MANX CRIMINAL LAW AND PROCEDURE

(in the Court of General Gaol Delivery and beyond)

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David Doyle

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About the author

David Doyle was sworn in as Her Majesty's Second Deemster in the Isle of Man on the 21st March 2003. As Second Deemster he has presided over preliminary hearings, criminal trials and sentencing hearings in the Court of General Gaol Delivery. He also presides over preliminary hearings and civil trials in the High Court of Justice in the Isle of Man and sits in the Appeal Division as and when required. He has an active interest in Manx law past, present and future. He also has an active interest in the role of the Island in the wider international community. On the 8th October 2005 he presented a paper on the Island's legal system and judiciary to the Legal Wales conference at Cardiff University. On the 3rd October 2007 he presented a paper on the Island's constitutional position and its legal system at Harvard Law School in Boston.

Foreword

Ready access to judicial decisions is fundamental not only to the proper accountability of judges but also to the fairness of any legal system and its future development. Although this might pose problems for a compact jurisdiction such as the Isle of Man, the Island has always been well served by its permanent judiciary and those Deemsters with whom I have served as Judge of Appeal have contributed much to avoiding such problems. His Honour Deemster Cain was the inspiration for the Manx Law Reports. His Honour Deemster Kerruish was responsible for Manx judgments on line, something which allows every person ready access to what the courts decide. Now His Honour Deemster Doyle, following in this excellent tradition, has produced his weighty tome on Manx criminal law.

I first met David Doyle shortly after I became Judge of Appeal. A few years later I read an article by him in the Journal of the Commonwealth Lawyers` Association as whether prior to the implementation of the Human Rights Act 2001 reference could be made to the European Convention on Human Rights to inform the exercise of an administrative, as opposed to a judicial, discretion. In so far as he concluded that it was preferable to follow decisions of the Staff of Government Division, to which I had been a party, rather than decisions of the House of Lords, I have always applauded his judgment. That view must have been shared by many others because soon afterwards he was appointed as Her Majesty's Second Deemster, an office which he has since held with great distinction.

It is fair to say that on his appointment David's knowledge of the criminal law was somewhat less than intimate, no doubt reflecting George Bernard Shaw's dictum that 'the criminal law is no use to decent people'. Over the subsequent years I became aware that his thorough preparation for cases which he was about to hear had produced voluminous notes to cover whatever problem might present itself in the Court of General Gaol Delivery. So it was that I expressed the view, initially in humour but later seriously, that such notes might form the basis for a book which might offer guidance for all criminal practitioners and judges. Hence this book was created. It is a work of unadulterated thoroughness and detail covering every aspect of the subject which seamlessly combines both scholarship and practicality. Anyone involved in criminal law in the Island would do well to read it and I warmly commend it.

Geoffrey Tattersall QC

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Preface and acknowledgments

1. This book is intended to assist trainee and newly qualified Manx advocates and others who wish to consider further certain basic points in respect of proceedings before the Court of General Gaol Delivery and beyond in the Appeal Division and the Privy Council. This book was conceived during my preparation for trials and during my talks to trainee advocates over the last seven years. The bulk of the material in this book started off as notes for those talks.

2. The nature of the work of the Court of General Gaol Delivery attracts much public interest and the proceedings before the court are frequently covered by the local newspapers, radio stations and various websites. It is important that material is available in respect of Manx criminal law and procedure in the Court of General Gaol Delivery and beyond so that those with an interest in such matters can be duly informed. Former First Deemster William Cain has from time to time called for further literature to be published on various areas of Manx law. The publication of this book is in part an endeavour to answer that call in the area of Manx criminal law and procedure.

3. This book should be of assistance to prosecution and defence advocates and indeed to those facing criminal charges, those who have been victims of criminal offences, those who have been convicted of criminal offences, the media, the police, politicians, probation officers, witness and victim support agencies and all others interested in Manx criminal law and procedure. It should assist them to understand the legal and procedural issues that may arise in the Court of General Gaol Delivery and beyond. It may also assist judges, lawyers, academics and students in other jurisdictions who wish to consider issues of Manx criminal law and procedure. Hopefully in years to come this publication may be regarded as a useful historical record of Manx criminal law and procedure in the early 21st century.

4. It is important however that the many limitations of this book be recognised. This book does not cover all relevant areas of Manx criminal law and procedure and the areas the book does cover are not always dealt with in any depth. This book covers the more common areas which arise in the Court of General Gaol Delivery in everyday practice. This book does not purport to be authoritative or to carry any great academic weight. It should simply be treated as a reference for further informed research.

5. I note and adopt the wise words of Lightman J (The Withers Lecture 2003*The Trustees' duty to provide information to Beneficiaries*) who expressed the dangers of relying on observations from judges who have not benefited from submissions on the point as follows:

> "I should however add a word of caution to those who hear or read this lecture. A judge who expresses his view of the law without the assistance of counsel's argument is like a mariner who sails dangerous straits without a pilot. He has no such warning as he is accustomed to receiving from that source of shoals or other navigational hazards. Not merely may it be unsafe to rely on what I say without such assistance, but it should not be assumed that, if ever an issue such as is touched on in this lecture comes before me in my judicial capacity, possessed with that assistance even I shall take the same view."

6. There are a number of people who have assisted in respect of this book and I would like to thank them for their assistance.

7. I thank the numerous trainee advocates who have attended my talks on criminal law and procedure over the years. I have benefited from their input and their questioning minds.

8. I thank all those advocates who have appeared before me and argued with skill and eloquence various points of law and procedure. I have benefited from their submissions on a vast variety of interesting points of criminal law and procedure.

9. Deemster Kerrruish, Her Majesty's former First Deemster and Clerk of the Rolls (the Island's Chief Justice), who sadly died on the 14th July 2010, permitted me to preside over the Court of General Gaol Delivery over many years and thus exposed me to stimulating challenges and interesting legal issues. I am grateful to him for that and for his guidance and support. Deemster Kerruish's contribution to the administration of justice on the Island has been immense. I thank Judge of Appeal Tattersall for his suggestion that the notes I had compiled from time to time in respect of my preparations for trials and my talks to trainee advocates be developed into a book. This book is in large part the result of that suggestion.

10. Deemster Kerruish and Judge of Appeal Tattersall have been responsible for producing many of the leading judgments of the Appeal Division referred to in this book. I am grateful to them, as we all should be, for their massive contribution to the development of Manx jurisprudence some of which this book endeavours to cover. Many of the Manx judgments referred to in this book may be accessed at *www.judgments.im*

11. It is important that as an Island we continue to develop our own jurisprudence to suit our own needs and that such jurisprudence is easily accessible and well known. Of course we should have regard to developments in other jurisdictions but we should never slavishly follow them. Whilst enthusiastically continuing to comply with our international obligations we should always have regard to our own local conditions.

12. In developing our own jurisprudence and Manx identity it is important that books on matters Manx continue to be published. Charles Guard and the Manx Heritage Foundation have been instrumental in the publication of such books including this one.

13. I thank Charles Guard and the Manx Heritage Foundation for their encouragement and for their work in arranging for the publication of this book. Charles has over many years been a supportive friend and an inspirational source of encouragement. Our respective professional paths first crossed on the 19th February 1986 when as a young advocate at short notice I was instructed to act for Radio Manx Limited. Charles (who was a young Manx Radio presenter at the time) had been summoned to appear at the Bar of Tynwald to show reason why he should not answer a summons to produce certain information relevant to the telecommunications industry on the Island. There were no findings of contempt against Charles and no journalistic sources had to be revealed but it was an exciting 24 hours. I also had the subsequent privilege of assisting Charles in co-hosting the *Month in Politics* series of radio programmes broadcast by Manx Radio. It was during that time that I fully appreciated the professionalism and the pursuit of perfection which were the hallmarks of Charles Guard. It was a real joy to work with him. The Island is very fortunate to have such an asset and I am grateful for his contribution to the publication of this book.

14. I thank the Isle of Man Law Society for funding the publication of this book. Without their generosity this publication would not have been possible. Jonathan Wild has presided over an important period in the Society's history. The Society in 2009 celebrated 150 years of existence. I am glad to see it continue in such a healthy state. Without the contribution of skilled, dedicated, well informed and well prepared advocates the administration of justice on this Island would suffer. We should not lose sight of the fact that in addition to the remunerative fee paying work advocates undertake many advocates

also undertake pro bono work and assist the more vulnerable members of our community here on the Island.

15. I thank Nora Lees who has spent much time and effort in producing numerous drafts of this book together with its predecessor notes and amending such drafts from time to time. I thank my clerks Tricia Cocker and Jacqui Brogan for the valuable support they have provided to the Court of General Gaol Delivery and to me personally over many years. I thank all those within court administration who on a daily basis provide the courts with support and assistance.

16. I thank my family for tolerating and supporting a husband and a father who spends far too much of his time immersed in the depths of Manx law and procedure and far too little time with his family.

17. I thank Eleanor Dangerfield for enthusiastically undertaking the enormous tasks of proof reading and the preparation of the Tables of Acts of Tynwald, Secondary Legislation, Manx cases and the Index. A book is of limited assistance without an accurate and comprehensive index. Eleanor's valuable input is most appreciated. Any errors that remain are, of course, my responsibility. I apologise in advance for any such errors.

18. Michael Kirby (formerly a Justice of the High Court of Australia) in his foreword (June 2009) to *Australian Criminal Justice* 4th edition by Findlay, Odgers and Yeo stated:

> "It is not easy to compress within the manageable space of an accessible text, the main contours of the law and practice that need to be understood to grasp the essence of our peculiar system of criminal justice."

19. I have endeavoured within the restraints of time and intellect to compress within a manageable space the main contours of Manx criminal law and procedure. Whether I have succeeded in that endeavour will be for others to judge.

20. I have attempted to state the relevant Manx criminal law and procedure as at 31st December 2009 incorporating some further developments since that date where possible prior to publication.

David Doyle
Isle of Man
October 2010

The Court of General Gaol Delivery

21. The Court of General Gaol Delivery deals with the most serious criminal cases arising in the Isle of Man. The main work of the court is focused on jury trials and the sentencing of those defendants who have been found guilty by a jury or who have pleaded guilty. In addition numerous legal issues have to be determined from time to time. These issues range from matters such as the admissibility of evidence to the stopping of proceedings on the grounds of abuse of process or on the basis of no case to answer submissions. A vast variety of legal issues are put before the Court of General Gaol Delivery for determination.

22. The work of the Court of General Gaol Delivery includes cases involving serious acts of violence ranging from assaults to murders, controlled drugs, sexual offences, dishonesty offences, causing death by dangerous driving, firearms offences, damage to property, unlawful detention and numerous other serious criminal offences. Frequently the cases which are dealt with by the Court of General Gaol Delivery are drug and/or alcohol related. The extensive sentencing powers of the Court of General Gaol Delivery range from the imposition of an absolute discharge to life imprisonment.

23. The Criminal Jurisdiction Act 1993 deals with the Court of General Gaol Delivery. In particular it deals with jurisdictional and procedural matters. Section 1(1) of the Criminal Jurisdiction Act 1993 provides that the Courts of General Gaol Delivery shall continue to sit for the purpose of (a) trying offences on information; (b) dealing with offenders committed for sentence under section 17 of the Summary Jurisdiction Act 1989; and (c) exercising any other jurisdiction conferred on them by any statutory provision. See for example the provisions of the Proceeds of Crime Act 2008 which give the Court of General Gaol Delivery jurisdiction to deal with various matters. Section 1(2) of the Criminal Jurisdiction Act 1993 provides that the president of the High Court shall from time to time assign a judge of the High Court to be a judge of such a court. The Criminal Jurisdiction Act 1993 also contains provisions dealing with informations, pleas, procedure, evidence, verdicts, sentences, appeals, retrials, costs, mentally disordered persons and miscellaneous and supplemental matters. Section 56A of the Criminal Jurisdiction Act 1993 provides that the seal of the Court of General Gaol Delivery shall be the same as the seal of the High Court.

24. The Custody Act 1995 deals with matters relevant to imprisonment, detention, custody and other sentencing matters.

25. Paragraphs 99-109 of the judgment in *R v Glover, Glover and Priestnal* (Court of General Gaol Delivery judgment delivered 25th August 2006) 2005-06 MLR 463 deal very briefly with the history of the Court of General Gaol Delivery and its constitution. *R v Kelly* 1522-1920 MLR 27 provides a useful insight into the constitution of the Court of General Gaol Delivery in 1824.

26. Consider also Edge's *Manx Public Law* (1997) in particular Part III for an historical and useful account of the development of Manx criminal law. Manx law has largely been influenced by England and Scottish law. William Cain one of the Island's former First Deemsters in his foreword to Edge's outstanding work stated: "It has long been the aim of most of those involved in Manx affairs to ensure that the Isle of Man keeps pace with developments elsewhere, in legal as in other matters, while at the same time emphasising, and where possible, enlarging the Island's autonomy."

Information, amendment, joinder and severance

27. Proceedings in the Court of General Gaol Delivery are commenced by an information (a document specifying the charges against a defendant) preferred by the Attorney General in the name and on behalf of Her Majesty. The Interpretation Act 1976 defines Her Majesty and the Crown as Her Majesty the Queen Sovereign for the time being of the United Kingdom. On occasions the information is stated to be signed for and on behalf of the Attorney General under authority delegated pursuant to paragraph 2, Schedule 8 of the Criminal Justice Act 2001.

28. Under section 2(2) of the Criminal Jurisdiction Act 1993 the information (in England and Wales referred to as the indictment) shall be lodged in the General Registry and 14 clear days before the date on which the defendant is arraigned a certified copy shall be served on the defendant or sent to him by registered post or the recorded delivery service, and a certified copy shall be sent to his advocate (if any).

29. In *Baines v The Attorney General* (judgment delivered on the 14th May 2009) Deemster Kerruish at paragraph [36] agreed with counsel: "that the Court of General Gaol Delivery becomes seised of a case when an information has been filed in the General Registry, or to be more precise when the information has been processed with the first appearance date and time having been endorsed thereon." At paragraph [37] the learned Deemster

continued: "Thus before arraignment a defendant and, if he is represented, his advocate have fourteen clear days to consider the information. I consider that such period not only provides a defendant with the information to duly consider his position and the advantages of an early plea whatever that plea may be, but also in the case where the Attorney General has issued a certificate under section 2 of the 1993 Act to consider whether such certificate ought to be challenged."

30. In *King* (judgment delivered 2nd April 2009) Acting Deemster Sullivan considered section 2 of the Criminal Jurisdiction Act 1993 and the requirement to serve the information on the defendant 14 clear days before the date on which the defendant is arraigned. Acting Deemster Sullivan stated:

> "7. The provisions of section 2 of the 1993 Act are clearly intended to ensure that a defendant has sufficient notice of the proceedings to be able to properly defend them …
> 8. … On a purposive interpretation I am satisfied that section 2 of the 1993 Act is not mandatory and that the Court therefore has a discretion to abridge the time if justice so demands."

31. An information may be preferred by the Attorney General (a) on committal of the defendant in accordance with Part II of the Summary Jurisdiction Act 1989 (b) on a direction given by the Appeal Division under section 33(3)(b) of the Criminal Jurisdiction Act 1993 or (c) of his own motion.

32. An information may not be preferred under section 2(3)(c) unless the Attorney General certifies in writing that in his opinion the evidence of the offence charged (a) would be sufficient for the defendant to be committed for trial; and (b) reveals a case of such seriousness or complexity that its management should without delay be taken over by the court; and such certificate shall not be subject to appeal or liable to be questioned in any court. See *Petition of Attorney General and Chief Constable* (judgment delivered 22nd September 2006) in respect of the purported ouster of the jurisdiction of the courts. Section 10(2) of the High Court Act 1991 states that for the avoidance of doubt, it is declared that the High Court does not have jurisdiction to hear and determine petitions of doleance in respect of any matter in, or proceedings of, the Court of General Gaol Delivery.

33. In respect of informations filed with the Court of General Gaol Delivery by the Attorney General pursuant to section 2(3) (c) and (5) of the Criminal Jurisdiction Act 1993 see the Appeal Division judgment in *R v Devo and Riedel* (delivered 29th October 2008) at paragraph 49 where the following is stated:

"…The Attorney General exercised his right, as to which we make no criticism, to place the matter before the Court of General Gaol Delivery without committal proceedings."

34. In *Baines v The Attorney General* (judgment of Deemster Kerruish delivered on the 14th May 2009) John Trevor Roche Baines sought an order that a certificate issued by the Attorney General under section 2(5) of the Criminal Jurisdiction Act 1993 be quashed or in the alternative an order requiring the Attorney General to reconsider the issue and maintenance of the certificate in the light of all material considerations including the consequence of a judgment of Deemster Doyle of the 24th November 2008 in criminal proceedings brought by the Attorney General against Mr Baines and Wendy Nicolau De Almeida Baines. The learned Deemster dismissed the petition. It was held that if a section 2(5) certificate was lawfully issued the court did not have jurisdiction to subsequently review the Attorney General's maintenance of the certificate or to require him to reconsider the maintenance of such certificate. The learned Deemster held that the certificate was lawfully issued and declined to quash the certificate or to grant an order that the Attorney General reconsider the issue and maintenance of the certificate.

35. In *Humphreys v The Attorney General of Antigua and Barbuda* (judgment delivered on the 11th December 2008) the Privy Council considered the position of a new system of committal proceedings in Antigua and Barbuda. Lord Hoffmann at paragraph 9 of the judgment stated that the question was not the extent to which the new committal proceedings differ from the old preliminary inquiries but whether the new system of committal proceedings and trial, taken as a whole, satisfied the requirements of section 15(1) of the Constitution of Antigua and Barbuda. Lord Hoffmann stated:

"It is one thing to say that if the procedure for bringing someone accused of an indictable offence to trial includes a preliminary inquiry, that inquiry must be conducted fairly, by an impartial court and so forth, it is another thing altogether to say that one cannot have a fair hearing without a preliminary inquiry."

36. Section 3(1) of the Criminal Jurisdiction Act 1993 provides that an information shall contain a statement of the specific offence or offences of which the defendant is charged, together with such particulars as are necessary for giving reasonable information as to the nature of the charge. See also the Criminal Code (Informations) Act 1920.

37. Section 4 of the Criminal Jurisdiction Act 1993 provides as follows:

"4 Amendment of information

(1) Where before trial or at any stage of the trial, it appears to the court that an information is defective, the court shall make such order for the amendment of the information as it thinks necessary to meet the circumstances of the case, unless the required amendments cannot be made without injustice.

(2) Where an information is amended, a note of the order under subsection (1) shall be endorsed on the information, which shall be treated for the purposes of the trial and all proceedings in connection with the trial as if it had always been in its amended form.

(3) Where before trial or at any stage of the trial, it appears to the court-

(a) that a defendant may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same information, or

(b) that for any other reason it is desirable to direct that he should be tried separately for any one or more offences in the information,

the court may order a separate trial of any count or counts in the information.

(4) Where before trial or at any stage of the trial, it appears to the court that the trial ought to be postponed as a consequence of an order under subsection (1) or (3), the court shall make such order as to the postponement of the trial as appears necessary.

(5) Where the court makes an order under subsection (3) or (4)-

(a) if the order is made during a trial, the court may order that the jury be discharged from giving a verdict on the count or counts the trial of which is postponed or on the information, as the case may be;

(b) the procedure on a separate trial of a count shall be the same in all respects as if the count had been found on a separate information;

(c) the procedure on a postponed trial (if the jury has been discharged) shall be the same in all respects as if the trial had not commenced;

(d) the court may make such order as to costs, the admission of the defendant to bail, the enlargement of recognizances and otherwise as the court thinks fit.

(6) Any power of the court under this section is in addition to and not in derogation of any other power of the court for the same or similar purposes."

38. *Collister* (Court of General Gaol Delivery judgment 16th December 2003) concerned the requirements as to the contents of an information and the ability to order the prosecution to specify in detail the particulars of the offences. The defendant is entitled to know what case he has to meet. See also section 49 of the Criminal Jurisdiction Act 1993 in respect of costs of a defective information.

39. Lord Ackner in *R v Savage* [1992] 1 AC 699 at 737 (HL) stated:

"Clearly, if an accused considers that he is entitled to further particulars of the offence with which he is charged, he can seek those from the prosecution and if unreasonably refused, he can obtain an order from the court."

40. From time to time the court has to consider applications by the prosecution for joinder of charges, joinder of defendants and applications from the defence for severance of charges or for separate trials. If the prosecution make a late application for joinder which risks trial dates being vacated that militates against permitting joinder unless the interests of justice require otherwise.

41. I briefly referred to some of the relevant law in respect of joinder of charges in one information in *Johnson* (judgment delivered 16th April 2007) as follows:

"The Law

30. Rule 3 of the Criminal Code (Informations) Act 1920 is headed "Joining of charges in one information" and states:

"Charges for any offences, whether felonies or misdemeanours, may be joined in the same information if those charges are founded on the same facts, or form or are part of a series of offences of the same or a similar character".

31. This rule is similar to rule 8 of the English Indictment Rules 1971.

32. Section 4(3) of the Criminal Jurisdiction Act 1993 provides that where before trial or at any stage of the trial it appears to the court —

(a) that a defendant may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same information, or

(b) that for any other reason it is desirable to direct that he should be tried separately for any one or more offences in the information,

the court may order a separate trial of any count or counts in the information.

33. It is important to consider the topics of joinder and severance separately but it is nevertheless of interest to consider the approach of the Court of General Gaol Delivery on severance in *R v Moroney and others* 1987-89 MLR 422 usefully brought to the attention of the court by Mr Taubitz. In that case the court held that the charges against the applicant were sufficiently related to charges against other accused to indicate that the interests of justice would be best served by their being tried together and the applicant had not proved to the courts' satisfaction that he would be so severely prejudiced by the joint trial that he could not expect to receive proper justice. The court followed the judgment of Sachs J in *R v Assim* [1966] 2 QB 249. Sachs J stated:

"... Where, however, the matters which constitute the individual offences of the several offenders are, on the evidence, so related, whether in time or by other factors, that the interests of justice are best served by their being tried together, then they can properly be the subject of counts in one indictment and can, subject always to the discretion of the Court, be tried together. Such a rule includes, but is not limited to, cases where there is evidence that the several offenders acted in concert".

34. Acting Deemster Field-Fisher at page 425 added:

"Joint trials are appropriate to incidents which, irrespective of being the subject of a joint charge on the indictment, are contemporaneous, as in cases relating to affray, or successive, as in protection racket cases, or linked in a similar manner ... As in all applications of this kind, one has to do a balancing test. I ask myself

whether Mr Moroney is going to be so severely prejudiced in any way by being tried jointly on this indictment that he cannot expect to receive proper justice. I am unable to reach that conclusion."

35. *Archbold* 2007 from paragraph 1-154 onward deals with the topic of "Joinder of counts in one indictment".

36. In *Kray* 53 Cr App R 412 and 569 it was held that (a) two offences may constitute a 'series' within the meaning of the rule and (b) although the relevant part of the rule does not require the offences to arise out of the same facts or be part of a system of conduct before joinder can be sanctioned, a sufficient nexus must nevertheless exist between the relevant offences. Such a nexus is clearly established if evidence of one offence would be admissible on the trial of the other but the rule is not confined to such cases. All that is necessary to satisfy the rule is that the offences should exhibit such similar features as to establish a prima facie case that they can be properly and conveniently tried together in the interests of justice, which include, in addition to the interests of the defendants, those of the Crown, witnesses and the public. A further relevant factor is the prejudice likely to arise in the second trial from extensive press reports of the first trial if the offences are tried separately. It was further held that it is not desirable that the rule should be given an unduly restricted meaning, since any risk of injustice can be avoided by the exercise of the judge's discretion to sever the indictment.

37. In *Ludlow v Metropolitan Police Commissioners* [1971] AC 29 the House of Lords held that (a) two offences can constitute a series and (b) both the law and the facts should be taken into account when deciding whether offences are similar or dissimilar in character. They concluded that there must be some nexus between the offences. Nexus is a feature of similarity which in all the circumstances of the case enables the offences to be described as a series. Their Lordships also cited, with implicit approval, the dictum in Kray that the operation of the rule is not restricted to cases where the evidence on one charge is admissible on the other(s) and expressly the dictum that the rule should not be given an unduly restricted meaning.

38. Blackstone's *Criminal Practice* 2003 from D10.24 deals with "Joinders of Counts in Indictment" and from D10.29 "Joinder of Accused". At paragraph D10.25 reference is made to *Barrell* (1979) 69 Cr App R 250 and it is stated that the rule extends to situations "where later offences would not have been committed but for the prior commission of an earlier offence". Shaw LJ at pages 252-3:

"..The test is whether the charges have a common factual origin. If ... the subsidiary charge is one that could not have been alleged but for the facts which give rise to .. the primary charge, then it is true to say for the purposes of rule 9 that those charges are founded, that is to say have their origin, in the same facts and can legitimately be joined in the same indictment".

39. Reference is also made to the interesting case of *Bellman* [1989] AC 836 and counts that are mutually destructive.

40. I have considered the relevant statutory provisions including sections 4 and 5 of the Misuse of Drugs Act 1976 and sections 1, 45 and 46 of the Drug Trafficking Act 1996. I do not set those provisions out in full in this judgment but I have full regard to them and the relevant caselaw. I have also considered *R v Montila* [2005] 1 Cr App R 26."

42. In *Purvis v Hopwood* (judgment delivered 24th July 2007) I stated the following:

"*Law*

18. Section 4(3) of the Criminal Jurisdiction Act 1993 provides that: "Where before trial or at any stage of the trial, it appears to the court –

(a) that a defendant may be prejudiced or embarrassed in his

defence by reason of being charged with more than one offence in the same information; or

(b) that for any other reason it is desirable to direct that he should be tried separately for any one or more offences in the information

the court may order a separate trial of any count or counts in the information." …

Determination of the Application

20. Having considered all the circumstances of this case, the Application, the submissions and the relevant law I am not persuaded that Miss Hopwood would be unduly prejudiced or embarrassed if she faced trial on the information with Mr Purvis. Nor have I been persuaded that for any other reason it is desirable to direct that Miss Hopwood should be tried separately for any one or more offences in the information or separately from Mr Purvis.

21. I have concluded that it is not in the interests of justice to order a separate trial of any of the counts in the information. I have concluded that it is not in the interests of justice to order separate trials of the defendants.

22. In my judgment all the counts in the information against the defendants can be properly and conveniently tried together in the interests of justice. The jury will be directed, as appropriate, to consider the case against each defendant and upon each count separately. Moreover the jury will be directed, as appropriate, to decide their verdicts on the basis of the evidence and not on the basis of any inferences of guilt by association. The trial Deemster can no doubt hear submissions from counsel at the trial as to any necessary directions. The jury can be trusted to decide the charges on the evidence and to pay full regard to any appropriate directions from the trial Deemster.

23. I therefore dismiss the Application."

43. In *R v Moroney and others* 1987-89 MLR 422 Acting Deemster Field-Fisher stated at pages 424-423:

"Of the authorities to which I have been referred it seems to me that the matter is put clearest in the case of *R. v. Assim* (2), where the headnote, made up essentially of extracts from the judgment given by Sachs, J., reads (50 Cr. App. R. at 224-225):

"Questions of joinder, whether of offences or of offenders, are matters of practice on which the Court has, unless restrained by statute, inherent power both to formulate its own rules and to vary them in the light of current experience and the needs of justice. ..

As a general rule it is no more proper to have tried by the same jury several offenders on charges of committing individual offences that have nothing to do with each other than it is to try together distinct offences committed by the same person. Where, however, the matters which constitute the individual offences of the several offenders are, on the evidence, so related, whether in time or by other factors, that the interests of justice are best served by their being tried together, then they can properly be the subject of counts in one indictment and can, subject always to the discretion of the Court, be tried together. Such a rule includes, but is not limited to, cases where there is evidence that the several offenders acted in concert."

Joint trials are appropriate to incidents which, irrespective of being the subject of a joint charge on the indictment, are contemporaneous, as in cases relating to affray, or successive, as in protection racket cases, or linked in a similar manner. That judgment of the Court of Appeal, the observations contained in it and the tests laid down in it were clearly approved in the case of *Chief Constable of Norfolk* v. *Clayton* .

As in all applications of this kind, one has to do a balancing test. I ask myself whether Mr. Moroney is going to be so severely prejudiced in any way by being tried jointly on this indictment that he cannot expect to receive proper justice. I am unable to reach that conclusion. I have taken into consideration the matters which have been urged upon me and in my view this is a perfectly proper case for those matters to be dealt with jointly on a joint trial. I have already indicated that I think questions as to whether the complexity of the trial, and therefore the resultant length, can be properly reduced without any overall diminution of the right to justice, of both individuals and the public, may well have to be considered at a later stage. I say no more about that."

44. In respect of joinder of defendants see *R v Assim* [1966] 2 QB 249, Sachs J at pages 261-262:

"Again, while the court has in mind the classes of case that have been particularly the subject of discussion before, it, such as incidents which, irrespective of there appearing a joint charge in the indictment, are contemporaneous (as where there has been something in the nature of an affray), or successive (as in protection racket cases), or linked in a similar manner, as where two persons individually in the course of the same trial commit perjury as regards the same or a closely connected fact, the court does not intend the operation of the rule to be restricted so as to apply only to such cases as have been discussed before it.

If examples are needed it is sufficient to say whilst it would be obviously irregular to charge two men in separate counts of the same indictment with burglary simply and solely because they had purely by coincidence separately broken into the same house at different times on the same night, this court, as already indicated, sees nothing in the facts in *Reg.* v. *Leigh & Harrison* which in principle prevented the joint trial of such closely related counts for perjury as were there separately laid against the two accused.

The last-named decision is overruled; whilst it accorded with the two cases that appear in the books of 1731 and have been consistently cited in Archbold, it was, of course, reached without the trial judge having the benefit of that considerable review of authorities which is so often impracticable on circuit. Save for that case, however, the court has not deemed it necessary as regards each of the many authorities cited to state seriatim whether it does or does not accord with the rules of practice as above formulated.

The court has already emphasised, and desires to repeat, that it is the interests of justice as a whole that must be the governing factor and that amongst those interests are those of the accused. It is essentially a matter for the discretion of the court whether several offenders can properly be tried together at the same time and it is necessary for the trial judge to scrutinise matters closely with the same degree of care that is applied in dealing with the question whether a single person can be charged with several offences before the same jury."

45. Acting Deemster Sullivan in *King* (judgment delivered 2nd April 2009) referred to various authorities in respect of two informations being tried together and commented as follows:

"10. If the Court holds that time should be abridged Mr. Neale seeks leave to have the two Informations tried together. The relevant provision is Rule 3 of the Criminal Code (Informations) Act 1920:

"Charges for any offences, whether felonies or misdemeanours, may be joined in the same information if those charges are founded on the same facts, or form or are part of a series of offences of the same or a similar character."

Mr.Neale referred to several English authorities the most pertinent of which is *Barrell and Wilson (1979) 60 Cr App R 250.* B,W and M were charged with affray in a discotheque and they were released on bail, M absconded but W alone visited the manager of the discotheque and it was alleged offered money to the manager to change his evidence. Application was made to sever the count of attempting to pervert the course of justice from the affray count. Shaw LJ held that the counts could be tried together stating that the test to be applied was:

"whether the charges have a common factual origin. If the charge described by counsel as a subsidiary charge is one that could not have been alleged but for the facts which give rise to what he called the primary charge, then it is true to say for the purpose of rule 9 that those charges are founded, that is to say have their origin, in the same facts and can legitimately be joined in the same indictment."

For these purposes "rule 9" is in identical terms to the 1920 Criminal Code. Mr. Justice Toulson amplified this test in *Regina v James Cox [2001] EWCA Crim 728* where, at paragraphs 21 and 22 he said:

" 21. We accept and follow the construction placed on the words of this court in Barrell and Wilson. Of course the words "have a common factual origin" are broad. The degree of overlap could range from something very tenuous to, at the other extreme, a situation where the facts are identical. A slight or tenuous connection would not be sufficient, but nor on the other hand need the facts be identical. We consider the two offences may fairly be said to be founded on the same facts or evidence where there is sufficient factual or evidential overlap to make it both just and convenient for them to be tried together. Here the evidence of P.C. Tucker on the trial (if there had been one) for witness intimidation would properly have included the history of dealings with the applicant, including his arrest of the applicant on the same day as driving whilst disqualified. Mr. Fitton sought to tie the alleged threat closely to the events of some months earlier and to exclude the driving whilst disqualified from part of the relevant narrative. We do not regard that as a realistic approach. Had the prosecution sought to lead the evidence of P.C. Tucker about the events of the day in question we have no doubt that such evidence would have been properly admissible.

22. Where evidence of facts going to establish the offence- that is to say, in this case, the offence of driving whilst disqualified- were properly admissible as part of the narrative events leading to the commission of the offence of witness intimidation, it must follow that there was sufficient factual and evidential overlap to meet the requirements of section 40. It was plainly just and convenient for the two matters to be tried together, rather than that P.C. Tucker should be called twice over in different courts to give substantially overlapping evidence about the events of the same day and be cross-examined twice."

Mr. O'Neill relied upon the Manx authority of *The Attorney General v. John Alan Johnson et al CRIM 2007/14*. In that case Deemster Doyle declined to join several counts of supply of and possession of controlled drugs with intent to supply against Johnson with several counts of drug trafficking against Johnson and several other defendants. Every case must be considered on its own facts and I find nothing in that case of relevance to this. Mr. O'Neill also submitted that the joinder would cause prejudice to the Defendant. That is a necessary consequence in this case and was recognised as such in *Barrell and Wilson*, but there did not prevent joinder, nor should it here in my judgment.

11. Having considered the authorities I am satisfied that there is sufficient connection between the evidence on the count of witness intimidation and the evidence on the other counts to make joinder in the interest of justice. In this particular case the Complainant's ordeal of having to give evidence twice should joinder not be allowed is more compelling a reason than in *Cox* where a police officer would have had to have given evidence twice if joinder was not permitted."

46. In *R v Haytner* [2005] UKHL 6 Lord Steyn stated:

"6 The practice favouring joint criminal trials is clear. It has been accepted for a long time in English practice that, subject to a judge's discretion to order separate trials in the interests of justice, there are powerful public reasons why joint offences should be tried jointly: R v Lake (1976) 64 Cr App R 172, 175 , per Widgery CJ. While considerations of the avoidance of delay, costs and convenience, can be cited in favour of joint trials this is not the prime basis of the practice. Instead it is founded principally on the perception that a just outcome is more likely to be established in a joint trial than in separate trials. The topic is intimately connected with public confidence in jury trials. Subject to a judge's discretion to order otherwise, joint trials of those involved in a joint criminal case are in the public interest and are the norm."

47. Bridge L J in *Novac* [1977] 65 Cr App R 107 criticised the overloading of indictments. At pages 118-119 he stated:

"We cannot conclude this judgment without pointing out that, in our opinion, most of the difficulties which have bedevilled this trial, and which have led in the end to the quashing of all convictions except on the conspiracy and related counts, arose directly out of the overloading of the indictment. How much worse the difficulties would have been if the case had proceeded to trial on the original indictment containing 38 counts, does not bear contemplation. But even in its reduced form the indictment of 19 counts against four defendants resulted, as is now plain, in a trial of quite unnecessary length and complexity. If the specific offence counts against Novac, Raywood, and Andrew-Cohen and all the counts against Archer had been tried separately, the main trial of the conspiracy and related counts would have been reasonably manageable and the four separate trials would have been short and straightforward. Quite apart from the question whether the prosecution could find legal justification for joining all these counts in one indictment and resisting severance, the wider and more important question has to be asked whether in such a case the interests of justice were likely to be better served by one very long trial; or by one moderately long and four short separate trials.

We answer unhesitatingly that whatever advantages were expected to accrue from one long trial, the precise character of which has never been apparent to us, they were heavily outweighed by the disadvantages. A trial of such dimensions puts an immense burden on both judge and jury. In the course of a four or five day summing-up the most careful and conscientious judge may so easily overlook some essential matter. Even if the summing-up is faultless, it is by no means cynical to doubt whether the average juror can be expected to take it all in and apply all the directions given. Some criminal prosecutions involve consideration of matters so plainly inextricable and indivisible that a long and complex trial is an ineluctable necessity. But we are convinced that nothing short of the criterion of absolute necessity can justify the imposition of the burdens of a very long trial on the Court.

In making these comments we are by no means criticising the learned judge in the instant case. When, at the outset, he had to consider the question of severance, to the limited extent that it was canvassed before him, he had no opportunity to consider the voluminous committal papers and could only decide on the basis of such arguments presented to him. He certainly had no opportunity to apply his

mind to the wider questions to which we have drawn attention. It must always be the responsibility of those who have the conduct of a prosecution of any magnitude to consider those wider questions. It is quite wrong for prosecuting authorities to charge, in a single indictment, numerous offenders and offences, simply because some *nexus* may be discoverable between them, leaving it to the Court to determine any application to sever which may be made by the defence. If multiplicity of defendants and charges threatens undue length and complexity of trial then a heavy responsibility must rest on the prosecution in the first place to consider whether joinder is essential in the interests of justice or whether the can reasonably be sub-divided or otherwise abbreviated and simplified. In jury trial brevity and simplicity are the hand-maidens of justice, length and complexity its enemies."

48. In *R v Roberts* [2008] EWCA Crim 1304 [2008] Crim LR 895 it was held that the requirement that the charges were "founded on the same facts" could be satisfied where the factual connection was established by the coincidence of time and place e.g. a search of premises locating cocaine, cannabis and air rifles. The propriety of the indictment had to be judged when it was drawn. See the useful judgment of the Privy Council in *Ferrell* [2010] UKPC 20 (judgment 29th July 2010) where the question was whether, in the circumstances of that case, there was sufficient nexus between the offences charged in money laundering counts and the drugs counts. In that case the court held that the just course was for the jury to consider all the counts together.

49. See *R v Oates* (judgment 14th February 2007) in respect of deleting reference to a count a defendant had pleaded guilty to from other contested counts in an information being put before a jury.

50. The prosecution should ensure where appropriate that all relevant alternatives are included in the information from the outset for example, if appropriate, section 33 and section 35 of the Criminal Code 1872 as amended offences and in drugs cases possession with intent to supply and simple possession again if appropriate on the facts and circumstances of the case. If there are to be pleas to the lesser count these pleas should be made at the earliest possible time and not left to the first day of the trial or shortly before the trial. If they are left late this will adversely effect any available sentencing discount and may attract adverse costs awards if time and costs have been wasted.

51. It is the responsibility of counsel to ensure that the information is in proper form before arraignment (*Hodgson and Pollin* [2008] EWCA Crim 895; *R v Newland* [1988] QB 402). Informations should be drafted to reflect the criminality of the case and to avoid complications (*R v N (P) and others* [2010] EWCA Crim 941).

52. See *R v Chargot Limited (t/a Contract Services*) [2008] UKHL 73 in respect of proceedings against employers under section 2 of the Health & Safety at Work Act 1974 and whether it is necessary for the prosecution to identify, allege and prove specific failures on the employer's part and as to whether a *Brown* direction (in conformity with *R v Brown* (1984) 79 Cr App R 115) was also required.

53. In *Taylor v Oake* 1996-98 MLR N 8 (judgment delivered on the 5th March 1998) the Appeal Division (Deemster Cain and Deemster Kerruish) dealt with an appeal which concerned the summary court enquiring of the prosecution as to whether they wished to amend a complaint which referred to one registration number of a vehicle whereas the evidence plainly referred to another. The Appeal Division, in the particular circumstances of that case, stated that the correct procedure is for the court to invite the prosecution to amend the complaint and, if necessary, to require the prosecution to amend the complaint to bring it into line with the evidence. An adjournment may be necessary if the defence are taken by surprise.

54. See *Clarke v McDaid* [2008] UKHL 8 on the need for formalities to be followed in respect of indictments in England and Wales.

55. The Appeal Division (Judge of Appeal Clothier and Deemster Eason) in *Kerruish v IOM Water and Gas Authority* 1972-77 MLR 286 held that the count in that case was not bad for duplicity.

56. See *Canavan* [1998] 1 Cr App R 79 and more recent cases such as *R v Thompson* [2004] 2 Cr App R 16 in respect of specimen charges and sample counts. See also *Tyack* (Privy Council judgment delivered 29th March 2006) and *Archbold Criminal Pleading Evidence & Practice* at paragraph 5-68 and paragraph 1-131 onwards. I refer in this book to that most useful publication simply as *Archbold*.

