th April and 24th June, the date when the appellant was sentenced, no additional or further factors relevant to the sentencing decision had emerged, save and except that the pre-sentence report supported the original view expressed by the judge that a custodial sentence was inappropriate. Accordingly a sentence of imprisonment, even if suspended, should not have been passed, and in the light of the indication given by the judge, was wrong in principle.

Proceedings on 19th April

19. A complete record was rightly made of the discussion in the judge’s chambers on 19th April. As counsel for the Crown put it, the meeting did not take place at his behest. As Stones had already pleaded guilty, and was awaiting sentence, his counsel was not present.
20. In the discussion which took place counsel for Goodyear explained various background matters, and eventually said:

“Mr Goodyear is very eager not to have a trial, and is very eager to avoid, if it were possible, the possibility of a custodial sentence, and on my behalf I wonder whether your Honour would be in a position to give any indication?”

The judge responded:

“Well, certainly not at this stage, because I haven’t considered the question of sentence at this point ... and in any event I don’t think I would be in a position to give an indication. ... I am sorry for that.”

21. Counsel for Daniels then addressed the judge. His observations ended:

“... I will make submissions ... that the custody threshold would not be passed, and I simply wondered whether your Honour is in a position to assist in that regard, both I anticipate on behalf of myself and my learned friend ... [counsel for Green].”

The judge replied:

“... as things stand and on the prosecution case at it is put, it seems to me that I cannot assist, although I can obviously say that your client’s good character would stand him in good stead, and a guilty plea would stand him in good stead. But it does seem to me at the moment the issue as to the value of the benefits is significant.”

22. Counsel for the appellant then raised what he described as “one important matter” which had arisen in discussion between counsel before they saw the judge. He pointed out that the Crown was not suggesting that the three defendants whose cases were then under consideration would not have received the work anyway. In other words, no specific or positive gain had been achieved.

23. The judge sought assistance from counsel for the Crown who commented:

“There is no suggestion by the Crown that the defendants got anything they wouldn’t otherwise have got. This is simply an allegation that they are keeping him sweet, as it were ... I hope I don’t oversimplify matters in putting it in that way, but that is the way in which I propose to open it to the jury.”

Counsel confirmed the judge’s understanding of what he had just said, that it was not suggested that the defendants had obtained additional work as a result of providing benefits for Mr Stones. He went on that there was no evidence to suggest that these defendants had benefited over and above any other contractors.

24. The judge told counsel for the appellant:

“Yes, in those circumstances I can revise what I said earlier. I do take the view, by contra distinction to the case of Mr Stones, who was a public servant and may be in a rather different position, but I do take the view that this is not a custody case.”

This was the critical sentence indication.

25. With that, counsel left the judge’s chambers. He allowed them time to see their clients and take instructions. Later that day, on re-arraignment, the three defendants pleaded guilty.

Proceedings on 24th June

26. We have already recorded the concerns expressed by counsel for the appellant at the proposal that a suspended sentence of imprisonment should be imposed on his client, and summarised the Crown’s case. No further repetition is needed.

27. In his sentencing remarks the judge reflected on the seriousness of offences of corruption, commenting that they were so serious that normally “only an immediate prison sentence can be justified”. He reflected on the appellant’s involvement, taking the view that it was more serious than that of Daniels and Green.

28. He said:

“... that this is a case in which a prison sentence is justified. I indicated on an earlier occasion that I did not think that this was a custody case. I hoped that that was not misunderstood. I certainly did not intend to indicate that this was case where the custody threshold had not been crossed. I was intending to indicate, for the benefit of the defendants, that they need not worry about having to serve an immediate prison sentence. I take the view that this is a case in which there are, however, exceptional circumstances, where the prison sentence which I have to pass can be suspended.”

Advance Indication of Sentence

29. In the light of the issues raised in this appeal, we have re-examined the principles which govern an indication of sentence given by the trial judge to a defendant.

30. The starting point is fundamental. The defendant is personally and exclusively responsible for his plea. When he enters it, it must be entered voluntarily, without improper pressure. There is to be no bargaining with or by the judge. These principles are derived from Turner itself.

31. Prior to Turner, it was not unusual for counsel to be seen (often separately from their solicitors,) by the trial judge in his chambers, and for the judge to tell counsel his view of the sentence which would follow an immediate guilty plea. The 37th edition of Archbold (1969) says nothing at all, and certainly nothing critical about this practice. It was Turner that brought the “vexed question of so-called ‘plea-bargaining’” into the open. We must briefly summarise the facts.