Attempts

57. Section 9 of the Criminal Law Act 1981 provides as follows:

> "9 Attempt to commit an offence to be deemed an offence
>
> (1) A provision which constitutes an offence shall, unless the contrary intention appears, be deemed to provide also that an attempt to commit such offence shall be an offence against that provision, punishable as if the offence itself had been committed.

(2) A person attempts to commit an offence if he does an act which is more than merely preparatory to the commission of the offence.

(3) A person may be guilty of attempting to commit an offence even though the facts are such that the commission of the offence is impossible.

(4) In any case where-

(a) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offence, but

(b) if the facts of the case had been as he believed them to be, his intention would be so regarded,

then, for the purposes of subsection (1), he shall be regarded as having had an intent to commit that offence."

58. See *Myers* (Appeal Division judgment 26th November 2008) in respect of sentencing for the commission of an offence of an attempt to commit an offence.

First appearance at Court of General Gaol Delivery

59. The defence advocate should ensure that arrangements have been made for the defendant to attend the hearing. Advocates should ensure that all relevant information has been obtained prior to the commencement of the court hearing. Advocates should not delay the hearing with unnecessary requests for short adjournments or delayed starts while late instructions are taken or late advice is given. It is appreciated that on occasions clients facing serious criminal charges can be difficult but advocates should make every effort to obtain full instructions before the relevant court hearing.

60. If the defendant is on bail the defence advocate should ensure that the defendant is aware of the time, date and place where his attendance will be required. The defendant should where necessary be reminded the day before the hearing. The defence advocate should have all the necessary contact details – mobile phone, email address etc. If the defendant fails to attend court, a bench warrant not backed for bail (or backed for bail in cases where it appears the accused may have had a reasonable cause to be absent) may be issued directing the police to arrest the defendant. A breach of bail and a failure to attend court may also affect the granting of bail in the future and will reflect badly upon the defendant.

61. Consider the attendance of a defendant in person or, where appropriate, by live television link. See the Criminal Jurisdiction

(Live Television Link) Rules 2008 (SD No 707/08). Section 29 of the Criminal Justice, Police and Courts Act 2007 provides that in any proceedings for an offence, a court may, after hearing representations from the parties and with the consent of the accused direct that the accused shall be treated as being present in the court for any particular hearing before the start of the trial if during that hearing the accused is held in custody in a prison or other institution and whether by means of a live television link or otherwise the accused is able to see and hear clearly and to be clearly seen and heard by it. If the court decides not to give such a direction it shall give its reasons for not doing so. The "start of the trial" shall be taken to occur (a) when the court begins to hear evidence for the prosecution at the trial; or (b) if the court accepts a plea of guilty without proceeding as in (a) when that plea is accepted.

62. The defendant should be in a position to enter a plea at his first appearance. If the plea is to be not guilty prosecution and defence counsel should file non availability and likely duration of trial and suggestions for any necessary case management directions in advance of the first appearance so that trial dates can be set without further delay. Defendants, witnesses and counsel should treat court proceedings as a priority and where necessary rearrange their other commitments in order to accommodate early trial dates. If the plea is to be a guilty plea counsel should file with the court prior to first appearance a signed agreed prosecution summary of facts together with any agreed basis of plea. Any agreements on facts and the basis of plea should take place promptly and, where possible, prior to the first appearance at the Court of General Gaol Delivery.

63. If a guilty plea is to be entered then defence counsel should ensure that the prosecution case or a summary of facts and a written basis of plea is agreed or if there is disagreement on a substantial issue that would effect the sentence a *Newton* hearing requested. Defence counsel should also request, where appropriate, social enquiry report and any other relevant and necessary reports. Reports over and above social enquiry reports such as psychiatric reports from the Drug and Alcohol Team will not be ordered as a matter of course and need to be justified. If the defendant has previously been engaged with the Drug and Alcohol Team and there is a psychiatric issue to highlight which may affect the sentencing process then a report from the Drug and Alcohol Team may be of assistance. If there is no mental health issue to consider then a psychiatric report will not generally be of much assistance.

64. Defence and prosecution advocates should sign an agreed prosecution case or summary of facts and agreed basis of plea. To avoid or minimise any future disputes it is prudent to obtain defendant's signature to the agreed summary of facts and basis of plea. The defence should in advance of the effective sentencing hearing file and serve a written outline of mitigation and any other documents they wish to rely on in mitigation together with recommendations as to sentence and any guideline cases. The prosecution should ensure that an up to date list of previous convictions is filed with the court and served on the defence. The prosecution should refer to any breaches of suspended sentences or offences committed whilst on bail and other matters relevant to the sentencing process. The prosecution should highlight any aggravating factors and supply copies of any guideline cases and give their recommendations as to sentence. Prosecution and defence counsel should indicate their views on appropriate starting points to assist the court. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Goodman* (judgment 1st June 2007) dealt with the desirability of stating starting points of sentence that is the starting point on the basis of a contested trial and without reflecting any mitigation.

65. Counsel should endeavour to ensure that guilty pleas are not left to the last minute. Prosecution counsel should ensure that any appropriate alternative counts are included in the information from the outset e.g. section 33 of Criminal Code 1872 as amended and section 35 alternative and possession of controlled drugs with intent to supply and simple possession alternative.

66. Undue delay is not in the interests of justice but as Lord Rodger pointed out in *Dyer v Watson* [2002] UKPC 1 at paragraph 157 many accused persons who are in fact guilty may prefer to dwell in the interim state of uncertainty rather than march steadily on to the end of their case where that state of uncertainty may be replaced by something worse. Advocates should take a firm grip of the case from the outset and ensure that expeditious progress is made.

67. In respect of any applications before, at or after the first appearance relating to the security of the defendant consider *Horden* [2009] EWCA Crim 388 in which it was held by the English Court of Appeal that the contractors who had brought H to court had been wrong to apply for an order that he be handcuffed in court, and the trial judge had been wrong to allow it. The fact that it might be wise for the prison to warn a contractor that there was some risk of a prisoner escaping (by means of ticking an "escape marker" on the Prisoner Escort

Record form) did not automatically mean that such a risk was strong enough to justify handcuffs in court. The contractor to whom the prison gave the warning would have to handle the prisoner in a number of different situations, including, for example, into and out of vehicles in the open air, near to other prisoners, and in some courts close to public areas. The situation in a courtroom was different. While a determined attempt to escape was very occasionally made from a court-room, it was a very public and a very unusual thing to do. Further, a mere "marker" such as in *Horden* was not by itself a sufficient basis for an application for handcuffs. Full supporting information ought to have been before the judge. Had it been, the judge would have refused the application (the Court of Appeal had sought further information from the prison and so had more information before it). The judge should have been given further information by the contractors. If not given it, he ought to have asked for it. The law was clear that a prisoner should not be visibly restrained in front of the jury unless there was sufficient reason, usually a real risk of violence or escape, and even if there was such a risk, alternative means of avoiding it should be preferred: *Vratsides* [1988] Crim. L.R 251; *Mullen* [2000] All E.R.(D.) 618. While the situation was less acute in the case of appearances without the jury or after conviction, even then physical restraint should be ordered only when necessary. H's conviction was not, however, rendered unsafe - his bad character was before the jury, overbearing any damage done to his standing by virtue of the handcuffs; the judge directed the jury not to take account of the handcuffs; and the Crown's case was overwhelming.

Communications with court administration

68. Advocates should ensure that they respond promptly and fully to any communications from court administration. Counsel should ensure that someone within their office is available to take urgent calls from court administration or to call back within 24 hours or sooner where appropriate.

69. In the normal course of events any written or electronic communications to the clerk to the court should be copied by the prosecution to the defence and by the defence to the prosecution and this should be clearly marked on the face of the communication. In the normal course of events the court should only see what all the parties see. In the *Petition of Attorney General and Chief Constable* (judgment 31st January 2006) I stated:

"13. I have regard to the important and fundamental principle of open justice that a judge should not receive representations from one side which are not copied to the other. (See for example the decision of the High Court of Australia in *Re JRL ex parte CJL* (1986) 161 CLR 342). Save and except in rare and exceptional cases such as public interest immunity matters, it is important that the court sees and hears no more than what all parties to the proceedings see and hear. Any communications with the court (such as correspondence to the clerk to the court) should be copied to all other parties to the proceedings. The Deemster should not see what the parties have not seen. The parties should see everything that the Deemster has seen. Justice must not only be done it must be seen to be done.

14. A central element in the system of justice administered by our courts is that it should be fair and this means that it must be open, transparent impartial and even-handed. It is for this reason that one of the cardinal principles of the law is that a judge hears the case before him on the evidence and arguments presented to him in open court by the parties or their legal representatives. It would be inconsistent with basic notions of fairness that a judge should take account or even receive communications which are not copied to all parties to the proceedings."

70. In the Privy Council case of *Dr Anneliese Diedrichs-Shurland v Talanga-Stiftung* (judgment 6th December 2006) Lord Hoffmann described letter communications by one party to the court with no copy being sent to the other parties as "grossly improper".

71. In *Parton* (General Gaol Delivery judgment delivered on the 30th July 2009) I concluded that the prosecution in the normal course of events should be permitted access to and copies of social enquiry reports, psychiatric reports, defence written submissions and other documentation filed in mitigation in respect of a sentencing hearing in the Court of General Gaol Delivery subject to certain restrictions on the use and disclosure of information contained in such documentation. It was again stressed that, in principle, what the court sees the parties should also see. It was accepted that public interest immunity matters were important exceptions to this general principle. *R v R* [2010] EWCA Crim 924 confirms the importance of the defence being given access to material relied on by the prosecution.

72. Prior to the first appearance at the Court of General Gaol Delivery a letter along the following lines is sent out by court administration:

"I write to inform you that the above named matter has been listed for < >.

I should be grateful if you would provide the Court with the following information:

1. What are the likely pleas? The Court expects defendants to enter pleas on their first appearance at the Court of General Gaol Delivery and for the matter to be

progressed by way of directions for trial or directions for the effective sentencing hearing.

2. If there is likely to be a trial:-

How long is it likely to take?

How many witnesses do you intend to call?

Are any points of law likely to arise? If so, please list any authorities upon which you intend to rely and provide copies of the same.

Are any questions of admissibility of evidence likely to arise?

Is there any other significant matter which might affect the trial of the case?

Please file defence and prosecution counsel and witness non-availability, estimates as to duration and suggestions for any future case management directions. Please also liaise with court administration as to appropriate trial dates.

3. If guilty pleas are to be entered the court would expect an agreed factual basis of plea to be submitted together with a written outline of mitigation and any other documents the Defence propose to rely on in mitigation well in advance of the effective sentencing hearing. In cases where material facts are disputed counsel should give notification of a request for a Newton hearing.

4. If the Defendant is seeking bail please file an application setting out the grounds for such application and specify the conditions the Defence consider appropriate together with a note of any conditions imposed by the Summary Court.

I would appreciate your reply within 7 days of the date hereof."

73. Advocates should ensure that a prompt and substantive response is sent to such letter and indeed any other communications from court administration. It is prima facie professional misconduct to fail to respond on a timely basis to communications from court administration. Advocates should, in advance of receipt of the pre-first appearance letter, have obtained all necessary information to deal with all relevant issues and to progress the case without undue delay.

Children in Court of General Gaol Delivery and media coverage

74. Section 74 Children and Young Persons Act 2001 provides as follows:

"74 Children in court during trials

(1) No child (other than an infant in arms) shall be permitted to be present in court during –

(a) the trial of any other person charged with an offence, or

(b) during any proceedings preliminary thereto, except during such time as his presence is required as a witness or otherwise for the purposes of justice.

(2) Where any child is present in court when he is not to be permitted to be so under subsection (1), he shall be ordered to be removed."

75. A child except in Part 8 is referred to in the Children and Young Persons Act 2001 as an individual under 18. Sections 74 and 80 are within Part 8. Section 3 of the Interpretation Act 1976 refers to a "young person" being over 14 and under 17 and "Child" as a person under 14.

76. Section 80 Children and Young Persons Act 2001 provides as follows:

> "80 Identification of child or young person in media
>
> (1) Subject to subsection (3), no written report of any proceedings in any court shall be published in the Island, and no report of any such proceedings shall be included in a relevant programme for reception in the Island, which-
> *(a)* reveals the name, address or school, or
> *(b)* includes any particulars calculated to lead to the identification,
> of any child or young person concerned in those proceedings, either as being the person against or in respect of whom the proceedings are taken or as being a witness therein.
> (2) Subject to subsection (3), no picture shall be published in any newspaper or periodical or included in a relevant programme as being or including a picture of any child or young person so concerned in any such proceedings.
> (3) Subject to subsection (4), a court may in any case by order dispense with the requirements of subsection (1) or (2) to such extent as may be specified in the order.
> (4) A juvenile court shall not exercise the power conferred by subsection (3) unless it is satisfied that it is in the interests of justice to do so.
> (5) If a report or picture is published or included in a relevant programme in contravention of this section, each of the following persons-
> *(a)* in the case of a publication of a written report as part of, or of a picture in, a newspaper or periodical, any proprietor, editor or publisher of the newspaper or periodical;
> *(b)* in the case of a publication of a written report otherwise than as part of a newspaper or periodical, the person who published it;
> *(c)* in the case of the inclusion of a report or picture in a relevant programme, any body corporate which is engaged in providing the service in which the programme is included and any person having functions in relation to the programme corresponding to those of an editor of a newspaper;
> is guilty of an offence and liable on summary conviction to a fine not exceeding £2,000.
> (6) Proceedings for an offence under this section shall not be instituted otherwise than by or with the consent of the Attorney General.
> (7) In this section 'relevant programme' means a programme included in a programme service (within the meaning of Part 1 of the Broadcasting Act 1993)."

77. See *In re Application of Isle of Man Newspapers* 1999-01 MLR N 14 where Deemster Kerruish dealt with an application under section 34 of the Children and Young Persons Act 1966. In that case it was held that although the full reporting of a crime is in the public interest, the

court had to consider not only the immediate effect of publicity on the child's welfare but also the effect in the foreseeable future. *R v Croydon Crown Court ex parte Trinity Mirror plc* [2008] EWCA Crim 50 dealt with two conflicting principles namely the protection and well being of children and open justice in courts exercising criminal jurisdiction. See also *Crawford v DPP* (English Queen's Bench Divisional Court The Times 20th February 2008) under the headling *Media consultation before publication ban imposed*.

78. Section 34 of the Sexual Offences Act 1992 provides that Schedule 2 of the Act shall have effect in relation to the anonymity of the complainant in proceedings for rape and related offences.

Trial directions

79. Counsel should submit suggestions as to case management directions to assist in preparation for and smooth conduct of trial. Counsel are under a duty to assist by early identification of the real issues in the case and have an obligation actively to assist the court and to cooperate in the progress of the case (*Robinson v Abergavenny Magistrates' Court* [2007] EWHC 2005).

80. In *R v McCluskey and others* (judgment delivered 24th July 2007) at paragraph 65 I stated:

> "65 Furthermore this court is satisfied that with the good sense and appropriate cooperation of the prosecution and the defence the hearing of all counts together will remain manageable and easily understandable by the jury. Where evidence can be agreed in advance of the trial then it should be agreed. Where admissions can be made in advance of the trial then they should be made. The hearing should focus on the main issues in dispute between the prosecution and the defence. Rule 19(1) of the Advocates' Practice Rules 2001 provides that:
>
> "Advocates have an overriding duty to the Court to ensure, in the public interest, that the proper and efficient administration of justice is achieved; they must assist the Court in justice…" "

81. The courts have stressed that counsel should focus on the main issues in dispute and provide realistic estimates as to the duration of the trial and only require necessary witnesses to be called. I reiterated the position in *Dobbie* (judgment delivered on the 23rd March 2009). The following are extracts from the judgment:

> "5. The prosecution and defence counsel must actively focus on the main issues in dispute in this case. Where admissions can properly be made and where

evidence can properly be agreed admissions should be made and evidence should be agreed.

6. Thomas LJ speaking extra-judicially in the Lord Merlyn-Rees Lecture 2009 on the 5th March 2009 put it well when he stressed:

"We have to forgo the notion that it takes as long as it takes".

7. There should be proper cooperation with counsel and with the court. A concerted effort must be made to keep the information essential and not to overload the jury. Sensible concessions should be made and cross examination should be short and to the point.

8. It is only in most exceptional cases that more than 3 or 4 weeks of court time should be allocated to cases. Exceptional in the sense of the number of defendants and charges. This is not an exceptional case in those terms.

9. Speaking judicially in *L* [2007] EWCA Crim 764 Thomas LJ stated:

"Time is not unlimited. No one should assume that trials can continue to take as long or use up as much time as either or both sides may wish, or think, or assert, they need. The entitlement to a fair trial is not inconsistent with proper judicial control over the use of time".

10. Counsel in this case need to focus on the critical issues rather than peripheral issues. I echoed Thomas LJ's comments in *L* in my judgment in *R v Glover Glover and Priestnal* reported at 2005-2006 MLR 463 at pages 474-475 and paragraphs 28-31:

"28. In *R v C* 2003-05 MLR N16 I endeavoured in general terms to outline the duties of advocates to the court. *MTM* (*Tax Consultants*) *Limited v Jones and Morris* (CLA 2001/103 judgment 16th February 2006) at paragraphs 88-101 outlined the duties of advocates in respect of the discovery process. Advocates, in civil and criminal matters, have an overriding duty to the court. Rule 19(1) of the Advocates' Practice Rules 2001 provides that: "Advocates have an overriding duty to the Court to ensure, in the public interest, that the proper and efficient administration of justice is achieved; they must assist the Court in justice and must not deceive or knowingly or recklessly mislead the Court".

29. Advocates have a duty not to waste time and money and to bring a case to hearing as quickly as possible (in the civil context see *Brennan v Brighton BC* The Times 24th July 1996, and *Blyth Valley BC v Henderson* (1996) PIQR 64). English solicitors have been held to have a duty to give reasonable estimates of the length of hearings and may be held responsible for costs where adjournments are caused by non-compliance with that duty (*Ibbs v Holloway Bros Pty Ltd* [1952] 1 All ER 220). Advocates should take reasonable and timely steps to ensure that adjournments are not unnecessarily brought about.

30. Moreover counsel should not assume that the amount of time available for a trial is indefinite. When trial dates are set counsel should ensure that the availability of all concerned in the case has been carefully checked. Commitments in other cases will be considered but it should not be assumed that simply because

counsel or witnesses may want to take holidays or be off island on courses or conferences that such commitments can be accommodated. Court commitments must take priority if cases are to proceed without undue delay. I should also add that I can see no reason why defendants should not be expected to enter pleas at their first appearance at the Court of General Gaol Delivery. Prior to the matter being listed at the Court of General Gaol Delivery the defendant since arrest and committal would have had ample time to consider his position. The norm therefore should be to expect pleas at the first appearance in the Court of General Gaol Delivery. Let all defendants and defence counsel be aware of that. There are far too many unnecessary applications for adjournments. Moreover late guilty pleas may not attract as significant a sentencing discount as early guilty pleas. If a defendant is guilty the sooner a guilty plea is entered the better for all concerned.

31. It is well established that as part of his responsibility for the management of a trial a Deemster is expected to control the timetable and is entitled to direct that the trial ought to be concluded by a specific date. If need be limitations have to be placed on the time witnesses are to spend in the witness box. Counsel should concentrate on the main issues. Evidence not in real dispute should be agreed and sensible concessions made on both sides. No one should assume that trials will be permitted to take as long or use up as much time as either or both sides might wish, or think, or assert they need. Time is not unlimited. The entitlement to a fair trial is not inconsistent with proper judicial control of time. Time is often wasted by unnecessary applications for adjournments. This case is an unfortunate example of that."

11. I referred in that case to rule 19(1) of the Advocates Practice Rules 2001 which indicated that advocates have an overriding duty to the court to ensure that the proper and efficient administration of justice is achieved. They must assist the court in justice.

12. Bridge LJ put it well some many years ago now in *Novac* [1977] 65 Cr App R 107 at 119 when he stated:-

"In jury trial brevity and simplicity are the hand-maidens of justice, length and complexity its enemies".

13. In this case I invite counsel to focus on the main critical issues. A blanket defence request that all witnesses are required without due regard to the main issues in the case does not assist in the proper and efficient administration of justice. If too much time is given to one case other cases then suffer. Counsel must be reasonable in their time estimates and must be reasonable in their requests for witnesses and they must focus on the main issues in the case."

82. The English Court of Appeal in *R v O'Dowd* [2009] EWCA Crim 905 stressed that trial judges should employ their case management powers to control the length of trials and to conduct them in a way that enables juries to retain and assess the evidence which they have heard. The process should not be diverted by the introduction of satellite issues. Experienced and competent defence counsel also recognise that it is in the defendant's best interests for sensible

dialogue and negotiation with the prosecution to take place and for sensible admissions to be made at an early stage. Michael Mansfield QC in *Memoirs of a Radical Lawyer* (June 2009) at page 97 put the position well when he stated:

> "A great deal can be achieved by sensible dialogue and negotiation, whether it's a contested trial or a guilty plea. The most obvious example is agreeing what evidence can be read without challenge, or can be reduced to admissions to save court time and money. Another is giving notice of legal submissions and attempting to distil the core issues out of court. If you don't, it merely leads to unnecessary argument and hostility - and an adjournment in any event. Neither judges nor juries appreciate trials that are consumed with personal duels fought out in public, so I have studiously tried to avoid these."

83. In *McVey* (Court of General Gaol Delivery judgment 30th October 2009) I stated:

> "Justice is not a game to be played with defendants trying to unreasonably require attendance of unnecessary witnesses and trying unreasonably to delay trial dates in the hope that the case against them will disappear. These cases will not disappear. These cases will go to trial and justice will be done."

84. Counsel should ensure that any applications they make identify precisely what it is they wish the court to do and the jurisdiction of the court to do what they are asking the court to do. Moreover counsel should refer the court to the relevant authorities. Hughes L J in *R v N Ltd and C Ltd* [2008] EWCA 1223 at paragraph 7:

> "With hindsight, it can be seen that the difficulties which have ensued might have been avoided if the discussion had been structured around an identifiable application to the Judge to do something specific."

85. Counsel should consider the necessary orders and directions which the court may be minded to make in respect of the trial including:

(1) Matter be set down for jury trial at < > <x days allocated; specify Deemster to preside> [See *Dobbie* judgment delivered 23rd March 2009 in respect of counsel's duty regarding trial duration estimates and the need to focus on the main issues; consider certificate of readiness or adjourning to date 28 days prior to trial for further mention and to ensure order complied with and no last minute developments immediately prior to trial which may necessitate vacation of trial dates]
(2) A jury be duly summoned
(3) The defence to indicate in writing to the prosecution by < > the witnesses they reasonably require to be called [see *McVey* judgment delivered 30th October 2009]

(4) Thereafter the prosecution to ensure that all reasonably required prosecution witnesses are to be duly summoned

(5) Defence to indicate to prosecution whether any transcripts of Defendant's interviews are agreed and if not to specify the areas of disagreement by <
>. The prosecution to respond by < >

(6) The defence to indicate to the prosecution any evidence that is agreed and in the event of agreement formal admissions to be filed by < >

(7) The defence to liaise with the prosecution and make representations to the prosecution as to the contents of the trial bundles by < >

(8) The prosecution to file and serve duly paginated court and jury bundles, opening note, list of witnesses and a schedule detailing approximate duration of evidence of each witness and specifying any statements that are to be read, any admissions and any other relevant matters by < > [see separate section in this book dealing with trial bundles and general preparation in relation to the contents of the court and jury bundles]

(9) Any expert evidence to be relied upon at trial on behalf of prosecution or defence to be exchanged and filed by < >. The experts to set out their qualifications and experience and direct their admissible evidence to the relevant disputed issue or issues in the case upon which they are able to express their opinions. In the event of a substantial disagreement the experts to consult with each other and file and serve a schedule setting out the areas of agreement and disagreement with a summary of their reasons for disagreement by < > or [Prosecution to file and serve any expert evidence it intends to rely upon at trial by < > and defence to file and serve any expert evidence it intends to rely upon at trial by < >]

[(10) Prosecution and defence to liaise with court administration to ensure that if any technical support needs to be available for trial it is available]

[(11) any site view necessary? If so make submissions and suggest any appropriate directions]

(12) Prosecution and defence to be at liberty to submit in written form suggestions (if possible on an agreed basis) in respect of any appropriate directions to the jury on any issues arising

(13) Any applications for preliminary and other issues including issues as to the admissibility of evidence to be determined by the court prior to trial to be filed and served together with written submissions and authorities in support by < > with written submissions and authorities in response to be filed and served by < > or within 14 days of filing and serving of application whichever date is sooner

(14) The defence to be at liberty to indicate in writing by serving on the prosecution and filing a copy with the court the general nature of any issues to be raised on behalf of the Defendant [As to the position in England and Wales in respect of defence statements see sections 5, (the duty to file) 6A (the contents) and 11 (Non compliance and adverse inferences) of the Criminal Procedure and Investigations Act 1996, Roderick Denyer QC Circuit Judge, Cardiff Crown Court *"The Defence Statement"* [2009] Crim LR 340 and volume 173 of Criminal Law & Justice Weekly 22 August 2009 *Essa* [2009] EWCA Crim 43]

(15) Prosecution and the defence to file duly signed certificate of readiness for trial 21/28 days prior to the date of the trial

(16) Bail/Custody.

<Consider any other necessary directions;
Counsel to highlight any other relevant issues>

Sentence directions

86. Counsel should consider the necessary orders and directions which the court may be minded to make in respect of the sentencing hearing including:

(1) Adjourn matter to < > for sentence <no longer than 6 weeks>.

(2) Social Enquiry Report to be prepared, filed with the court and served on prosecution and defence by 4pm < > [normally within 28 days, consider whether any other reports necessary such as a psychiatric report from Drug and Alcohol Team: the court prior to ordering the production of a psychiatric report will be required to be satisfied that there is a relevant psychiatric issue that needs to be addressed prior to sentencing]

(3) If on bail – in the normal course of events there would be an additional condition of bail imposed namely that Defendant attend as required appointments to enable the preparation and completion of a Social Enquiry Report and any other reports that have been ordered.

(4) Prosecution and defence to agree sign and file written summary of facts/prosecution case and any agreed basis of plea by < > [normally within 7 days if not already filed].

(5) Defence to file and serve written outline of mitigation, and any other documents which the defence wish to rely on in mitigation, any recommendations as to sentence together with copies of any guideline cases by 4pm on < >[normally at least 7 days before court. Defence should provide copies to prosecution in

advance so prosecution can check them out. Discourage defendants from filing documents/letters etc on the day of sentencing – they should be filed and served well in advance].

(6) Prosecution to file and serve by 4pm on < > [normally at least 10 days before hearing] the prosecution's recommendations as to sentence, the sentencing options available to the court, copies of any guideline cases and a note detailing what the prosecution consider to be the aggravating factors in the case together with any other documents upon which the prosecution intend to rely upon at the sentencing hearing.

(7) Matter adjourned to < >. Defendant remanded in custody/on bail in the meantime.

Bail

87. Advocates and defendants should not assume simply because bail has been granted by the court of summary jurisdiction that the Court of General Gaol will also grant bail or if it does that it will be on the same conditions as those imposed by the court of summary jurisdiction. It is not a case of renewing or continuing the bail granted in the summary court. It is a matter of applying for bail afresh at the first appearance in the Court of General Gaol Delivery. The same applies even where bail has previously been granted by a Deemster in the High Court in an appeal against a refusal of a summary court to grant bail. Moreover it should not be assumed simply because the summary court has refused to grant bail that the Court of General Gaol Delivery will also refuse to grant bail.

88. If the defence wish the defendant to be granted bail then a fresh written application should be made which can be heard during the defendant's first appearance at the Court of General Gaol Delivery. The necessary details should be set out in a written bail application including the charges, previous convictions, proposed bail address, proposed conditions, proposed surety, connections with the Island and the full grounds of the application.

89. Defence counsel should ensure that all the factors referred to in *McStein* 2001-03 MLR N 36 are covered. Defence counsel should contact the prosecution in respect of the bail application and consider conditions and whether agreement is possible. If not counsel should endeavour to narrow the areas of dispute. Counsel should ensure that any potential surety is present in court and understands the obligations they are about to enter and the likely consequences if the defendant

breaches bail and fails to attend court. Defence advocates should inform the Deemster of the terms of bail issued by the summary court and the terms that the defence propose be granted by the Court of General Gaol Delivery. Defence advocates should notify the prosecution of the proposed bail conditions and ensure that the prosecution are given adequate time to check out the proposed address of residence of the defendant and the suitability of any proposed surety and any other relevant matters. If the prosecution are suggesting certain conditions then they should indicate the reasons for the imposition of the conditions suggested.

90. If defence advocates subsequently apply to vary conditions they should ensure that the prosecution is contacted and in the application attach the prosecution's written agreement or indicate that the application is not agreed. Defence counsel should ensure that any applications to vary conditions are made in good time. For example if the application is for permission to depart the jurisdiction do not make the application on the day of the proposed departure. Counsel should endeavour to give at least 7 days notice to the prosecution and the court unless it is not possible to give such notice in the particular circumstances of the case. Counsel should ensure that defendants are aware of the need for prompt instructions to be given in respect of any desired variations to bail conditions.

91. In *R(Ajaib) v Birmingham Magistrates' Court* [2009] EWCA Crim 2127 an officer stated in respect of an application to vary police bail conditions that the police had information from a source he was unwilling to identify that indicated that A was a flight risk, and the deputy district judge took this material into account in refusing the application. The English Court of Appeal held that she was right to do so. No procedure had been laid down for such proceedings, and it had been right to follow the procedure contemplated by *R(DPP) v Havering Magistrates' Court* [2001] Cr App R 2 (breach proceedings). Without deciding it, the court assumed that Article 5 of the European Convention on Human Rights applied as for breach proceedings, but the information given did amount to the essence of the allegation (*Home Secretary v AF (No 3)* [2008] EWCA Civ 1148) and A could have countered it either by way of submissions or evidence on oath. The Court rejected a defence suggestion that a special advocate procedure should be adopted.

92. In respect of the prosecution's duty to disclose material relevant to bail applications see *R(Raissi) v Secretary of State for the Home Department* [2008] EWCA Civ 72. That authority is also useful in

respect of bail applications where the charges are simply "holding charges" and other more serious charges may follow.

93. Lord Bingham, whose mother's family were Manx, in *Hurnam v The State* [2005] UKPC 49 at paragraph 1 usefully outlined in general terms the principal issues in respect of bail as follows:

> "In Mauritius, as else where, the courts are routinely called upon to consider whether an unconvicted suspect or defendant should be released on bail, subject to conditions, pending his trial. Such decisions very often raise questions of importance both to the individual suspect or defendant and to the community as a whole. The interest of the individual is of course to remain at liberty, unless or until he is convicted of a crime sufficiently serious to justify depriving him of his liberty. Any loss of liberty before that time, particularly if he is acquitted or never tried, will inevitably prejudice him and, in many cases, his livelihood and family. But the community has a countervailing interest, in seeking to ensure that the course of justice is not thwarted by the flight of the suspect or defendant or perverted by his interference with witnesses or evidence, and that he does not take advantage of the inevitable delay before trial to commit further offences."

Granting or refusing bail

94. A remand in custody followed by an acquittal or a remand in custody for a period longer than the eventual sentence imposes a manifest, sometimes an unavoidable, injustice. The importance of the liberty of the subject should not be underestimated and neither should the importance of the protection of the community.

95. In *Alberta v Ell* 2003 SCC 35 the Supreme Court of Canada at paragraph 453 referred to the comments of Professor Friedland in relation to the value of individual liberty. Custody during the period before trial not only affects the mental, social and physical life of the defendant and his family but also may have a substantial impact on the result of the trial itself. We should all abhor any unnecessary deprivation of liberty and positive steps should be taken to ensure that detention before trial is kept to a minimum.

96. In *Fardon* [2004] HCA 46 Kirby J in the High Court of Australia (their final appeal court) observed:

> "The Bail Act expressly provides for consideration, in bail decisions, of whether there is an unacceptable risk that, whilst released, the accused will commit an offence, that is a future offence … it is enough to point to the great difference between refusal of bail in respect of a pending charge of a past offence and refusal of liberty, potentially for very long intervals of time, in respect of estimations of future offending, based on predictions of propensity and submitted to proof otherwise than by reference to the criminal standard of proof."

97. In *Thomas v Mowbray* [2007] HCA 33 (2nd August 2007) Kirby J emphasised the value of liberty and stated at paragraph 338 that:

> "the protection of the community is only one of a great number of otherwise strict and ascertainable criteria to be considered in bail proceedings. It is not the only factor."

98. In *R v Bell* 2005-06 MLR 327 I also endeavoured to emphasise the importance of the liberty of the subject. At paragraph 31 I stated:

> "The liberty of the subject has always had a special place in the jurisprudence of common law jurisdictions. Dalton's *The Country Justice* (1742), reflects this when dealing with arrest and imprisonment by stating (op.cit., at 406): "The Liberty of a Man is a Thing Specially favoured by the Common Law"."

99. In addition to having regard to the importance of the liberty of the subject the courts should also have regard to the protection of the community.

100. As a matter of domestic Manx law bail should be granted unless the court is satisfied that there are substantial grounds for believing that the defendant if released on bail would:

(a) fail to attend court;
(b) commit an offence while on bail;
(c) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.

101. The Court should consider all the circumstances of the particular case and adopt a balanced approach. In particular the court should consider:

(a) the seriousness of the offence and the probable sentence if the defendant was convicted (although the risk of absconding cannot be gauged solely on the basis of the severity of the sentence faced by the defendant);
(b) the defendant's character, his home, occupation, assets, associations, community ties and links to the Isle of Man;
(c) his record for answering bail in the past;
(d) the strength of the evidence against him;
(e) the length of time to the trial;

The Court must undertake a balancing exercise that takes into account many factors including the importance of the liberty of the subject and the protection of the community.

102. Any decision to refuse bail should only be taken where this can be justified both under domestic law, principally the Bail Act 1952 and the authorities on the provisions of that Act and under the European Convention on Human Rights.

103. In *Gault v United Kingdom* (European Court of Human Rights, Fourth Section : November 20, 2007) [2008] Crim LR 476 it was stated that the European Court's approach to Article 5(3) requires "that a judge must examine all the facts arguing for and against the existence of a genuine requirement of public interest justifying, with due regard to the presumption of innocence, a departure from the rule of respect for the accused's liberty." At paragraph 22 of the report at (2008) 46 E.H.R.R. 48 it is stated:

> ".. the court recalls that the risk of absconding cannot be gauged solely on the basis of the severity of the sentence faced by the applicant."

104. A person charged with an offence should be released pending trial unless the prosecution can show that there are relevant and sufficient reasons to justify continued detention.

105. A decision whether or not to grant bail requires the exercise of judicial discretion. A defendant should only be refused bail where this is necessary to avoid a real and substantial risk that were the defendant released:

(1) he would
  (a) fail to attend trial; or;
  (b) interfere with evidence or witnesses, or otherwise obstruct the course of justice; or;
  (c) commit an offence while on bail; or;
  (d) be at risk of harm against which he would be inadequately protected; or

(2) a disturbance to public order would result.

106. Detention will only be necessary if the risk cannot be adequately addressed by the imposition of appropriate bail conditions that would make detention unnecessary. In many cases the risk can be adequately addressed by the imposition of appropriate bail conditions.

107. Any court refusing bail should give reasons that explain why detention is necessary. Those reasons should be closely related to the individual circumstances of the defendant. Any court granting bail should also give reasons for such decision.

108. In *R (Fergus) v Southampton Crown Court* [2008] EWHC 3273 Silber J stressed that in withdrawing or refusing bail it was particularly important that the judge specify detailed reasons. The reasons must be more than merely reciting one of the statutory grounds. The reasons must relate to the particular facts of the case. Particular care should be taken where the prosecution are not asking for bail to be revoked but the court is considering whether to withdraw bail on its own initiative. Silber J set out the position under English law as follows:

> "17 Under the Bail Act 1976 a court must grant bail unless there is a significant risk of the defendant failing to surrender, committing further offences whilst on bail or interfering with witnesses or otherwise obstructing the course of justice. In this case, as I have explained, the reasoning of the judge was "I am worried about both of you failing to attend." There were two facts that might have justified a decision to withdraw bail. They related first to the seriousness of the offences with which he was charged, relating as they do to class A drugs and, second, the relevant previous convictions of the claimant. The first was in 2000 when he was sentenced to a fine of £10 for failing to surrender. The second was in 2007 for failing to surrender to custody at the appointed time, presumably because he was late, for which he received a sentence of one day's imprisonment.
>
> 18 On the other hand, in this case there are many factors in favour of continuing bail. First, the prosecution had not opposed bail. Second, the claimant had been admitted to bail four months earlier and since then had abided by his conditions of residence and reporting to a specified police station. Third, there was no evidence that the claimant had committed further offences while on bail. Fourth, the claimant had surrendered to bail when required to do so at the magistrates' court on 29 August 2008. Fifth, his bail had been enlarged when he was absent through ill health and he provided medical evidence to support the reason why he could not attend court. Finally, he had surrendered bail on 31 October 2008 even though he knew he would be re-arrested for further questioning on related matters.
>
> 19 Mr Rhodes, who appeared today on behalf of the claimant, drew my attention to the decision of Mr Justice Collins, sitting in this court, in *R (on application of Thompson) v Central Criminal Court*, a decision given on 6 October 2005 in which he said at paragraph 10:
>
> "The approach under the Bail Act is entirely consistent with the approach of the European Court as regarded proper under Article 5, namely there must be a grant of bail unless there are good reasons to refuse. The approach therefore really is not should there be bail granted but should custody be opposed, that is, is it necessary for the defendant to be in custody. That is the approach that the court should take. Only if persuaded that it is necessary should a remand in custody take place. It would be necessary if the court decides that whatever conditions can be reasonably imposed in relation to bail there are nevertheless substantial

grounds for believing that the defendant will either fail to surrender to custody, commit an offence, interfere with witnesses or otherwise obstruct justice."
On that basis Mr Rhodes contends that the critical test for determining whether or not custody should be imposed was whether it was necessary for the defendant to be in custody.

20 Drawing all these strings together, it seems to me that - bearing in mind the presumption in favour of granting bail and the high threshold that a defendant should only be remanded in custody if it was "necessary" - there are very significant factors here which cause concern. First, the defendant had been on bail for more than four months. Second, he complied with all reporting and residence conditions of bail. Third, he surrendered to bail when required to do so.

21 To my mind, certain consequences flow from that. First, it is not reasonable for a court to withdraw bail unless it is necessary to do so especially as any decision to withdraw bail engages rights under Article 5. Second, any such reason justifying the decision to withdraw bail must be stated by the decision maker explaining why bail should be withdrawn and that reason must relate to the facts. Such a reason must be more than merely reciting that one of the statutory grounds has been made out. The underlying facts have to be put forward.

22 In this case no good reason has been put forward by the judge nor by the Crown Prosecution Service to establish one of the statutory grounds as to why bail should be refused.

23 In those circumstances it follows, in my view, that the claim that the judges decision to withdraw bail based on irrationality has been made out when one considers the presumption, the history in this case and the failure of the judge to give any reason to justify his conclusion. I therefore quash the decision of the Southampton Crown Court withdrawing the claimant's bail."

109. The following are extracts from the Bail Act 1952:

"2 Bail in offences triable by a Court of Summary Jurisdiction

Where any person is charged with any offence before a Court of Summary Jurisdiction, the Court which is trying the charge, if it shall see fit, or if it shall refuse to do so, one of the Judges of the High Court of Justice, if he shall see fit, may, at any time, admit such accused person to bail by recognizance, with or without a surety or sureties, conditioned that he will appear at the time and place when and where the charge is to be further inquired into, or when or where he is to be tried for such offence, and that he will surrender and take his trial, and will not depart the court without leave.

3 Bail in offences triable on information

(1) Where any person is charged with an offence triable on information before a justice or justices of the peace, the justice or justices, if he or they shall see fit, may, at any time, admit such accused person to bail by recognizance, with or without a surety or sureties, conditioned that he will appear at the time and place

when or where the charge is to be further inquired into, or when or where he is to be tried, for such offence, and that he will surrender and take his trial, and will not depart the court without leave.
(2)…
(3) Where any person is charged with an offence triable on information before a justice or justices of the peace, one of the judges of the High Court may, at any time (whether the justice or justices has or have refused to do so or not) admit such accused person to bail by recognizance with or without a surety or sureties, conditioned that he will appear at the time and place when or where the charge is to be further inquired into, or when or where he is to be tried for such offence, and that he will surrender and take his trial, and will not depart the court without leave.

3A Conditions for bail

(1) A Court may require a person to comply, before release on bail or later, with such requirements as appear to the court to be necessary to secure that-

(a) he surrenders to custody;

(b) he does not commit an offence while on bail;

(c) he does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person;

(d) he makes himself available for the purpose of enabling inquiries or a report to be made to assist the court in dealing with him for the offences.

(2) If it appears to the court that a person who is to be released on bail is unlikely to remain in the Isle of Man until the time appointed to him to surrender to custody, that person may be required, before release on bail, to give security for his surrender to custody."

110. Schedule 1 of the Rules of the High Court of Justice 2009 refers to claims for which the chancery procedure in the Civil Division of the High Court is the normal procedure. Paragraph 5(b) of Schedule 5.1 refers to applications for bail or forfeiture of recognizance. It would appear that applications to a judge of the High Court of Justice under section 2 of the Bail Act 1952 should be made to the Civil Division using the chancery procedure.

The imposition of conditions

111. Before imposing conditions of bail the court should consider whether such conditions are necessary, proportionate and fair. Some conditions of bail (for example curfew) can amount to a serious interference with the liberty of the subject.

112. A court may require a person to comply with such requirements as appear to the court to be necessary to secure that:

(1) he surrenders to custody;
(2) he does not commit an offence while on bail;
(3) he does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person;
(4) he makes himself available for the purpose of enabling inquiries or a report to be made to assist the court in dealing with him for the offence.

113. Various conditions can be considered. For example:

(1) defendant's own recognizance;
(2) surety;
(3) requirement to attend court and not depart without leave of the court;
(4) not depart the Isle of Man without leave of the court;
(5) residence;
(6) report in person to Douglas Police Headquarters every day/specific days between specified hours;
(7) not approach or communicate in any way (directly or indirectly) with any prosecution witnesses specified in a list to be supplied to the defendant by the prosecution and filed with the court; not to approach or communicate in any way (directly or indirectly) with any co-defendants [N.B. consider Article 8 of the Convention and ensure such conditions do not cover members of family unless such is justified];
(8) observe a curfew between specified hours with a doorstep condition namely a requirement that the defendant presents himself at the open door of the premises upon the request of a police officer during the hours of curfew [consider also electronic monitoring];
(9) surrender passport or declare that he does not have one and will not make an application for one;
(10) not to enter on-licensed premises;
(11) not to enter the area marked red on the plan annexed to the bail bond [counsel to provide plan]
(12) to attend appointments as required for the preparation and completion of a social enquiry report and any other reports ordered by the court [relevant where defendant entered guilty plea and reports ordered].

114. The court and defence counsel should explain clearly to the defendant the conditions imposed and the need to strictly comply with such conditions and the consequences of a breach of a bail condition which can include loss of liberty. Moreover it should be made plain to the defendant that if he fails to attend court the matter may proceed in his absence and without the benefit of defence legal representation. In respect of applications to vary bail conditions see *R (Ajaib) v Birmingham Magistrates' Court* [2009] EWHC 2127 (Admin).

115. Where a surety is required in an endeavour to reduce any flight risk the defence should ensure that the surety attends court and fully understands the obligations he is entering into and the consequences if the defendant fails to attend court which may include the forfeiture of the entire sum put forward by the surety even in cases where no culpability attaches to the surety. The surety will be required to sign the relevant bail bond. The court and defence counsel should warn surety of the consequences if the defendant breaches his bail and fails to attend trial. In considering whether a proposed surety is suitable regard may be had to his financial resources; his character and previous convictions; and his relationship to the person for whom he stands surety.

116. Counsel should check the financial position of surety before putting surety forward to the court to act as surety. Counsel should be satisfied that the proposed surety is "good for the money". Kennedy L J in *Birmingham Crown Court ex parte Rashid Ali* (1999) 163 JP 145 stated that:

> "it is irresponsible (and possibly a matter for consideration by a professional disciplinary body) for a qualified lawyer or legal executive to tender anyone as surety unless he or she has reasonable grounds for believing that the surety will, if necessary, be able to meet his or her financial undertaking."

117. For the position of the surety where a defendant absconds see *Spring* 2001-03 MLR N37 (judgment 23rd April 2003). The starting point is the forfeiture of the full recognizance. Absence of culpability on the part of the surety is a factor but not in itself a reason to reduce or set aside the obligation. There is jurisdiction to order part only to be forfeited.

Breach of bail conditions

118. In respect of the procedure to be adopted when dealing with allegations of breach of bail conditions see *Fitzsimmons* (Court of General Gaol Delivery judgment 14th December 2009). In short

summary a constable who has reasonable cause to suspect that a person is breaking or has broken a condition of bail may arrest that person and must bring him before a Justice as soon as practicable and in any event within twenty-four hours of his arrest. See section 5 of the Criminal Law Act 1981. Under section 36 of the Interpretation Act 1976 it would appear that you do not count Sundays, Christmas Days, Good Fridays, bank holidays and days appointed for public thanksgiving or mourning.

119. Section 5 of the Criminal Law Act 1981 provides as follows:

> "5 Arrest of persons granted bail
>
> (1) A constable may arrest without warrant any person who has been admitted to bail-
>
> (a) if the constable has reasonable grounds for believing that that person is likely to break the condition that he will appear at the time and place required or any other condition on which he was admitted to bail, or has reasonable cause to suspect that that person is breaking or has broken any such other condition; or
>
> (b) on being notified in writing by any surety for that person that the surety believes that that person is likely to break the first-mentioned condition and for that reason the surety wishes to be relieved of his obligations as a surety.
>
> (2) A person arrested under subsection (1)-
>
> (a) shall, except where he was so arrested within the period of twenty-four hours immediately preceding an occasion on which he is required by virtue of a condition of his bail to appear before any court, be brought as soon as practicable and in any event within twenty-four hours after his arrest before any justice of the peace; and
>
> (b) in the said excepted case, shall be brought before the court before which he is required to appear as aforesaid.
>
> (3) A justice of the peace before whom a person is brought under subsection (2) may, if of the opinion that that person has broken or is likely to break any condition on which he was admitted to bail, remand him in custody or commit him to custody, as the case may require, or alternatively release him on his original recognizance or on a new recognizance, with or without sureties, and if not of that opinion shall release him on his original recognizance."

120. The matter must be dealt with by the Justice within twenty-four hours of arrest or, it would appear, there is no jurisdiction (*R (Culley) v The Crown Court sitting at Dorchester* [2007] EWHC 109 (Admin) and *R v Liverpool City Justices ex parte DPP* [1992] 3 WLR 20).

121. Section 3(1) of the Justices Act 1982 provides that a person holding the office of Deemster shall also be a justice.

122. Section 111 of the Summary Jurisdiction Act 1989 provides as follows:

> "(1) Any jurisdiction, power or authority conferred by any statutory provision on a court of summary jurisdiction may be exercised by a Deemster, who shall (as nearly as may be) in so doing follow the like procedure as applies in such courts.
>
> (2) Any party to proceedings before a Deemster by virtue of this section shall be entitled to the like rights, remedies and privileges as those to which he would be entitled before a court of summary jurisdiction."

123. The defendant must be given a full opportunity to answer the allegation of breach of bail.

124. A Justice is required to ensure that the defendant has a full and fair opportunity to comment on and answer the material put before the court by the prosecution in respect of the alleged breach of bail. If that material includes oral evidence the defendant should be given an opportunity to cross examine the witness and if the defendant desires to give oral evidence himself he is entitled to do so.

125. The Justice when forming his opinion must take proper account of the quality of the material upon which he is asked to adjudicate. The material is likely to range from mere assertion at the one end of the spectrum which is unlikely to have any probative effect, to documentary proof at the other end of the spectrum (Latham L J in *R v Havering Magistrates' Court* [2001] 1 WLR 805).

126. The Justice is obliged to come to an honest and rational opinion on the material put before the Justice. In doing so the Justice must evaluate the material carefully and bear in mind the consequences to the defendant, namely the fact that the defendant is at risk of losing his liberty in the context of the presumption of innocence. The Justice should also bear in mind any consequences adverse to the protection of the community. The Justice should seek to provide fairness to the defendant on the one hand but securing the objectives of justice and the protection of the public during the period up to and including the trial on the other.

127. The Justice should consider:

    (1) has there been a breach (admitted or proved to the Justice's satisfaction)?

(2) if the Justice reaches the conclusion that a condition of bail has been breached the Justice must decide whether to grant fresh bail and if so on what conditions or to remand in custody.

128. The Justice should consider the nature and seriousness of the breach and all other circumstances. For example was the defendant caught attempting to flee the Island on a boat the day before his trial was due to commence or was he 5 minutes late reporting at Douglas Police Headquarters? It does not automatically follow that simply because a defendant has breached a condition of bail that his bail should be revoked and he should be remanded in custody. Breach of bail is only one factor to be considered when considering whether to admit the bailed person to bail again.

129. In *R v Havering Magistrates' Court* [2001] 1 WLR 805 Latham L J at pages 816-817 stated that breach of bail proceedings were by their very nature emergency proceedings to determine whether or not a person, who was not considered to present the risks which would have justified remanding in custody in the first instance none the less does now present one or other of those risks. The mere fact of a breach cannot justify detention. Such a finding only gives the Justice the power to detain and not the duty to detain. Latham L J continued:

> "it seems to me that in exercising that power the justice would not be entitled to order detention by reason simply of the finding of a breach … To hold that breach of a condition was ipso facto a ground for detention would, it is agreed by all parties, be a decision taken on a ground outside the purposes which the European Court of Human Rights has determined justify detention under article 5. The fact of a breach of a condition may be some evidence, even powerful evidence, of a relevant risk arising. But it is no more than one of the factors which a justice must consider in exercising his discretion …"

130. In *McKeown* [2001] 1 WLR 805 the English Divisional Court concluded that if the Bail Act 1976 was interpreted so as to entitle a court to deny a defendant bail simply on the basis that he had been arrested for breaking conditions of bail this may be incompatible with Article 5(3) of the European Convention on Human Rights.

131. See also *R (Thomas) v Greenwich Magistrates Court* [2009] EWHC 1180 (Admin) where Hickinbottom J provides a useful summary of the approach to be taken and the relevant law in respect of dealing with allegations of breach of bail conditions.

132. The following are extracts from the judgment of Refshauge J in *Raeyers* [2009] ACTSC 88 (10th July 2009) sitting in the Supreme Court of the Australian Capital Territory:

> "1. Nicholas Raeyers, the applicant, has sought bail for one day to visit his girlfriend, Serena Patricia Condon-Reid, in hospital. She is in hospital because she was injured seriously in a motor vehicle accident caused when the applicant drove a car away from police who wished to pull him over and question him. At the time he was on bail for offences, a condition of which required him not to drive a motor vehicle, be in the driving seat of a motor vehicle or possess the keys of a motor vehicle.
> 2. These facts would be sufficient to justify refusing bail and this indeed I did this morning, on the basis that Mr Raeyers posed too great a risk to the community.
> 3. He has a long history of offending including failure to comply with court orders which comprised failures to answer bail and other matters. He has never, however, breached bail granted by the Supreme Court.
> 4. Although he has not been convicted of any offences for the previous two years, he is currently facing two series of charges, one for which he was originally on bail and the current offences which, as I have mentioned, include offences, to the majority of which he has pleaded guilty, arising out of the motor vehicle accident in which his girlfriend was seriously injured.
> 5. There were real risks that Mr Raeyers would not appear to take his trial or that he would commit further offences. I could also not be satisfied that he would comply with his conditions of bail. Bail is granted on conditions that need to be obeyed for they are the protection that the court considers necessary to justify the liberty of an applicant for bail. Breach negatives that justification and entitles the court to remand the person in custody."

133. The following are extracts from the judgment of Refshauge J in *Asgari* [2009] ACTSC 74 (23 June 2009) sitting in the Supreme Court of the Australian Capital Territory:

> "7. Given the level of intoxication and the fact that the police officers described him as having watery eyes, slurred speech and as being breathless, it is probably true that his faculties were so impaired that he did not in fact know that he had passed the curfew time. This is an explanation but, of course, no excuse. The fact that he clearly was self-intoxicated meant that he had put himself in a position where he was at risk of breaching his bail conditions.
> 8. It is, of course, clear that he was blatantly in breach of his bail. It was one hour and 50 minutes after the curfew time had started. It is also probably a notorious fact that drug dealers do their work sometimes at night, especially in relation to what might be called party drugs. Suspicion, however, is not a sure basis on which to decide this issue of whether bail should be revoked and whether bail should be granted again, although that risk is no doubt the reason why the curfew was imposed in the first place and why a breach of it is so relatively serious.
> 9. I am also aware that Mr Asgari is to be sentenced by the Chief Justice on 9 July 2009, only about three weeks away. In *Burton v R* (1974) 3 ACTR 77, Fox J relied on the fact that sentencing was to take place shortly thereafter to refuse bail in that case.

10. Ms J Campbell, who appeared for the DPP, fairly put the case. She noted that the charges that Mr Asgari is facing are ones where a jail sentence would be well within range. Mr K Saeedi, who said all that could be possibly said on behalf of Mr Asgari, agreed to this assessment.
11. Were the offence committed by Mr Asgari in the commission of the breach of bail to have been of a kind that Mr Asgari is facing in this court, I would have had no hesitation in refusing him bail. This is a borderline case. Courts, as MrAsgari must realise, impose bail conditions in a way that is intended to satisfy the court that the liberty of the offender bailed can be granted in the context of the objectives of the *Bail Act 1992* (ACT)_(see s 22) and that those objectives, including the attendance of the defendant at court, the protection of the community against the commission of further offences and the interests of the offender and other persons, can be properly protected. Mr Asgari must realise that he cannot automatically expect that bail will not be revoked where he breaches conditions that the courts expect him to obey.
12. I have said it is a borderline case and Mr Saeedi has relied upon the undoubted fact that this is the first occasion on which Mr Asgari comes before the courts for drug offences. Had he a history of drug offending, which he will now have by virtue of the pleas of guilty that he has entered into, breaches of conditions such as a curfew, imposed obviously because of the nature of the offences, would also justify the court in refusing to allow him further bail.
13. On balance, however, I am prepared to grant him bail again, but on conditions that are, on this occasion, somewhat stricter than those that have already been granted…"

134. When revoking bail subsequent to a breach of a bail condition the court should give reasons for such decision and ensure that such revocation is necessary, proportionate and fair.

Factual basis of sentence

135. In the *Fleming* appeal (judgment delivered by the Appeal Division on the 29th July 2005 reported at 2005-06 MLR N 4 and N 5) the Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) made some useful observations in relation to basis of pleas and *Newton* hearings. The following are extracts from the judgment :

"24. Before leaving this issue we feel it is necessary that we should say something about the procedure which should be adopted when a defendant intends to plead guilty on a particular basis of fact, particularly where such is likely to have a substantial impact on the appropriate sentence.

25. This situation was considered by the Court of Appeal in *Smythe.* Judge Mellor stated:

'If the material available to the Crown indicates that a basis of plea may well be true, the Crown should clearly accept that basis. If the Crown takes the view that the evidence or circumstances are such that it could not properly support any suggestion that the version put forward by the

defence is wrong, it should make that clear. If the Crown feels unable to go that far, it should leave it to the defence to put forward its version and to the judge to decide whether or not to accept it or enquire further by way of a Newton hearing or otherwise. The interests of justice are not furthered by the words 'we cannot gainsay', followed by the introduction of material, the only relevance of which can be to seek to demonstrate the opposite'.

26. Moreover in *R v Beswick* [1999] 1 Cr App R (S) 343 the Court of Appeal indicated that it was always open to the sentencing judge to refuse to accept a plea of guilty which is tendered to him on an artificial basis.

27. We entirely agree with such observations. If the Crown accept that the proposed basis of plea is true or probably true, it is entirely proper that they should indicate that position and the sentencing judge will no doubt invariably accept such basis of plea and sentence on that basis. By contrast if the Crown dispute the truth of the proposed basis of plea, they should robustly say so and, unless he things that there is no significant impact on the appropriate sentence, the sentencing judge will no doubt invariably conduct a *Newton* hearing to resolve such dispute before sentencing. In the residual class of cases where the Crown simply does not know whether the proposed basis of plea is true, they should so inform the sentencing judge and it will be for him to determine whether it is appropriate that there should be a *Newton* hearing. In a case such as this, justice may well require the sentencing judge to determine whether he accepts that this was a case of true non-commercial supply or whether the offender was in effect a retail supplier of drugs to his friends.

28. For the avoidance of any doubt, we add that any agreed basis of plea should always be set out in writing – *R v Tolera* [1999] 1 Cr App R (S) 25."

136. See also *R v Underwood* [2005] 1 Cr App R(S) 90 and [2005] 1 Cr App R 13 at 178 (judgment delivered the day after the Appeal Division's judgment in *Fleming*). The following are extracts from the headnote :

"The essential principle in relation to sentencing was that the judge must do justice. So far as possible the offender should be sentenced on a basis which accurately reflected the facts of the individual case. Where the defendant pleaded guilty on a factual basis different from that which appeared from the Crown's case, the responsibility for taking any initiative and alerting the prosecutor to the areas of dispute rested with the defence. If the Crown accepted the defendant's account a written agreement, signed by both advocates, should be made available to the judge, if possible before the acceptance of any plea or pleas. The judge was not bound by any agreement between counsel and was entitled of his own motion to insist on a *Newton* hearing (*R v Newton* (1983) 77 Cr. App. R. 13). Where the prosecution disputed the defence version or where it was ignorant of facts raised by the defence the court should be notified in writing of the points in issue. If the defendant was denying that a specific criminal offence had been committed, the

tribunal for deciding whether the offence had been proved was the jury and a *Newton* hearing would in inappropriate. Where the impact of the dispute on the eventual sentencing decision was minimal, a *Newton* hearing was unnecessary. Where a *Newton* hearing was appropriate it should be held immediately, unless that was impracticable for some reason. The defendant should be called to give evidence in support of facts which were exclusively within his knowledge. If he did not, then, subject to any explanation, the judge might draw such inferences as he thought fit from that fact. The judge might reject assertions advanced by the defence even if the Crown did not offer positive contradictory evidence. The judge was entitled to decline to hear evidence about disputed facts if the case advanced by the defendant was absurd or obviously untenable. If so, the judge should explain why he had reached that conclusion.

At the end of the *Newton* hearing the judge should direct himself in accordance with ordinary principles and explain his conclusions in a judgment. He could not make findings of fact and sentence on a basis which was inconsistent with the pleas to counts which had already been approved by the court. Where there were a number of defendants to a joint enterprise, the judge, while reflecting on the individual basis of pleas, should bear in mind the relative seriousness of the joint enterprise in which the defendants were involved. He should also take care not to regard a written basis of plea offered by one defendant, without more, as evidence justifying an adverse conclusion against another defendant. If the issues were wholly resolved in the defendant's favour the credit due to him for a guilty plea should not be reduced. If, however, the defendant was disbelieved or a prosecution witness suffered unnecessary or inappropriate distress as a result of unfounded cross-examination then the judge should reduce the discount to that to which the defendant would otherwise have been entitled."

137. The following are relevant extracts from *Archbold* :

" The Crown case

5-72 In *R v Tolera* [1999] 1 Cr.App.R.29, C.A, Lord Bingham C.J. considered the procedure to be adopted on a plea of guilty. Ordinarily, sentence would be passed on the basis of the facts disclosed in the witness statements of the prosecution and the facts opened on behalf of the prosecution, which together could be called the "Crown case", unless the plea was the subject of a written statement of the basis of the plea which the Crown accepted. The Crown should consider such a written basis carefully, taking account of the position of any other relevant defendant and with a reasonable measure of scepticism…

The defence case

5-73 In *Tolera, ante*, Lord Bingham continued by saying that if the defendant wished to ask the court to pass sentence on any other basis than that disclosed in the Crown case, it was necessary for the defendant to make that clear,. If the Crown did not accept the defence account, and if the discrepancy between the two accounts was such as to have a potentially significant effect on the level of sentence, then consideration must be given to the holding of a *Newton* hearing (*post*, 5-74) to resolve the issue.

The initiative rested with the defence which was asking the court to sentence on a basis other than that disclosed by the Crown case.

His Lordship said that it often happened that when a defendant described the facts of an offence to a probation officer for purposes of a pre-sentence report, he gave an account which differed from that which emerged from the Crown case, usually by glossing over, omitting or misdescribing the more incriminating features of the offence. While the sentencing judge would read this part of the pre-sentence report, he would not in the ordinary way pay attention for purposes of sentence to any account of the crime given by the defendant to the probation officer where it conflicted with the Crown case. If the defendant wanted to rely on such an account by asking the court to treat it as the basis of sentence, it was necessary that the defence should expressly draw the relevant paragraphs to the attention of the court and ask that it be treated as the basis of sentence. The prosecution should be forewarned of this request, even though they would now ordinarily see the report. The issue could then be resolved, if necessary by calling evidence.

If the defendant, having pleaded guilty, advanced an account of the offence which the prosecution did not, or felt they could not, challenge, but which the court felt unable to accept, whether because it conflicted with the facts disclosed in the Crown case or because it was inherently incredible and defied common sense, it was desirable that the court should make it clear that it did not accept the defence account and why. There was an obvious risk of injustice if the defendant did not learn until sentence was passed that his version of the facts was rejected because he could not then seek to persuade the court to adopt a different view. The court should therefore make its views known and, failing any other resolution, a hearing could be held, and evidence called, to resolve the matter. That would usually involve calling the defendant, and the prosecutor should ask appropriate questions to test the defendant's evidence, adopting for this purpose the role of an *amicus*, exploring matters which the court wished to be explored. It was not generally desirable that the prosecutor, on the ground that he had no evidence to contradict that of the defendant, should leave the questioning to the judge.

In *R v Myers* [1996] 1 Cr.App. R(S) 187, the Court of Appeal commended the practice of writing down the basis on which the plea was accepted. But in *R v Beswick* [1996] 1 Cr.App R(S) 343, C.A, it was held that the sentencer is not bound by a version of the facts agreed between the parties. He is entitled to direct that a *Newton* hearing (*post*) takes place. If he does so, this does not provide a basis for withdrawing a plea of guilty, providing it was clear that the accused was admitting guilt of the offence charged. If the judge directs a *Newton* hearing, it is the duty of the prosecution to assist the court by calling evidence and testing any evidence called on behalf of the defence. The issues to be tried should be clearly identified and there should be agreement as to which prosecution witnesses were to be called and which to be read. See also *R v Lester*, 63 Cr. App.R. 144, CA.

In *Att-Gen's Reference (No. 81 of 2000) (R v Jacobs*) [2001] 2 Cr.App.R.(S) 16, C.A, and in *Att-Gen's Reference (N0 58 of 2000)* (*R. v. Wynne*) [2001] 2 Cr.App.R.(S) 19, C.A, the court commented on the undesirability of accepting a basis of plea which did not reflect the evidence and which restricted the sentencing options of the judge. In *R v*

Robotham, [2001] 2 Cr. App. R(S) 69, C.A, it was held that the decision of a judge to adjourn a case for sentence did not give rise to a legitimate expectation on the part of the defendant that the court had accepted the basis of plea (which had not been challenged by the prosecution), and that a judge dealing with the case subsequently was entitled to insist on a *Newton* hearing before passing sentence.

In *R. v. Underwood* [2005] 1 Cr.App.R.(S.) 13, the Court of Appeal re-emphasised the following points: (i) the responsibility for taking the initiative and alerting the prosecution to the fact that their case is disputed rests with the defence; (ii) areas of dispute should be identified so as to focus the court's attention on the matters in issue; (iii) the court was not bound by any agreement as to plea, and was at liberty to ignore any document that had not been signed by both parties;(iv) where the prosecution have no evidence to dispute the defendant's account then, particularly if the facts relied on arose from his own personal knowledge and depended on his own personal account, they should not normally agree that account unless supported by other material.

The undesirability of pleas being accepted on an artificial basis was reiterated in *R v. George* [2006] 1 Cr.App.R.(S.) 119, CA, where a complaint that the appellant had been deprived of his right to trial by an independent and impartial tribunal was rejected. It was in the public interest than an offender was properly sentenced for what he had done, and accordingly, if a judge, on reading the papers, came to the view that a basis of plea appeared artificial, he was bound to say so; this could not give rise to a perception of bias in the fair-minded and informed observer; the judge was saying no more than that the written evidence suggested that what had happened was different from what the defendant was asserting; and, by requiring a *Newton* hearing, he was saying no more than that a hearing was required to resolve those differences. As to the use by the judge of robust language in rejecting the basis of plea, and reserving the hearing to himself, the complaint of bias was bound to fail where, thereafter, the judge had conducted the hearing with scrupulous fairness.

As a matter of good practice, the prosecution, when responding to a basis of plea in a case where confiscation proceedings might follow, ought to bear in mind the question of whether it will be asking for a confiscation inquiry to be made and, if so, what if any admission is being made (in relation to the basis of plea) which would apply to that inquiry; it is generally undesirable that a defendant should not know from the outset how far the prosecution are prepared to go; in some cases, the prosecution may be in a position to make the kind of express acknowledgement that was made in *R. v. Lunnon (Keith*) [2005] 1 Cr.App.R.(S.) 24, CA, that the indicted offence is the defendant's first involvement in relevant crime, and to do so knowing that the acknowledgment will be carried forward into confiscation proceedings; in other cases, likely to be the majority, they may be able to say no more than that for the purpose of sentence they do not and cannot dispute a particular assertion made by a defendant, but they cannot say what information may arise in any subsequent confiscation proceedings; where, therefore, the prosecution accepted as a basis of plea that the defendant had been involved in the supply of Class A drugs for a period of about six months prior to his arrest (the indictment apparently being amended to reflect this), such acceptance left wholly open the question of whether there had been any benefit from drug trafficking

before that period; and it was not right to say that the acceptance of that admission carried with it the further assertion "and we agree he had never done it before"; and this was particularly so where there was no express concession by the prosecution that the defendant had never previously been involved in drugs, and detailed financial reports put forward by the prosecution shortly after the acceptance of plea made it clear that they were seeking to rely on unexplained credits to the defendant's bank statements over a six year period for the purposes of the statutory assumptions arising under section 4 of the *DTA* 1994: *R.v. Lazarus* [2005] 1 Cr.App.R.(S.) 98, CA (following in *R.v . Green* [2007] 3 All E.R. 751, CA).

Where a plea of guilty is accepted on a particular basis, but a subsequent pre-sentence report discloses information suggesting that the true view of the facts is more serious, the contents of the report should be canvassed, so that the basis on which the sentencer is to proceed is clear: *R v Cunnah* [1996] 1 Cr. App. R.(S) 393, C.A.

5-74 Resolution of disputed issues

The procedure to be followed where conflicting versions of the facts of the offence are put forward was considered in *R v Newton,* 77 Cr. App.R. 13, C.A. Lord Lane C.J. said that in some cases it was possible to obtain an answer from a jury, where the different versions could be reflected in different charges in the indictment. The second method was for the judge himself to hear the evidence on one side and another, and come to his own conclusion, acting so to speak as his own jury. The third possibility was for the judge to hear no evidence, but to listen to the submissions of counsel; but if this course is adopted, "if there is a substantial conflict between the two sides… the version of the defendant must so far as possible be accepted."

In *Underwood*, *ante*, the court said that where it was necessary, relevant evidence should be called by the prosecution and the defence (see also *R v McGrath and Casey*, 5 Cr App.R(S). 460, CA), particularly where the issue arose from facts which were within the exclusive knowledge of the defendant. If the defendant did not give evidence, then, subject to any explanation offered, the judge might draw such inference as he saw fit. The judge could reject the evidence of the defence and his witnesses, even if the prosecution had called no contradictory evidence, but reasons for doing so should be explained in a judgment. The court said that the judge could not make findings of fact and pass sentence on a basis that was inconsistent with pleas to counts already approved by the court; and particular care was needed in relation to a multi-count indictment involving one defendant, or an indictment involving a number of defendants; where there was a joint enterprise the judge, while reflecting on the individual basis of pleas, should bear in mind the seriousness of the joint enterprise on which all were involved. As to matters of mitigation, the court said that these are not normally dealt with by way of a *Newton* hearing but it was always open to the court to allow a defendant to give evidence in mitigation of sentence. If the factual issues were resolved entirely in a defendant's favour, credit for the guilty plea should be not reduced; if, however, the defendant was disbelieved, or required a prosecution witness to be called, or if the defendant showed no insight into

the consequences of his offence and no genuine remorse, the court held that the discount might be reduced; and that there may be exceptional circumstances in which the entitlement to credit would be wholly dissipated by the *Newton* hearing. In such cases, the judge should explain his reasons. As to withholding the discount, or part thereof, see also *R. v. Stevens*, 8 Cr.App.R.(S.) 297, CA; *R. v. Jauncey*, *ibid*., 401, CA, *R. v. Williams*, 12 Cr. App. R.(S) 415, CA; and *R. v. Hassell* [2001] 1 Cr.App.R.(S.) 67, CA. As to full credit being given where a *Newton* hearing had been scheduled (necessitating case preparation), following early guilty pleas, but before the differences between the parties were resolved by agreement, see *Att.-Gen.'s References (Nos 117 and 118 of 2006*) (*R. v. Jesus and De Oliviera*), post, 5-82.

At a *Newton* hearing, the judge should not put questions until counsel have completed their examination (see *R. v. Myers*, *ante*). He should direct himself in accordance with the normal criminal standard of proof (see R.*v. McGraith and Casey*, *ante,* and *R. v. Nabil Ahmed*, 6 Cr.App.R.(S.) 391, CA) and in announcing his decision, should indicate that he has done so (*R. v. Kerrigan*, 14 Cr.App.R(S.) 179, CA). If the case involves an issue of identification, the sentencer should approach the matter as if he were a jury and direct himself in accordance with the guidelines in *R. v. Turnbull* (post 14-2) (see *R. v. Gandy,* 11 Cr.App.R.(S.) 564, CA). The prosecution must not put forward a version of the facts in the course of a "Newton hearing" which would be consistent with a more serious offence than the offence to which the offender has pleaded guilty (see *R. v. Druce*, 14 Cr.App.R.(S.) 691, CA). It is submitted that in so far as *R. v. Nottingham Crown Court*, *ex p*. *DPP* [1966] 1 Cr. App.R.(S.) *283*, DC, implies that the prosecution may allege facts in a *Newton* hearing which show that the defendant is guilty of a more serious offence that the offence of which he has been convicted, it is inconsistent with authority and principle.

If the Crown Court rejects the version put forward by the accused after hearing evidence, an appeal to the Court of Appeal on the basis that the factual question was wrongly determined will "only succeed in clear cases" which will be "rare indeed" when the accused has given evidence himself: see *R.v* . *Nabil Ahmed*, *ante*; and *R. v. Parker*, ibid, at 444.

As to the inappropriateness of a judge embarking upon a *Newton* hearing to decide whether or not the defendant had committed a discrete, but similar, offence to that (those) already before the court, when making an assessment of dangerousness under section 229 of the *CJA 2003* (post 5-297), see *R v Considine*; *R v Davis* [2007] 3 All E.R. 621, CA (post 5-306).

Matters of dispute not requiring resolution

5-75 The cases establish three situations where although there is a dispute as to the facts of the case, the court is not obliged to hear evidence under the principles laid down in *Newton*. The first is where the difference in the two versions of the facts is immaterial to the sentence (See *R. v. Hall*, 6 Cr. App. R.(S.) 321, CA; *R. v. Bent*, 8 Cr.App.R.(S.) 19, CA). If the sentencer does not hear evidence, he should specifically proceed on the defendant's version: *R. v. Hall*, *ante*; see also *R. v. Sweeting*, 9 Cr.App.R.(S) 372, CA.

The second exception is where the defence version can be described as "manifestly false" or "wholly implausible" (see *R. v. Hawkins*, 7 Cr.App.R.(S.) 351, CA; *R. v. Bilinski*, 9 Cr.App.R.(S). 360, CA; *R. v.*

Walton, *ibid*. at 107, CA; and *R.v . Mudd*, 10 Cr. App. R(S). 22, CA). See also *R. v. Palmer*, 15 Cr.App.R.(S.) 123, CA and *R. v. Broderick*, *ibid*. at 476, CA (couriers claiming to believe that they were carrying cannabis as opposed to a Class A drug). A judge may form such a view of the defence basis of plea where, for example, he had presided over a trial of co-defendants; but he should only do so after hearing full submissions and giving a reasoned decision so that the basis on which subsequent mitigation would take place was entirely clear to all concerned: *R. v. Taylor* [2007] 2 Cr.App.R.(S). 24, CA.

The third exception is the case where the matters put forward by the defendant do not amount to a contradiction of the prosecution case, but rather to extraneous mitigation explaining the background of the offence or other circumstances which may lessen the sentence. These matters are likely to be outside the knowledge of the prosecution: see *R. v. Broderick*, *ante*. Where the facts put forward by the defence do not contradict the prosecution evidence, the cases justify the following propositions.

(a) The defendant may seek to establish his mitigation through counsel or by calling evidence. The decision whether to call evidence is his responsibility, and there is no entitlement to an indication from the court that the mitigation is not accepted (*Gross v. O'Toole*, 4 Cr. App. R.(S.) 283, DC); but such an indication is desirable (*R v. Tolera* [1999] 1 Cr.App.R. 29,CA).

(b) The prosecution are not bound to challenge the matter put forward by the defendant, by cross-examination or otherwise (*R.v. Kerr,* 2 Cr.App.R.(S.) 54,CA), but may do so (*R. v. Ghandi,* 8 Cr.App.R.(S.) 391, CA; *R v Tolera*, *ante*).

(c) The court is not bound to accept the truth of the matters put forward by the defendant, whether or not they are challenged by the prosecution (*Kerr, ante*): see *R. v. Broderick*, *ante.*

(d) In relation to extraneous matters of mitigation raised by the defendant, a civil burden of proof rests on the defendant, although in the general run of cases the court would accept the accuracy of counsel's statement: R.*v . Guppy*, 16 Cr.App.R.(S.) 25, CA."

138. In the *Cunnah* case [1996] 1 Cr App R(S) 393 it was indicated that where a plea of guilty is tendered and accepted on an agreed basis of the facts of the offence, but a subsequent pre-sentence report discloses that the offender has admitted to a more serious version of the facts, the court should canvass the question of which version of the facts is to be adopted, or sentence on the agreed basis. Everyone must be clear about the basis on which the sentencer proposes to proceed.

139. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Brummitt* (judgment 13th January 2009) made reference at paragraph 14 to the uncontroversial legal principles that if a jury can have reached a verdict only on a particular basis of fact a sentencing judge must adopt such basis of fact when sentencing and that if it is not possible to ascertain which of two differing versions of

fact had been accepted by the jury, a sentencing judge is entitled to form his own view of the facts.

140. In *R v Brown* (judgment 29th January 2007) the Appeal Division (Judge of Appeal Tattersall and Acting Deemster King) stated at paragraph 49:

> "… As already indicated, it was for the Learned Deemster when he came to sentence, to make his own judgment upon that same evidence as to the basis of any conviction if (as was the case here) the words in question did not expressly indicate the nature of the harm being threatened. And this of course he did so, as Mr. O'Neil concedes and as to which he makes no complaint."

Prosecution offering no evidence

141. Section 8(2) of the Criminal Jurisdiction Act 1993 provides that if a person pleads not guilty and the prosecutor proposes to offer no evidence against him, the court may order that a verdict of not guilty be recorded without the defendant being given in charge to a jury, and the verdict shall have the same effect as if he had been tried and acquitted on the verdict of a jury. See *Archbold* paragraph 4-189 in respect of offering no evidence. See also *Archbold* paragraph 4-190 onwards and *Blackstone's* at paragraph D 11.27 in respect of leaving a count on the file not to be proceeded with without leave of the court or the Appeal Division.

142. See *RC(FB) v DPP* [2009] EWHC 106 in respect of cases where the prosecution do not proceed in view of unreliable evidence.

Change of plea

143. It is only in very rare cases that it would be appropriate for the court to exercise its discretion in favour of an accused person wishing to change an unequivocal plea of guilty to one of not guilty. This is particularly so where the accused has been represented by experienced counsel. For authorities in this area of the law see *S v Recorder of Manchester* [1971] AC 481, *Drew* [1985] 81 Crim App R 190, *Sayed* [2005] EWCA Crim 2386, *Sheikh* [2004] EWCA 492 and *Surhaindo* [2006] EWCA Crim 1429. See also the useful judgment of Deputy High Bailiff Montgomerie in *Chief Constable v Atkinson* (judgment delivered on the 24th October 2008) and an article entitled *Changing an Unequivocal Plea of Guilty in the Crown Court* by Roderick Denyer [2007] Crim LR 156.

144. The fundamental question appears to be whether the Deemster hearing the application is satisfied that the plea represented a genuine acknowledgment of guilt. The court has a discretion to allow the withdrawal of a guilty plea when not to do so might work an injustice. Mantell L J in *Skeikh* refers to the following examples: when a defendant has been misinformed about the nature of the charge or the availability of a defence or where he has been put under pressure to plead guilty in circumstances where he is not truly admitting guilt.

145. In *Hall* (Appeal Division judgment 16th March 2007) the Appeal Division (Deemster Kerruish and Deemster Doyle) dealt with a proposed change of plea after sentence. At paragraph [16] the Appeal Division stated:

> "[16] The authorities make it clear that if a plea of "guilty" tendered in a court of summary jurisdiction was an unequivocal plea that is a plea which could not be described as a "guilty but …" plea, then once sentence has been passed by that court and the conviction is accordingly complete, it is too late for an appellate court to entertain an application for a change of plea, see *S (an Infant) –v- Manchester City Recorder* (1971) AC 481 HL. Also, a plea is not equivocal because it is based upon incorrect or corrupted evidence, see *R –v- Bolton J ex parte Scally* (1991) 1 QB 537DC, where relief was available on judicial review. We refer to Archbold Criminal Pleading Evidence and Practice (2007) paragraphs 2-195 to 197. This Court is entitled to enquire into the question whether the plea entered before the summary court was equivocal. However, unless there is something which prima facie raises the issue of an equivocal plea having been tendered before the court of summary jurisdiction, this Court ought not to make inquiry. The issue of equivocality is confined to what went on before the court of summary jurisdiction. If the evidence reveals that nothing occurred there to render the plea equivocal that is the end of the matter and this Court will proceed to hear the appeal against sentence, if pursued. In a case of an appellant producing some prima facie and credible evidence tending to show that the plea before the court of summary jurisdiction was equivocal, this Court may seek assistance from a transcript of the proceedings in the court below, or, if it is considered more conducive to justice, from such court as to what happened before that court and only after considering such assistance should this Court decide the issue. In *P. Foster (Haulage) Limited –v- Roberts*, 67 Cr.App.R. 305, DC it was said that the Crown Court should ask itself three questions, (a) was the plea itself equivocal?, (b) if not, did anything occur during the proceedings which should have led the justices to consider whether they should exercise their discretion to invite or permit a change of plea?, (c) if so, had it been shown that by not inviting a change of plea the justices had exercised their discretion wrongly? As to the second issue, such court stated that if the defendant is legally represented, it will be rare that it can be said that it ought to have been apparent to the justices that they should consider exercising their discretion to invite a change of plea. If, however, the mitigation, other than general assertion in mitigation, is inconsistent with the legal ingredients of the offence, or with the plea, then the court of summary jurisdiction should not shy from doing so."

146. See *Archbold* paragraphs 4-186 to 4-187 in respect of change of plea generally.

147. See *Archbold* paragraph 2-200 re: change of plea of "guilty" following committal by Summary Court to the Crown Court for sentence. See also *R v Mutford and Lothingland Justices Ex parte Harber* [1971] 2 QB 291.

Sentencing

General

148. Counsel should consider all relevant sentencing options and be in a position to address the court on the same. Counsel should check the maximum sentence for the offence. Counsel should consider all the necessary and appropriate orders and the relevant sentencing guidelines. There needs to be a full consideration of the facts and circumstances of offence and the offender, victim issues and issues relevant to the punishment of the offender, the protection of the public, deterrence and the rehabilitation of the offender. Consider also the aggravating and mitigating factors. Consider all the circumstances of the case.