32. The defendant, a man with many previous convictions, pleaded not guilty to theft. During an adjournment in the trial, counsel indicated that he wished to have a discussion with the judge, and went and did so. After he had spoken to the judge, and following that discussion, he advised Turner that in his (counsel’s) opinion, if he pleaded guilty, the outcome might well be a non-custodial sentence, but that if the case proceeded and he was convicted by the jury, he ran the risk of going to prison.

33. The defendant received the impression that the views expressed to him by counsel represented the views the judge had communicated to counsel. This Court decided that this represented improper pressure on the defendant to plead guilty, and that in the circumstances, the appropriate course would be to treat the guilty plea as a nullity.

34. It was immediately acknowledged that it was counsel’s duty to give the accused the best advice he could, and “if need be advice in strong terms”. This advice would normally convey the potential value as a mitigating factor of a guilty plea. We pause to note that, inevitably, robust advice from counsel creates a degree of pressure on his

client, and, what is more, the situation in which the defendant is placed itself constitutes a further source of pressure. Neither of these is improper. Turner emphasised that as far as possible justice should be administered in open court. Nevertheless for a variety of reasons, freedom of access between counsel and the judge was not prohibited. The problem arose from any discussion between them about sentence. This created the danger of pressure, or the appearance of pressure on the defendant to plead guilty. Such pressure, coming from the court, was unacceptable.

35. In essence, Turner decided that whereas counsel may give advice, which includes advice about the likely sentence on a guilty plea, such information coming from the court itself was impermissible:

“The judge should, subject to the one exception referred to hereafter, never indicate the sentence which he is minded to impose. A statement that on a plea of guilty he would impose one sentence but that on a conviction following a plea of not guilty he would impose a severer sentence is one which should never be made. This could be taken to be undue pressure on the accused, thus depriving him of that complete freedom of choice which is essential.”

The court referred to occasions when the judge would tell counsel that on the basis of the information before him, the sentence which would follow a guilty plea would be non-custodial, without saying anything about what would happen if the case proceeded to trial and conviction.

“Even so, the accused may well get the impression that the judge is intimating that in that event a severer sentence, maybe a custodial sentence would result, so that again he may feel under pressure. This accordingly must also not be done.”

The only exception to the rule that an indication of sentence should not be given is:

“... that it should be permissible for a judge to say, if it be the case, that whatever happens, whether the accused pleads guilty or not guilty, the sentence will or will not take a particular form, e.g. a probation order or a fine, or a custodial sentence.”

36. The principles in Turner have been consistently applied. The authorities are summarised in Archbold, Criminal Pleading, Evidence and Practice 2005 edition at paragraphs 4-78 to 4-81, and in Blackstone, Criminal Practice, 2005, at paragraphs D 11.53- D 11.54. The principles were consolidated in the Practice Direction (Criminal Proceedings Consolidation) para. IV.45 (2002 1 WLR 2870), and the Attorney General issued guidance to counsel for the prosecution on the acceptance of pleas, with observations about the duty of the advocate for the Crown when discussions leading to a sentence indication arose (Attorney General’s Guidelines [2001] 1 CAR 425). We have considered all this material.
37. There have been earlier suggestions that the principle in Turner, at any rate in its full ambit, merits re-examination. In the Report of the Royal Commission on Criminal

Justice, Chairman: Viscount Runciman of Doxford, July 1993, paragraphs 41-58, it was noted that

“A significant number of those who now plead guilty at the last minute would be more ready to declare their hand at an earlier stage if they were given a reliable early indication of the maximum sentence that they would face if found guilty.”

38. The Report analysed the implications of the judgment in Turner, noting that the Crown Court study conducted for the Commission showed overwhelming support among both judges and barristers for a change. It recommended that:

“At the request of defence counsel on instructions from the defendant, judges should be able to indicate the highest sentence that they would impose at that point on the basis of the facts as put to them. ... We envisage that the procedure which we recommend would be initiated solely by, and for the benefit of, defendants who wish to exercise a right to be told the consequences of a decision which is theirs alone.”

The Commission implied that the single question which the judge would have a discretion to answer would be: “What would be the maximum sentence if my client were to plead guilty at this stage?”

39. The Report then addressed the management and structure of the process, if the constraints in Turner were to be relaxed.
40. In Sir Robin Auld’s Review of the Criminal Courts of England and Wales, October 2001, the Advance Indication of Sentence was discussed at pp. 434-444.
41. After examining the evidence, Sir Robin concluded that subject to a number of specified safeguards, “On the request of a defendant, through his advocate, the judge should be entitled formally to indicate the maximum sentence in the event of a plea of guilty at that stage and the possible sentence on conviction following a trial”.
42. He believed that the ability of the judge to give an indication to a defendant who wished to know the maximum sentence he would receive in the event of a plea of guilty would “enable the guilty defendant and those advising him to evaluate the judge’s indication and assess the advantage or otherwise of proceeding with a plea. He believed that a comparison between the sentence on a plea of guilty and a possible sentence on conviction was justified, explaining:

“That comparison is precisely what a defendant considering admitting his guilt wants to know. He knows and will in any event, be advised by his lawyer that a plea of guilty can attract a lesser sentence and broadly what the possible outcomes are, depending on his plea. So what possible additional pressure, unacceptable or otherwise, can there be in the judge, whom he has requested to tell him where he stands, indicating more precisely the alternatives?”

43. Like the Royal Commission, Sir Robin then explained his views about the structure and management of any post-Turner procedure.
44. In the White Paper entitled “Justice for All”, prepared after and in response to Sir Robin’s Review, there appeared to be a general welcome to a system for an advance indication of sentence made in response to a formal request initiated by the defendant (4.42 and 4.43).
45. Some departure from the principles in Turner is now permitted by statute. In Schedule 3 of the Criminal Justice Act 2003, dealing with the allocation of cases triable either way, and sending cases to the Crown Court, paragraph 6, substituting s 20 of the Magistrates Court Act 1980, addresses the procedure where summary trial appears more suitable. The accused is entitled to request an indication of sentence, whether “a custodial sentence or non-custodial sentence would be more likely to be imposed if he were to be tried summarily ... and to plead guilty. The court is entitled, but not obliged, to respond to such a request.” In short, there is no longer any absolute prohibition against an advance indication of sentence.
46. With effect from 4th April this year the Criminal Procedure Rules 2005, and by amendment to the Consolidated Criminal Practice Direction, the Practice Direction on Criminal Case Management came into force. The plea and case management hearing in the Crown Court now specifically requires the judge to seek and be given information on the following matters. First, following the guidance published by the Sentencing Guidelines Council in December 2004 on the Reduction in Sentence for Guilty Plea, whether the defendant has in fact been advised about the credit to be obtained for a guilty plea, and second, what steps had been taken to see whether the case might be resolved without a trial.
47. These matters sufficiently demonstrate a very different culture to that which obtained when Turner was decided. In all these circumstances the time has therefore come for this Court to reconsider it.
48. Turner emphasised that the defendant was entitled to receive advice from his counsel about the sentence possibilities, so as properly to inform himself whether to plead guilty or not. That was deemed not to involve the risk of pressure on him. However Turner did not directly address the situation which would apply if the defendant personally was seeking an indication of sentence from the judge. After Turner, it became the practice to assume that he was not entitled to do so. Therefore, a somewhat strange situation developed that although the defendant’s decision about his plea could properly be informed by the views of counsel about the sentence the judge would be likely to pass (provided always that he, counsel, had not participated in any discussions with the judge) it had simultaneously to be made ignorant of the judge’s own views, even if the defendant wanted to know them. That position requires examination. In any event, the further question remains whether it continues to be appropriate to proceed on the basis that clear, and if necessary strong, but inevitably incompletely informed advice from counsel, about the advantages which would accrue from and the consequences which would follow an early guilty plea is permissible, while an intimation of these matters initiated by the judge should always, without more, be deemed to constitute improper pressure on the defendant, and therefore prohibited.