149. See *Newbery* (judgment delivered on the 13th January 2009) at paragraphs 182, 183 and 184 in respect of the key elements in the sentencing process namely protection of the public, punishment, deterrence and rehabilitation of offenders. See *Baines* (Appeal Division judgment 29th September 2010) in respect of deterrent sentences.

150. See *R(Edwards-Sayer) v Secretary of State for Justice* [2008] EWHC 467 (Admin) in respect of the phrase "convicted prisoner". There is a useful summary of the authorities on the word "conviction". See also Deemster Kerruish's judgment in *Beaumont* 1999-01 MLR 149 where it was held that a defendant is convicted at the time of sentencing and not when he pleads guilty.

151. Counsel should ensure that the court is given all relevant and up to date information relevant to the sentencing process. In the *Attorney General's Reference (Kneale*) 1993-95 MLR 239 Hytner J A at pages 243-244 stated: "We do find that we should take into account that Deemster Cain was actively misled, however innocently, into believing that he was dealing with a youth of good character."

And at pages 244-245:

"For guidance, we should state that offences should be dealt with chronologically; we do not know why in this case summonses were not served in relation to the earlier offences until January 1994. But we are relieved and encouraged to hear from Mr. Montgomerie that an enquiry is now taking place into the reasons for that error. Applications should not be made to adjourn earlier cases in order to avoid the accused having previous convictions when appearing for a later offence. The court is not suggesting, however, that in this case the application was made for an improper reason.

Had Deemster Cain known of the pending cases, he should and would have adjourned the case of death by reckless driving until the earlier cases had been disposed of. Furthermore, counsel should take particular care in dealing with the situation which faced Mr. Wannenburgh. We would emphasize that it is not the duty of counsel for a defendant to volunteer facts aggravating the offence; but counsel must avoid half truths which deceive and in relation to pending cases where a guilty plea is intended counsel should be inhibited from suggesting that the defendant is a person of good character.

We have considered what sentence to pass in this case. We would normally have passed a longer sentence than the one which we have decided to impose, which is one of six months' youth custody. We have imposed what we would regard as an unusually short sentence for an offence such as this, where there has been a previous course of bad driving, for four reasons.

The first is that the respondent has already served part of his sentence of community service; we would at this stage wish to emphasize that, contrary to the belief of many members of the public, community service is not a soft option; it is very often an onerous punishment and some hardened offenders prefer to serve a short period of custody rather than a community service order. Secondly, we take into account the unusual features of a reference, namely that the respondent will have had his hopes raised by the actual sentence and then suffered a bitter shock on hearing that there would be a review of the sentence. Thirdly, his extreme youth, and fourthly, the almost certain loss of his job. We do not disturb the consequential sentences that the respondent's licence be endorsed, that he be disqualified from driving for five years and required to pass a driving test before being able to drive again. We wish to emphasize that in future, for such an offence, offenders should anticipate a much longer period in custody.

Finally, it is clear that the heavy financial penalties passed by the magistrates' court were imposed in the belief that the respondent would be at liberty and earning money. We would in the circumstances encourage him to appeal against those sentences."

152. In *Christian* (Appeal Division 28th September 2004) the Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) at paragraph [9] in effect stated that where proceedings are pending in the Summary Court and the Court of General Gaol Delivery it would be far more preferable for matters to be dealt with by one judge who could take a global view of the consequences and the totality of the defendant's criminal activity.

Custody

153. Custody is the last resort. Section 9(1) of the Custody Act 1995 provides that no court shall impose custody on a person unless it is of the opinion that no other method of dealing with him is appropriate.

154. Section 9(2) of the Custody Act 1995 provides that without prejudice to subsection (1), no court shall impose custody on a child or young person unless the court is of the opinion that the circumstances are so exceptional that it would be inappropriate to deal with him by any other method.

155. Youth is a powerful mitigating factor especially in relation to an offender of previous good character. The courts are always reluctant to impose immediate custodial sentences on young people. See *B v Oake* 1996-98 MLR N18 in respect of custodial sentences and juveniles. There are two possible sets of circumstances "so exceptional" that a court could be justified in imposing custody on a juvenile under section 9(2) of the Custody Act 1995 because any other method of dealing with him is "inappropriate". One is that the offence follows a stream of repeated offences in respect of which community sentences have been tried and failed. The other is that the offence itself is so grave that it warrants immediate custody (e.g serious violence to the person). A first offence of burglary and vandalism is unlikely to be such a case. See also *F v Oake* 1996-98 MLR 50, *O v Oake* 1993-95 MLR N3, *N v Chief Constable* (2DS 2002/19 judgment Appeal Division 9th April 2002) and *T v Chief Constable* (2DS/2002/008 judgment Appeal Division 28th February 2002). In *O v Oake* 1993-95 MLR N 3 it was held by the Appeal Division that the importation or attempted importation of drugs into the Island was an offence of such seriousness that it demanded a custodial sentence, even for juveniles.

156. For the purposes of forming an opinion under section 9(1) or (2) of the Custody Act 1995 the court shall (a) obtain and consider information about the circumstances including, unless the court thinks it unnecessary or impracticable, a social inquiry report, and (b) take into account any information before the court which is relevant to his character and mental condition.

157. In *Ollerenshaw* 1999 1 Cr App R(S) 65 the English Court of Appeal stated that when a court was considering imposing a comparatively short period of custody, of about 12 months or less, it should ask itself whether an even shorter period might be equally effective in protecting the interests of the public and punishing and deterring the criminal. There might be cases where six months might be just as effective as nine, or two months as effective as four.

Reports

158. The Court may order production of reports such as social enquiry report from the Isle of Man Probation Service and psychiatric report from the Drug and Alcohol Team to assist in the sentencing process. Counsel will need to satisfy the court as to a relevant psychiatric issue which would impact on sentence before a psychiatric report can be ordered.

159. If a defendant is on bail pending sentence the court will consider adding a condition that the defendant shall cooperate with the preparation of any reports and attend any necessary meetings as required.

160. Section 24 of the Criminal Jurisdiction Act 1993 provides as follows:

> "24 Power to adjourn for reports
> (1) After a person has been convicted on information and before he has been sentenced or otherwise dealt with, the court may adjourn the case for the purpose of enabling inquiries to be made or of determining the most suitable method of dealing with his case, and may remand him in custody or on bail.
> (2) Without prejudice to subsection (1), where-
> (a) a person is charged on information with an offence punishable with custody, and
> (b) the court is satisfied that he did the act or made the omission charged, but is of pinion that an inquiry ought to be made into his physical or mental condition before the method of dealing with him is determined,
> the court shall adjourn the case and remand him in custody or on bail for such period or periods, no single period exceeding 6 weeks, as the court thinks necessary to enable a medical examination and report to be made.
> (3) Where a person is remanded on bail under subsection (2)-
> (a) it shall be a condition of the recognizance that he shall-
> (i) undergo medical examination by a qualified medical practitioner or, where the inquiry is into his mental condition and the recognizance so specifies, 2 such practitioners; and
> (ii) for that purpose, attend at an institution or place, or on any such practitioner, specified in the recognizance and, where the inquiry is into his mental condition, comply with any directions which may be given to him for the said purpose by any person of any class so specified; and
> (b) if arrangements have been made for his reception, it may be a condition of the recognizance that he shall, for the purpose of the examination, reside until the expiration of such period as may be specified in the recognizance or he is discharged therefrom, whichever occurs first, in an institution or place so specified, not being an institution or place to which he could have been committed.
> (4) On exercising the powers conferred by subsection (2) the court shall send to the institution to which the defendant is committed, or to the institution or place at which or the person by whom he is to be examined, as the case may be, a statement of-
> (a) the reasons why the court is of opinion that an inquiry ought to be made into his physical or mental condition, and
> (b) any information before the court about his physical or mental condition."

161. The court should not impose custody without first considering a social inquiry report unless the court thinks it unnecessary or impracticable. Section 9 of the Custody Act 1996 provides as follows:

> "9. General restrictions on custody
> (1) No court shall impose custody on a person unless it is of the opinion that no other method of dealing with him is appropriate.
> (2) Without prejudice to subsection (1), no court shall impose custody on a child or young person unless the court is of the opinion that the circumstances are so exceptional that it would be inappropriate to deal with him by any other method.
> (3) For the purpose of forming an opinion under subsection (1) or (2) the court shall-
> (a) obtain and consider information about the circumstances including, unless the court thinks it unnecessary or impracticable, a social inquiry report, and
> (b) take into account any information before the court which is relevant to his character and mental condition.
> (4) Where a court of summary jurisdiction imposes custody on a person, it shall state in open court the reasons-
> (a) for its opinion that no other method of dealing with him is appropriate; and
> (b) if no social inquiry report has been obtained, for its opinion that such a report is unnecessary or impracticable;
> and those reasons shall be entered in the order book."

162. The Appeal Division in *Watterson* (judgment 24th March 1993, unreported) at page 3 stated:

> "…it must be made clear that courts are not restricted to following blindly recommendations made in a social enquiry report; there may be many occasions when a social enquiry report does not recommend a non-custodial sentence, but the court may find that a non-custodial sentence is justified. Similarly, simply because a social enquiry report does recommend a non-custodial sentence, it does not mean that the court must blindly follow the recommendation; what is required of the court, and required strictly, is that it pays careful attention to anything in a social enquiry report. It is clear from the remarks of the Deemster that he has every respect for Mrs Hulme, as does this court, but that on this occasion he found he could not follow the recommendation."

Mitigation

163. Defence counsel should file with the court and serve on the prosecution a written outline of mitigation, sentencing authorities, recommendations as to sentence and any other documents the defence propose to rely on in mitigation well in advance of effective sentencing hearing. Defence advocates have the opportunity to present written outline of mitigation in advance. They should not underestimate the importance of that. Defence advocates should focus their pleas in mitigation on the tribunal that will be imposing the sentence and not on the defendant or his family and friends in the public gallery. It is inappropriate to try to appeal to the emotions. Counsel should be concise, realistic, objective and focused in

mitigation. Counsel should not stray from the agreed facts. Counsel should agree the facts and basis of plea well in advance of the sentencing hearing. If the parties cannot reach agreement then counsel must consider the option of a *Newton* hearing if a matter material to the sentence is in dispute. If a *Newton* hearing is required and the court determines the facts against the defence then the sentencing discount for a guilty plea may be significantly reduced. Indeed in some cases it may be reduced to nil (*Elicin and Moore* [2008] EWCA Crim 2249).

164. See Current Sentencing Practice which gives examples of some potential mitigating factors. The following is an extract from pages 523-525:

"Mitigating Factors

General principles

Allowance for mitigating circumstances is within the discretion of the court, and may be withheld if there is a proper reason for doing so

Personal characteristics of the offender

A sentence may be discounted to reflect the youth of the appellant
A sentence may be discounted where the offender is in his sixties or older
A sentence may be discounted to reflect the fact that the offender is of previous good character
A sentence may be discounted to some extent where an offender, although not of previous good character, has not yet exhausted all possible credit for previous good behaviour
A sentence may be discounted to reflect the fact that an offender has made a serious attempt to lead a law-abiding life, despite a substantial criminal record
Where an offender has previous convictions for offences of a different character from those of which he has now been convicted, the sentencer may disregard them in determining the sentence for the latest offence
Where an offender is to be sentenced for offences of the same general character as those for which he has been sentenced to imprisonment in the past, it may be appropriate to discount the sentence to some extent if the alternative is to impose a sentence very much more severe than those he has previously received for similar offences
A sentencer may give credit to an offender for meritorious conduct wholly unrelated to the offence for which he is to be sentenced

Circumstances preceding the commission of the offence

A sentence may be discounted where the offender has acted under provocation
The sentencer may take into account the fact that the offence was the result of emotional stress

The sentencer may take into account the fact that the offence was committed as a result of serious financial difficulty for which the offender was not wholly responsible
The fact that the offence was committed while the offender was affected by drink is not normally a mitigating factor
Where it is alleged that the commission of the offence was the result of the initiative of an agent provocateur, the sentence will not be mitigated unless the officer concerned has acted improperly
The fact that the offence was committed to provide money to support an addiction is not a mitigating factor

The effect of the sentence on persons other than the offender

The fact that the imprisonment of the offender will adversely affect his wife and children is not normally a matter which can be taken into account
The sentencer may take into account the effect of the sentence on the offender's dependants, where the circumstances are such that they will be subjected to an unusual measure of hardship as a result of his imprisonment
The sentencer may take account of the effect of a sentence on the offender's dependants where the effect of a custodial sentence would be to deprive his children of all parental care
The sentencer may take account of the effect of a sentence on the offender's family when sentencing a woman who is the mother of young children

Additional hardships resulting from conviction

The sentencer may take account of the consequences of conviction for the offender, over and above the sentence to be imposed for the offence
The sentencer may take account of any physical disability or illness which will subject the offender to an unusual degree of hardship if he is imprisoned
The sentencer may not take account of the fact that the offender, if sentenced to imprisonment, will be detained in solitary confinement for his own protection in accordance with the Prison Rules 1964, r. 43
The offender's individual reaction to prison life is not a matter which should affect the sentence. When sentencing a man the court is concerned with the character of his crime and his individual circumstances as revealed in his criminal background, if any
The sentencer may take account of the fact that the offender will be discharged from military service
The fact that an offender is HIV positive is not in itself necessarily a reason for mitigating a custodial sentence

Conduct of the offender after the commission of the offence

The sentencer may take account of the fact that the offender has demonstrated his remorse, by means over and above a plea of guilty
The fact that the offender has paid, or offered to pay compensation, does not necessarily justify a discount in his sentence
Where an offender who has committed grave offences discloses to the police information of substantial value in the investigation of similarly grave offences committed by others, or the involvement of others in the same offences, the sentencer may give credit to the offender by discounting the sentence to a

substantial degree; but the extent of the discount is a matter to be decided by the sentencer in relation to the circumstances of the particular case
Where an offender avoids apprehension for a substantial period of time, the sentencer may make such allowance in mitigation as may be appropriate in the circumstances
Where an offender commits offences as a young person but is convicted of them as an adult, the fact that he committed the offences as a young person is a powerful factor in sentencing him

Factors arising out of the conduct of the proceedings against the offender

Where an incident in the course of proceedings gives rise to the appearance of injustice, or creates a justified sense of injustice on the part of the offender, his sentence may be discounted to compensate for it Where a person convicted of an offence and sentenced to imprisonment has served part of that sentence before the conviction is quashed on appeal, he is not entitled to credit for that sentence against a further sentence of imprisonment imposed on a later occasion for offences committed subsequently to the quashing of the conviction"

165. Martin Wasik in *Emmins on Sentencing* (at pages 60-71) gives examples of mitigating factors as follows:

(1) offender has acted under provocation
(2) offender has acted under duress
(3) offender has been tricked by the authorities into committing the offence
(4) offender acted under a mistake or ignorance of the law
(5) offender is relatively young
(6) offender is relatively old (see *R v Heron* [2009] EWCA Crim 94)
(7) offender has a good character, a clean record or relatively few previous convictions
(8) offender has rendered substantial assistance to the police (See *R v P* [2008] 2 Cr App R(S) 5 in respect of effect on sentence of cooperation, assistance and valuable information given to the prosecuting authorities).
(9) offender has performed some meritorious act unrelated to the offence which shows him in a good light
(10) offender has shown remorse
(11) offender has pleaded guilty
(12) adverse effects of sentence on offender will be especially severe
(13) offender's serious illness
(14) severe adverse effect of sentence on offender's family
(15) lapse of time since the commission of the offence
(16) relevance of previous convictions

166. See also *Archbold* at paragraph 5-90 onwards in respect of mitigation.

167. Defence counsel presenting a plea in mitigation should not give personal character references for the defendant. Counsel presents submissions on behalf of a client rather than bringing to the attention of the court the personal beliefs or opinions of counsel. Moreover counsel should not attempt to give evidence during a plea in mitigation. Counsel should not express personal beliefs when presenting a plea in mitigation. For example it would be inappropriate for counsel to say the following on behalf of a client for whom counsel is advancing a plea in mitigation:

> "I have been acting for the defendant for years and I'm convinced he's finally turned the corner and he will not commit any offences in the future" or "I've been impressed with the defendant in my dealings with him. I believe he is a man of good character and am personally convinced that his remorse is genuine."

168. Stockdale and Devlin in *Sentencing* give some wise advice to defence counsel at paragraph 5.15: "… he should not allow himself to be carried away … He should remember the general rule that counsel personally should not figure in the case. Assertions such as the following should be avoided: "I have seen him in the cells and it is plain to me that he has learned his lesson", or "I feel sure that he bitterly regrets what he has done, and that he is most unlikely to repeat this kind of offence". On the other hand, there is no harm in making submissions to the like effect in proper form: "In the circumstances in my submission he is most unlikely to offend again". The circumstances referred to will not include evidence given by counsel about what he has observed, or any personal opinion of his."

169. See the remarks of Lord Phillips on *Mitigation* to the Law Society in London on the 11th October 2007:

- consider personal mitigation
- remorse and willingness to address the problems underlying the criminal behaviour
- discount for guilty plea to be calculated after any relevant mitigating factors have been taken into account
- where offence on the cusp of the custody threshold chances of rehabilitation will be better if the defendant is given a community sentence rather than a custodial sentence
- aspects of mitigation that suggest that the defendant may avoid re-offending have the most significant effect on sentence
- most significant single feature is the good character of the offender. Reluctance to send a defendant to prison for a first offence when the offence is not so serious as to make custody inevitable.

170. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Caldwell-Camp* 2003-05 MLR 505 at paragraph 66 stated:

> "The sentencer will wish to have due regard to a guilty plea and to apply an appropriate discount. It is in the public interest that the expenditure of time and money on a full trial is avoided. Although discount will be given, we suggest that where there is no sensible alternative to a guilty plea the discount will be more limited."

171. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Watterson* (judgment delivered 25th September 2007) at paragraph [39] stated:

> ".. She probably had no real alternative but to plead guilty to counts 1 to 6 but for her frank admissions it is unlikely that the court would have appreciated the full extent of her drug dealing. As to count 7 we consider that it is inherently unlikely that any count of production would have been pursued against the Appellant in the absence of her admission. It seems to this court that such matters offer very considerable mitigation to the Appellant, even though we recognise that by making such admissions the Appellant was avoiding the risk for later prosecution for such matters…
>
> [40] Taking all such matters into account it seems to this court that the appropriate reduction of sentence to reflect the Appellant's pleas of guilty and mitigation was one third."

172. In *Milligan v R* 1993-95 MLR N 14 the Appeal Division (Judge of Appeal Hytner and Deemster Corrin) held that the discount for a guilty plea is not automatic and there will be no discount if the nature of the offence or the circumstances of the offender call for a maximum sentence. See now *Hamblett* (Appeal Division judgment 5th February 2010).

173. In *Elicin and Moore* [2008] EWCA Crim 2249 the English Court of Appeal Criminal Division held that where offenders plead guilty in the face of an overwhelming prosecution case the normal discount for their plea is reduced to 20 per cent in accordance with the Sentencing Guidelines Council guideline on the reduction in sentence for a guilty plea but where offenders put forward a basis of plea which is not accepted with the result that the court conducts a *Newton* hearing in which the offender's account is not accepted, the sentencing judge is entitled to refuse any reduction in sentence. Hooper J at paragraph 11 stated:

> "11 In our view a judge is entitled to refuse any reduction where there is an overwhelming case, as there is in this case, and where thereafter there has been a

Newton hearing during which the defendant has clearly lied as to his involvement in the offence. Even if any reduction were allowed in this case it would have been a very small reduction indeed and not such as would lead this court to describe the sentences as manifestly excessive. For these reasons the appeals are dismissed."

174. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Jeffrey Cameron Watterson* (judgment delivered 25th April 2008) stated:

"51**.** We readily agree that the Respondent was entitled to mitigation for the fact that he had produced the drug into the Island for his own personal use. If we had been quantifying such mitigation in isolation we would have adjudged that at most an eighteen month reduction from the starting point was justified.

52. We have considered the other mitigation available to the Respondent and agree with Miss Norman that it is relatively limited. Whilst the Respondent admitted his guilt from a very early stage and pleaded guilty at the earliest opportunity and must therefore be given some credit for such behaviour, we are bound to observe firstly that he had little realistic opportunity but to do so once he had excreted the packages containing the heroin and secondly that he initially denied the possession of any drugs, was not cooperative with the police and refused to voluntarily produce the drugs, undergo an x-ray or be examined by a doctor who might have been able to remove such packages. Moreover it is clear that the Respondent only later consented to an x-ray and a CT scan after he had been admitted to hospital because of concerns for his welfare.

53. By contrast there were clearly aggravating factors in that the Respondent concealed the drugs in his rectum so that they were not immediately detectable and had a previous conviction for production and possession with intent to supply. Further the Respondent did not identify the supplier of his heroin, thereby depriving himself of significant mitigation."

[In that case, which involved a defendant producing 41.2 grams of heroin into the Island for his own use, the Appeal Division indicated that the starting point was 8 years and that the appropriate sentence taking into account the mitigation was 5 years but imposed 4 years to take account of double jeopardy].

175. In *Khan and others v R* [2008] EWCA Crim 531 LCJ Phillips at paragraph 67 stated: "[The defendant in a drugs case] did not need to see the prosecution evidence in order to decide whether he was guilty. By waiting almost to the door of the court [a week before trial] to indicate his plea he forfeited much of the credit for a guilty plea. None the less guidance given by the Sentencing Guidelines Council indicates that he should have been given a discount for his late guilty plea of about 10% of the sentence".

At paragraph 69 it was stated:

"The reason for the discount for a guilty plea is essentially pragmatic. It is a reward for the saving of the time and the resources that is consequent on the plea. For a defendant the plea usually carries with it the possibility of advancing by way of additional mitigation the defendant's regret for his offending. If as in the

case of [Y] the defendant advances what the judge regards as a ludicrous story, he robs himself of the possibility of the additional mitigation. He should not, however, be deprived of all credit for the benefit that the guilty plea nonetheless affords to the prosecution. [Y] did not abandon his basis of plea but left it to the judge to form his own view of Y's participation. The position would have been very different if as a result of his stance it had been necessary to have a *Newton* hearing."

176. Duress or threats are of limited mitigation. In *Teare* (judgment 1 June 2007) the Appeal Division referred to a claim that the appellant had been acting under duress (threats to his family) a matter not raised by him in interview with the police and which did not form part of the basis of plea. At paragraph 42 the Appeal Division said:

"For our part we are bound to say that we believe that such threats can offer no more than fairly minimal mitigation, if any. We say this for two reasons. Firstly, a person faced with such threats, which will derive from a situation into which he has put himself has a choice of whether he reports matters to the police. Secondly, save in very exceptional cases and we do not believe that this is such a case we do not regard it as in the public interest that a court should treat unsubstantiated threats as significant mitigation : were the position otherwise every defendant before the court would contend that there was duress."

177. This approach was also adopted by the Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Goodman* (judgment 1 June 2007) where the explanation that the defendant had been heavily in debt at the time to loan sharks who forced him to bring the drugs over to the island was contained in the agreed summary of facts and accepted by the prosecution. There was reference to various threats. Even in those circumstances the Appeal Division stated (at paragraph 38 of their judgment) that: "a plea in mitigation based on an unsubstantiated or unchallenged account of duress, or pressure can offer no more than fairly minimal mitigation, if any."

178. In *Conroy v R* 1996-98 MLR N 18 the Appeal Division (Judge of Appeal Tattersall and Deemster Cain) indicated that where an offender has pleaded guilty but there is evidence which might lead to mitigation if the court were to make a finding on it – for example, on a charge of possession of drugs with intent to supply, evidence of threats and possibly injury from the offender's supplier – it is the duty of the offender's advocate to request a *Newton* hearing so that the court has the opportunity to make a finding on that evidence. If the court does not make a finding in favour of the defendant and time and costs have been wasted on a *Newton* hearing the mitigation otherwise available to the defendant may however be diminished (*Elicin and Moore* [2008] EWCA Crim 2249).

179. In an endeavour to increase the likelihood of the main offenders being caught and brought to justice the courts have made it plain that they will give significant sentencing discounts to those defendants (guilty of offences under the Misuse of Drugs Act 1976) who are willing to name the main dealers and suppliers and provide other useful information to the police. It needs to be crystal clear that the court is willing to give a substantial sentencing discount to those who provide useful information to the police and the prosecution authorities. The position is not limited to those convicted of offences under the Misuse of Drugs Act 1976. It applies to all defendants convicted of any criminal offences. If they cooperate and provide useful information they will be dealt with more leniently than if they did not cooperate and did not provide information. The Appeal Division in the *Caldwell-Camp* case 2003-05 MLR 505 emphasised that:

> "Early, and useful assistance in helping the police and the prosecution authorities to prosecute others will almost invariably result in a substantial reduction of the sentence which would otherwise be imposed."

180. In *Todd v R* 1993-95 MLR 330 Judge of Appeal Hytner stated that in drugs cases "the courts must apply a stick and a carrot – on the one hand realistic sentences for offenders who maintain silence, on the other, a substantial discount for those who are prepared to give information."

181. See *R v P and Blackburn* [2007] EWCA Crim 229; [2008] 2 Cr. App R(S) 5 in respect of guidance on sentencing an offender who has provided assistance to a prosecutor or investigator. The English Court of Appeal referred to the convention of giving lower sentences to those who had informed on or given evidence against those who participated in the same or linked crimes or in respect of crimes in which they had no personal involvement. It was stated that this was a price worth paying to achieve the public interest that major criminals in particular should be prosecuted to conviction.

182. In *Hill v Oake* 1993-95 MLR N 2 it was held by the Appeal Division (Deemster Corrin and Deemster Cain) that confinement of a convicted police officer with prisoners previously arrested by the officer may be mitigation.

183. In *Crossley v R* 1993-95 MLR N 14 it was held by the Appeal Division (Judge of Appeal Hytner and Deemster Corrin) that an unusually severe effect of imprisonment on vulnerable personality may be mitigation. Bullying in prison is a matter for the prison authorities and is not mitigation.

184. In *Bull v R* 1993-95 MLR N 13 it was held by the Appeal Division (Judge of Appeal Hytner and Deemster Corrin) that a delay of almost two years before trial is not mitigation if it was caused by the appellant's own actions.

185. In *Faragher v R* 1990-92 MLR 428 it was held by the Appeal Division (Judge of Appeal Hytner and Deemster Corrin) that it was no mitigation that the female offender would be the only female in prison.

186. In *York* [2005] HCA 60 the High Court of Australia had to consider whether to interfere with a sentence because of the risk to the appellant's safety whilst in prison. Hayne J at paragraph 37 stated that: "Execution of sentences of imprisonment passed by the courts, and caring for prisoners under sentence, are tasks committed to the executive arm of government and regulated, for the most part, by legislation."

187. In *King* 2005-06 MLR N 3 it was held by the Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) that if an assault was committed as part of a joint enterprise sentence on an individual offender should reflect the totality of injuries whichever offender caused them. There was no mitigation in a joint enterprise case in saying "I didn't cause all the injuries."

188. In *Williams* 2003-05 MLR N 8 the Appeal Division (Judge of Appeal Tattersall and Deemster Doyle) indicated that sentences on counsellors and procurers should reflect their different roles.

189. In *Craine v R* 1978-80 MLR 233 the Appeal Division (Judge of Appeal Glidewell and Deemster Eason) held that it may be mitigation where an offender makes no further attempts at molestation and leaves when told to do so by the victim.

190. In *R v Mako* (2000) 17 CRNZ 272 (CA) the New Zealand Court of Appeal held (1) in general, an early guilty plea will warrant a generous discount, because the plea reflects acknowledgement of wrongdoing, saves resources, and relieves victims from the anxieties of trial. However, in this case the respondent entered an early guilty plea on the aggravated robbery charge but failed to acknowledge the totality of offending until the start of trial. A modest discount was appropriate (2) Youth and rehabilitation prospects may be mitigating factors, but offenders who have accumulated long lists of prior convictions while still in their teens cannot expect leniency.

191. The Appeal Division (Deemster Cain and Deemster Kerruish) in *Hepburn* (judgment 1st November 1999, unreported) took into account that the offender was a serving soldier and upheld an appeal against a custodial sentence imposed for an offence of assault causing actual bodily harm. The Appeal Division imposed a fine in the knowledge that the offender would be the subject of further punishment under military law. The offender had also served one third of the custodial sentence originally imposed upon him. The Appeal Division added:

> "We would comment that the fact that a defendant is a serving soldier is but one factor to be considered by a sentencer and its importance must not be over-emphasised. As we have indicated it is not the primary consideration before the court."

192. See guideline cases for specific mitigation in respect of specific offences.

Aggravating factors

193. In addition to the plea in mitigation delivered on behalf of the defendant the court will also be considering the aggravating factors and the position of the victim and the protection of the public.

194. Prior to the sentencing hearing prosecution counsel should file with the court and serve on the defence a note of the aggravating factors in the case, the relevant sentencing options and guideline cases and their recommendations as to sentence.

195. Martin Wasik in *Emmins on Sentencing* (at pages 57-60) gives the following as examples of some of the more common aggravating factors:

(1) victim especially vulnerable
(2) breach of trust
(3) premeditation, 'professional' offender
(4) group offending
(5) offending whilst on bail
(6) offence prevalence
(7) racially motivated offending

196. The Appeal Division in *Westhead* (judgment 22nd November 2005, unreported) at paragraph [22] stated:

> "The fact that the Appellant committed the offences whilst he was under the influence of drink, is no excuse".

197. Under section 41 Criminal Justice, Police and Courts Act 2007 when considering the seriousness of an offence if the defendant was under the influence of alcohol at the time the offence was committed the court (a) may treat that fact as an aggravating factor; and (b) if it does so, must state in open court that the offence was so aggravated.

198. In *Gallagher v R* 1981-83 MLR 314 the Appeal Division (Judge of Appeal Hytner and Deemster Luft) held that intoxication could be an aggravating circumstance in sexual offence cases if the accused foresees that intoxication is likely to reduce self control and lead to sexual violence.

199. Andrew Ashworth in *Sentencing and Criminal Justice* (3rd Ed) comments on aggravating factors at pages 132-9, 155-159 and refers to offences by groups or gangs, offences against young, elderly or otherwise vulnerable victims, offences involving the abuse of trust or authority, racially motivated offences and offences involving planning or organisation.

200. See also *Archbold* at paragraph 5-55 onwards in respect of determining the seriousness of the offences and the references to previous convictions.

201. The defendant's previous convictions may be relevant to the sentencing process in a number of ways. They may go to the seriousness of the offence and may be indicative of the dangerousness of the offender and the need to protect the public from him. They may assist in deciding the effectiveness or otherwise of a particular type of sentence. They may provide an insight into the defendant's criminal career and in particular whether he has made a real effort over a period of years to put a previous pattern of offending behaviour behind him.

202. In *Chief Constable of Humberside Police v The Information Commissioner* [2009] EWCA Civ 1079 the English Court of Appeal at paragraph 109 stressed that it was the duty of the Crown to place before the sentencing court a complete record of previous convictions of the defendant. A previous conviction is to be treated as aggravating the offence if it reasonably can be. Hughes L J stated that a court may of course disregard an old conviction and often will, but it may be wrong to do so. Certainly there ought often to be a real difference between sentencing a person who has never before offended and sentencing one who has, perhaps similarly, albeit many years

previously. The Court must be in a position to make an informed decision.

203. In *S v Oake* 1990-92 MLR 215 the Appeal Division (Deemster Corrin and Deemster Callow) held that to enter a private dwelling at night with the intention of stealing and walk into a bedroom where a child was sleeping was so grave an offence that a custodial sentence was essential, whatever the age of the offender. In *B v Oake* 1996-98 MLR N 18 the Appeal Division (Deemster Corrin and Deemster Cain) held that a first offence of burglary and vandalism is unlikely to justify sending a juvenile to custody. See now *Smith* 2003-05 MLR N 20 where the Appeal Division (Deemster Kerruish and Acting Deemster Sullivan) laid down new guidelines for determining the appropriate sentence for domestic burglary.

204. See guideline cases for specific aggravating factors in respect of specific offences.

Suspended sentence

205. See section 10 and Schedule 1 of the Custody Act 1995. A court which passes a sentence of custody for a term of not more than 2 years may order that the sentence shall not take effect unless during a period specified in the order, being not less than one year or more than 2 years from the date of the order, the offender commits in the Island another offence punishable with custody and thereafter a competent court orders that the original sentence shall take effect.

206. In *Jameson* (judgment 29th April 2005) the Appeal Division (Deemster Kerruish and Deemster Doyle) at paragraph [19] stated that the decision whether to suspend a custodial sentence is a matter for the sentencer having taken into account all the relevant circumstances of the offence, the offender and the background circumstances. In Manx law there is a wide discretion when considering whether or not to suspend the operation of a custodial sentence. There is no statutory requirement in the Isle of Man that the circumstances which may justify the exercise of judicial discretion to suspend a custodial sentence must be exceptional or limited to the circumstances of the offence.

207. In *Fair* (Appeal Division judgment 26th August 1997) the Appeal Division confirmed that there should be a good reason for suspending a sentence of custody if an offence is serious enough to justify a

custodial sentence in the first place. Deemster Cain in *Fair* at page 3 stated:

> "There should be a good reason for suspending a sentence of custody, if an offence is serious enough to justify a custodial sentence in the first place, although there are no statutory guidelines in the Isle of Man as to when a sentence of custody should be suspended. I am not satisfied that there is any good reason to suspend the sentence of custody in this case."

208. In *Attorney General's Reference No 8 of 2007* [2007] EWCA Crim 922 the English Court of Appeal did not interfere where a suspended sentence was imposed on a young offender who had been convicted of one count of possessing cannabis with intent to supply and one count of possessing cocaine with intent to supply. The Court of Appeal stated:

> "21. The judge had every reason for the unusual approach that he adopted to this case. He had every reason for taking a particularly lenient view of this offender and imposing a sentence which, being custodial, emphasised the gravity of the offending, but which, being suspended, reflected the fact that she was unlikely to offend again and that it was not necessary in the circumstances that she should go straight into detention."

209. The court should explain to the defendant his liability if during the operational period he commits an offence punishable with custody. Defendants need to be aware of the consequences of a breach of suspended sentence. The imposition of a suspended sentence is not an easy option. If there is a breach (i.e. another offence punishable with imprisonment committed during the operational period of the suspended sentence) the usual result will be the activation of the suspended sentence.

210. The court has a number of options when dealing with a breach of a suspended sentence. It can (a) order the suspended sentence to take effect with the original term unaltered (b) order the sentence to take effect with the substitution of a lesser term (c) vary the order by substituting the operational period to a period expiring not later than 3 years from the date of the variation (d) make no order. The court must activate the original term unless 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 the reasons.

211. If further offences punishable by custody are committed during the operational period of a suspended sentence then in the normal course

of events the breach of the suspended sentence will be dealt with by activating the suspended sentence in its entirety.

212. The authorities make it crystal clear that the activation of the suspended sentence is the normal consequence of the commission of an offence during the operational period of a suspended sentence. That is qualified to a certain extent as follows: where the subsequent offence is both of a relatively trivial nature and of a different character from the offence for which the suspended sentence was imposed, the sentencer may consider that it would be unjust to activate the sentence but that would be an exceptional matter.

213. The authorities make it plain that the fact that an offence committed during an operational period of a suspended sentence is of a different character from the offence from which the suspended sentence was imposed is not in itself a ground for not activating the suspended sentence.

Suspended sentence supervision order

214. See Schedule 1 of the Custody Act 1995 paragraph 6 onwards in respect of a suspended sentence supervision order. See also the amendments inserted by section 43 of the Criminal Justice, Police and Courts Act 2007. See paragraph 10 in respect of a breach of the requirements of a supervision order.

Community service order

215. Section 14 and Schedule 3 of the Criminal Law Act 1981 make provision for community service orders. The number of hours should not be less than forty nor more than two hundred and forty.

216. The relevant provisions of the Schedule are as follows:

> "1. (1) Where a person of or over fourteen years of age is convicted of an offence (not being an offence for which the sentence is fixed by law), the court by or before which he is convicted may, instead of dealing with him in any other way (but subject to paragraph 2) make an order (in this Act referred to as a 'community service order') requiring him to perform unpaid work in accordance with the subsequent provisions of this Schedule for such number of hours (being in the aggregate not less than forty nor more than two hundred and forty) as may be specified in the order…
> 2. A court shall not make a community service order in respect of any offender unless the offender consents and the court is satisfied-
> (a) that arrangements exist for persons to perform work under such orders;

(b) after considering a report by a probation officer about the offender and his circumstances and, if the court thinks it necessary, hearing a probation officer, that the offender is a suitable person to perform work under such an order;

(c) that provision can be made under the arrangements for him to do so; and

(d) that, in the event of the offender being less than seventeen years, his parent or guardian also consents to the order being made unless the court is satisfied that the consent is unreasonably withheld against the wishes of the offender.

3. Where a court makes community service orders in respect of two or more offences of which the offender has been convicted by or before the court, the court may direct that the hours of work specified in any of those orders shall be concurrent with or additional to those specified in any other of those orders, but so that the total number of hours which are not concurrent shall not exceed the maximum in paragraph 1.

4. The functions conferred by the subsequent provisions of this Schedule on the relevant officer shall be discharged by a person nominated by the Department of Home Affairs for the purpose of those provisions.

5. Before making a community service order the court shall explain to the offender in ordinary language-

(a) the purpose and effect of the order (and, in particular, the requirements of the order as specified in Part II);

(b) the consequences which may follow under Part III if he fails to comply with any of those requirements; and

(c) the circumstances in which the court has power under Part IV to review the order.

6. The court by which a community service order is made shall forthwith give copies of the order to the relevant officer and he shall give a copy to the offender.

7.(1) The Council of Ministers may by order direct that paragraph 1 shall be amended by substituting, for the maximum number of hours specified in that paragraph as originally enacted or as previously amended under this paragraph, such number of hours as may be specified in the order.

(2) An order under sub-paragraph (1) shall not have effect until it has been approved by Tynwald.

8. Nothing in paragraph 1 shall be construed as preventing a court which makes a community service order in respect of any offence from making an order for costs against, or imposing any disqualification on, the offender or from making in respect of the offence an order under section 16 or 17 or under Part I of Schedule 6, or under section 30 of the Theft Act 1981.

PART II

OBLIGATIONS OF PERSON SUBJECT TO COMMUNITY SERVICE ORDER

9. An offender in respect of whom a community service order is in force shall-

(a) report to the relevant officer and subsequently from time to time notify him of any change of address; and

(b) perform for the number of hours specified in the order such work at such times as he may be instructed by the relevant officer.

10. Subject to paragraph 20, the work required to be performed under a community service order shall be performed during the period of twelve months beginning with the date of the order but, unless revoked, the order shall remain in force until the offender has worked under it for the number of hours specified in it.

11. The instructions given by the relevant officer under this Part shall, so far as practicable, be such as to avoid any conflict with the offender's religious beliefs

and any interference with the times, if any, at which he normally works or attends a school or other educational establishment.

PART III
BREACH OF REQUIREMENTS OF COMMUNITY SERVICE ORDER

12. If at any time while a community service order is in force in respect of an offender it appears on complaint to a justice of the peace that the offender has failed to comply with any of the requirements of Part II (including any failure satisfactorily to perform the work which he has been instructed to do), the justice may issue a summons requiring the offender to appear at the place and time specified therein, or may, if the complaint is in writing and on oath, issue a warrant for his arrest.

13. Any summons or warrant issued under this Part shall direct the offender to appear or be brought before a court of summary jurisdiction.

14. If it is proved to the satisfaction of the court of summary jurisdiction before which an offender appears or is brought under this Part that he has failed without reasonable excuse to comply with any of the requirements of Part II, the court may, without prejudice to the continuance of the order, impose on him a fine not exceeding £1,000 or may-

(a) if the community service order was made by a court of summary jurisdiction, revoke the order and deal with the offender, for the offence in respect of which the order was made, in any manner in which he could have been dealt with for that offence by the court which made the order if the order had not been made;

(b) if the order was made by a Court of General Gaol Delivery, commit him to custody or release him on bail until he can be brought or appear before such a court.

15. A court of summary jurisdiction which deals with an offender's case under paragraph 14(b) shall send to the Chief Registrar a certificate signed by a justice of the peace certifying that the offender has failed to comply with the requirements of Part II in the respect specified in the certificate, together with such other particulars of the case as may be desirable; and a certificate purporting to be so signed shall be admissible as evidence of the failure before a Court of General Gaol Delivery.

16. Where, by virtue of paragraph 14(b) the offender is brought or appears before a Court of General Gaol Delivery and it is proved to the satisfaction of the court that he has failed to comply with any of the requirements of Part II, that court may either-

(a) without prejudice to the continuance of the order, impose on him a fine not exceeding £1,000; or

(b) revoke the order and deal with him, for the offence in respect of which the order was made, in any manner in which he could have been dealt with for that offence by the court which made the order if the order had not been made.

17. A person sentenced under paragraph 14(a) for an offence may appeal to the Staff of Government Division against the sentence.

18. In proceedings before a Court of General Gaol Delivery under this Part, any question whether the offender has failed to comply with the requirements of Part II shall be determined by the court and not by the verdict of a jury.

19. A fine imposed under this Part shall be deemed for the purposes of any enactment to be a sum adjudged to be paid by a conviction.

PART IV
AMENDMENT AND REVOCATION OF COMMUNITY SERVICE ORDERS, AND SUBSTITUTION OF OTHER SENTENCES

20. Where a community service order is in force in respect of any offender and, on the application of the offender or the relevant officer, it appears to a court of summary jurisdiction that it would be in the interests of justice to do so having regard to circumstances which have arisen since the order was made, the court may extend, in relation to the order, the period of twelve months specified in paragraph 10.

21. Where such an order is in force and-

(a) on any such application; or

(b) on the offender being convicted of an offence before a court of summary jurisdiction, it appears to the court that, having regard to such circumstances, it would be in the interests of justice that the order should be revoked or that the offender should be dealt with in some other manner for the offence in respect of which the order was made, the court may-

(a) if the order was made by a court of summary jurisdiction, revoke the order or revoke it and deal with the offender for that offence in any manner in which he could have been dealt with for that offence by the court which made the order if the order had not been made;

(b) if the order was made by a Court of General Gaol Delivery, commit him to custody or release him on bail until he can be brought or appear before such a court;

and, where the court deals with his case under sub-paragraph (b) it shall send to the Chief Registrar such particulars of the case as may be desirable.

22. Where an offender in respect of whom such an order is in force-

(a) is convicted of an offence before a Court of General Gaol Delivery; or

(b) is committed by a court of summary jurisdiction to a Court of General Gaol Delivery for sentence and is brought or appears before the Court of General Gaol Delivery; or

(c) by virtue of paragraph 21(b), is brought or appears before a Court of General Gaol Delivery, and it appears to the Court of General Gaol Delivery to be in the interests of justice to do so, having regard to circumstances which have arisen since the order was made, the Court may revoke the order or revoke the order and deal with the offender, for the offence in respect of which the order was made, in any manner in which he could have been dealt with for that offence by the court which made the order if the order had not been made.

23. A person sentenced under paragraph 21(a) for an offence may appeal to the Staff of Government Division against the sentence…

26. Where a court of summary jurisdiction proposes to exercise its powers under paragraph 20 or 21 otherwise than on the application of the offender, it shall summon him to appear before the court and, if he does not appear in answer to the summons, may issue a warrant for his arrest."

217. The Appeal Division (Deemster Cain and Deemster Kerruish) in *Hepburn* (judgment 1st November 1999, unreported) stated:

"The purpose of a Community Service Order is to punish the offender in a constructive manner and enable him to make some reparation to the community for the offence."

218. The Appeal Division (Judge of Appeal Hytner and Deemster Corrin) in *Attorney General's Reference (Kneale*) 1993-95 MLR 239 at 245 stated: " … we would at this stage wish to emphasise that, contrary to the belief of many members of the public, community service is not a soft option; it is very often an onerous punishment and some hardened offenders prefer to serve a short period of custody rather than a community service order."

Compensation order

219. Section 21 and Schedule 6 of the Criminal Law Act 1981 make provision for compensation orders. The relevant provisions of Schedule 6 are as follows:

"1. Subject to the provisions of this Schedule, 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') 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.
2. In the case of an offence under the Theft Act 1981, where the property in question is recovered, any damage to the property occurring while it was out of the owner's possession shall be treated for the purposes of paragraph 1 as having resulted from the offence, however and by whomsoever the damage was caused…
4. In determining whether to make a compensation order against any person, and in determining the amount to be paid by any person under such an order, it shall be the duty of the court-
(a) to have regard to his means so far as they appear or are known to the court; and
(b) in a case where it proposes to make against him both a compensation order and a confiscation order under Part I of the Criminal Justice Act 1990, shall also have regard to its duty under section 2(7) of that Act (duty where the court considers that the offender's means are insufficient to satisfy both orders in full to order the payment out of sums recovered under the confiscation order of sums due under the compensation order).
5. The compensation to be paid under a compensation order made by a court of summary jurisdiction in respect of any offence of which the court has convicted the offender shall not exceed £5,000, and the compensation or total compensation to be paid under a compensation order or compensation orders made by a court of summary jurisdiction in respect of any offence or offences taken into consideration in determining sentence shall not exceed the difference (if any) between the amount or total amount which under the preceding provisions of this paragraph is the maximum for the offence or offences, of which the offender has been convicted and the amount or total amounts (if any) which are in fact ordered to be paid in respect of that offence or those offences.

PART II
APPEALS IN THE CASE OF COMPENSATION ORDERS
7. A compensation order made by a court of summary jurisdiction shall be suspended-

(a) in any case until the expiration of the period for the time being prescribed by law for the giving of notice of appeal against a decision of a court of summary jurisdiction;

(b) where notice of appeal is given within the period so prescribed, until the determination of the appeal.

8. Where a compensation order has been made against any person in respect of an offence taken into consideration in determining his sentence-

(a) the order shall cease to have effect if he successfully appeals against his conviction of the offence or, if more than one, all the offences, of which he was convicted in the proceedings in which the order was made;

(b) he may appeal against the order as if it were part of the sentence imposed in respect of the offence or, if more than one, any of the offences, of which he was so convicted.

PART III

REVIEW OF COMPENSATION ORDERS

9. At any time before a compensation order has been complied with or fully complied with, the court which made the order may, on the application of the person against whom it was made, discharge the order, or reduce the amount which remains to be paid, if it appears to the court-

(a) that the injury, loss or damage in respect of which the order was made has been held in civil proceedings to be less than it was taken to be for the purposes of the order; or

(b) in the case of an order in respect of the loss of any property, that the property has been recovered by the person in whose favour the order was made.

PART IV

ENFORCEMENT OF COMPENSATION ORDERS

10. The amount of any compensation awarded under a compensation order shall be recoverable or otherwise enforceable-

(a) except in the case of a private prosecution (that is to say, a prosecution instituted by a private citizen acting in a private capacity), in the same manner as a fine;

(b) in the case of a private prosecution in the same manner as a judgment for a civil debt.

PART V

EFFECT OF COMPENSATION ORDER ON SUBSEQUENT AWARD OF DAMAGES IN CIVIL PROCEEDINGS

11. This Part shall have effect where a compensation order has been made in favour of any person in respect of any injury, loss or damage and a claim by him in civil proceedings for damages in respect thereof subsequently falls to be determined.

12. The damages in the civil proceedings shall be assessed without regard to the order; but where the whole or part of the amount awarded by the order has been paid, the damages awarded in the civil proceedings shall not exceed the amount (if any) by which, as so assessed, they exceed the amount paid under the order.

13. Where the whole or part of the amount awarded by the order remains unpaid and the court awards damages in the civil proceedings, then, unless the person against whom the order was made has ceased to be liable to pay the amount unpaid (whether in consequence of an appeal, of his imprisonment for default or otherwise), the court shall direct that the judgment-

(a) if it is for an amount not exceeding the amount unpaid under the order, shall not be enforced; or
(b) if it is for an amount exceeding the amount unpaid under the order, shall not be enforced as to a corresponding amount, without the leave of the court."

220. In *Halsall v Cain* 1978-80 MLR 66 the Appeal Division (Judge of Appeal Clothier, Deemster Eason and Deemster Luft) indicated that a compensation order is generally inappropriate if the court is sending the defendant to custody and the defendant does not have immediately available assets to discharge it. The Appeal Division indicated that compensation orders should not be used against an offender without capital resources who may have difficulty in earning money to meet the liability on his release from prison.

Probation order

221. The Criminal Justice Act 1963 was an Act to abolish transportation, penal servitude and hard labour. It also provided improved and new methods of dealing with offenders and persons liable to imprisonment and empowered the courts to order compensation for the victims of crime. The following are extracts from the Criminal Justice Act 1963 in respect of probation orders:

"2 Probation
[1948/3] (1) Where a court by or before which a person is convicted of an offence (not being an offence the sentence of which is fixed by law) is of opinion that having regard to the circumstances, including the nature of the offence and the character of the offender, it is expedient to do so, the court may, instead of sentencing him, make a probation order, that is to say, an order requiring him to be under the supervision of a probation officer or some other person, such other person being named in the order for a period to be specified in the order of not less than six months nor more than three years.
Provided that a probation order shall not, without the consent of the Department of Health and Social Security, place a child or young person under the supervision of a person other than an officer of that Department designated for the purpose by that Department.
(2) .....
(3) Subject to the provisions of the next following section, a probation order may in addition require the offender to comply during the whole or any part of the probation period with such requirements as the court, having regard to the circumstances of the case, considers necessary for securing the good conduct of the offender or for preventing a repetition by him of the same offence or the commission of other offences:
Provided that (without prejudice to the power of the court to make an order under subsection (2) of section eight of this Act) the payment of sums by way of damages for injury or compensation for loss shall not be included among the requirements of a probation order.

(4) Without prejudice to the generality of the last foregoing subsection, a probation order may include requirements relating to the residence of the offender:

Provided that-

(a) before making an order containing any such requirements, the court shall consider the home surroundings of the offender; and

(b) where the order requires the offender to reside in an approved probation hostel, or any other institution, the period for which he is so required to reside shall be specified in the order.

(4A) Without prejudice to the generality of subsections (3) and (4), a probation order may in addition-

(a) require the person to remain for periods specified in the order at a place so specified, and paragraphs 1(3) to (8) and 2 of Schedule 5 to the Criminal Justice Act 2001 and rules made under paragraph 5 of that Schedule shall apply to such requirements as they apply to a curfew order;

(b) include the requirements which are authorised by Schedule 1A.

(5) Before making a probation order, the court shall explain to the offender in ordinary language the effect of the order (including any additional requirements proposed to be inserted therein under subsection (3) or subsection (4) of this section or under the next following section) and that if he fails to comply therewith or commits another offence he will be liable to be sentenced for the original offence; and if the offender is not less than fourteen years of age the court shall not make the order unless he expresses his willingness to comply with the requirements thereof.

(6) The court by which a probation order is made shall forthwith give copies of the order to the probation officer or other person responsible for the supervision of the offender, and he shall give a copy to the offender, to the parent or guardian (if present in court) of an offender who is under the age of seventeen years, and to the person in charge of any premises in which the probationer is required by the order to reside.

3 Probation orders requiring treatment for mental condition

(1) Where the court is satisfied, on the evidence of a registered medical practitioner approved for the purposes of section 12 of the Mental Health Act 1998, that the mental condition of an offender is such as requires and may be susceptible to treatment, but is not such as to warrant his detention in pursuance of a hospital order, the court may make a probation order and include in it a requirement that the offender shall submit, during the whole of the probation period or during such part of that period as may be specified in the order, to treatment by or under the direction of a registered medical practitioner with a view to the improvement of the offender's medical condition.

(2) The treatment required by any such order shall be such one of the following kinds of treatment as may be specified in the order-

(a) treatment as a resident patient in a hospital or mental nursing home;

(b) treatment as a non-resident patient at such institution or place as may be specified in the order; or

(c) treatment by or under the direction of such registered medical practitioner as may be so specified;

but except as aforesaid the nature of the treatment shall not be specified in the order.

(3) A court shall not make a probation order containing such a requirement as is mentioned in subsection (1) unless it is satisfied that arrangements have been

made for the treatment intended to be specified in the order and, if the offender is to be treated as mentioned in subsection (2)(a), for his reception.

(4) While the probationer is under treatment as a resident patient in pursuance of a requirement of the probation order, the probation officer responsible for his supervision shall carry out the supervision to such an extent only as may be necessary for the purpose of the discharge or amendment of the order.

(5) Where the medical practitioner by whom or under whose direction a probationer is being treated for his mental condition in pursuance of a probation order is of opinion that part of the treatment can be better or more conveniently given in an institution or place not specified in the order, being an institution or place in or at which the treatment of the probationer will be given by or under the direction of a registered medical practitioner, he may, with the consent of the probationer, make arrangements for him to be treated accordingly, and the arrangement may provide for the probationer to receive part of his treatment as a resident patient in an institution or place although it is not one which could have been specified in that behalf in the probation order.

(6) Where any such arrangements as are mentioned in subsection (5) are made for the treatment of a probationer-

(a) the medical practitioner by whom the arrangements are made shall give notice in writing to the probation officer responsible for the supervision of the probationer, specifying the institution or place in or at which the treatment is to be carried out; and

(b) the treatment provided for by the arrangements shall be deemed to be treatment to which he is required to submit in pursuance of the probation order.

(7) Section 61(2) and (3) (medical reports) of the Mental Health Act 1998 applies for the purpose of this section as it applies for the purpose of any provision of Part 3 of that Act.

(8) In this section-

'hospital' and 'hospital order' have the same meanings as in the Mental Health Act 1998;

'mental nursing home' has the same meaning as in the Nursing and Residential Homes Act 1988.

4 Discharge, amendment and review of probation orders

(1) The provisions of the First Schedule to this Act shall have effect in relation to the discharge and amendment of probation orders.

(2) Where, under the following provisions of this Act, a probationer is sentenced for the offence for which he was placed on probation, the probation order shall cease to have effect.

5 Breach of requirement of probation order

(1) If at any time during the probation period it appears on complaint to a justice that the probationer has failed to comply with any of the requirements of the order, the justice may issue a summons requiring the probationer to appear at the place and time specified therein, or may, if the complaint is in writing and on oath, issue a warrant for his arrest.

(2) If without reasonable excuse a person fails to comply with any of the requirements of a probation order made in respect of that person, that person shall be liable on summary conviction, to custody for a term not exceeding 6 months or to a fine not exceeding £5,000, or to both.

(2A) A conviction for an offence under subsection (2) is in addition to and does not affect the conviction in respect of which the person was placed on

probation nor the continuance of the probation order nor the powers that may be exercised by a court in respect of the person, conviction or order.

(3) If, on the application of a probation officer, it is proved to the satisfaction of the court before which a probationer appears or is brought under this section that the probationer has failed to comply with any of the requirements of the probation order, that court may-

(a) if the probation order was made by a court of summary jurisdiction, deal with the probationer, for the offence in respect of which the probation order was made, in any manner in which the court could deal with him if it had just convicted him of that offence;

(b) if the probation order was made by a Court of General Gaol Delivery, commit him to custody or release him on bail (with or without sureties) until he can be brought or appear before the court of General Gaol Delivery.

(4) Where the court of summary jurisdiction deals with the case as provided in paragraph (b) of the last foregoing subsection, then-

(a) the court shall send to the Court of General Gaol Delivery a certificate signed by a justice, certifying that the probationer has failed to comply with such of the requirements of the probation order as may be specified in the certificate, together with any such other particulars of the case as may be desirable; and a certificate purporting to be so signed shall be admissible as evidence of the failure before the Court of General Gaol Delivery; and

(b) where the probationer is brought or appears before the Court of General Gaol Delivery, and it is proved to the satisfaction of that Court that he has failed to comply with any of the requirements of the probation order, that court may deal with him, for the offence in respect of which the probation order was made, in any manner in which the court could deal with him if he had just been convicted before that court of that offence.

(5) .....

(6) A probationer who is required by the probation order to submit to treatment for his mental condition shall not be treated for the purposes of this section as having failed to comply with that requirement on the ground only that he has refused to undergo any surgical, electrical or other treatment if, in the opinion of the court, his refusal was reasonable having regard to all the circumstances; and without prejudice to the provisions of section seven of this Act a probationer who is convicted of an offence committed during the probation period shall not on that account be liable to be dealt with under this section for failing to comply with any requirement of the probation order…

7 Commission of further offence or breach of condition

(1) If it appears to a judge or a justice on whom jurisdiction is hereinafter conferred that a person in whose case a probation order or an order for conditional discharge has been made has been convicted by a court in any part of the British Islands of an offence committed during the probation period or during the period of conditional discharge, and has been dealt with in respect of that offence, or has, during the period of conditional discharge, failed to comply with any condition specified in the order, the judge or justice may issue a summons requiring that person to appear at the place and time specified therein, or may issue a warrant for his arrest:

Provided that a justice shall not issue such a summons except on complaint and shall not issue such a warrant except on complaint in writing and on oath.

(2) The following persons shall have jurisdiction for the purposes of the foregoing subsection, that is to say-

(a) if the probation order or the order for conditional discharge was made by the Court of General Gaol Delivery, a judge of that court;

(b) if the order was made by a court of summary jurisdiction, a justice;

(c) in the case of a probation order, by whatever court it was made, a justice.

(3) A summons or warrant issued under this section shall direct the person named therein to appear or to be brought before the court by which the probation order or the order for conditional discharge was made:

Provided that-

(a) if that court is a court of summary jurisdiction and the summons or warrant is issued by the High Bailiff or a justice, the summons or warrant may direct him to appear or to be brought before the supervising court; and

(b) if a warrant is issued requiring him to be brought before a Court of General Gaol Delivery, and he cannot forthwith be brought before that court because that court is not being held, the warrant shall have effect as if it directed him to be brought before a court of summary jurisdiction; and the court of summary jurisdiction shall commit him to custody or release him on bail (with or without sureties) until he can be brought or appear before the Court of General Gaol Delivery.

(4) If a person in whose case a probation order or an order for conditional discharge has been made by a Court of General Gaol Delivery is convicted and dealt with by a court of summary jurisdiction in respect of an offence committed during the probation period or during the period of conditional discharge, the court of summary jurisdiction may commit him to custody or release him on bail (with or without sureties) until he can be brought or appear before the court by which the order was made, and if it does so the court of summary jurisdiction shall send to the Court of General Gaol Delivery a copy of the minute or memorandum of the conviction entered in the Order Book certified by the clerk of the court.

(5) Where it is proved to the satisfaction of the court by which a probation order or an order for conditional discharge was made, or, if the order (being a probation order) was made by a court of summary jurisdiction, to the satisfaction of that court or the supervising court, that the person in whose case that order was made has been convicted and dealt with in respect of an offence committed during the probation period, or during the period of conditional discharge, as the case may be, or has, during the period of conditional discharge, failed to comply with any condition specified in the order, the court may deal with him, for the offence for which the order was made, in any manner in which the court could deal with him if he had just been convicted by or before that court of that offence.

(6) If a person in whose case a probation order or an order for conditional discharge has been made by a court of summary jurisdiction is convicted before a Court of General Gaol Delivery of an offence committed during the probation period or during the period of conditional discharge, or is dealt with by a Court of General Gaol Delivery for an offence so committed in respect of which he was committed for sentence to that court, the Court of General Gaol Delivery may deal with him, for the offence for which the order was made, in any manner in which the court of summary jurisdiction could deal with him if it had just convicted him of that offence.

(7) If a person in whose case a probation order or an order for conditional discharge has been made by a court of summary jurisdiction is convicted by another court of summary jurisdiction of any offence committed during the probation period or during the period of conditional discharge, that court may, if it

is satisfied that it has the consent of the court which made the order or, in the case of a probation order, if it is satisfied that it has the consent of that court or of the supervising court, deal with him, for the offence for which the order was made, in any manner in which the court could deal with him if it had just convicted him of that offence.

8 Supplementary provisions as to probation and discharge

(1) Without prejudice to the provisions of section 82(3) of the Children and Young Persons Act 2001 (which enables a court to order the parent or guardian of a child or young person found guilty of an offence to give security for his good behaviour), any court may , on making a probation order or an order for conditional discharge under this Act, if it thinks it expedient for the purpose of the reformation of the offender, allow any person who consents to do so to give security for the good behaviour of the offender and, in the case of an order of conditional discharge wherein conditions are specified, for compliance with such conditions, and section ten of this Act shall apply to any security so given before a court of summary jurisdiction.

(2) and (3) .....

(4) In proceedings before a Court of General Gaol Delivery under the foregoing provisions of this Act, any question whether a probationer has failed to comply with the requirements of the probation order or has been convicted of an offence committed during the probation period, and any question whether any person in whose case an order for conditional discharge has been made has failed to comply with any condition specified therein or has been convicted of an offence committed during the period of conditional discharge, shall be determined by the court and not by the verdict of a jury.

9 Effects of probation and discharge

(1) Subject as hereinafter provided, a conviction of an offence for which an order is made under this Act placing the offender on probation or discharging him absolutely or conditionally 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 of any subsequent proceedings which may be taken against the offender under the foregoing provisions of this Act:

Provided that where an offender, being not less than seventeen years of age, at the time of his conviction of an offence for which he is placed on probation or conditionally discharged as aforesaid, is subsequently sentenced under this Act for that offence, the provisions of this subsection shall cease to apply to the conviction.

(2) Without prejudice to the foregoing provisions of this section, the conviction of an offender who is placed on probation or discharged absolutely or conditionally as aforesaid shall in any event be disregarded for the purposes of any enactment which imposes any disqualification or disability upon convicted persons or authorises or requires the imposition of any such disqualification or disability.

(3) The foregoing provisions of this section shall not affect-

(a) any right of any such offender as aforesaid to appeal against his conviction, or to rely thereon in bar of any subsequent proceedings for the same offence;

(b) the revesting or restoration of any property in consequence of the conviction of any such offender, or

(c) the operation, in relation to any such offender, of any enactment in force at the commencement of this Act which is expressed to extend to persons

dealt with under subsection (1) of section three of the Probation of Offenders Act, 1913, as well as to convicted persons."

222. The First Schedule contains provisions in respect of the discharge and amendment of probation orders. The following are extracts from the First Schedule :

" Discharge

1. The court by which a probation order was made may, upon application made by the probation officer or other person responsible for the supervision of the offender or by the probationer, discharge the order…

3. Without prejudice to the provisions of the last foregoing paragraph, the supervising court may, upon application made by the probation officer or other person responsible for the supervision of the offender or by the probationer, by order amend a probation order by cancelling any of the requirements thereof or by inserting therein (either in addition to or in substitution for any such requirement) any requirement which could be included in the order as if it were then being made by that court in accordance with the provisions of sections two and three of this Act:

Provided that-

(a) the court shall not amend a probation order by reducing the probation period, or by extending that period beyond the end of three years from the date of the original order;

(b) the court shall not so amend a probation order that the probationer is thereby required-

(i) to reside in an approved probation hostel, or in any other institution, or

(ii) to submit to treatment for his mental condition,

for such period as is specified in the order;

(c) the court shall not amend a probation order by inserting therein a requirement that the probationer shall submit to treatment for his mental condition unless the amending order is made within three months after the date of the original order.

4. Where the medical practitioner by whom or under whose direction a probationer is being treated for his mental condition in pursuance of any requirement of the probation order is of opinion-

(a) that the treatment of the probationer should be continued beyond the period specified in that behalf in the order; or

(b) that the probationer needs different treatment, being treatment of a kind to which he could be required to submit in pursuance of a probation order; or

(c) that the probationer is not susceptible to treatment; or

(d) that the probationer does not require further treatment;

or where the practitioner is for any reason unwilling to continue to treat or direct the treatment of the probationer, he shall make a report in writing to that effect to the probation officer and the probation officer shall apply to the supervising court for the variation or cancellation of the requirement.

General

5. Where the supervising court proposes to amend a probation order under this Schedule, otherwise than on the application of the probationer, it shall summon him to appear before the court; and if the probationer is not less than fourteen years of age, the court shall not amend a probation order unless the

probationer expresses his willingness to comply with the requirements of the order as amended:
Provided that this paragraph shall not apply to an order cancelling a requirement of the probation order or reducing the period of any requirement.
6. On the making of an order discharging or amending a probation order, the High Bailiff or the clerk to the court, as the case may be, shall forthwith give copies of the discharging or amending order to the probation officer or other person responsible for the supervision of the offender, and the probation officer shall give a copy to the probationer and to the person in charge of any place in which the probationer is or was required by the order to reside."

223. Schedule 1A contains provisions in respect of additional requirements of probation orders as follows:

"Requirements as to testing for drugs
1. This Schedule applies where a court proposing to make a probation order is satisfied that the offender is dependent on or has a propensity to misuse drugs.
2. A probation order may include a requirement ('the testing requirement') that the offender submits, during the whole or a specified part of the probation period, to periodic testing for the purpose of ascertaining the presence of drugs in the offender's body.
3. The offender shall, in accordance with the terms of the testing requirement, provide at such times and in such circumstances as may be determined by the probation officer responsible for the supervision of the offender, samples of such description as may be so determined.
4. The probation officer responsible for the supervision of the offender shall make arrangements with a person having the necessary qualifications to take such samples as are appropriate to comply with the testing requirement.
5. The testing requirement shall specify the frequency of testing and the drugs for which the tests are to be undertaken.
6. (1) If at any time during the probation period a sample taken from the offender shows-
(a) the presence in his body of relevant drugs when none were present when the offender was last tested; or
(b) the level of relevant drugs in his body is no less than when last tested,
that shall be treated as constituting a failure to comply with the requirements of the probation order and section 5 shall have effect accordingly.
(2) In this paragraph 'relevant drugs' means the drugs for which testing is required under the testing requirement."

224. *Cullen v Rogers* [1982] 2 All ER 571 is a useful reminder to those imposing probation orders to take care in relation to the imposition of conditions. There are limitations.

Combination order

225. Section 7 of the Criminal Justice (Penalties Etc.) Act 1993 provides that where a person over 14 years of age is convicted of an offence (not being an offence for which the sentence is fixed by law) the court

may, instead of dealing with him in any other way, make a combination order. A combination order is an order requiring the convicted person both (a) to be under the supervision of a probation officer for a period specified in the order not being less than 12 months nor more than 3 years and (b) to perform unpaid work for a number of hours so specified being in the aggregate not less than 40 hours and not more than 120 hours. The court shall not make a combination order unless it is of the opinion that (a) the offence or the combination of the offence and another offence associated with it, is serious enough to warrant such a sentence and (b) the order is the most suitable for the offender. See also sections 2 to 9 of the Criminal Justice Act 1963 and section 14 and schedule 3 Criminal Law Act 1981.

Electronic monitoring

226. See section 47 of the Criminal Justice, Police and Courts Act 2007 in respect of electronic monitoring and community orders.

Exclusion order

227. Under the Criminal Justice (Exclusion of Non-Resident Offenders) Act 1998 the court is given the power to make an exclusion order. The following are extracts from the 1998 Act:

"1 (1) Subject to the provisions of this Act, where a court convicts a person of an offence for which he is punishable with custody, the court may make an order prohibiting that person from being in, or entering the Island.
(2) An exclusion order-
(a) shall expire at the end of the period of 5 years beginning with the day on which it comes into operation; and
(b) shall not come into operation until (disregarding any power of a court to grant leave to appeal out of time) there is no further possibility of an appeal on which the order could be varied or set aside.
(3) An exclusion order may be made-
(a) on application by the prosecutor; or
(b) by the court of its own motion.
(4) A person who is subject to an exclusion order is guilty of an offence if he fails to comply with the order at a time after he has been, or has become liable to be, removed from the Island under this Act and shall be liable on summary conviction to custody for a term not exceeding 6 months or a fine not exceeding £5,000 or both.
(5) In proceedings against a person for an offence under subsection (4) it shall be a defence for him to show that he took all reasonable steps and exercised all due diligence to avoid committing the offence.
(6) In this Act, an order under subsection (1) is referred to as an 'exclusion order'.
2 Cases in which exclusion orders shall not be made
(1) A court shall make an exclusion order if it is satisfied that-

(a) it is conducive to the public good; and

(b) the circumstances are such that the order is not in breach of any international obligation of the United Kingdom which has effect in relation to the Island; and

(c) the circumstances otherwise justify the making of the order.

(2) An exclusion order shall not be made in respect of a person who, on the date on which the order is made,-

(a) is ordinarily resident in the Island; or

(b) is an Isle of Man Worker within the meaning of the Control of Employment Act 1975; or

(c) has not attained the age of 17 at the time of his conviction or, on consideration of any available evidence, it appears to the court that he has not done so; or

(d) has a child, parent or spouse who is ordinarily resident in the Island.

(3) When any question arises under this Act whether or not a person is entitled to rely on subsection (2), it shall lie on the person asserting it to prove that he is.

(4) Before making an exclusion order, a court shall explain to the person concerned, so far as material, the effect of subsection (2).

3 Exclusion orders: supplementary provisions

(1) An exclusion order may be made in addition to any other sentence or order which may be made on conviction.

(2) Subject to section 1(2), an exclusion order may be suspended so as to come into operation immediately after a convicted person has served a term in custody.

(3) The question whether an offence is one for which a person is punishable with a term of custody shall be determined without regard to any enactment restricting the custody of young offenders or persons who have not previously been sentenced to imprisonment.

(4) A person who has at any time become ordinarily resident in the Island shall not be treated for the purposes of this Act as having ceased to be so resident by reason only of his having remained in the Island in breach of any statutory provision other than this Act.

(5) A person shall not be treated as becoming ordinarily resident in the Island by reason only of his serving a term of custody in the Island.

(6) The fact that an exclusion order against a person has expired shall not prevent the making of a further exclusion order against him.

4 Appeals against exclusion orders

(1) When a court makes an exclusion order, the validity of the order shall not be called into question by any other court except on an appeal to the Staff of Government Division against the order or against the conviction on which it is made.

(2) An exclusion order shall be treated as a sentence for the purpose of any enactment providing an appeal against sentence.

5 Postponed determinations

(1) Where a court considers that it requires further information before making an exclusion order it may, for the purpose of enabling that information to be obtained, postpone making the order for such period as it may specify.

(2) More than one postponement may be made under subsection (1) in relation to the same case.

(3) The court shall not specify a period under subsection (1) which-

(a) by itself, or

(b) where there have been one or more previous postponements under subsection (1), when taken together with the earlier specified period or periods, exceed 14 days beginning with the date of conviction.

(4) A postponement or extension under subsection (1) may be made-

(a) on application by the defendant or the prosecutor; or

(b) by the court of its own motion.

(5) Where the court exercises its power under subsection (1), it may nevertheless proceed to sentence, or otherwise deal with, the defendant in respect of the offence in question.

(6) In this section 'the date of conviction' means-

(a) the date on which the defendant was convicted; or

(b) where he appeared to be sentenced in respect of more than one conviction, and those convictions were not all on the same date, the date of the latest of those convictions.

6 Removal directions

(1) When making an exclusion order, the court may, in accordance with the following provisions of this section, give directions for-

(a) the removal from the Island of a person who is subject to an exclusion order; and

(b) where the court thinks fit, the detention of the person pending his removal.

(2) Directions under this section may be directions for the removal from the Island of the person in question in accordance with arrangements to be made by the Chief Constable in compliance with the directions.

(3) Directions under this section shall specify the country or territory to which the person in question is to be removed.

(4) No directions under this section shall be for the removal of a person to any country or territory other than one-

(a) of which the person in question is a national or citizen;

(b) in which he obtained a passport or other document of identity; or

(c) to which there is reason to believe that he will be admitted.

(5) No directions under this section shall be given for the removal of a British citizen, a British Dependent Territories citizen, a British Overseas citizen or a British National (Overseas) to a country or territory outside the United Kingdom unless he is also a national or citizen of, or has indicated that he is willing to be removed to, that country or territory.

(6) A person in respect of whom directions are given under this section may be placed under the authority of a police constable or a prison officer on board any ship or aircraft in which he is to be removed in accordance with the directions.

(7) The costs of complying with any directions under this paragraph shall be defrayed by the Department of Home Affairs out of money provided by Tynwald.

7 Detention pending removal

(1) A person in respect of whom directions for detention pending removal have been given under section 6, may be detained in accordance with the directions.

(2) A person liable to be detained under this section may be arrested without warrant by a police constable.

(3) The captain of a ship or aircraft, if so requested by a police constable or a prison officer, may prevent any person placed on board the ship or aircraft

under section 6 from disembarking in the Island or, before the directions for his removal have been fulfilled, elsewhere.

(4) Where under subsection (3) the captain of a ship or aircraft is requested to prevent a person from disembarking he may for that purpose detain him in custody on board the ship or aircraft.

8 Detention: supplementary provisions

(1) If a justice of the peace is satisfied that there are reasonable grounds for suspecting that a person liable to be arrested under section 7 is to be found on any premises he may grant a search warrant authorising any constable to enter those premises for the purpose of searching for and arresting that person.

(2) A person detained under this Act shall be deemed to be in legal custody at any time when he is so detained and, if detained otherwise than on board a ship or aircraft, may be detained in such a place as the Department of Home Affairs may from time to time direct.

(3) Where a person is detained under this Act, any police constable or prison officer may take all such steps as may be reasonably necessary for photographing, measuring or otherwise identifying him.

(4) Any person detained under this Act may be taken in the custody of a constable or a prison officer to and from any place where his attendance is required for the purpose of establishing his nationality or citizenship or for making arrangements for his admission to a country or territory outside the United Kingdom or where he is required to be for any other purpose connected with the operation of this Act."

228. The Appeal Division (Judge of Appeal Tattersall and Deemster Cain) in *Campbell* (judgment delivered 3rd July 2002) considered an exclusion order that had been imposed against a defendant who had pleaded guilty to the offence of harassment. The Appeal Division felt that the terminology of section 2(1)(a) of the Criminal Justice (Exclusion of Non-Resident Offenders) Act 1998 was readily understandable and that there was a clear test to apply. The Appeal Division did not consider that the English authorities on deportation were of any assistance in this context. At paragraph [19] of the judgment the Appeal Division stated:

"In our judgment the test which is to be applied in determining whether to make an exclusion order is clearly set out in section 2(1) and does not include the risk re-offending. The test includes whether it is conducive to the public good to make such an order and whether the circumstances otherwise justify the making of an order".

229. The Appeal Division in the *Campbell* case concluded as follows:

"[20] On the facts of this case we are satisfied that the requirements of section 2(1) were met. The Appellant had no connection whatsoever with the Island, save that he had hoped to settle here with Miss Clark. That did not happen. His behaviour towards Miss Clark was disgraceful. He is a man with many previous convictions. We have no doubt whatsoever that his exclusion from the Island is conducive to the public good and that all the circumstances justify the making of

an exclusion order. Accordingly we can see no merit in this appeal and it is dismissed."

230. The Appeal Division (Deemster Kerruish and Deemster Doyle) in *Department of Tourism and Leisure v Maule* (judgment delivered on the 12th March 2007) dealt with the definition of "ordinarily resident" in the context of the Control of Employment legislation. Ordinarily resident involves some degree of permanence and an element of continuity, order or settled purpose. It may mean according to the way in which a person's life is usually ordered. It may refer to a person's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration. There must however be a degree of settled purpose and a sufficient degree of continuity.

231. The Appeal Division in *Armieneos* (judgment delivered on the 28th October 2003) held that it had jurisdiction to deal with an application for a stay of an exclusion order pending appeal. See also *Jones* 1999-01 MLR 369.

232. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *O'Keeffe* (judgment delivered 1st June 2009) dismissed an appeal against an exclusion order and stressed at paragraph 36 that:

"judicial considerations of sections 2(1) and 2(2) are completely separate and that there is no interplay between the two sub-sections."

233. The Appeal Division (Deemster Kerruish and Deemster Doyle) in *O'Reilly* (judgment delivered on the 22nd June 2009) stated:

"33. As to the words 'ordinarily resident', we refer to *R v Barnet London Borough Council Ex parte Nilish Shah* [1983] 2 AC 309, and part of Lord Scarman's judgment at 341e-g, in which he cited with approval the judgment of Lord Warrington in *Levene –v- IRC*, thus:-

In Levene's case [[1928] AC 217] Lord Warrington of Clyffe said, at p.232:

'I do not attempt to give any definition of the word "resident". In my opinion it has no technical or special meaning for the purposes of the Income Tax Act. "Ordinarily resident" also seems to me to have no such technical or special meaning. In particular it is in my opinion impossible to restrict its connotation to its duration. A member of this House may well be said to be ordinarily resident in London during the Parliamentary session and in the country during the recess. If it has any definite meaning I should say it means according to the way in which a man's life is usually ordered.'"

Lord Scarman continued at 343g-344b and 344c:-

"Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that 'ordinarily resident' refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration.

There is, of course, one important exception. If a man's presence in a particular place or country is unlawful, e.g. in breach of the immigration laws, he cannot rely on his unlawful residence as constituting ordinary residence (even though in a tax case the Crown may be able to do so) … There is indeed express provision to this effect in the [Immigration] Act of 1971, section 33(2). But even without this guidance I would conclude that a man could not rely on his own unlawful act to secure an advantage which could have been obtained if he had acted lawfully.

…
And there must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. All the law requires is that there is a settled purpose. This is not to say that the propositus [the applicant] intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled."

34. The proper interpretation of the words "ordinarily resident" must, of course, depend on the statutory framework and the legal context in which it arises. We agree that it is a question of degree and involves a consideration of the purpose of the relevant statute and all the circumstances of the case.

35. The purpose of the Act is to enable a court to exclude a non-resident offender from the Island if the court is satisfied that such exclusion is conducive to the public good, not in breach of any international obligation of the United Kingdom which has effect in relation to the Island and the circumstances otherwise justify the making of the exclusion order. However, section 2(2) of the Act provides, inter alia, that an exclusion order shall not be made in respect of a person who, on the date on which the order is made, is ordinarily resident on the Island. Section 2(3) places the onus on the person to prove that one, or more of the provisions of section 2(2) apply to him as at the date of sentence.

36 If a person's presence on the Isle of Man is unlawful that person cannot rely on his unlawful residence as constituting ordinary residence for the purposes of section 2(2)(a). If a person moves to, and takes up residence on the Island in an endeavour to avoid the criminal legal process in another jurisdiction then he cannot be said to be lawfully ordinarily resident on the Island. In this case, whilst there was no restriction to prevent the Appellant moving to the Island on, or about 3rd January 2007, his failure to attend the Irish court on 18th January 2007, and our

finding that he was aware of such court appearance leads us to the conclusion that the Appellant moved to the Island to avoid such court appearance. His residence on the Island was unlawful. Thus, he cannot be said to have been lawfully ordinarily resident when the First Exclusion Order was made.

37. We dismiss the appeal."

Register of sex offenders

234. Section 1 of the Criminal Justice Act 2001 and Schedule 1 provides for a register of sex offenders. The following are extracts from the Schedule:

"Schedule 1
Registration of Sex Offenders
Section 1
Notification Requirements for Sex Offenders
Sex offenders subject to notification requirements
1. (1) A person becomes subject to the notification requirements of this Schedule (in this Schedule referred to as 'the notification requirements') if, after the commencement of this Schedule-

(a) he is-

(i) convicted of an offence specified in paragraph 2 (in this Schedule referred to as a 'scheduled offence'); or

(ii) found not guilty of a scheduled offence by reason of insanity, or to be under a disability and to have done the act charged against him in respect of such an offence; and

(b) the court by which he is convicted has by order directed that he is subject to the notification requirements.

(2) A person becomes subject to the notification requirements if, after the commencement of this Schedule-

(a) in the Island, he is cautioned by a constable in respect of a scheduled offence which, at the time when the caution is given, he has admitted; and

(aa) before giving the caution-

(i) the constable has served on the person a notice, in such form as is prescribed by order made by the Department of Home Affairs, setting out the consequences of accepting a caution under this Schedule; and

(ii) the person must consent to the caution being given; and

[Head (aa) inserted by Sex Offenders Act 2006 s 15.]

(b) at the time when the caution is given, he is served with a notice, in such form as is prescribed by an order made by the Department of Home Affairs, which directs that he is subject to the notification requirements.