49. In our judgment, there is a significant distinction between a sentence indication given to a defendant who has deliberately chosen to seek it from the judge, and an unsolicited indication directed at him from the judge, and conveyed to him by his counsel. We do not see why a judicial response to a request for information from the defendant should automatically be deemed to constitute improper pressure on him. The judge is simply acceding to the defendant's wish to be fully informed before making his own decision whether to plead guilty or not guilty, by having the judge's views about sentence available to him rather than the advice counsel may give him about what counsel believes the judge's views would be likely to be.
50. We cannot, and do not seek to water down the essential principle that the defendant's plea must always be made voluntarily and free from any improper pressure. On closer analysis, however, we cannot discern any clash between this principle, and a process by which the defendant personally may instruct his counsel to seek an indication from the judge of his current view of the maximum sentence which would be imposed on the defendant. In effect, this simply substitutes the defendant's legitimate reliance on counsel's assessment of the likely sentence with the more accurate indication provided by the judge himself. In such circumstances, the prohibition against the judge giving an unsolicited sentence indication would not be contravened, and any subsequent plea, whether guilty or not guilty, would be voluntary. Accordingly it would not constitute inappropriate judicial pressure on the defendant for the judge to respond to such a request if one were made.
51. We have further reflected whether there should continue to be an absolute prohibition against the judge making any observations at all which may trigger this process. The judge is expected to check whether the defendant has been advised about the advantages which would follow an early guilty plea. Equally he is required to ascertain whether appropriate steps have been taken by both sides to enable the case to be disposed of without a trial. Following this present judgment he will know that counsel is entitled to advise the defendant that an advance indication of sentence may be sought from him. In these circumstances, we do not believe that it would be logical, and it would run contrary to the modern views of the judge's obligation to manage the case from the outset, to maintain as a matter of absolute prohibition that the judge is always and invariably precluded from reminding counsel in open court, in the presence of the defendant, of the defendant's entitlement to seek an advance indication of sentence. The judge would no doubt approach any observations to this effect with caution, first, to avoid creating pressure or the perception of pressure on the defendant to plead guilty and, second, bearing in mind the risk of conveying to the defendant that he has already made up his own mind on the issue of guilt, or indeed that for some reason he does not wish to try the case. If notwithstanding any observations by the judge, the defendant does not seek an indication of sentence, then, at any rate for the time being, it would not be appropriate for the judge to give or insist on giving an indication of sentence, unless in any event he would be prepared to give the indication permitted by Turner (see paragraph 35) that the sentence will or will not take a particular form.
52. To that extent therefore, and subject to the guidance which follows, the practice in Turner and the subsequent authorities which applied it, need no longer be followed.

Guidelines

53. The objective of these Guidelines is to ensure common process and continuing safeguards against the creation or appearance of judicial pressure on the defendant. The potential advantages include, first and foremost, that the defendant himself would make a better informed decision whether to plead, or not. Experience tends to suggest that this would result in an increased number of early guilty pleas, which a consequent reduction in the number of trials, and the number of cases which are listed for trial, and then, to use current language, “crack” at the last minute, usually at considerable inconvenience to those involved in the intended trial, and in particular, victims and witnesses. Properly applied, too, there may be a reduced number of sentences to be considered by the Attorney General, and where appropriate, referred to this Court as unduly lenient. In short, an increase in the efficient administration of justice will not impinge on the defendant’s entitlement to tender a voluntary plea.
54. In our judgment, any advance indication of sentence to be given by the judge should normally be confined to the maximum sentence if a plea of guilty were tendered at the stage at which the indication is sought. In essence we accept the recommendation of the Report of the Royal Commission that the judge should treat the request for a sentence indication, in whatever form it reaches him, as if he were being asked to indicate the maximum sentence on the defendant at that stage. For the process to go further, and the judge to indicate his view of the maximum possible level of sentence following conviction by the jury, as well as its level after a plea of guilty, would have two specific disadvantages. First, by definition, the judge could not be sufficiently informed of the likely impact of the trial on him (or the trial judge) in the sentencing context. It would be unwise for him to bind himself to any indication of the sentence after a trial in advance of it, in effect on a hypothetical basis. If he were to do so, to cover all eventualities he would probably have to indicate a very substantial possible maximum sentence. This would lead to a second problem, arising from the comparison between the two alternatives available to the defendant, that is the maximum level after a trial, and the maximum level following an immediate plea. With some defendants at any rate, the very process of comparing the two alternatives create pressure to tender a guilty plea.

The Judge

55. The judge should not give an advance indication of sentence unless one has been sought by the defendant.
56. He remains entitled, if he sees fit, to exercise the power recognised in Turner to indicate, that the sentence, or type of sentence, on the defendant would be the same, whether the case proceeded as a plea of guilty or went to trial, with a resulting conviction. Nowadays, given the guidance published by the Sentencing Guidelines Council on the credit to be given for a guilty plea, this would be unusual. He is also entitled in an appropriate case to remind the defence advocate that the defendant is entitled to seek an advance indication of sentence.
57. In whatever circumstances an advance indication of sentence is sought, the judge retains an unfettered discretion to refuse to give one. It may indeed be inappropriate for him to give any indication at all. For example, he may consider that for a variety of reasons the defendant is already under pressure (perhaps from a co-accused), or vulnerable, and that to give the requested indication, even in answer to a request, may create additional pressure. Similarly, he may be troubled that the particular defendant

may not fully have appreciated that he should not plead guilty unless in fact he is guilty. Again, the judge may believe that if he were to give a sentence indication at the stage when it is sought, he would not properly be able to judge the true culpability of the defendant, or the differing levels of responsibility between defendants. In a case involving a number of defendants, he may be concerned that an indication given to one defendant who seeks it, may itself create pressure on another defendant. Yet again, the judge may consider that the application is no less than a “try on” by a defendant who intends or would be likely to plead guilty in any event, seeking to take a tactical advantage of the changed process envisaged in this judgment. If so, he would probably refuse to say anything at all, and indeed, a guilty plea tendered after such tactical manoeuvrings may strike the judge as a plea tendered later than the first reasonable opportunity for doing so, with a consequent reduction in the discount for the guilty plea.

58. Just as the judge may refuse to give an indication, he may reserve his position until such time as he feels able to give one, for example, until a pre-sentence report is available. There will be occasions when experience will remind him that in some cases the psychiatric or other reports may provide valuable insight into the level of risk posed by the defendant, and if so, he may justifiably feel disinclined to give an indication at the stage when it is sought. Another problem may simply be that the judge is not sufficiently familiar with the case to give an informed indication, and if so, he may defer doing so until he is.
59. In short, the judge may refuse altogether to give an indication, or may postpone doing so. He may or may not give reasons. In many cases involving an outright refusal, he would probably conclude that it would be inappropriate to give his reasons. If he has in mind to defer an indication, the probability is that he would explain his reasons, and further indicate the circumstances in which, and when, he would be prepared to respond to a request for a sentence indication.
60. If at any stage the judge refuses to give an indication (as opposed to deferring it) it remains open to the defendant to seek a further indication at a later stage. However once the judge has refused to give an indication, he should not normally initiate the process, except, where it arises, to indicate that the circumstances had changed sufficiently for him to be prepared to consider a renewed application for an indication.
61. Once an indication has been given, it is binding and remains binding on the judge who has given it, and it also binds any other judge who becomes responsible for the case. In principle, the judge who has given an indication should, where possible, deal with the case immediately, and if that is not possible, any subsequent hearings should be listed before him. This cannot always apply. We recognise that a new judge has his own sentencing responsibilities, but judicial comity as well as the expectation aroused in a defendant that he will not receive a sentence in excess of whatever the first judge indicated, requires that a later sentencing judge should not exceed the earlier indication. If, after a reasonable opportunity to consider his position in the light of the indication, the defendant does not plead guilty, the indication will cease to have effect. In straightforward cases, once an indication has been sought and given, we do not anticipate an adjournment for the plea to be taken on another day.
62. Later in this judgment we will deal with the obligations of the defence and the prosecution, and to the extent that they may be relevant to the judge’s decision, they

should be applied. For example, an indication should not be sought on a basis of hypothetical facts. Where appropriate, there must be an agreed, written basis of plea. Unless there is, the judge should refuse to give an indication: otherwise he may become inappropriately involved in negotiations about the acceptance of pleas, and any agreed basis of plea.