(3) A person falling within sub-paragraphs (1) and (2) shall continue to be subject to the notification requirements for such period as is directed by-

(a) the court under sub-paragraph (1)(b); or

(b) by the notice under sub-paragraph (2)(b), but that period shall not exceed the maximum period set out opposite a person of his description in the following:

A person who, in respect of the offence, is or has been sentenced to custody for life or for a term of 30 months or more:	An indefinite period
A person who, in respect of the offence or finding, is or has been admitted to a hospital subject to a restriction order :	An indefinite period
A person who, in respect of the offence, is or has been sentenced to custody for a term of more than 6 months but less than 30 months:	A period of 10 years beginning with the relevant date
A person who, in respect of the offence, is or has been sentenced to custody for a term of 6 months or less:	A period of 7 years beginning with the relevant date
A person who, in respect of the offence or finding, is or has been admitted to a hospital without being subject to a restriction order:	A period of 7 years beginnings with the relevant date
A person of any other description:	A period of 5 years beginning with the relevant date

(4) Sub-paragraph (5) applies where a person falling within sub-paragraph (1)(a) is or has been sentenced, in respect of two or more scheduled offences-

(a) to consecutive terms of custody; or

(b) to terms of custody which are partly concurrent.

(5) In cases to which this sub-paragraph applies, sub-paragraph (3) shall have effect as if the person were or had been sentenced, in respect of each of the offences, to a term of custody which-

(a) in the case of consecutive terms, is equal to the aggregate of those terms;

(b) in the case of concurrent terms, is equal to the aggregate of those terms after making such deduction as may be necessary to secure that no period of time is counted more than once.

(6) Where a person found to be under a disability, and to have done the act charged against him in respect of a scheduled offence, is subsequently tried for the offence, the finding, and any order made in respect of the finding, shall be disregarded for the purposes of this paragraph.

(7) In this Schedule 'the relevant date' means-

(a) in a case of a person falling within sub-paragraph (1)(a)(i), the date of the conviction;

(b) in a case of a person falling within sub-paragraph (1)(a)(ii), the date of the finding;

(c) in a case of a person falling within sub-paragraph (2)(b) , the date of the caution.

(8) A direction by the court under sub-paragraph (1)(b) shall be treated for the purposes of any enactment relating to appeals to be a sentence passed on conviction.

(9) A person who is the subject of a notice under sub-paragraph (2)(b) may by complaint appeal against the direction to the High Bailiff.

(10) On the determination of a complaint under sub-paragraph (9), the High Bailiff may cancel, vary or uphold the declaration.

(11) A determination of the High Bailiff under sub-paragraph (10) may be appealed against in the same manner as an appeal against sentence passed on conviction and any enactment relating to appeals shall apply accordingly.

(12) An order under sub-paragraph (2)(b) shall be laid before Tynwald.

Serious offences which are 'scheduled offences'

2. (1) The following offences are scheduled offences-

(a) offences under the following provisions of the Sexual Offences Act 1992-

(i) section 1 (rape);
(ii) section 2 (procurement by threats or lies);
(iii) section 3 (administering drugs to obtain or facilitate sexual act);
(iv) section 4 (intercourse with young people);
(v) section 5 (sexual act with subnormal person);
(vi) section 6 (sexual act with a mental patient);
(vii) section 7 (incest);
(viii) an offence under section 8 (incitement to commit incest);
(ix) section 9 (unnatural offences);
(x) section 11 (assault with intent to commit buggery);
(xi) section 12 (bestiality);
(xii) section 13 (indecent assault);
(xiii) an offence under section 14 (indecent conduct towards young people);
(xiv) section 18 (procurement of a young person);
(xv) section 19 (procurement of subnormal person);
(xvi) section 23 (causing or encouraging prostitution of, intercourse with, or indecent assault on, young people);
(xvii) section 24 (causing or encouraging prostitution of subnormal person);
(xviii) section 25 (living on or controlling prostitution);
(xix) section 28 (keeping a brothel);
(xx) an offence equivalent to any of those in heads (i) to (xix) if that offence was an offence under an enactment repealed by the Sexual Offences Act 1992;

[Subhead (xx) added by Sex Offenders Act 2006 s 15.]

(b) an offence under Schedule 3 to this Act (indecent photographs of children);

(c) subject to sub-paragraph (2)(b), an offence under section 178 of the Customs and Excise Management Act 1986 (penalty for fraudulent evasion of duty etc.) in relation to goods prohibited to be imported under section 42 of the Customs Consolidation Act 1876 (prohibitions and restrictions) (an Act of Parliament) as it has effect in the Island;

(d) offences under section 2 of the Obscene Publications and Indecent Advertisements Act 1907 (printing, selling, etc. indecent or obscene publications);

(e) an offence under section 9 of the Theft Act 1981 of burglary with intent to commit rape;

(f) an offence of conspiracy to commit any of those offences;

(g) an offence of attempting to commit any of those offences;

(ga) an offence under section 9A of the Sexual Offences Act 1992 (abuse of position of trust);

[Head (ga) inserted by Sexual Offences (Amendment) Act 2006 s 3.]

(gb) an offence under section 18A of the Sexual Offences Act 1992 (meeting a person under 16 following sexual grooming); and

[Head (gb) inserted by Sexual Offences (Amendment) Act 2006 s 3.]

(h) an offence of inciting another to commit any of those offences.

(2) In sub-paragraph (1)-

(a) heads (a)(iv) and (viii), (ga) and (gb) do not apply in respect of a first offence committed by an offender who, at the time of the offence, was under 18; and

[Head (a) amended by Sexual Offences (Amendment) Act 2006 s 3.]

(b) head (c) does not apply where the prohibited goods did not include indecent photographs or pseudo photographs of a person which give the impression or predominant impression that the person shown is a child.

(3) For the purposes of sub-paragraph (2)(b), paragraph 7 of Schedule 3 to this Act (interpretation) shall apply as it applies for the purposes of that Schedule.

Effect of notification requirements

3. (1) A person who is subject to the notification requirements shall, before the end of the period of 2 days beginning with the relevant date or, if later, the commencement of this Schedule, notify to the police the following information, namely-

(a) his name and, where he also uses one or more other names, each of those names;

(b) his home address;

(c) the nature and place of his employment; and

(d) the name and business address of his employer.

(2) A person who is subject to the notification requirements shall also, before the end of the period of 2 days beginning with-

(a) his using a name which has not been notified to the police under this paragraph;

(b) any change of his home address;

(c) his having resided or stayed, for a qualifying period, at any premises in the Island, the address of which has not been notified to the police under this paragraph; or

(d) any change of the nature and place of his employment.

notify that name, the effect of that change or, as the case may be, the address of those premises to the police.

(3) A notification given to the police by any person shall not be regarded as complying with sub-paragraph (1) or (2) unless it also states-

(a) his date of birth;

(b) his name on the relevant date and, where he used one or more other names on that date, each of those names; and

(c) his home address on that date.

(4) For the purpose of determining any period for the purposes of sub-paragraph (1) or (2) , there shall be disregarded any time when the person in question-

(a) is remanded in or committed to custody by an order of a court;

(b) is serving a sentence of custody or a term of service detention;

(c) is detained in a hospital; or

(d) is outside the Island.

(5) A person may give a notification under this section-

(a) by attending at any police station in the Island and giving an oral notification to any police officer, or to any person authorised for the purpose by the officer in charge of the station; or

(b) by sending a written notification to any such police station.

(6) Any notification under this section shall be acknowledged; and an acknowledgement under this sub-paragraph shall be in writing and in such form as the Chief Constable may direct.

(7) In this paragraph-

'home address', in relation to any person, means the address of his home, that is to say, his sole or main residence in the Island or, where he has no such residence, premises in the Island which he regularly visits;

'qualifying period' means-

(a) a period of 14 days; or

(b) two or more periods, in any period of 12 months, which (taken together) amount to 14 days.

Travel notification

3A. (1) The Department may by regulations make provision requiring relevant offenders who leave the Island, or any description of such offenders-

(a) to give in accordance with the regulations, before they leave, a notification under subparagraph (2);

(b) if they subsequently return to the Island, to give in accordance with the regulations a notification under sub-paragraph (3).

(2) A notification under this sub-paragraph must disclose-

(a) the date on which the offender will leave the Island;

(b) the country (or, if there is more than one, all the countries) to which the offender will travel and the offender's point of arrival (determined in accordance with the regulations) in each country;

(c) any other information prescribed by the regulations which the offender holds about the offender's departure from or return to the Island and the offender's movements and place or places of accommodation while outside the Island.

(3) A notification under this sub-paragraph must disclose any information prescribed by the regulations about the offender's return to the Island.

(4) Regulations under sub-paragraph (1) may make different provision for different categories of person.

(5) Regulations under sub-paragraph (1) shall be laid before Tynwald.

[Para 3A inserted by Criminal Justice, Police and Courts Act 2007 s 1.]

Offences

4. (1) If a person-

(a) fails, without reasonable excuse, to comply with paragraph 3(1) or (2) ; or

(b) notifies to the police, in purported compliance with paragraph 3(1) or (2), any information which he knows to be false,

that person shall be liable-

(i) on summary conviction to a fine not exceeding £5,000, or to custody for a term not exceeding 6 months, or to both; or

(ii) on conviction on information to a fine, or to custody for a term not exceeding 5 years, or to both.

[Subpara (1) amended by Criminal Justice, Police and Courts Act 2007 s 1.]

(2) A person commits an offence under sub-paragraph (1)(a) on the day on which he first fails, without reasonable excuse, to comply with paragraph 3(1) or (2) and continues to commit it throughout any period during which the failure

continues; but a person shall not be prosecuted under that provision more than once in respect of the same failure.

(3) If a person-

(a) fails, without reasonable excuse, to comply with sub-paragraph (3A) or regulations under that sub-paragraph; or

(b) notifies to the police, in purported compliance with sub-paragraph (3A) or regulations under that sub-paragraph, any information which the person knows to be false'

that person shall be liable-

(i) on summary conviction to a fine not exceeding £5,000, or to custody for a term not exceeding 6 months, or to both; or

(ii) on conviction on information to a fine, or to custody for a term not exceeding 5 years, or to both.

[Subpara (3) added by Criminal Justice, Police and Courts Act 2007 s 1.]

Young offenders

5. (1) In the case of a person who is under 18 on the relevant date, paragraph 1(3) shall have effect as if for any reference to a period of 10 years, 7 years or 5 years there were substituted a reference to one-half of that period.

(2) In the case of a person who is under 18 on the relevant date, the court may direct that, until he attains that age, paragraphs 3, 3A and 4 and regulations under paragraph 3A shall have effect as if an individual having parental responsibility for him-

(a) were authorised to comply on his behalf with the provisions of paragraph 3 and 3A and regulations under that paragraph ; and

[Item (a) amended by Criminal Justice, Police and Courts Act 2007 s 1.]

(b) were liable in his stead for any failure to comply with those provisions.

[Subpara (2) amended by Criminal Justice, Police and Courts Act 2007 s 1.]

(3) In the case of a person who is under 18, paragraph 4(1) and (3) shall have effect as if the words 'or to custody for a term not exceeding 6 months, or to both' were omitted.

[Subpara (3) amended by Criminal Justice, Police and Courts Act 2007 s 1.]

Certificates for purposes of Schedule 1

6. (1) Sub-paragraph (2) applies where, on any date after the commencement of this Schedule, a person-

(a) is convicted of a scheduled offence;

(b) is found not guilty of a scheduled offence by reason of insanity; or

(c) is found to be under a disability and to have done the act charged against him in respect of a scheduled offence.

(2) If the court by or before which the person is so convicted or so found-

(a) states in open court-

(i) that on that date he has been convicted, found not guilty by reason of insanity or found to be under a disability and to have done the act charged against him; and

(ii) that the offence in question is a scheduled offence; and

(b) certifies those facts (whether at the time or subsequently),

the certificate shall, for the purposes of this Schedule, be evidence of those facts.

(3) Sub-paragraph (4) applies where, on any date after the commencement of this Schedule, a person is in the Island cautioned by a constable in respect of a scheduled offence and which, at the time when the caution is given, he has admitted.

(4) In a case to which this sub-paragraph applies, if the constable-

(a) informs the person that he has been cautioned on that date and that the offence in question is a scheduled offence; and

(b) certifies those facts (whether at the time or subsequently) in such form as the Department of Home Affairs may by order prescribe,

the certificate shall, for the purposes of this Schedule, be evidence of those facts.

(5) An order under this paragraph shall be laid before Tynwald."

235. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Bridson* (judgment 31st July 2009) provided guidance in respect of the period of registration on Register of Sex Offenders. In *Bridson* the Appeal Division varied the order of the sentencing Deemster so that the registration continued for an indefinite period.

236. See *R v F* [2009] EWCA Crim 319 on the issue as to whether the imposition of notification requirements for an indefinite period is compatible with Article 8 of the European Convention on Human Rights. See also *R (F) v Secretary of State for the Home Department* [2010] UKSC 17.

Sex offenders travel notification order

237. See Criminal Justice Act 2001, Sex Offenders Act 2006 and the Sex Offenders Act 2006 (Sexual Offences Prevention) Order 2007. See also section 1 of the Criminal Justice, Police and Courts Act 2007 which inserts paragraph 3A in Schedule 1 to the Criminal Justice Act 2001 in respect of regulations regarding travel notifications. See the Sex Offenders (Travel Notification Requirements) Regulations 2007 (SD No 753/07). Depending on the circumstances of the case a defendant may be made subject to the travel notification requirements pursuant to the Sex Offenders (Travel Notification Requirements) Regulations 2007.

Sex offences prevention order

238. If the court is satisfied that it is necessary to make a sexual offences prevention order pursuant to section 1 of the Sex Offenders Act 2006 it may do so. Such an order should be fair and proportionate.

239. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *R v Volante* (judgment 5th September 2008) provided guidance in respect of sexual offences prevention orders. The following are extracts from the Appeal Division's judgment in *Volante* :

“90. The power of a court to make a Sexual Offences Prevention Order is contained in section 1 of the Sex Offenders Act 2006, the relevant part of which provides :

`(1) A court may make an order (`sexual offences prevention order`) under this section in respect of a person (`the defendant`) if -

(a) subsection (2) or (3) applies to the defendant ; and

(b) the court is satisfied that it is necessary to make such an order, for the purpose of protecting the public or any particular members of the public from serious sexual harm from the defendant.

(2) This subsection applies to the defendant where the court deals with him or her in respect of a listed offence.`

91. A `listed offence` is defined as an offence listed in paragraph 2 of Schedule 1 to the Criminal Justice Act 2001 and is prescribed for the purposes of this Part 1 of the Act by an order made by the Department of Home Affairs. The offences committed by the Appellant fall within such definition.

92. `Serious sexual harm` has been defined as `death or serious personal injury, whether physical or psychological, occasioned by further offences` : see *R v Halloren* [2004] 2 Cr App R (S) 57.

93. In such circumstances the Acting Deemster was entitled to make an order if satisfied that it was necessary to make the same for the purpose of protecting the public or any particular members of the public from serious sexual harm, as so defined, from the Appellant.

94. The Acting Deemster was so satisfied. Mr Quinn invites us to adopt the contrary view. We decline to do so. It is settled law that this court should only interfere with the exercise of a trial judge`s discretion if the sentence imposed is manifestly wrong or so excessive or inadequate as to appear wrong in principle or if the court erred in principle : see *Perry v Clague* [1961-71] MLR 162, at 166. We are satisfied that that having regard to all the evidence, including the victim impact statements, the Acting Deemster was entitled to impose such an order.

95. Mr Quinn`s secondary submission was that the order was wider than was necessary and that this court should impose an order with a narrower remit.

96. The material parts of section 3 of the Sex Offenders Act 2006 provides :

`(1) A sexual offences prevention order -

(a) prohibits the defendant from doing anything described in the order, and

(b) has effect for a fixed period (not less than 5 years) specified in the order or until further order.

(2) The only prohibitions that may be included in the order are those necessary for the purpose of protecting the public or any particular members of the public from serious sexual harm from the defendant.`

97. Many cases have emphasised that a Sexual Offences Prevention Order must be justified on the basis that it is necessary, as distinct from being desirable, and necessary for the reasons set out in the statute and that the terms of such Order must be tailored to meet the danger that the offender presents and should not be wider than is necessary : see *R v RH* [2006] EWCA Crim 1470 and *R v Collard* [2005] 1 Cr App R (S) 34.

98. Before this court there was much discussion as to the width of the Order made by the Acting Deemster and the proper interpretation thereof. As such discussion progressed it became clear that not only was the Order unnecessarily complex but it was far wider than could be justified as necessary. For example, the Order would have restricted the Appellant from visiting any recreational, sporting or leisure area used by children under the age of 16 years unless accompanied by an adult which we believe was unnecessary wide.

99. However although Mr Quinn submitted that it was unnecessary that the Order should expressly prohibit the Appellant from entering or attending any gymnasium frequented by children under the age of 16 years because he will not be permitted by the British Gymnastics Association to coach again, we reject this submission. We consider that it is necessary to prohibit the Appellant from acting as a coach, official or volunteer in any organisation which would involve him having contact with children.

100. In such circumstances we substitute for the Order made by the Acting Deemster, an Order in the following terms :

`AND IT IS ORDERED that the Defendant's name be added to the Sex Offender's Register for a period of 10 years and for that period the Defendant be subject to the notification requirements of Schedule 1 of the Criminal Justice Act 2001 and subject to the travel notification requirements pursuant to the Sex Offenders (Travel Notification Requirements) Regulations 2007

And the Court being satisfied that it is necessary to make a Sexual Offences Prevention Order pursuant to section 1 of the Sex Offenders Act 2006

IT IS FURTHER ORDERED that the Defendant be PROHIBITED from doing any of the following for a period of 10 years:-

[a] Entering and/or attending at any gymnasium which is frequented at any time by a child or children

[b] Acting as a coach, official, or volunteer in respect of any organisation which would involve the Defendant having any form of contact with a child or children. For the avoidance of doubt 'contact' includes non-physical contact

[c] Approaching, speaking or communicating with, in any way, either directly or indirectly, the victims or any family members of the victims or of the Prosecution witnesses at the trial who were children at the time of giving evidence

[d] To have any involvement in any capacity with a club, organisation, or association frequented by children

[e] To allow any child within his home or any part of his home, including any garden, or outbuilding belonging thereto unless [i] such child is accompanied by an adult member of the child's family, or of the Defendant's family, or [ii] such child is a member of the Defendant's family

[f] To be the supervising adult of any child in any mode of transport unless such child is a member of the Defendant's family

In this Order 'child' or 'children' means a person or persons who has, or have not attained the age of 16 years."

240. See also *R v Smith* [2009] EWCA Crim 785 and [2009] Crim LR 600.

241. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Bridson* (judgment delivered 16th June 2009) stated:

"The length of the Sexual Offences Prevention Order

43. In support of his submission that the Sexual Offences Prevention Order should have been `until further order`, and not for a fixed period of 8 years as ordered by the Acting Deemster, Mr Neale reminded the court that it is a necessary precondition to the making of such an order that the court is satisfied that it is necessary to make such an order for the purpose of protecting the public, or any particular members of the public from serious sexual harm from the Respondent.

44. In the light of Mrs Stott`s observations as to the risk of the Respondent re-offending and the risk of significant harm to others, it is unsurprising that the Acting Deemster adjudged that it was appropriate to make such an order.

45. Mr Neale submitted that where there was no material upon which the Acting Deemster could properly conclude that the protection of the public would cease to be required or the risk of harm would cease after a determinate period, he should have made an order `until further order`. He reminded the court that in *Attorney-General v Gosling* [20th November 2006] this court, as presently constituted, substituted an indeterminate life sentence for a determinate sentence where the offender constituted a danger to the public for an unpredictable period of time.

46. We note that section 7(1) of the Sex Offenders Act 2006 gives power upon application by a defendant, or the Attorney General to vary, renew or discharge a Sexual Offences Prevention Order.

47. Mr O`Neill`s response to this submission was that if the court was persuaded that a longer period than 8 years might be required for the protection of the public, the authorities could apply to extend such period.

48. Whilst we accept that there would be power to vary an order for a fixed period, in this case we are persuaded that the public need to be protected for an unpredictable period of time, the length of which is likely to depend upon the

Respondent`s willingness to undergo appropriate treatment and his response thereto. It was inappropriate to impose an order for a fixed period. In such circumstances we adjudge that the Sexual Offences Prevention Order should be `until further order` and we so order.

The period of Registration on the Sex Offences Register

49. Acting Deemster Turner ordered that the Respondent`s name be added to the Sex Offenders Register for a period of 10 years and that he be subject to the notification requirements thereto, pursuant to Schedule 1 of the Criminal Justice Act 2001.

50. Paragraph 1(3) of Schedule 1 of the Criminal Justice Act 2001 provides that the maximum period for the notification requirement for a sex offender, who has been sentenced to a period of 30 months or more is an indefinite period.

51. Given that we have increased the custodial sentence to be served by the Respondent to 42 months, there can be no doubt that this court has jurisdiction to lengthen the period of registration on the Sex Offences Register and the notification requirements thereto and can order that such should be for an indefinite period.

52. Although we note that the notification requirements in the Island are less onerous than in England and Wales, such requirements are still onerous and accordingly at the conclusion of the hearing we invited both Mr Neale and Mr O`Neill to consider whether there was any statutory power to vary any period imposed by the court for the notification requirement. Because this issue had not previously been considered by them in either their skeleton arguments or oral submissions, we ordered that supplemental written submissions should be filed by them on this discrete issue.

53. In such submissions, both Mr Neale and Mr O`Neill agreed that there is no power to amend or vary such period. Given that the point has not been fully argued, we are prepared to accept that such is the case for the purpose of this Reference alone. Should the point be raised for future consideration by this court, it must be fully argued.

54. In his skeleton arguments, Mr Neale encouraged this court to increase the period of registration to life. Mr O'Neill did not address the period of registration. Having accepted for the purpose of this Reference alone that once imposed there is no power to amend or vary a period of registration, and not having had benefit of argument, we have decided to require argument as to whether we should interfere with the period of registration, and if so, whether we such should impose an indefinite or lesser period.

Conclusion

55. We thus vary the sentence imposed by Acting Deemster Turner so that the custodial term is increased from 28 months to 42 months, and the Sexual Prevention Order is varied so that it is until further order. As to the extended licence period, and the period of registration on the Sex Offenders Register we reserve our decisions relevant to the same until we have had benefit of further

argument from Mr Neale, and Mr O'Neill, which further argument will be scheduled for the July sitting of this court."

242. See *Warren* (Appeal Division judgment 1st February 2010) in respect of sexual offences prevention orders.

Extended sentence

243. See Section 38 of the Criminal Justice Act 2001 extended licence periods in respect of sexual or violent offences. Sexual offences means an offence under paragraph 2(1) of Schedule 1. Violent offence means an offence which leads, or is intended or likely to lead, to a person's death or to physical injury to a person, and includes an offence which is required to be charged as arson (whether or not it would otherwise fall within this definition).

244. Section 38 of the Criminal Justice Act 2001 provides as follows:

> "38 Sentences extended for licence purposes
>
> (1) This section applies where a court which proposes to impose a custodial sentence for a sexual or violent offence considers that the period (if any) for which the offender would, apart from this section, be subject to a licence would not be adequate for the purpose of preventing the commission by him of further offences and securing his rehabilitation.
>
> (2) Subject to subsections (3) to (5), the court may pass on the offender an extended sentence, that is to say, a custodial sentence the term of which is equal to the aggregate of-
>
> (a) the term of the custodial sentence that the court would have imposed if it had passed a custodial sentence otherwise than under this section ('the custodial term'); and
>
> (b) a further period ('the extension period') for which the offender is to be subject to a licence and which is of such length as the court considers necessary for the purpose mentioned in subsection (1).
>
> (3) The extension period shall not exceed-
>
> (a) 10 years in the case of a sexual offence; and
>
> (b) 5 years in the case of a violent offence.
>
> (4) The term of an extended sentence passed in respect of an offence shall not exceed the maximum term permitted for that offence."

245. See *Bridson* (Appeal Division judgment 31st July 2009) in respect of extended sentences for licence purposes.

Offences to be taken into consideration

246. In respect of offences to be taken into consideration reference may be made to a list of offences prepared by the prosecution, signed by the defendant and filed with the court. The defendant's position in

relation to such list should be ascertained after he has entered his pleas in respect of the counts contained in the information. The defendant (not his counsel) should be asked in open court –

(1) Have you considered the list of offences to be taken into consideration? Have you had a full opportunity of considering the list? Do you understand the document and its effect?
(2) Do you admit each of the offences?
(3) Do you wish each of them to be taken into consideration?

It is the responsibility of the judge to ensure that the offender understands the document which he has received and that he has had time to consider it.

Fines

247. Consider the statutory maximum fine if any. In respect of time to pay see section 28 of the Criminal Jurisdiction Act 1993. In respect of committal in default of payment in respect of summary courts consider section 95 of the Summary Jurisdiction Act 1989. See section 5 of the Criminal Justice Act 1990 in respect of the procedure for enforcing fines. Consider periods of custody in default of payments of fine. See section 27 and schedule 1 of the Criminal Jurisdiction Act 1993 in respect of periods of custody for non-payment of fines.

Attendance centre

248. Under section 37 and paragraph 2(1) of Schedule 7 of the Criminal Justice Act 2001 where a person is convicted of an offence punishable with custody (not being an offence the sentence for which is fixed by law) the court may order him to attend such centre as may be specified in the order for such number of hours as may be so specified. The aggregate number of hours shall not exceed 12. Provision is also made in Schedule 7 in respect of the discharge and variation of attendance centre orders and for dealing with any breaches of attendance centre orders or attendance centre rules. See also SD No 156/05 the Attendance Centre Rules 2005. Rule 3(1) provides that the occupation and instruction given at a centre shall include a programme of group activities designed to assist offenders to acquire or develop personal responsibility, self-discipline, skills and interests.

Anti-social behaviour sentence

249. Section 28A of the Criminal Justice Act 2001 provides as follows:

"28A Anti-social behaviour sentence

(1) The court by or before which a person ('the defendant') is convicted of an offence (not being an offence the sentence for which is fixed by law) may, in addition to any penalty or sentence prescribed for the offence by the enactment creating the offence, make an order ('an anti-social behaviour sentence') under this section if subsection (2) applies.

(2) The court may make an anti-social behaviour sentence if it is satisfied-

(a) that the offence was committed in circumstances in which harassment, alarm or distress was caused by the defendant to one or more persons not of the same household as the defendant; and

(b) that an anti-social behaviour sentence is necessary to protect any person in the Island or in a particular area or locality within the Island from such further anti-social acts by the defendant; and

(c) that the offence was committed after the date on which this section comes into operation.

(3) An anti-social behaviour sentence may prohibit the defendant from doing anything described in the sentence.

(4) The prohibitions that may be imposed by an anti-social behaviour sentence are those necessary for the purpose of protecting persons in the Island or in a particular area or locality within the Island from further anti-social acts by the defendant.

(5) An anti-social behaviour sentence shall have effect for a period (not exceeding 3 years) specified in the sentence.

(6) The defendant may apply by complaint to the court which made an anti-social behaviour sentence for it to be varied or discharged by order of the court.

(7) If without reasonable excuse a person does anything which that person is prohibited from doing by an anti-social behaviour sentence, that person shall be liable-

(a) on summary conviction, to custody for a term not exceeding 6 months or to a fine not exceeding £5,000, or to both; or

(b) on conviction on information, to custody for a term not exceeding 5 years or to a fine, or to both.

(8) Where a person is convicted of an offence under subsection (7), it shall not be open to the court by or before which the person is so convicted to make an order under section 6(1)(b) (conditional discharge) of the Criminal Justice Act 1963 in respect of the offence.

(9) A conviction of an offence under subsection (7) is in addition to and does not affect the conviction in respect of which the anti-social behaviour sentence was imposed.

(10) For the purposes of any enactment conferring rights of appeal in criminal cases, an anti-social behaviour sentence is a sentence passed on the offender by the court for the offence for which the anti-social behaviour sentence was passed."

Curfew order

250. Section 29 and Schedule 5 of the Criminal Justice Act 2001 gives the court power to impose a curfew order. Schedule 5 provides as follows:

"Schedule 5
Curfew Orders
Section 29
Power for court to impose curfew order

1. (1) Where a person is convicted of an offence (not being an offence for which the sentence is fixed by law) the court by or before which he is convicted may make a curfew order, that is to say, an order requiring him to remain, for periods specified in the order, at a place so specified.

(2) A curfew order may specify different places or different periods for different days, but shall not specify-

(a) periods which fall outside the period of 6 months beginning with the day on which it is made; or

(b) periods which amount to less than 2 hours or more than 12 hours in any one day.

(3) The requirements in a curfew order shall, as far as practicable, be such as to avoid-

(a) any conflict with the offender's religious beliefs or with the requirements of any community service order, probation order, combination order, attendance centre order or supervision order to which he may be subject; and

(b) any interference with the times, if any, at which he normally works or attends school or other educational establishment.

(4) A curfew order shall include provision for making a person responsible for monitoring the offender's whereabouts during the curfew periods specified in the order; and a person who is made so responsible shall be of a description specified in an order made by the Department of Home Affairs.

(5) A court shall not make a curfew order unless the court has been notified by the Department of Home Affairs that arrangements for monitoring the offender's whereabouts are available in the area in which the place proposed to be specified in the order is situated and the notice has not been withdrawn.

(6) Before making a curfew order, the court shall explain to the offender in ordinary language-

(a) the effect of the order;

(b) the consequences which may follow if he fails to comply with any of the requirements of the order; and

(c) that the court has power to review the order on the application either of the offender or of the responsible person.

(7) Before making a curfew order, the court shall obtain and consider information about the place proposed to be specified in the order (including information as to the attitude of persons likely to be affected by the enforced presence there of the offender).

(8) The court by which a curfew order is made shall give a copy of the order to the offender and to the person responsible for monitoring the offender's whereabouts during the curfew periods specified in the order.

(9) The Department of Home Affairs may by order direct that sub-paragraph (2) shall have effect with the substitution, for any period there specified, of such period as may be specified in the order.

(10) An order under sub-paragraph (9) shall not come into operation unless it is approved by Tynwald.

Procedural requirements for curfew orders

2. (1) Where a court makes a curfew order, the particular order or orders comprising or forming part of the sentence shall be such as in the opinion of the court is, or taken together are, the most suitable for the offender and in forming that opinion, a court may take into account any information about the offender which is before it.

(2) Where a court makes a curfew order, the restrictions on liberty imposed by the order or orders shall be such as in the opinion of the court are commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it and in forming that opinion, a court shall take into account all such information about the circumstances of the offence and any offences associated with it (including any aggravating or mitigating factors) as is available to it.

Enforcement etc of curfew orders

3. (1) If at any time while a curfew order is in force in respect of an offender it appears on complaint to a justice of the peace that the offender has failed to comply with any of the requirements in a curfew order, the justice may issue a summons requiring the offender to appear at the place and time specified therein, or may, if the complaint is in writing and substantiated on oath, issue a warrant for his arrest.

(2) Any summons or warrant issued under this paragraph shall direct the offender to appear or be brought before a court of summary jurisdiction.

(3) If it is proved to the satisfaction of the court of summary jurisdiction before which an offender appears or is brought under this paragraph that he has failed without reasonable excuse to comply with any of the requirements in a curfew order, the court may-

(a) impose on him a fine not exceeding £5,000;

(b) if the curfew order was made by a court of summary jurisdiction, revoke the order and deal with the offender, for the offence in respect of which the order was made;

(c) if the order was made by a Court of General Gaol Delivery, commit him to custody or release him on bail until he can be brought or appear before that court.

(4) A court of summary jurisdiction which deals with an offender's case under sub-paragraph (3)(c) shall send to the Chief Registrar a certificate signed by a justice of the peace certifying that the offender has failed to comply with the requirements in a curfew order in the respect specified in the certificate, together with such other particulars of the case as may be desirable; and a certificate purporting to be so signed shall be admissible as evidence of the failure before a Court of General Gaol Delivery.

(5) Where, by virtue of sub-paragraph (3)(c) the offender is brought or appears before a Court of General Gaol Delivery and it is proved to the satisfaction of the court that he has failed to comply with any of the requirements in a curfew order, that court may-

(a) impose on him a fine not exceeding £5,000;

(b) revoke the order; and

(c) deal with him, for the offence in respect of which the order was made.

(6) A person sentenced under sub-paragraph (3) or (5) may appeal to the Staff of Government Division against the sentence.

(7) In proceedings before the Court of General Gaol Delivery under sub-paragraph (5), any question whether the offender has failed to comply with the requirements of the relevant order shall be determined by the Court without a jury.

Amendment of curfew orders

4. (1) Where a curfew order is in force and-

(a) on the application of the offender or the responsible person; or

(b) on the offender being convicted of an offence before a court of summary jurisdiction,

it appears to a court of summary jurisdiction that, having regard to such circumstances, it would be in the interests of justice that the order should be revoked or that the offender should be dealt with in some other manner for the offence in respect of which the order was made, the court may-

(i) if the order was made by a court of summary jurisdiction, revoke the order or revoke it and deal with the offender for that offence in any manner in which he could have been dealt with for that offence by the court which made the order if the order had not been made;

(ii) if the order was made by a Court of General Gaol Delivery, commit him to custody or release him on bail until he can be brought or appear before such a court,

and, where the court deals with his case under head (ii) it shall send to the Chief Registrar such particulars of the case as may be desirable.

(2) Where an offender in respect of whom such an order is in force-

(a) is convicted of an offence before a Court of General Gaol Delivery; or

(b) is committed by a court of summary jurisdiction to a Court of General Gaol Delivery for sentence and is brought or appears before the Court of General Gaol Delivery; or

(c) by virtue of sub-paragraph (1)(ii), is brought or appears before a Court of General Gaol Delivery,

and it appears to the Court of General Gaol Delivery to be in the interests of justice to do so, having regard to circumstances which have arisen since the order was made, the Court may revoke the order or revoke the order and deal with the offender, for the offence in respect of which the order was made, in any manner in which he could have been dealt with for that offence by the court which made the order if the order had not been made.

(3) A person sentenced under sub-paragraph (1) or (2) for an offence may appeal to the Staff of Government Division against the sentence.

(4) Where a court of summary jurisdiction proposes to exercise its powers under sub-paragraph (1) otherwise than on the application of the offender, it shall summon him to appear before the court and, if he does not appear in answer to the summons, may issue a warrant for his arrest.

Regulation of curfew orders

5. The Department of Home Affairs may make rules for regulating-

(a) the monitoring of the whereabouts of persons who are subject to curfew orders; and

(b) without prejudice to the generality of paragraph (a), the functions of the responsible person of such persons as are mentioned in that paragraph.

Interpretation

6. (1) In this Schedule-

'responsible person' means-

(a) in relation to an offender who is subject to a probation order, the probation officer responsible for his supervision;

(b) in relation to an offender who is subject to a curfew order, the person responsible for monitoring his whereabouts during the curfew periods specified in the order.

(2) References in this Schedule to the offender's being under the age of 17 years are references to his being under that age on conviction.

(3) For the purposes of paragraphs 3 and 4, the jurisdiction conferred on a court of summary jurisdiction shall be exercised by a juvenile court in the case of a juvenile.

Offenders under the age of 17 years

7. Paragraphs 1 to 6 shall not have effect in relation to offenders who are under the age of 17 years unless paragraph 8 has been brought into operation by an order under section 64.

8. (1) A court shall not make a curfew order in respect of offenders who are under the age of 17 years unless the court has been notified by the Department of Health and Social Security that arrangements for monitoring the offender's whereabouts are available in the area in which the place proposed to be specified in the order is situated and the notice has not been withdrawn.

(2) Before making a curfew order in respect of an offender who is under the age of 17 years, the court shall obtain and consider information about his family circumstances and the likely effect of such an order on those circumstances.

(3) In relation to an offender who is under the age of 17 years, paragraph 1(2)(a) shall have effect as if the reference to 6 months were a reference to 3 months.

(4) The Department of Home Affairs may by order direct that sub-paragraph (3) shall have effect with such additional restrictions as may be so specified.

(5) An order under this sub-paragraph (4) shall not come into operation unless it is approved by Tynwald."

Reparation orders and restorative justice

251. Section 35 of the Criminal Justice Act 2001 gives the court power to impose a reparation order. The relevant provisions are as follows:

"35 Reparation orders

(1) This section applies where a person is convicted of an offence other than one for which the sentence is fixed by law.

(2) Subject to the provisions of this section and section 36, the court by or before which the offender is convicted may make an order (a 'reparation order') which requires the offender to make reparation as specified in the order-

(a) to a person or persons so specified; or

(b) to the community at large;

and any person so specified must be a person identified by the court as a victim of the offence or a person otherwise affected by it.

(3) The court shall not make a reparation order unless it has been notified by the Department of Home Affairs that arrangements for implementing such orders are available and the notice has not been withdrawn.

(4) The court shall not make a reparation order in respect of the offender if it proposes-

(a) to pass on him a custodial sentence or a sentence under section 8 of the Custody Act 1995; or

(b) to make in respect of him a community service order under Schedule 3 to the Criminal Law Act 1981, a combination order under section 7 of the Criminal Justice (Penalties, Etc.) Act 1993, or a compensation order under Schedule 6 to the Criminal Law Act 1981.

(5) The court shall not make a reparation order in respect of the offender without the offender's consent.

(6) A reparation order shall not require the offender-

(a) to work for more than 24 hours in aggregate; or

(b) to make reparation to any person without the consent of that person.

(7) Subject to subsection (8), requirements specified in a reparation order shall be such as in the opinion of the court are commensurate with seriousness of the offence, or the combination of the offence and one or more offences associated with it.

(8) Requirements so specified shall, as far as practicable, be such as to avoid-

(a) any conflict with the offender's religious beliefs; and

(b) any interference with the times, if any, at which the offender normally works or attends school or any other educational establishment.

(9) Any reparation required by a reparation order-

(a) shall be made under the supervision of a relevant officer; and

(b) shall be made within a period of 3 months from the date of the making of the order.

(10) In this section 'the relevant officer' means-

(a) in the case of a person of or over 17 years of age, by a person nominated by the Department of Home Affairs; and

(b) in the case of a person under 17 years of age, by a person nominated by the Department of Health and Social Security.

36 Reparation orders: supplemental

(1) Before making a reparation order, a court shall obtain and consider a written report by a relevant officer (within the meaning given in subsection (10) of section 35) indicating-

(a) the type of work that is suitable for the offender; and

(b) the attitude of the victim or victims to the requirements proposed to be included in the order.

(2) Before making a reparation order, a court shall explain to the offender in ordinary language-

(a) the effect of the order and of the requirements proposed to be included in it; and
(b) the consequences which may follow under subsection (3) if he fails to comply with any of those requirements.
(3) Any person who is the subject of a reparation order and who fails to comply with its requirements shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £5,000 or to custody for a term not exceeding 6 months, or to both."

252. In *R v Clotworthy* [1998] 15 CRNZ 651 the New Zealand Court of Appeal reduced a custodial sentence in an assault case because of the offender's participation in the restorative conference. See also the speech of Lord Falconer to the Justice Research Consortium Conference, June 2004 *Restorative Justice and sentencing – facing the issues.*

253. In April 2009 the Island successfully hosted a major international criminal justice conference which, amongst other matters, considered restorative justice approaches. It is likely that the Island, subject to the will of Tynwald, will travel further along the progressive path of restorative justice in the future.

Ban from licensed premises

254. See section 33 Licensing Act 1995 and *Davidson* (Appeal Division judgment delivered 9th December 2004) is worthy of consideration.

255. In *Davidson* the Appeal Division (Deemster Kerruish and Acting Deemster Sullivan) stated:

"[11] Unfortunately, the learned High Bailiff gave no reasons for the imposition of the ban: it is therefore impossible to ascertain his reasoning in this regard. We therefore approach the consideration of the ban from first principles.

[12] Miss. Hannon submits that no ban should be imposed for any first offence committed on licensed premises. We reject such submission, each case must depend upon its individual facts. In this case, we accept, however, that this offence is at the less serious end of the spectrum, no physical violence was used or threatened, and immediately after the offensive remarks were made the Appellant left the public house. His behaviour outside the public house was inexcusable, but this was the subject of a separate charge. Of greater significance to us is that the commission of this offence was entirely coincidental. In our view, the Appellant was clearly following the South African men, and had those men entered a fast food store instead of a public house, the abusive words would no doubt have been used there instead.

[13] If the learned High Bailiff had been concerned about the Appellant's drinking habits it would have been open to him to apply a ban under subsection (4)(a) rather than (b) which is as follows:

(a) an order that he shall not purchase liquor from the holder of any licence for such period (not exceeding 5 years) from the date of the order as may be specified in the order"

We note that the Appellant was at liberty between the commission of these offences on 7th March 2004 until he was finally arrested after the latest offences, for which he was sentenced, on 22 May 2004. No other offences were committed on licensed premises in spite of the fact that the Appellant had committed offences of theft of alcohol. As previously remarked the Appellant has an appalling record for his age, but he has no other convictions in relation to licensed premises. We note he was just 18 at the time of the commission of this offence.