The Defence

63. Subject to the judge's power to give an appropriate reminder to the advocate for the defendant (paragraph 53) the process of seeking a sentence indication should normally be started by the defendant.
64. Whether or not the judge has given an appropriate reminder, the defendant's advocate should not seek an indication without written authority, signed by his client, that he, the client wishes to seek an indication.
65. The advocate is personally responsible for ensuring that his client fully appreciates that:
 - (a) he should not plead guilty unless he is guilty;
 - (b) any sentence indication given by the judge remains subject to the entitlement of the Attorney General (where it arises) to refer an unduly lenient sentence to the Court of Appeal;
 - (c) any indication given by the judge reflects the situation at the time when it is given, and that if a "guilty plea" is not tendered in the light of that indication the indication ceases to have effect;
 - (d) any indication which may be given relates only to the matters about which an indication is sought. Thus, certain steps, like confiscation proceedings, follow automatically, and the judge cannot dispense with them, nor, by giving an indication of sentence, create an expectation that they will be dispensed with.
66. An indication should not be sought while there is any uncertainty between the prosecution and the defence about an acceptable plea or pleas to the indictment, or any factual basis relating to the plea. Any agreed basis should be reduced into writing before an indication is sought. Where there is a dispute about a particular fact which counsel for the defendant believes to be effectively immaterial to the sentencing decision, the difference should be recorded, so that the judge can make up his own mind.
67. The judge should never be invited to give an indication on the basis of what would be, or what would appear to be a "plea bargain". He should not be asked or become involved in discussions linking the acceptability to the prosecution of a plea or basis of plea, and the sentence which may be imposed. He is not conducting nor involving himself in any plea bargaining. In short, he is not to be asked to indicate levels of sentence which he may have in mind depending on possible different pleas. Thus, for example, he should refuse to give an indication based on the possibility that the defendant might plead guilty to s 18, alternatively s 20, alternatively s 47.

68. In the unusual event that the defendant is unrepresented, he would be entitled to seek a sentence indication of his own initiative. There would be difficulties in either the judge or prosecuting counsel taking any initiative, and informing an unrepresented defendant of this right. That might too readily be interpreted as or subsequently argued to have been improper pressure.

The Prosecution

69. As the request for indication comes from the defence, the prosecution is obliged to react, rather than initiate the process. This presented no problem in the days before Turner, when the common understanding, universally applied, was that the prosecution did not, indeed was obliged not to involve itself in or appeal against a sentencing decision. None of that continues to apply.
70. We must expressly identify a number of specific matters for which the advocate for the prosecution is responsible.
- (a) If there is no final agreement about the plea to the indictment, or the basis of plea, and the defence nevertheless proceeds to seek an indication, which the judge appears minded to give, prosecuting counsel should remind him of this guidance, that normally speaking an indication of sentence should not be given until the basis of the plea has been agreed, or the judge has concluded that he can properly deal with the case without the need for a Newton hearing.
- (b) If an indication is sought, the prosecution should normally enquire whether the judge is in possession of or has had access to all the evidence relied on by the prosecution, including any personal impact statement from the victim of the crime, as well as any information of relevant previous convictions recorded against the defendant.
- (c) If the process has been properly followed, it should not normally be necessary for counsel for the prosecution, before the judge gives any indication, to do more than, first, draw the judge's attention to any minimum or mandatory statutory sentencing requirements, and where he would be expected to offer the judge assistance with relevant guideline cases, or the views of the Sentencing Guidelines Council, to invite the judge to allow him to do so, and second, where it applies, to remind the judge that the position of the Attorney General to refer any eventual sentencing decision as unduly lenient is not affected.
- (d) In any event, counsel should not say anything which may create the impression that the sentence indication has the support or approval of the Crown.

S 36 of the Criminal Justice Act 1988

71. We have reflected on the possible impact of these changes on the exercise by the Attorney General of his responsibilities to refer unduly lenient sentences to this Court, in the light of further submissions received in writing from counsel for the prosecution after the conclusion of the hearing. We do not envisage a process by which the judge should give some kind of preliminary indication, leading to comments on it by counsel for the Crown, with the judge then reconsidering his indication, and perhaps raising it to a higher level, with counsel for the defendant then

making further submissions to persuade the judge, after all, to reduce his indication. If nothing else, such a process would smack of precisely the kind of bargaining process which should be avoided. In our judgment, if counsel for the prosecution has addressed his responsibilities in accordance with the previous paragraph, the discretion of the Attorney General to refer a sentence would be wholly unaffected by the advance sentence indication process. Of course, if a sentence indication has been given in accordance with these guidelines, before referring the eventual sentencing decision to this Court, the Attorney General's decision would no doubt reflect that the defendant had indeed pleaded guilty in response to the sentence indication, properly sought from and given by the judge. As we have explained, we do not anticipate that counsel for the Crown will have said or done anything which may indicate or convey support for or approval of the sentence indication. If however he has done so, the question whether the sentence should nevertheless be referred to this Court as unduly lenient, and the decision of the Court whether to interfere with and increase it, will be examined on a case by case basis, in the light of everything said and done by counsel for the Crown.

Appeal against sentence

72. We have expressly dealt with the position of the Attorney General if, in the event, an unduly lenient sentence is imposed. The defendant's entitlement to apply for leave to appeal against sentence if, for example, insufficient allowance has been made for matters of genuine mitigation, is similarly unaffected.

Process

73. We anticipate that any sentence indication would normally be sought at the plea and case management hearing. In cases "sent" to the Crown Court under s 51 of the Crime and Disorder Act 1998, or transferred under s 4 of the Criminal Justice Act 1987 or s 53 of the Criminal Justice Act 1991, this is usually the first opportunity for the defendant to plead guilty and therefore the moment when the maximum discount for the guilty plea will be available to the defendant. For victims and witnesses, too, there is a huge advantage in the earliest possible conclusion to the case. That said, as the judgment makes clear, we do not rule out the entitlement of a defendant to seek an indication at a later stage, or even, in what we know would be a rare case, during the course of the trial itself.
74. The judge is most unlikely to be able to give an indication, even if it is sought, in complicated or difficult cases, unless issues between the prosecution and the defence have been addressed and resolved. Therefore in such cases, no less than seven days' notice in writing of an intention to seek an indication should normally be given in writing to the prosecution, and the court. If an application is made without notice when it should have been given, the judge may conclude that any inevitable adjournment should have been avoided and that the discount for the guilty plea should be reduced accordingly. It may be that in due course the Criminal Procedure Rules Committee will wish to consider the question of notice, and its length, and indeed whether either of the relevant case progression forms should be amended.
75. The hearing should normally take place in open court, with a full recording of the entire proceedings, and both sides represented, in the defendant's presence.

76. As already indicated, in cases of any complexity or difficulty, proper notice should be given to the Crown that a sentence indication will be sought. The fact that notice has been given, and any reference to a request for a sentence indication, or the circumstances in which it was sought, would be inadmissible in any subsequent trial.
77. If the process we envisage is properly followed, there should be very little need for the judge to involve himself in the discussions with the advocates, although obviously he may wish to seek better information on any aspect of the case which is troubling him. We do not anticipate an opening by the Crown, or a mitigation plea by the defence. That must be postponed until after the defendant has pleaded guilty. Generally speaking, we assume that the process will be very short, the judge bearing in mind that the defendant and the public are present, and that he (the judge) may be the trial judge, and that he is simply deciding whether to respond, and if so how, to a request that he give an indication of the maximum sentence he would pass if the defendant pleaded guilty at that stage. The fact that the case may yet proceed as a trial, and that if it does so, no reference may be made to the request for a sentence indication, leads to the conclusion that reporting restrictions should normally be imposed, to be lifted if and when the defendant pleads or is found guilty.

Magistrates' Court

78. In our judgment it would be impracticable for these new arrangements to be extended to proceedings in the Magistrates' Court. We are not at present satisfied that an advance sentence indication can readily be applied to and processed there. We believe that it would be better for the new arrangements in the Crown Court to settle in for some time before considering whether and, if so how, similar arrangements can be made in the context of summary trials. Accordingly, for the time being, the magistrates should confine themselves to the statutory arrangements in Schedule 3 of the 2003 Act.

The decision in this case

79. In our judgment the judge should have abided by the sentencing indication he gave on 19th April. This was one of those rare cases in which a non-custodial sentence for an offence of corruption may have been appropriate. The appellant gained nothing positive from his corrupt activities. They had taken place in the fairly distant past. He did not gain any advantage over his business competitors. He possessed useful skills which might well have been deployed to the benefit of the community on an unpaid basis under a community punishment order. He pleaded guilty. An additional punitive element would have been provided by a larger fine. In summary, without attempting to lay down any sort of guideline, the decision not to impose a custodial sentence might in the particular circumstances of this case have been justified, and a community punishment order and enhanced fine may, arguably, have met the justice of the case.
80. In our judgment it would not now be appropriate either to increase the fine, or to substitute the suspended sentence of imprisonment with a community punishment order. We shall therefore simply quash the suspended sentence of imprisonment.