[14) For the reasons expressed in paragraph [11], in particular, absent any finding to the contrary, our view is that the commission of this offence was entirely coincidental to the South Africans choosing to visit a public house. In the absence of assistance of reasons for the ban, and/or its length, and bearing in mind the concomitant sentences of imprisonment totalling 14 months, we do not consider that a ban was called for in this case. We have considered what other, if any, sentence should be imposed instead of the ban. In the light of the other sentences passed on the same occasion, we intend to impose no separate penalty for this offence. To that extent this appeal is allowed."

Conditional discharge

256. Under Section 6 of the Criminal Justice Act 1963 where the court is of opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it may be inexpedient to inflict punishment and that a probation order is not appropriate the court may discharge him subject to the condition that he commits no offence during such period, not exceeding three years or discharge him conditionally on his entering into a recognizance to be of good behaviour and to comply with such conditions during such period, not exceeding three years as may be specified in the order.

257. Section 6 of the Criminal Justice Act 1963 is set out below for ease of reference:

"6 Absolute and conditional discharge

(1) Where the 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-

(a) discharging him absolutely, or,

(b) if the court thinks fit,

(i) 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, or

(ii) discharging him conditionally on his entering into a recognizance to be of good behaviour and to comply with such conditions during such period, not exceeding three years, as may be specified in the order.

(2) An order discharging a person under the provisions of paragraph (b) of subsection (1) of this section is in this Act referred to as 'an order for conditional discharge', and the period specified in any such order as 'the period of conditional discharge'.

(3) Before making an order for conditional discharge the court shall explain to the offender in ordinary language the effect of any conditions which may be contained in the order and that if he commits another offence during the period of conditional discharge or fails to comply with any conditions which may be specified in the order he will be liable to be sentenced for the original offence.

(4) Where, under the following provisions of this Act, a person conditionally discharged under this section is sentenced for the offence in respect of which the order for conditional discharge was made, that order shall cease to have effect."

258. In *Macaulay v Cain* 1978-80 MLR 75 the Appeal Division (Deemster Eason and Deemster Luft) held that under section 9 of the Criminal Justice Act 1963 a conditional discharge was deemed to be no conviction if the conditions of the conditional discharge were observed and therefore there was no right of appeal.

Absolute discharge

259. Section 6 of the Criminal Justice Act 1963 empowers a court to discharge an offender absolutely.

Pardons

260. See *Halsburys Laws* 4th Ed Vol 8(2) paragraph 823 and *Christian v Nowell* (PC) 1522-1920 MLR 5 in respect of pardons generally. See *R (Shields) v Secretary of State for Justice* (QBD judgment delivered 17th December 2008) in respect of the power to pardon prisoner sentenced abroad. See *Prisoners, Pardons and Politics: R(Shields) v Secretary of State for Justice* [2009] Crim LR 648 article by Hannah Quirk.

261. See *Mallard v The Queen* [2005] HCA 68 in respect of the prerogative of mercy.

Confiscation order

262. See Drug Trafficking Act 1996 and the Proceeds of Crime Act 2008 together with various Manx authorities including *R v Miller* (judgment delivered 15th June 2001 by Deemster Kerruish). See *R v May* [2008] UKHL 28, *CPS v Jennings* [2008] UKHL 29 (piercing the corporate veil and benefit) and *R v Green* [2008] UKHL 30 (issue of payment or rewards in respect of drug trafficking being received jointly by two or more persons acting as principals to a drug trafficking offence). See also *Telli v Revenue and Customs Prosecution Office* [2008] 2 Cr App. R(S) 48 where it was indicated that agreements between the Crown and the defence must not be inconsistent with the framework of the statutory scheme.

263. Section 2 of the Drug Trafficking Act 1996 makes provision for confiscation orders.

264. Where the court proceeds under section 2 of the Drug Trafficking Act 1996 it shall first determine whether the defendant has benefited from drug trafficking.

265. For the purposes of the Drug Trafficking Act 1996 a person has benefited from drug trafficking if he has at any time received any payment or other reward in connection with drug trafficking carried on by him or another person.

266. If the court determines that the defendant has so benefited the court shall before sentence determine in accordance with section 5 the amount to be recovered.

267. The court shall then (a) order the defendant to pay that amount (b) take account of the order before imposing any fine on him or other financial orders.

268. Under section 2(7) of the Drug Trafficking Act 1996 the standard of proof required to determine any question arising under the Act as to:

    (a) whether a person has benefited from drug trafficking or
    (b) the amount to be recovered in his case by virtue of section 2, shall be that applicable in civil proceedings .

269. Section 3 of the Drug Trafficking Act 1996 deals with postponed determinations. Unless satisfied that there are exceptional circumstances the total period of the adjournment should not exceed 6

months beginning with the date of conviction. Where the defendant appeals his conviction unless there are exceptional circumstances the court should not adjourn for a period exceeding 3 months ending after the date on which the appeal is determined or otherwise disposed of. "Date of conviction" is defined in section 3(11) of the Drug Trafficking Act 1996.

270. Section 4 of the Drug Trafficking Act 1996 concerns assessing the proceeds of drug trafficking. Subject to certain provisions of the Drug Trafficking Act 1996 the Court of General Gaol is required, for the purposes (a) of determining whether the defendant has benefited from drug trafficking and (b) if he has of assessing the value of his proceeds of drug trafficking, to make certain assumptions.

271. The required assumptions are -

(a) that any property appearing to the court -
  (i) to have been held by the defendant at any time since his conviction, or
  (ii) to have been transferred to him at any time since the beginning of the period of 6 years ending when the proceedings were instituted against him,

was received by him, at the earliest time at which he appears to the court to have held it as a payment or reward in connection with drug trafficking carried on by him;

(b) that any expenditure of his since the beginning of that period was met out of payments received by him in connection with drug trafficking carried on by him; and

(c) that, for the purpose of valuing any property received or assumed to have been received by him at any time as such a reward, he received the property free of any other interests in it.

272. The court shall not make any required assumption in relation to any particular property or expenditure if -
  (a) that assumption is shown to be incorrect in the defendant's case; or
  (b) the court is satisfied that there would be a serious risk of injustice in the defendant's case if the assumption were to be made;

and where, under the subsection, the court does not make one or more of the required assumptions, it shall state its reasons

[subsection (2) does not apply if the only drug trafficking offence is an offence in respect of proceeds of drug trafficking]

273. Section 5 of the Drug Trafficking Act 1996 oncerns the amount to be recovered under a confiscation order. Section 5(1) of the Drug Trafficking Act 1996 provides that subject to subsection (3) the amount to be recovered in the defendant's case under the confiscation order shall be the amount the Court of General Gaol Delivery assesses to be the value of the defendant's proceeds of drug trafficking.

274. Section 5(3) of the Drug Trafficking Act 1996 provides that if the court is satisfied that the amount that might be realised at the time the confiscation order is made is less than the amount the court assesses to be the value of his proceeds of drug trafficking, the amount to be recovered in the defendant's case under the confiscation order shall be:

(a) the amount appearing to the court to be the amount that might be so realised; or

(b) a nominal amount, where it appears to the court (on the information available to it at the time) that the amount that might be so realised is nil.

275. Under section 6 of the Drug Trafficking Act 1996 the amount that might be realised at the time a confiscation order is made against the defendant is:

(a) the total of the values at that time of all the realisable property held by the defendant, less

(b) where there are obligations having priority at that time, the total amount payable in pursuance of such obligations;

together with the total values at that time of all gifts caught by the Act.

276. Realisable property means (a) any property held by the defendant and (b) any property held by a person to whom the defendant has directly or indirectly made a gift caught by the Act.

277. Section 7 of the Drug Trafficking Act 1996 concerns value of property and other matters. Section 8 of the Drug Trafficking Act 1996 concerns gifts caught by the Act.

278. See *R v John Miller* judgment of Deemster Kerruish 15th June 2001 generally and in respect of gifts. See also *Gibson v Revenue and Customs Prosecutions Office* [2008] EWCA Civ 645.

279. In *R v May* [2008] UKHL 28 the following appeared as an endnote:

"Endnote

48. The committee would conclude by drawing attention to the current importance of the power to make confiscation orders. In the period April 2007 - February 2008 the courts in England and Wales made 4504 such orders in sums totalling £225.87 million. In recent years the number of orders and the sums confiscated have steadily risen. Recognition of the importance and difficulty of this jurisdiction prompts the committee to emphasise the broad principles to be followed by those called upon to exercise it:

(1) The legislation is intended to deprive defendants of the benefit they have gained from relevant criminal conduct, whether or not they have retained such benefit, within the limits of their available means. It does not provide for confiscation in the sense understood by schoolchildren and others, but nor does it operate by way of fine. The benefit gained is the total value of the property or advantage obtained, not the defendant's net profit after deduction of expenses or any amounts payable to co-conspirators.

(2) The court should proceed by asking the three questions posed above: (i) Has the defendant (D) benefited from relevant criminal conduct? (ii) If so, what is the value of the benefit D has so obtained? (iii) What sum is recoverable from D? Where issues of criminal life style arise the questions must be modified. These are separate questions calling for separate answers, and the questions and answers must not be elided.

(3) In addressing these questions the court must first establish the facts as best it can on the material available, relying as appropriate on the statutory assumptions. In very many cases the factual findings made will be decisive.

(4) In addressing the questions the court should focus very closely on the language of the statutory provision in question in the context of the statute and in the light of any statutory definition. The language used is not arcane or obscure and any judicial gloss or exegesis should be viewed with caution. Guidance should ordinarily be sought in the statutory language rather than in the proliferating case law.

(5) In determining, under the 2002 Act, whether D has obtained property or a pecuniary advantage and, if so, the value of any property or advantage so obtained, the court should (subject to any relevant statutory definition) apply ordinary common law principles to the facts as found. The exercise of this jurisdiction involves no departure from familiar rules governing entitlement and ownership. While the answering of the third question calls for inquiry into the financial resources of D at the date of the determination, the answering of the first two questions plainly calls for a historical inquiry into past transactions.

(6) D ordinarily obtains property if in law he owns it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else. He ordinarily obtains a pecuniary advantage if (among other things) he evades a liability to which he is personally subject. Mere couriers or custodians or other very minor contributors to an offence, rewarded by a specific fee and having no interest in the property or the proceeds of sale, are unlikely to be found to have obtained that property. It may be otherwise with money launderers."

280. See also *CPS v Jennings* [2008] UKHL 29 and *R v Green* [2008] UKHL 30. In the *Jennings* case the issues of piercing the corporate

veil and the meaning of 'benefit' were considered. *Green* involved the issue of payments or rewards in respect of drug trafficking being received jointly by two or more persons acting as principals to a drug trafficking offence. See *R v Allpress* [2009] EWCA Crim 8. See *R v Winters* The Times 12.1.09 in respect of proving the benefit of drug trafficking. See *Islam* [2008] EWCA Crim 1736 & 1740 in respect of appeals against confiscation orders.

281. In *Grayson v UK* (Application nos 1995/05 and 15085/06 Chamber judgment 23 September 2008) it was held that it was not incompatible with the notion of a fair hearing in criminal proceedings to place the onus on each applicant to give a credible account of his current financial situation. It was not unreasonable to expect the applicants to explain what had happened to the money from their drug dealing over a period of years. Such matters fell within their knowledge.

282. In *R v Nelson* [2009] EWCA Crim 1573 the English Court of Appeal held that confiscation proceedings which had been properly brought in accordance with statutory provisions to deprive a convicted defendant of the benefit of his crime should not be stayed as an abuse of process because the judge considered that they might produce an oppressive result.

283. In *R v Knaggs* [2009] EWCA 1363 the English Court of Appeal held that a defendant who pleaded guilty to an offence without any challenge to the facts presented by the prosecution was not, as a matter of law, thereby debarred from challenging the prosecution evidence for the purpose of a confiscation hearing.

284. See also *R v Briggs-Price* [2009] UKHL 19.

285. See also the provision of the Proceeds of Crime Act 2008 in respect of confiscation orders and *International Finance Trust Company Limited v New South Wales Crime Commission* [2009] HCA 49 in respect of without notice proceedings.

Forfeiture and disposal

286. In respect of the power of the court to deprive an offender of property used, or intended for use, for the purposes of crime see section 16 of the Criminal Law Act 1981 which provides as follows:

> "16 Power to deprive offender of property used, or intended for use, for purposes of crime

(1) Where a person is convicted of an offence and-

(a) the court by or before which he is convicted is satisfied that any property which has been lawfully seized from him or which was in his possession or under his control at the time when he was apprehended for the offence or when a summons in respect of it was issued-

(1) has been used for the purpose of committing, or facilitating the commission of, any offence; or

(2) was intended by him to be used for that purpose; or

(b) the offence, or an offence which the court has taken into account in determining his sentence, consists of unlawful possession of property which has been lawfully seized from him or which was in his possession or under his control at the time when he was apprehended for the offence or when a summons in respect of it was issued.

the court may make an order under this section in respect of that property and may do so whether or not it also deals with the offender in respect of the offence in any other way and without regard to any restrictions on forfeiture in any Act passed before the Criminal Justice Act 1990.

[Subs (1) substituted by Criminal Justice Act 1990 s30.]

(1A) In considering whether to make an order under subsection (1) in respect of any property a court shall have regard-

(a) to the value of the property; and

(b) to the likely effects on the offender of the making of the order (taken together with any other order that the court contemplates making).

[Subs (1A) inserted by Criminal Justice Act 1990 s30.]

(2) Facilitating the commission of an offence shall be taken for the purposes of this section and section 17 to include the taking of any steps after it has been committed for the purpose of disposing of any property to which it relates or of avoiding apprehension or detection, and references in this or that section or an offence punishable with imprisonment shall be construed without regard to any prohibition or restriction imposed by or under any enactment on the imprisonment of young offenders.

(3) An order under this section shall operate to deprive the offender of his rights (if any) in the property to which it relates, and the property shall (if not already in their possession) be taken into the possession of the police.

(4) Section 34 of the Summary Jurisdiction Act 1989 shall apply, with the following modifications, to property which is in the possession of the police by virtue of this section –

(a) no application shall be made under subsection (1) of that section by any claimant of the property after the expiration of six months from the date on which the order in respect of the property was made under this section; and

(b) no such application shall succeed unless the claimant satisfies the court either that he had not consented to the offender having possession of the property or, where an order is made under subsection (1)(*a*), that he did not know, and had no reason to suspect, that the property was likely to be used for the purpose mentioned in that paragraph.

[Subs (4) amended by Summary Jurisdiction Act 1989 Sch 5. Para (b) amended by Criminal Justice Act 1990 s30.]

(5) In relation to property which is in the possession of the police by virtue of this section and in respect of which no application has been made within the period specified in subsection (4)(*a*) or no such application has

succeeded, section 34(1) of the said Act of 1989 shall apply as if the owner of the property cannot be ascertained.
[Subs (5) amended by Summary Jurisdiction Act 1989 Sch 5.] "

287. In respect of the power of the court to order forfeiture of drugs or anything which relates to an offence under the Misuse of Drugs Act 1976 or a drug trafficking offence see section 27 of the Misuse of Drugs Act 1976 which provides as follows:

"27 Forfeiture

(1) Subject to subsection (2) below, the court by or before which a person is convicted of an offence to which this section applies may order anything shown to the satisfaction of the court to relate to the offence, to be forfeited and either destroyed or dealt with in such other manner as the court may order.
[Subs (1) amended by Criminal Justice Act 1990 s 31.]

(1A) This section applies to any offence which is either (or both) of the following –

(a) an offence under this Act;

(b) a drug trafficking offence, as defined in section 1(3) of the Drug Trafficking Act 1996.
[Subs (1A) inserted by Criminal justice Act 1990 s 31. Para (*b*) amended by Drug Trafficking Act 1996 Sch 1.]

(2) The court shall not order anything to be forfeited under this section, where a person claiming to be the owner of or otherwise interested in it applies to be heard by the court, unless an opportunity has been given to him to show cause why the order should not be made."

Starting points

288. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Goodman* (judgment delivered 1st June 2007) provided guidance in respect of the indication of starting points that is the starting point of sentence on the basis of a contested trial and without reflecting any mitigation. *Goodman* concerned sentences for offences under the Misuse of Drugs Act 1976. At paragraphs 27 and 28 it was indicated that the sentencing judge in sentencing for these types of offences should make it clear what is his starting point for sentence assuming a conviction after a trial and without reflecting any mitigation so that there can be no misunderstanding when he imposes sentence as to what degree such sentence has been reduced to reflect the available mitigation. Counsel for the prosecution and defence should indicate their views on the appropriate starting point in advance of the effective sentencing hearing.

289. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Clinton* (judgment 29th October 2009) stated:

> "71. We do not consider that the application of the sentencing guidelines in this case was disproportionate. Such sentencing guidelines provide guidance as to a usual starting point for sentence, it is for the sentencing judge to determine the actual starting point in the circumstances of the partiulcar case, and what sentence should be imposed in the light of all the aggravating and mitigating factors. We reject Mr O'Neill's submission that the sentencing guidelines do not allow the sentencing judge to fully consider and give approproiate credit for the circumstances of the offender. In so far as it is believed that such guidelines compel a sentencing judge to impose a particular sentence, such a belief is erroneous."

290. In *Taylor* (judgment 4th April 2008) the Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) indicated that matters such as the fact that drugs were required for personal use were more appropriately considered in the context of the degree of mitigation given to a defendant in reducing the sentence to be imposed rather than in the assessment of the starting point for sentence. In *Taylor* the Appeal Division stated:

> "20. Accordingly in *Caldwell-Camp* this court set out bands of starting points for sentence by reference to the weight of drugs in powder form and by reference to the number of tablets, capsules or other units of drugs supplied. Such starting points assumed a conviction after a trial and did not reflect any mitigation. But it is important to note two matters emphasised by the court.
>
> 21. Firstly, the court stressed that the quantity of drugs was not the only factor relevant to the exercise of the sentencing discretion and that `there may be some cases where the appropriate starting point may be above or below the band otherwise appropriate, but it will seldom be the case that the starting point for any quantity of drugs will be below five years`. In our judgment an appropriate starting point will reflect not only the quantity of drugs involved but also the totality of the offences committed [see for example *Goodman* in which this court adjudged that the production and supply of two different Class A drugs justified an increased starting point than each of the drugs individually would justify], the manner in which they were committed and in some cases the level of criminality of the offender.
>
> 22. Secondly, the court stressed that in determining the appropriate sentence to be imposed on a defendant, the sentencing judge will have regard to all relevant matters which may include matters of aggravation such as the sophistication of the methods used to avoid detection, and matters of mitigation such as co-operation with the police, pleas of guilty and when they were first intimated, and other matters of personal mitigation. Such considerations may result in the sentencing judge imposing a sentence which is greater or lower than the starting point for sentence.

23. It thus necessarily follows that in every case of this type a sentencing judge has to consider firstly, what was the starting point for sentence and secondly, to what extent such starting point should be increased, or reduced to become the sentence imposed.

24. We turn to the facts of this case.

The appropriate starting point for sentence

25. Firstly, we consider the appropriate starting point for sentence in this case.

26. The guidelines in *Caldwell-Camp* indicate that the appropriate band for the starting point for sentence for the supply of 1-500 tablets is 5 to 8 years custody. Having considered the submissions of Mrs Watts, who then appeared on behalf of the Attorney General, who contended for a starting point of 6 years custody and Mr Stephen Wood, who then appeared on behalf of the Respondent, who contended for a starting point of 3½ to 4 years custody, Deemster Doyle concluded that there should be a starting point for sentence of 4 years custody.

27. Before this court Miss Norman submitted that Deemster Doyle erred in so concluding and we must therefore consider whether Deemster Doyle was entitled to adopt the starting point for sentence which he did.

28. Miss Norman correctly observed that, whilst Deemster Doyle had stated that he had considered all the authorities and all the circumstances of the case, he gave no explanation as to why the starting point was not within the guidelines and did not suggest that the circumstances of the Respondent`s case were in any way exceptional. She submitted that there was no reason for Deemster Doyle to depart from the guidelines and that the appropriate starting point should have been 6 years.

29. Miss Hannan adopted a realistic and sensible approach. She conceded that the starting point of 4 years adopted by Deemster Doyle could not be justified by reference to the guidelines set out in *Caldwell-Camp.* She contended for a starting point of 5 years and, in doing so, relied on the Respondent`s explanation, not challenged by the Attorney General, that he intended to supply ecstasy only to his friends, that he was not commercially motivated and that Deemster Doyle had expressly accepted that the Respondent`s motivation was not to make money. Whilst we recognise that the absence of a financial motive is a matter of some relevance, we are not persuaded that it is a matter of a substantial importance, particularly because the mischief of the offence of possession with intent to supply is that illegal drugs were intended to be supplied to others.

30. Although we thus concede that the court was required to have some regard to the Respondent`s non-commercial approach and that ordinarily such might be taken into account in determining the starting point for sentence, we note that in this case Miss Hannan also relied upon the fact that the persons to whom the Respondent supplied drugs were not in a public place or young vulnerable persons, but simply his friends, and acquaintances. In these circumstances on the facts of this case we think that it is appropriate that all these matters should be considered in the context of the degree of mitigation given to the Respondent in reducing the starting point for sentence to the sentence to be imposed rather than

in assessing the starting point for sentence. In some sense it matters not at what stage relevant mitigation is taken into account : it is only important that it *is* taken into account before the determination of the sentences to be imposed.

31. We recognise that in adopting the starting point for sentence Deemster Doyle was exercising a discretion and that this court should be slow to interfere with the exercise of such discretion. That said we agree with Miss Norman that there was nothing remarkable about this case which should have led to the adoption of a starting point outside the guidelines. On the precise facts of this case we think it is appropriate to determine the starting point for sentence on the basis of the quantity of drugs which the Respondent intended to supply to others [here 84 ecstasy tablets], leaving to mitigation all questions of non-commercial motive and to whom the drugs were intended to be supplied. Adopting such an approach we are satisfied that the correct starting point for sentence was 6 years and that Deemster Doyle erred in adopting a starting point of 4 years. On the facts of this case we can see no reasons which would justify departing from the guidelines set out in *Caldwell-Camp*."

291. In *Taylor* the Appeal Division increased the sentence of 18 months to a sentence of 33 months.

292. In *Crosbie* (judgment 23rd September 2009) the Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) declined to give the Attorney General leave to refer the case for review of the sentence. The Appeal Division stated:

"18. Ms Hughes, on behalf of the Attorney General, explained to the court that the thrust of the Attorney General`s application was that the starting point of 5 years custody adopted by Deemster Doyle was too low and that, adopting the guidelines set out by this court in *Caldwell-Camp v R* [2003-05] MLR 505, it ought to have been between 8 and 11 years. In fact she contended for a starting point of 8 years custody but conceded that had Deemster Doyle adopted a starting point of 7 years, such could not have been criticised.

19. Such argument was founded upon the fact that the Respondent had been concerned in the production of 56.1 grams of cocaine. Ms Hughes submitted that in so far as Deemster Doyle had, in determining the starting point for sentence, taken into account the fact that the Respondent had pleaded guilty to count 4 on the basis that most of the cocaine was for her own use but that she would have shared it with her friends and sold the remainder to a few friends for profit, Deemster Doyle had erred. In support of such submission Ms Hughes relied upon dicta of this court in *Attorney General v Taylor* [4th April 2008] where this court indicated that matters such as the fact that drugs were required for personal use were more appropriately considered in the context of the degree of mitigation given to a defendant in reducing the sentence to be imposed rather than in the assessment of the starting point for sentence.

20. Although we did not hear any submissions from Mrs Jones, on behalf of the Respondent, we are satisfied that there is much merit in such submission. In all the circumstances we are satisfied that the period of 5 years custody adopted as a

starting point by Deemster Doyle was too low and the appropriate starting point was 8 years, although we agree that [since Deemster Doyle was exercising a discretion as to the starting point, the exercise of which this court should be slow to interfere with] this court could not have adjudged that a starting point of 7 years custody was wrong.

21. Given that at one stage during her oral submissions Ms Hughes submitted that the effect of *Caldwell-Camp* was that the guidelines must be followed save in exceptional circumstances, we think it important that we should emphasise that in *Caldwell-Camp* this court emphasised that the guidelines therein enunciated were `indicative only and for the purpose of giving guidance to judges at first instance charged with the exercise of a sentencing discretion so as to reduce the incidence of unnecessary and inappropriate inconsistency` [see paragraph 46], that `there may be some cases where the appropriate starting point may be above or below the band otherwise appropriate` [see paragraph 52] and `there is a delicate balance to be struck between the issuing of guidelines to assist judges at first instance and the proper exercise by such judges of their sentencing discretion` [see paragraph 57].

22. It is common ground that the appropriate sentence to be served by the Respondent required to reflect a number of matters, which overall offered the Respondent very considerable mitigation. Firstly, whilst the Respondent had not pleaded guilty at the first opportunity, she did plead guilty at an early stage and her admission that she had intended to supply some of the cocaine to others merits much credit given that it is conceded that there was no other evidence to confirm that and she could easily, and perhaps persuasively, have contended that all such cocaine was for her own personal use. Secondly, there was other strong mitigation deriving from her own personal circumstances : at the time of the offences she was of good character and in employment. Thirdly, the Respondent had pleaded guilty to count 4 on the basis that most of the cocaine was for her own use but that she would have shared it with her friends and sold the remainder to a few friends for profit. Fourthly, Deemster Doyle readily recognised that `this was not a sophisticated and prolonged commercial operation`. Indeed Ms Hughes accepted that this was a `one-off` event.

23. Taking all such matters into account each member of this court would have imposed a total sentence of 3½ years custody on this Respondent. In such circumstances we have to consider whether a total sentence of 3 years custody , which Deemster Doyle expressly recognised was lenient, was unduly lenient. Moreover if we were minded to increase the sentence on the Respondent we would have to have regard to the principle of double jeopardy.

24. For all these reasons, having considered Ms Hughes` written submissions and heard her oral submissions in support of this Reference, we are convinced that there is no realistic prospect that the reference to review the sentence would succeed."

293. In *R v Saw* [2009] EWCA Crim 1 the English Court of Appeal at paragraph 4 referred to the expression 'starting point' and stated:

"It is nowadays used to identify a notional point within a broad range, from which the sentence should be increased or decreased, to allow for aggravating or mitigating features, rather than the lowest point in the range."

294. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Johnson* (judgment 12th June 2008) at paragraph 15 stated that there was no room for an "arithmetical approach" to starting points. The Appeal Division stated:

"…The essence of *Caldwell-Camp* is that, while this court has given broad guidelines for judges, it is for the sentencing judge to decide where within the band the starting point should be on the particular facts of the case. In such circumstances there is no room for an arithmetical approach which in any event is inconsistent with the fact that the bands of starting points overlap."

295. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) stated at paragraph 29 of a judgment delivered on the 29th October 2009 in *Myers* : "… In the case of an offence involving the trafficking of Class A drugs a judge is required firstly to ascertain a starting point for sentence, following the guidance of this court in *Caldwell-Camp,* and secondly, after weighing the matters which he identifies as aggravating the offence or offering the defendant mitigation, to exercise his sentencing discretion so as to impose what he believes to be the appropriate sentence for such offence."

296. See also *Harrison v Attorney General* 2004 JLR 111 (Jersey Court of Appeal):

" Conclusions on starting points

93 As we have already observed, one of the advantages of the sentencing process in this jurisdiction is the assistance given to the Jurats by the Crown. The delay between verdict and sentence affords an opportunity to the Crown Advocate to research any relevant authorities and to assist the Royal Court in moving for a specific sentence in their conclusions.

94 To a limited extent, the conclusions may be guesswork because the Crown will not necessarily be aware of all the mitigating features relating to the offender which the defence advocate may be able to put before the court, although it will have received the social enquiry report and any other reports as well as any testimonials, references, letters or other material to be relied on by the defence, in accordance with *Practice Direction (Royal Ct.) (Testimonials, References, Letters from Defendants, etc. for Sentencing Purposes) (2004/01)*. But insofar as the conclusions consist of an assessment of the mischief of the offence itself, of the proper weight in sentencing terms for its commission, the Crown seems to us to be in a particularly good position to assist and to research the appropriate authorities so as to ensure that the aggravating features, pleas and mitigation in such cases arc clearly identified to enable the Royal Court to make appropriate comparisons.

95 In cases where the Crown is moving for a custodial sentence, we see no reason why the Crown should not undertake this research and include, as part of its conclusions, an assessment of the starting point for the offence in question and we would expect them to do so**.** Indeed, the Crown conducted such an exercise in the Royal Court in this case. We are confident that such assessments will prove valuable to the Jurats in the task they have to undertake in the Royal Court.

96 We accept that the key to the effective operation of sentencing as between this court and the Royal Court is not for this court to impose a sentencing straitjacket which forces the Royal Court to determine sentences according to a fixed and immutable set of rules, but rather to ensure that, whatever route is chosen by the Royal Court, the journey is well mapped and signposted. Provided the reasoning of the Royal Court is clear, the necessary discretion which the lower court possesses in sentencing matters will not easily be questioned or overturned.

97 It is obvious that where the sentencing court gives adequate reasons, though using a method of sentencing which does not apply a starting point, the appellate court will be able to perform its functions satisfactorily. If the case of *Hanby* (4) had come before this court on appeal, the court would have been able fully to assess the reasons for the sentence and the allowances which the Royal Court had made for the various matters which aggravated and mitigated the offence as well as the conduct of the offender, despite the fact that the Royal Court failed to identify a starting point.

98 It is when the reasoning of the Royal Court is unclear that the Court of Appeal feels bound to reason its own way to an assessment of sentence, which, if it differs from the sentence of the Royal Court, may result in the appeal being allowed. In setting out its own reasons this court not infrequently feels bound to ascertain an appropriate starting point sentence for the gravity of the offence. This may result in the Court of Appeal deciding that the sentence of the Royal Court is too high, and therefore allowing the appeal. But it may result in this court deciding that the sentence of the Royal Court is too low: that was the position in *Harris* (20), in which ascertainment by this court of the appropriate starting point showed that the sentence imposed by the Royal Court for manslaughter by the injection of Class A drugs was inappropriately lenient.

99 However, in our judgment, the advantages of fixing a starting point are considerable for the reasons we have identified above. We hope that we will have allayed the concerns in the use of starting points which have been ventilated by the Royal Court in the cases to which we have referred, and which have contributed to a reluctance by the Royal Court to use starting points in non-drugs cases.

100 We emphasize, therefore, that we regard it as desirable for the Royal Court to identify starting points; but what we have said does not constitute a direction that the Royal Court must perform this function. We do not conclude that the absence of the application of a starting point of itself prevents this court from carrying out its functions as defined in the Court

of Appeal (Jersey) Law 1961 provided that the Royal Court's reasoning is clear; nor do we conclude that the absence of a starting point constitutes a breach of art. 6 of the European Convention on Human Rights. To that extent, we take the view that any inferences to the contrary which may have arisen from what was said by this court on this point in *Harris* (20), *Channing* (15) and *Le Pavoux* (24) should be disregarded.

101 Finally, in the context of starting points, may we express the hope, as a result of this judgment, that the difficulties and problems to which this vexed question has given rise can now firmly be put to one side and that the administration of criminal justice in this jurisdiction can proceed, so far as the sentencing process is concerned, with a better understanding of what is expected from its participants. We now turn to the submissions which Advocate Tremoceiro addressed to us specific to this appellant."

297. An extract from the headnote to the case reads as follows:

"Held, dismissing the appeal:
(1) It was not inappropriate for the Court of Appeal to exercise general though light control over the sentencing procedures of the Royal Court. Whenever the interests of justice required it, its powers extended to considering the process by which that court had decided what sentence to pass and to reviewing its procedure so as to allow the Court of Appeal to determine its fairness and adequacy and ensure its compliance with the requirements of the European Convention on Human Rights. In more conventional terms, it would then interfere with a sentence passed by the Royal Court where (a) it was not justified by law; (b) it was passed on the wrong factual basis; (c) some matter had been improperly taken into account or some fresh matter needed consideration; or (d) the sentence was wrong in principle or manifestly excessive (paras. 22-24; paras. 2-3l*;* paras. 97-98).

(2) It was desirable for the Royal Court to identify starting points for sentences in all cases, though the court would not direct that it do so since it did not wish to impose a sentencing straitjacket on the Royal Court. It was clear in any event that the absence of a starting point neither offended art. 6 of the European Convention nor usually prevented the appellate court from carrying out its functions, provided that the Royal Court's reasoning was clear. The advantages of using starting points were nevertheless considerable, as (a) they made the sentencing process more transparent and helped to promote open justice; (b) the building up of a body of precedent of cases with decided starting points would help to achieve consistency in sentencing, and advocates would be able to advise their clients more accurately; and (c) it would help the court to ensure that the appropriate sentencing reductions had been made, particularly for guilty pleas. Some estimation would certainly be required when selecting starting points because most current Jersey authority did not specify them for particular offences (although there were some examples where this had been done satisfactorily) - but the task was well within the capacity of the Royal Court with the assistance of the Crown in moving its conclusions (paras. 56-57; paras. 75-81; paras. 89-92; paras. 94-100; para. 108; para. 117; paras. 127-130).

(3) The selection of a starting point was the first stage in a two- stage process:
(a) it should be selected by weighing up the aggravating features of the offence (including the accused's bad character specifically relating to the offence though not general bad character) and any factors which reduced its gravity;
(b) excluded from the starting point would be the weight given to any plea of guilty (which should be the first deduction made from the starting point), matters of personal mitigation, time spent awaiting trial, good character or other personal circumstances (all of which should be deducted next and might be expressed as a single comprehensive discount covering all relevant factors);
(c) it followed that the factors listed in (b) above would be considered at the second stage of the two-stage process (paras. 45-46; paras. 69-72; paras. 91-92).

(4) The identification of a starting point in every case would not, moreover, lead to proliferation of appeals based on cases with similar facts because (a) as the variables in non-drugs cases were much greater than in drugs cases, it would be unproductive to compare one case directly with another—and it was an established practice to require counsel to rely only on comparator cases which laid down principles or guidelines; and (b) the Court of Appeal did not test figures given by the Royal Court, either-for starting or finishing points, by reference to other cases. The use of starting points in sentencing in drugs cases had not caused significant problems (paras. 58-65).

(5) The Royal Court would be greatly assisted if, when moving its conclusions (especially those involving a custodial sentence) the Crown were to research the appropriate authorities on aggravation, pleas and mitigation, present the results of that research to the court and in all cases to include in its conclusions its own assessment of the starting point (paras. 94-95).

(6) Proof of intent was not a requirement of the offence of grave and criminal assault in Jersey and it was therefore not appropriate to consider whether the offence in the present case in England would have fallen under s18, s20 or s.47 of the Offences Against the Person Act 1861. Introducing such a requirement would make the sentencing process unnecessarily and artificially restricted and to attempt to introduce elements of the English offences into the sentencing process for the Jersey offence would significantly increase the likelihood of introducing more *Newton* hearings into the process (paras. 114-119).

(7) The Crown, when drafting the statement of facts in the case of a grave and criminal assault, and the Jurats, when considering the appropriate sentence to pass, should make an assessment of the seriousness of the offence and should consider, *inter alia* -

(a) the nature of the deliberation with which the assault was carried out;
(b) whether the blow was aimed;

(c) whether the incident was committed in cold blood;
(d) the degree of force with which the blow was struck;
(e) the nature, extent, gravity, and permanence of the injury caused;
(f) if a weapon was used, the nature of such a weapon;
(g) whether the weapon was carried or seized on the instant;
(h) how many were concerned in the assault and the circumstances which gave rise to their involvement;
(i) the nature and extent of any provocation offered by the victim;
(j) whether the offender had a record of committing the same or similar offences or constituted a danger to himself or the public (para. 120).

(8) Although there was no maximum sentence for contempt of court, the appeal against the sentence of 12 months concurrent with the main offence would be allowed as it was excessive, no example having been found of a sentence of 12 months passed for absconding in breach of bail. Moreover, any sentence for contempt should normally be consecutive to the substantive sentence. In this case, a sentence of three months would be substituted but the court would not alter the sentence to run consecutively, since the total sentence of 3½ years was, on the fact of the case, entirety appropriate (paras. 133-134; paras. 142-143).

(9) It was clear that r.1(1) of the Criminal Proceedings (Computation of Sentences) (Jersey) Rules 1968, which provided that the length of a prison sentence should be reduced by any period which the accused had already spent in prison in connection with the same offence, did not apply to orders of overseas courts and the accused's sentence would therefore not be reduced by the time he had spent in the Spanish prison awaiting extradition. The court would not interpret the rule contrary to the normal rule of construction that words in a statute were assumed to be used consistently by draftsmen - the first use of the word "court" in the rule admittedly referring to a court in Jersey, the second use of the same word had to be given the same restricted meaning. Nevertheless, the Royal Court did have a discretion to take account of the period spent in custody overseas pending extradition and had made some allowance for it, though this was affected by the extent to which the accused had brought the custody on himself, *e.g.* by opposing extradition. The court did not have to exercise its discretion to grant full day-for-day discount from the point at which the accused ceased opposing extradition as he had brought the imprisonment on himself by initially absconding from Jersey, and the authorities had acted promptly at all times (paras. 135 - 136*;* paras. 139-142)"

298. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *R v Jeffery Cameron Watterson* (judgment delivered 25th April 2008) at paragraph 14 stated:

"Although *Goodman* was dealing with different drug offences, there can be no doubt that such dicta are appropriate in all cases. Such an approach where a judge initially sets out what his sentence would have been, assuming a conviction after a trial and without reflecting any mitigation, makes it transparent what effect a plea of guilty and mitigation have had on the sentence in fact imposed."

Leniency and mercy

299. In the *Attorney General's Reference No 73 of 2006* (judgment October 10th 2006) it was stressed that judges may temper justice with mercy.

300. In *Angela Schumann* (Times 15th February 2007) Phillips L C J stated:

> "There is one word that you will not read in the sentencing guidelines and that is 'mercy'. There are occasions where the court can put the guidelines and authorities on one side and apply mercy instead."

301. In *Weston* [1980] Crim App R(S) 391 it was indicated that a short sentence of up to 3 months ("clang of the prison gates") may be punishment and deterrent enough in some circumstances especially where the defendant is of good character, the offence is out of character and there is genuine remorse.

302. In *Westhead* (judgment 22nd November 2005, unreported) the Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) exercised leniency and substituted for a custodial sentence of 90 days a community service order of 200 hours.

303. In *Ahier* [2005] JRC 134 the Royal Court of Jersey exercised leniency and gave a drug addict a chance to stay out of prison by placing her on probation for 12 months. The Royal Court of Jersey also exercised leniency in *De Gouveia* [2005] JRC 139.

304. Lord Phillips in the *Attorney General's Reference No 8 of 2007* [2007] EWCA Crim 922 at paragraph 16 stated:

> *"*16. We wish to make one thing clear. The oath taken by a judge to administer justice "without fear or favour, affection of ill-will" extends to imposing what the judge concludes to be the appropriate sentence, without being deterred by the fear of an Attorney's reference. That is not to say that a judge should not pay careful regard to sentencing guidelines, whether laid down by this court or by the Sentencing Guidelines Council. But these are only guidelines. There will be cases where there is good reason to depart significantly from the guidelines. In particular, this may be appropriate where the facts of the offence diminish its seriousness in comparison to the norm, or where there is particularly powerful personal mitigation. In such circumstances it is quite wrong for the judge to refrain from imposing the sentence that he considers appropriate because of apprehension that this may cause the Attorney General to intervene. We have no doubt that the Attorney General recognises that a departure from the guidelines, even if it is substantial, is not of itself to justify his intervention. The test for

intervention is not leniency, but undue leniency. Leniency where the facts justify it is to be commended, not condemned."

305. Lord Lane in *Attorney General's Reference No 4 of 1989* (1989) 11 Crim App R(S) 517 stated:

"That mercy should season justice is a proposition as soundly based in law as it is in literature."

306. The Appeal Division (Judge of Appeal Hytner and Deemster Luft) in *R v Jewell* 1981-83 MLR 366 at 371 stated:

"Quite apart from our obvious feeings of deep sympathy with the victim in this case and the victim in the first case, we naturally feel the greatest compassion for this appellant, and it would be only somebody wholly lacking in normal human feelings who could not view his history and his circumstances without a feeling of pity for him; but in this case we have been motivated above all by the safety of the public on this Island. In any event, we feel that it is highly likely that in passing a sentence of life imprisonment we may actually be passing a sentence which in the end is more beneficial to the appellant than would have been a determinate sentence of between 12 and 15 years' imprisonment."

307. The Appeal Division (Deemster Cain and Deemster Kerruish) in *Hepburn* (judgment 1st November 1999, unreported) allowed an appeal against the imposition of a custodial sentence for an offence of assault causing actual bodily harm and imposed a community service order. The Appeal Division decided that in the unusual circumstances of the case a lengthy community service order could properly be imposed on one of the appellants in place of the custodial sentence.

308. In *Crossley v R* 1993-95 MLR N14 the Appeal Division (Judge of Appeal Hytner and Deemster Corrin) dealt with an appeal involving a 17 year old male who was serving a two year sentence. He was immature and unassertive and had allegedly been bullied and assaulted by other prisoners. Further, the effect on him of being in custody had in itself been unusually harsh and his mental condition was such that he was being held in hospital. The Appeal Division held that alleged attacks in prison, however bad the circumstances, were not matters for the courts but should be passed on to the executive for investigation and action. On the other hand, the fact that normal imprisonment in itself had had a far greater effect on a prisoner with an unusually vulnerable personality than could have been anticipated when the sentence was passed was a matter that could be taken into account on appeal. Since the appellant had suffered and would in the future suffer unusual consequences if he remained in prison, the balance of the sentence would be suspended and a supervision order imposed.

309. In the *Attorney General's Reference (Nos 132 and 133 of 2004)* Times 21st March 2005 it was stated that it was important when sentencing offenders to bear in mind their children's interests.

310. In *Furness v R* 1984-86 MLR 245 the Appeal Division (Judge of Appeal Hytner and Deemster Luft) reduced the sentence first as an act of compassion to the appellant's dying wife and secondly because the appellant would suffer more severely while serving the sentence, because of his wife's illness, than would an ordinary offender.

311. In *Perry v Clague* 1961-71 MLR 162 the Appeal Division (Deemster Kneale and Deemster Moore) exercised leniency in an endeavour to induce an offender to turn from a criminal to an honest way of life.

Severe sentences

312. Sometimes severe sentences are necessary. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Morrison* (judgment 15th September 2003) stated :

> "Those who commit serious offences and flout the law must realise the inevitability of a custodial sentence."

313. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Caldwell-Camp* (judgment delivered 24th March 2005) at paragraph 56 stated :

> "Large-scale drug misuse poses an exceptional threat to our society and offences involving Class A drugs merit significant punishment at a level capable of deterring others."

314. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Clinton* (judgment 29th October 2009) stated at paragraph 55 that counsel's submission on a particular point: "fails to recognise that there is a problem in the Island in the trafficking of Class A drugs, a need to protect young people from exposure to such drugs and the profound adverse consequences to both individuals and society generally from drugs becoming endemic in society. That is what motivated this court in *Caldwell-Camp* to promulgate sentencing guidelines which we believed would have a substantial deterrent effect on both offenders and those who might be tempted to commit such offences."

315. The Appeal Division (Judge of Appeal Tattersall and Deemster Doyle) in *Freeman* (judgment delivered 15th July 2003) at paragraph 23 stated:

"Those who commit wanton and pre-meditated acts of violence must understand that when convicted they will be punished severely. Further those who are tempted to commit acts of violence must be deterred from so doing by the sentences which the courts impose."

316. The English Court of Appeal in *Bulande v Secretary of State for the Home Department* [2008] EWCA Civ 806 stressed that a society had a fundamental interest in protecting its members from violent crime.

317. The Appeal Division (Judge of Appeal Tattersall and Deemster Doyle) in *Christian* (judgment delivered 4th June 2008) dismissed an appeal against an appellant, who had on the 21st January 2008, been convicted of 12 counts of indecent assault on his daughter over a four year period. The Appeal Division concluded that the overall sentence imposed in that case was neither manifestly excessive or wrong in principle. The Appeal Division stated their reasons as follows:

"36. Firstly these offences constituted a breach of trust by a father towards his daughter over a very substantial period of time. It is unsurprising that they were not reported to the police for many years and that the effect of them on the Complainant was very substantial.

37. In this context we echo the dicta of Newman J in *R v JW* [2000] 1 Cr App R (S) 234, at 235:

'It has to be remembered, in our judgment, that in cases such as this a mere recital of the indecency recounts but the crimes, but the circumstances of such persistent abuse as this mean that a young girl is forced to live, day in night out, for years to suffer the stress, anxiety, shame and confusion being the consequences to which these offences give rise. Day after day this victim must have returned to school carrying the burden of hurt, shame and humiliation and suffered in silence. Inevitably childhood years are ruined. From crimes such as these there is no escape, no means to prevent them being committed at the time, and generally no support or counselling between times to alleviate the shame and fear they generate.'

38. Secondly, although we accept that the Appellant had no relevant previous convictions, we do not believe that there was any mitigation which could properly be advanced on behalf of the Appellant. He was convicted after a trial in which the Complainant was required to give evidence.

39. Thirdly, it is crucial that those who are tempted to commit offences of this kind should know that the courts will impose severe sentences, if necessary the maximum sentence provided. The sentences imposed on this Appellant are not only to punish him but to deter others."

Sentencing not a mathematical process

318. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Myers* (judgment delivered 29th October 2009) at paragraph 29 stated:

> "We add this. Sentencing is never merely a mathematical exercise : it is a matter for the exercise of discretion by the sentencing judge."

319. In *R v Martin* the English Court of Appeal (judgment April 5th 2006) stressed that sentencing decisions do not represent a mathematical exercise resulting from an arithmetical calculation. The sentencing judge has a heavy responsibility of making a balanced analysis of the requirements of both justice and mercy in each individual case, reflecting the sometimes conflicting aggravating and mitigating features of it.

320. Kirby J in *Postiglione v R* (1997) 189 CLR 295 at 339 stated: "It is a mistake to endeavour to reduce judicial sentencing to mathematical accuracy or analytical certainty."

321. In *Harrison* [2008] EWCA Crim 3170 the English Court of Appeal stressed that sentencing is not an arithmetically precise exercise and guidelines are simply guidelines. A mechanistic approach cannot be supported.

Consecutive/concurrent sentences

322. Consider in cases involving more than one offence whether the sentences should be concurrent (i.e. run together) or consecutive (i.e. one to start after the completion of the other). When consecutive sentences are imposed the duty of the sentencer is to make sure that the totality of the consecutive sentences is not excessive.

323. In *Westhead* (judgment 23rd May 2006) the Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) accepted that a "sentencing judgment must always ensure that the totality of consecutive sentences imposed is not excessive."

324. The court must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Watterson* (judgment delivered 4th December 2009) stated: "53. Subject to the question of totality we can see no reason in principle why the sentence for the offence of doing an act against public justice should not run consecutively to the sentence for the offence of manslaughter."

325. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Thomas* (judgment delivered 24th October 2006) stated:

> "17. We recognise that consecutive sentences can be justified for offences arising from the same incident if different in principle - see *Purcell v Oake* [1990-92] MLR 185 in which case this court held that the offences of simple possession and possession with intent to supply were different in principle and could justify consecutive sentences.
>
> 18. Miss Hannan referred the court to dicta of Clothier JA in *Skillen v R* [1972-77] MLR 331 where, at 333, he stated :
>
> 'It is contrary to the public interest for any offender to serve a total sum of imprisonment which is too long in relation to the need to protect the public and to deter other offenders and to punish him. For he is liable to become enured to having his life controlled and ordered for him and to become incapable of fending for himself. And in the meantime his family becomes a burden upon the public purse. Wherever it can reasonably be said that a group of offences constitutes a new or fresh outbreak of lawbreaking having the same character and motivation common to each, it is open to the court to impose concurrent sentences if it thinks fit so as to arrive at a total sentence which is appropriate in all the circumstances.'
>
> 19. Whilst we do not dissent from Clothier JA's reasoning as to sentencing policy, we do not consider that such dicta offer any principled basis for determining whether a judge, when sentencing for a number of offences, should impose a concurrent or consecutive sentence. In our judgment, as was the case in *Purcell v Oake*, a consecutive sentence can be justified where offences are different in principle although the sentencing judge will have to ensure that the total sentence imposed is not too long. On the facts of this case we are satisfied that the drug offences and the firearm offence were different in principle and that, notwithstanding that they were committed at the same time, a consecutive sentence was justified.
>
> 20. Thirdly, Miss Hannan invited this court to consider the question of totality, it being contended that on the facts of this case an overall sentence of three years custody was too long.
>
> 21. Whilst we readily recognise, as did Deemster Doyle, that a court must always ensure that the totality of consecutive sentences imposed is not excessive [see *Skillen v R* and *Hartley v Cain* [1978-80] MLR 196] we do not accept this submission. These were serious offences committed by a mature man who has an appalling antecedent history and who continues to pose a substantial risk of re-offending. If he continues to offend he must realise that the sentences imposed upon him will become longer in an endeavour to protect the public from his criminal behaviour. Having carefully considered the facts and circumstances relevant to the offences and the Appellant, we decline to conclude that the total sentence imposed was too long.

22. It follows that we consider that this appeal is devoid of any merit and it is dismissed."

326. In *R v Moore* (judgment delivered 22nd November 2006) the Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) dealt with an appeal in respect of sentences imposed in an arson case and at paragraph 27 stated:

"27. We recognise that, having decided to impose consecutive sentences for offences committed on bail, which practice this court has consistently approved of, Deemster Doyle was constrained to reduce the sentences for each individual offence so as not to offend the principle that the total sentence imposed was too long. However, we have reached the conclusion that the sentences imposed were unduly lenient, and that a longer overall sentence was appropriate in this case. Moreover, we believe that it is appropriate to impose substantial terms of custody on each count and to make such sentences concurrent."

327. McCombe J in *R v Donovan and Matthews* (sentencing remarks 23rd January 2009) at paragraph 22 stated:

"Finally, it has to be remembered that when sentences are passed for a number of offences, committed as part of a course of criminal conduct, the sentences can be expressed to be served consecutively to one another or concurrently to one another. It remains important to pass a sentence that, in total, is not excessive for the offending as a whole. The law requires this; it is called the principle of "totality". This may mean that the total sentence for all the offences is rather less than would be the case if one simply passed sentences for the individual offences and added them together. In the interests of a proper total sentence, the final term of imprisonment will be rather less than that."

328. The Appeal Division (Judge of Appeal Tattersall and Deemster Cain) in *Lamb* (judgment delivered 17th April 1999, unreported) stated that in the case of a courier whose sole purpose is to transfer drugs to his contact on the Island it would be inappropriate to impose any consecutive sentence and that the primary sentence imposed by the court should be for the offence of production with a shorter concurrent sentence for the offence of possession with intent to supply. In the case of an offender who elects to both produce drugs into the Island and then possess them with the intent of him personally supplying to others - whether as a retailer or a wholesaler, because the offences are different types of offences, the primary sentence imposed by the court should be for the possession with intent to supply with an appropriate consecutive sentence for the offence of production. The nature and the degree of concealment of the drugs will be an important factor. The court will also need to have careful regard to the totality of the sentence imposed so as to ensure that it is not unduly excessive. But see now *Batty* (Appeal Division judgment 30th July

2010) where at paragraph 23 the Appeal Division (Judge of Appeal Tattersall and Deemster Corlett) stated:

"23. Having reflected on the dicta in *Lamb* which preceded the enunciation by this court of sentencing guidelines in drug trafficking cases in *Caldwell-Camp*, we are bound to say that we find it difficult to discern logic in the distinction between the person `whose sole purpose is to transfer drugs to his contact in the Island` where it is said to be inappropriate to impose a consecutive sentence and the person `who elects to both produce drugs into the Island and then possess them with the intent of him personally supplying to others, whether as a retailer or as a wholesaler` where a consecutive sentence is appropriate. We are satisfied that this is an unhelpful analysis which would be best avoided in the future and that it is more important for the sentencing judge to concentrate on the totality of the criminality within the offences of production and possession with intent to supply and to ensure that, whether or not consecutive sentences are imposed, the overall sentence is not manifestly excessive.

24. To that extent we agree with Mr Benson that there is no general principle of law that there needs to be exceptional circumstances for the imposition of consecutive custodial sentences for offences which arise out of the same transaction : he gave the example of driving whilst disqualified and with excess alcohol."

329. In *Langton v Teare* 1984-86 MLR 354 the Appeal Division (Deemster Luft and Deemster Corrin) held that concurrent sentences may be appropriate for several offences arising from a single transaction happening within a short period of time but the court must also ensure that the total sentence is not inadequate because of the concurrency.

330. See Current Sentencing Practice A5-2:

(1) consecutive terms of imprisonment should not generally be imposed in respect of offences which arise out of a single incident
(2) consecutive terms of imprisonment may be inappropriate where the offences concerned form a series of similar offences against the same victim and are committed over a short period of time
(3) where an offender commits burglary with intent to steal and then uses violence against the occupant of the premises who interrupts him, the offences do not form part of the same transaction and consecutive sentences may be appropriate
(4) where violence is used against a police officer who is endeavouring to arrest the offender for an offence he has committed

consecutive sentences may be passed in respect of the offence of violence against the police officer and the offence for which he was attempting to arrest the offender

(5) where an offender who commits a robbery or other violent offence carries a firearm in order to facilitate that offence a consecutive sentence should be imposed for the offence of carrying the firearm

(6) where further offences are committed whilst on bail the sentences should normally be consecutive

(7) where an offender is sentenced for an offence in respect of which he has previously been subjected to a community order or granted a conditional discharge, the sentence in respect of the original offence should normally be consecutive to any sentence imposed for the later offence, which caused him to be liable to be sentenced for the original offence

(8) where a court activates a suspended sentence following conviction of the offender for an offence committed during the operational period of the suspended sentence, the suspended sentence should normally be ordered to run consecutively to any sentence of imprisonment imposed for the later offence

(9) a court may impose consecutive sentences for offences committed on the same occasion when there are exceptional circumstances which justify a departure from the usual practice

(10) where an offender is sentenced to a term of imprisonment for an offence a sentence for attempting to pervert the course of justice in relation to that offence should normally be consecutive to that offence

(11) where a custodial sentence is passed on an offender who is serving a custodial sentence for another offence, the new sentence should be ordered to run consecutively to the existing sentence, with appropriate allowance for the totality of the two sentences

(12) a court should not pass a sentence to run consecutively to another sentence which the offender is already serving, if the offender has previously been released from that sentence and has been recalled to serve the sentence following the revocation of his licence

(13) a sentence of imprisonment imposed for an offence may be ordered to be served consecutively to a term for which the offender has been committed for contempt of court

(14) where the court imposes a serious of consecutive terms of imprisonment the court should view the aggregate and make such reductions as may be necessary if the aggregate of the consecutive terms does not appear to be just and appropriate

(15) where a series of consecutive sentences are imposed in respect of a number of offences of moderate gravity, the aggregate will be

excessive if it reaches the level of sentence which would be considered appropriate for really serious crime

(16) a sentencer imposing a series of consecutive sentences should pay particular attention to the aggregate in the case of a relatively young offender receiving his first sentence of immediate imprisonment

(17) where an offender is sentenced to a long term of imprisonment for a crime in the first order of gravity it may be appropriate to order any sentences of imprisonment which are imposed at the same time for lesser unrelated offences to run concurrently

(18) the totality principle applies to a persistent offender as much as to any other category of offender

(19) where a sentencer is dealing with an offender for a series of offences, and is required to adjust the sentences in order to avoid an excessive aggregate, it is better to impose concurrent sentences which are appropriate to the offences for which they are passed, than a series of consecutive sentences, each shorter than would normally be appropriate

(20) where a sentencer is dealing with an offender who has recently been sentenced to imprisonment by another judge for different offences, and decides to impose a further term of imprisonment consecutive to the existing term, he should have regard to the totality of all the sentences to which the offender will become subject, and adjust the sentence to be imposed in light of the aggregate.

331. In *Parry and Faragher v R* 1961-71 MLR 298 the Appeal Division (Judge of Appeal Bingham and Deemster Moore) stated that it was desirable that sentences on charges arising from a series of offences, similar in nature and closely connected in time, should run concurrently, but the overriding principle was that the court should look at the overall position and decide on the appropriate sentence for the offences as a whole.

332. In *Skillen v R* 1972-77 MLR 331 the Appeal Division (Judge of Appeal Clothier and Deemster Eason) stated that when consecutive sentences are imposed the duty of the sentencer is to ensure that the totality of the consecutive sentences is not excessive for it is not sufficient merely to add the sentences together without more. Such an approach might result in the imposition of a sentence which would be wholly out of proportion to the circumstances of the offender and his offence, exceed what was necessary for protecting the public and deterring the commission of other offences, and distort the pattern of justice for the future. Wherever it can reasonably be said that a group of offences having a common character and motivation constitute a

new or fresh outbreak of crime, it is open to the court to impose concurrent sentences so as to arrive at a total sentence which is appropriate in all the circumstances.

333. In *Purcell v Oake* 1990-92 MLR 185 the Appeal Division (Judge of Appeal Hytner and Deemster Corrin) held that the possession of drugs for supply was different in principle from possession for one's own use. The Appeal Division dismissed the appeal and held that the Court of General Gaol Delivery was right to pass consecutive sentences for possession of heroin and possession of cannabis with intent to supply.

334. In *Hartley v Cain* 1978-80 MLR 196 the Appeal Division (Judge of Appeal Glidewell and Deemster Eason) held that the court was under a duty when deciding whether to make sentences consecutive or concurrent to ensure that the overall sentence was not excessive. It was further held that the sentence would ordinarily run from the date the appeal was dismissed less the time in custody before the notice of appeal was filed but the court had a discretion to vary, for example the court may order that it run from the date it was passed and give credit for the total time in custody.

335. See also *Corris v R* 1961-71 MLR 198 in respect of concurrent and consecutive sentences.

336. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Roberts* (1st June 2007) at paragraph 60 stated:

> " … In our judgment when, as here, long custodial sentences are imposed, no useful purpose is served by increasing those sentences to a small degree."
>
> [in that case 7 years 3 months custody, 7 years for Class A drugs and 3 months consecutive in respect of possession of cannabis – consecutive sentence in theory justified but not useful]

337. See, on a different point, section 26 of the Criminal Jurisdiction Act 1993 which provides as follows:

> "26 Consecutive sentences
>
> (1) Where a person -
> (a) is convicted of an offence punishable with custody, and
> (b) is already liable to be detained in custody for another offence,
> the court may impose a sentence of custody to commence at the expiration of the term of custody for which he was previously sentenced.
> (2) Subsection (1) applies even though the aggregate term of custody exceeds the term which may be imposed for either offence."

Maximum sentences

338. The statute specifying the criminal offence will usually also refer to the maximum sentence the court can impose in sentencing an offender who has committed such offence. In arriving at a starting point for sentence the court will have regard to the maximum sentence the court is permitted to impose and any relevant sentencing guidelines.

339. In *Bridson* (judgment delivered 16th June 2009) the Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) dealt with a submission that in the particular circumstances of that case the starting point for sentence should be close to the maximum penalty. The Appeal Division stated:

> "29. The maximum sentence for the offence of indecent assault is 7 years custody. It may be observed that the maximum penalty for the like offence in England and Wales is 14 years.
>
> 30. Mr Neale`s submission was that, given the circumstances of the offence and the offender, the starting point for sentence before taking into account the Respondent`s plea of guilty and any other mitigation was a period of 6 years custody.
>
> 31. Given that such a starting point is close to the maximum penalty, Mr Neale referred the court to *Her Majesty The Queen v L.M.* [2008] SCC 31 in which the Supreme Court of Canada restored the maximum penalty imposed by a trial judge and considered in what circumstances the imposition of a maximum penalty was warranted. LeBel J, giving the judgment of a majority, stated :
>
> `18. This individualized sentencing process is part of a system in which Parliament has established a very broad range of sentences that can in some cases extend from a suspended sentence to life imprisonment. The *Criminal Code* provides for a maximum sentence for each offence. However it seems that the maximum sentence is not always imposed where it could or should be, as judges are influenced by an idea or viewpoint to the effect that maximum sentences should be reserved for the worst cases involving the worst circumstances and the worst criminals. … As a result, maximum sentences become almost theoretical :
>
> In the end the difficulty with maximums is that they may be seen as almost theoretical rather than as an indication of how seriously an offence is to be treated in the "ordinary" case.
>
> (T W Ferris, Sentencing : Practical Approaches (2005), at p. 292).
>
> 19. As Morin JA noted in his dissenting reasons, human nature is such that it will always be possible for a court to imagine a worse case than the one before it. Morin JA rightly pointed out that it is important for a judge, when deciding whether the maximum sentence can or should be imposed for a given offence, to

avoid contemplating fictitious situations in this way. This approach is consistent with this Court`s recent case law.

20. In *R v Cheddesingh* [2004] SCC 16, the Court acknowledged the exceptional nature of the maximum sentence, but firmly rejected the argument that it must be reserved for the worst crimes committed in the worst circumstances. Instead, all the relevant factors provided for in the *Criminal Code* must be considered on a case-by-case basis, and if the circumstances warrant imposing the maximum sentence, the judge must impose it and must, in so doing, avoid drawing comparisons with hypothetical cases.`

32. We unreservedly accept and adopt such dicta. When sentencing any defendant for a serious offence it is always a temptation for a tribunal to contemplate what more serious offences could hypothetically have been committed in an attempt to justify a failure to impose a sentence which is or approaches the statutory maximum. Whilst we reaffirm the exceptional nature of the maximum sentence we too reject any notion that a maximum sentence should be reserved for worst crime committed in the worst circumstances. It is a matter of judgment for the tribunal as to whether, given the particular circumstances of the case, the maximum sentence is warranted and thus ought to be imposed."

340. In *Milligan v R* 1993-95 MLR N 14 the Appeal Division held that the discount for a guilty plea is not automatic and there will be no discount if the nature of the offence or the circumstances of the offender call for a maximum sentence.

341. In *Myers* (judgment delivered 26th November 2008) the Appeal Division stated:

"18. We agree that the sentence of 6 years custody was manifestly excessive. On a guilty plea it equated to the appropriate sentence for an offence of possession of a relatively small amount of a Class A drug with intent to supply - whereas this was an offence of attempted possession only. Moreover, given that there must be much more serious cases of attempted possession, particularly where a much larger quantity of drugs was involved with the consequent risk that such drugs might be a temptation to, or might be stolen by, others we do not think that this was a case which could justify the imposition of a sentence almost at the maximum level, particularly when there was a guilty plea, albeit a late guilty plea."

Sentencing of co-defendants

342. See *Archbold* paragraphs 4-192 to 4-196 and 5-105 in respect of sentencing co-defendants.

343. Whenever practicable all offenders involved in a particular offence should be sentenced at the same time by the same judge but this is not always possible. Subject to issues of undue delay a sentence in respect of a defendant who has pleaded guilty may be postponed until the

other or others have been tried. By that time the court will be in possession of the facts relating to all of them and will be able to assess properly the degree of guilt among them (*R v Payne* 34 Cr App R 43). *Archbold* at paragraph 4-192 adds that where however the judge is of the opinion at any stage during the proceedings that he is in possession of the material facts and is able to assess properly the degree of guilt as between the particular defendant and the other accused it is within his discretion to deal with the defendant at that stage if it is desirable that he should do so. It is normally undesirable that defendants who have pleaded guilty should have to wait many months for sentence while others are being dealt with at contested trials. There is also the danger that at trial the defendants who pleaded not guilty will endeavour to minimise their role and exaggerate the role of the defendants who pleaded guilty. Those defendants who pleaded guilty will not be able to cross examine those defendants who pleaded not guilty and it may be that the court is not presented with a completely accurate picture at trial. Also consider the position of those defendants remanded in custody awaiting sentence and the length of time to the sentencing hearing.

344. *Archbold* at paragraph 5-76 deals with the position in respect of evidence given in trial of co-defendants and states that:

> "A judge in sentencing a defendant who has pleaded guilty, may take into account evidence given during the trial of a co-defendant who pleaded not guilty; he must however, bear in mind that self-serving statements are likely to be untrue, and that the evidence given during the trial was not tested by cross-examination on behalf of the defendant who pleaded guilty; such a defendant should be given the opportunity to give evidence of his version of the facts: *R. v. Smith (Patrick),* 10 Cr.App.R.(S.) 271, CA (preferring *R. v. Taggart*, 1 Cr.App.R.(S.) 144, CA, and *R. v. Depledge, ibid*., at 183, CA to *R. v. Michaels and Skoblo* 3 Cr. App. R.(S.) 188 C.A. and *R. v, Winter, Colk and Wilson* [1997] 1 Cr. App. R.(S.)331, CA."

345. Goddard LCJ in *Payne* 34 Cr App R 43 delivered the judgment of the English Court of Criminal Appeal on the 12th December 1949 and stated:

> "It may be a very convenient course to sentence prisoners who plead Guilty on the first day, but that ought not to apply where several persons are indicted together and one pleads Guilty and the other or others Not Guilty. In such a case the proper course is to postpone sentence on the prisoner who has pleaded Guilty until the other or others have been tried and then to bring the prisoner who has pleaded Guilty up in the Court where the other or others have been tried and let all who have been convicted be dealt with together, because by that time the Court will be in possession of the facts relating to all of them and will be able to assess properly the degree of guilt among them. The reason why the appellant received a heavier sentence than his other two co-prisoners is because he was tried in a different Court on a different day. It is a most inconvenient practice and it is a practice

which is wrong and which ought to cease. Quarter sessions should be informed that where more than one prisoner is joined in an indictment and one pleads Guilty and the other or others plead Not Guilty, the sentencing of the first one should be postponed until the others have been tried and all whose guilt has been established should be sentenced together. I hope that quarter sessions will take notice of the opinion of this Court and discontinue a practice which can only lead to disproportionate sentences being passed and will naturally leave a sense of grievance in the minds of prisoners. [The LCJ continued as follows:]

What I have said will not apply in the exceptional case where a prisoner who pleads Guilty is going to be called as a witness. In such circumstances, the general practice is that he should be sentenced there and then, so that there should be no suspicion of his evidence being coloured by the fact that he hopes to get a lighter sentence because of the evidence which he gives. If it is a case in which one prisoner is going to be called to give evidence against another, that may be a good reason for dealing with him separately. I do not throw doubt on that very proper practice; I am speaking only of cases in which those circumstances do not arise." [but see below for summary of modern practice]

346. At paragraph 4-195 of *Archbold* under the heading *Sentencing defendant who is to give evidence for the Crown* it is stated that where a man pleads guilty and it is the prosecutor's intention to call him against a co-defendant, the decision as to whether the trial judge sentences him before or after he has given evidence for the prosecution is a matter within the discretion of the judge (*R v Palmer* 99 Cr App R 83). *Archbold* states that the modern practice is generally not to sentence an accomplice until the conclusion of all the proceedings in the case; this would enable the judge to get the flavour of the case and to view it in the round at the conclusion of all the evidence (*R v Palmer* and *R v Weekes* 74 Cr App R 161, 166). This practice is based on the risk of disparity in sentence; different considerations apply in respect of sentence on an offender who is to give evidence for the prosecution in a case that is unrelated to his own, so as to mitigate his own sentence (*Chan Wai-Keung v R* [1995] 2 Cr App R 194, PC).

347. *Archbold* at paragraph 4-196 under the heading *Sentencing defendant who is to give evidence for a co-defendant* states that ordinarily a person falling within this category should be sentenced at the end of the case (*R v Coffey* 74 Cr App R 168).

348. *Broadbridge* 1983 Cr App R (S) 269 concerned the position where a judge sentenced an offender whose accomplice had already been sentenced by another judge. Sir John Thompson at page 271 stated:

"This Court has said many times that it is desirable that co-accused should, if possible, be sentenced at the same time, and in any event by a judge common to all of them. But sometimes it is not possible, since some defendants plead guilty

and others not guilty, and those who have pleaded guilty are dealt with if there is to be delay before the others are sentenced. Here the judge had to sentence an accused who had pleaded guilty and had been convicted, and whose co-accused some time earlier had pleaded guilty and had been sentenced by a different judge.
It is a situation which unfortunately often arises. Usually the judge who still has to pass sentence will be told what sentence the co-accused received, and no doubt that will be one of the factors which he considers when determining the sentence that he should pass. But it appears to be submitted here that he ought to pass the same sentence as was passed on the co-accused unless he can distinguish between them. It is argued that to equip himself to perceive whether there are any differentiating features between the two cases the judge should, if asked, and perhaps even if not asked, adjourn the case before him in order to be informed of the detailed circumstances of the case that he has not tried, and no doubt obtain a transcript of the proceedings in that other case. That was the suggestion that was made to the learned judge below in this case, and, in our view, he rightly rejected it. The duty of the sentencing judge is to deal with the person who is before him for the offence that he committed, allowing in so doing for such favourable circumstances as there are, such as, for example, that the accused pleaded guilty. This appellant pleaded not guilty. Here the judge passed a sentence which is not seriously complained of, and one part of which can certainly be said to be lenient. The fact that the appellant's co-accused White, who pleaded guilty on an earlier occasion before another court, received a longer, but suspended, sentence is not a circumstance that leads us to impugn the sentence that the learned judge passed in this case.
We affirm that sentence, and dismiss the appeal."

349. *Archbold* deals with *Broadbridge* at paragraph 5-105 under the heading *Accomplice already dealt with by a different judge*.

350. In *Langton v Teare* 1984-86 MLR 354 the Appeal Division (Deemster Luft and Deemster Corrin) indicated that the court has a duty to ensure that any disparity between sentences imposed upon co-defendants is not such as to give rise to a sense of grievance. It was held that disparities may be justified by differences between the offenders and the offences.

Media and victim issues in the sentencing process

351. In respect of media and victim issues in the sentencing process the Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Lindon* (judgment 28th October 2005) stated:

"13. In *R v Sargeant* (1975) 60 Cr App R 74 Lawton LJ, at 77, observed that:

'The courts do not have to reflect public opinion. On the other hand courts must not disregard it.'

14. In *R v Nunn [*1996] 2 Cr App R (S) 136 the Court of Appeal was confronted, in an appeal against sentence for causing death by dangerous driving,

with letters from relatives of the deceased urging leniency because the sentence imposed was adversely affecting them. At page 140, Judge, J, (as he then was), stated:

'We mean no disrespect to the mother and the sister of the deceased, but the opinions of the victim, or the surviving members of his family, about the appropriate level of sentence do not provide any sound basis for reassessing a sentence. If the victim feels utterly merciful towards the criminal and some do, the crime has still been committed and must be punished as it deserves. If the victim is obsessed with vengeance, which can in reality only be assuaged by a very long sentence, as also happens, the punishment cannot be made longer by the court than would otherwise be appropriate. Otherwise cases with identical features would be dealt with in widely different ways leading to improper and unfair disparity.

If carried to its logical conclusion the process would end up by imposing unfair pressures on the victims of crime or the survivors of a crime resulting in death, to play a part in the sentencing process which many of them would find painful and distasteful. This is very far removed from the court being kept properly informed of the anguish and suffering inflicted on the victims by the crime.'

However it may be observed that the court held that whilst it was not concerned with the relatives' judgment as to the appropriate level of the sentence, it could not disregard the clear evidence that the length of the sentence was adding to the grief and anxiety which they were suffering consequent upon the death of the deceased.

15. Such dicta were approved by the Court of Appeal in *R v Roche* [1999] 2 Cr App R (S) 105. and *R v Matthews* [2003] 1 Cr App R (S) 26. In *Roche* Lord Bingham CJ, (as he then was), stated, at 109:

'it is, of course, a cardinal principle of sentencing that it is for the court to pass what it judges to be the appropriate sentence, having regard to all the circumstances relating to the offence and the offender. The system is not one which allows the injured party to dictate the sentence to be imposed, which must always have regard to wider considerations than the wishes of those who suffer as the result of the commission of criminal offences. Just as it is not for the injured party to call for such and such a sentence to be imposed by way of vengeance, so it is not for the injured party to prevail by calling for a sentence well below the level of sentence ordinarily passed. If the court were as a matter of course to accede to a plea for vengeance by the relatives of a deceased person, then it would be appropriate to pay regard to pleas for compassion also. But the court is not swayed by demands for vengeance and has to be very cautious in paying attention to pleas for mercy.'

16. We believe that such cases emphasise that a court cannot allow a desire for vengeance or compassion to influence the sentence to be imposed, save for those few cases where on appeal it is shown that the excessive length of a sentence imposed is adding to the burdens of surviving relatives. Even assuming that a court is satisfied that public opinion has been accurately recorded, the court should resist allowing public opinion to achieve disproportionate status in the

overall sentencing process. We have no doubt that it is for a court to pass what it adjudges is the appropriate sentence, having regard to all the circumstances relating to both the offence and the offender. It is important that a court approaches that task objectively and dispassionately. Whilst the court should not disregard public opinion, the court should, never be overborne or intimidated into imposing a sentence which it regards as unjust."

352. Judge of Appeal Hytner in *Attorney General's Reference (Kneale)* 1993-95 MLR 239 at page 242 stated:

"… there must always be a judicial concern of the public in general and the feelings of the victim or, in the case of death, the feelings of the family. Courts can never and certainly ought never to pass such sentence as may be demanded by or on behalf of the victim. In many cases, indeed most cases, where death has resulted from an offence, no sentence can satisfy the relatives and certainly no sentence can reverse the tragedy. Further, the courts must be astute to gauge public concern without reference to immediate campaigns in the media arising out of a particular offence."

353. In *R v Venables* [1998] AC 407 the House of Lords held that while a sentencing judge might take into account general considerations of public confidence in the administration of justice, natural justice would require him to ignore as irrelevant public petitions or public opinion as expressed in the media. Lord Goff at page 491 drew a distinction between public concern of a general nature with regard to, for example, the prevalence of certain types of offence, and the need that those who commit such offences should be duly punished and public clamour that a particular offender whose case is under consideration should be singled out for severe punishment. Lord Goff stated:

"It is legitimate for a sentencing authority to take the former concern into account, but not the latter."

354. Lord Steyn at page 526 referred to "informed public opinion" and added:

"Plainly a sentencing judge must ignore a newspaper campaign designed to encourage him to increase a particular sentence. It would be an abdication of the rule of law for a judge to take into account such matters … He ought to ignore the high-voltage atmosphere of a newspaper campaign. The power given to him requires, above all, a detached approach."

355. A separate section of this book (at paragraphs 828 and 829) deals with applications for stays where there has been inappropriate media coverage. See *Teare* 1993-95 MLR 212 and *Flanagan* (Appeal Division judgment 29th July 2004). See also *Watterson* (Appeal Division judgment 4th December 2009) in respect of taking into

account the views of the victim's family in the sentencing process following a conviction for manslaughter.

Licence and sentence expiry dates and early release of detainees

356. See section 23(1) and Schedule 2 of the Custody Act 1995 in respect of licence and sentence expiry dates and early release of detainees.

357. Consider the options of breach: the defendant could be returned to prison to serve the entire or part of the remaining period, such period to be served before the commencement of any sentence for the fresh offence or concurrently or no action could be taken.

358. In *Johnson* (judgment delivered 12th June 2008) the Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) at paragraph 21 stated:

> "Those who are sentenced to terms of custody and released on licence well understand that the commission of an offence whilst on licence entitles a court to order them to be returned to custody, perhaps to serve that portion of their custodial sentence which they have not served. In determining the period to be so served, a court is not required to have regard to principles of totality."

Sentencing guidelines

359. The Appeal Division has on numerous occasions (see for example *Caldwell-Camp* 2003-05 MLR 505) stressed that sentencing guidelines are guidelines and not binding in any formal sense. They are intended to be flexible guidelines not rigid tramtracks. The Deemster at first instance still retains a sentencing discretion. The Appeal Division (Judge of Appeal Hytner and Deemster Corrin) in *Bull v R* 1993-95 MLR N 13 (judgment delivered 24th April 1995) stressed that by definition sentencing guidelines are to be used flexibly. In *Bowley* [2008] EWCA 2036 the English Court of Appeal stressed that guidelines were guidelines and judges should not be unduly constrained by particular sentencing brackets which are set out in the guidelines. Counsel should refer to any relevant sentencing guidelines and where counsel seek to persuade the court not to follow the guidelines counsel should state clear reasons why it is not appropriate to facts and circumstances of the case before the court to follow the guidelines.

360. In *R v Bao* [2008] 2 Cr App R(S) 10 it was indicated that sentencing judges were obliged to follow guidelines even if they disagreed with them.

361. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Clinton* (judgment delivered 29th October 2009) stated:

> "71 … Such sentencing guidelines provide guidance as to a usual starting point for sentence, it is for the sentencing judge to determine the actual starting point in the circumstances of the particular case, and what sentence should be imposed in light of all the aggravating and mitigating factors. We reject Mr O'Neill's submission that the sentencing guidelines do not allow the sentencing judge to fully consider and give appropriate credit for the circumstances of the offender. Insofar as it is believed that such guidelines compel a sentencing judge to impose a particular sentence, such a belief is erroneous."

362. *Bowering* [2005] EWCA Crim 3215 Nov 9th 2005 stresses that if the court is not following the guidelines the court must state its reasons. See also *R v Best* [2006] All ER (D) 134 (Jan) CA and *Wong* [2001] 1 HCA 64 (15th November 2001). In November 2009 it was announced that Lord Justice Leveson had accepted the position of chairman to the Sentencing Council in England and Wales. The remit of the Council includes an obligation to produce guidelines for the courts to follow when sentencing offenders but it will also consider the effectiveness and impact of sentencing in England and Wales which may in turn inform policy makers and legislators.

363. The Privy Council in *Tyack* (judgment delivered 29th March 2006) considered the effect of the United Kingdom's sentencing guidelines in overseas jurisdictions.

364. If there are no relevant sentencing guidelines issued by the Appeal Division consider authorities in other jurisdictions including the authorities in Current Sentencing Practice in relation to sentencing issues in England and Wales. If reference is made to English or other cases decided outside the jurisdiction consider these cases in the light of any differing maximum sentences under the relevant statutory provisions and in light of local conditions.

365. The following guideline authorities on sentencing matters in particular areas may be of some assistance:

Sex offenders:	*AG's References 37, 38 etc* of 2003 [2004] 1 Cr App R(S) 84 *AG's References 120, 91, and 119 of 2002* [2003] EWCA Crim 5, *Christian* (Appeal Division judgment 4th June 2008 in respect of historic sex offences and sentencing), *R v Volante* (Appeal

	Division judgment 5th September 2008), *Bridson* (Appeal Division judgments 16th June 2009 and 31st July 2009), *Attorney General's References No 67 of 2008 (Sharon Edwards)* [2009] EWCA Crim 132, *R v S* [2008] EWCA Crim 600 (sexual grooming of children), *Warren* (Appeal Division judgment 1st February 2010)
Indecent images:	*Oliver* [2003] 2 Cr App R (S) 15
Rape:	*R v Milberry* [2003] 2 Cr App R (S) 31, *Finn* (Appeal Division judgment 26th September 2002), *Gallagher* 1981-83 MLR 314, *Qualtrough* 1987-89 MLR 244
Unlawful sexual Intercourse:	*Parker* (Appeal Division judgment 18th July 2003)
Incest:	*AG's Ref (No 1 of 1989)* (1989) 11 Cr App R (S) 409 1, *R v MH* [2001] 2 Cr App R (S) 10
Firearm offences:	*Thomas* (Appeal Division judgment 24th October 2006), *R v Crispin* [2008] EWCA Crim (gun crime)
Benefit fraud:	*R v Graham and Whatley* [2005] 1 Cr App R (S) 115
Drugs:	*Caldwell-Camp* 2003-05 MLR 505 (Appeal Division), *Fleming* (Appeal Division judgment 29th July 2005), *Goodman* (Appeal Division judgment 1st June 2007), *Watterson* (Appeal Division judgment 25th September 2007), *Taylor* (Appeal Division judgment 4th April 2008), *Todd* 1993-95 MLR 300, *Aramah* (1982) 4 Cr App R (S) 407 and subsequent authorities *Gillies* (Appeal Division judgment 16th April 2004 paragraph [21] re: minders), *Teare* (Appeal Division judgment 1st June 2007 re: duress), *Jeffrey Cameron Watterson* (Appeal Division judgment 25th April 2008), *R v Greaves* [2008] 3 Cr App R(S) 7 (supplying drugs to prisoners), *Myers* (Appeal Division judgment 26th November 2008 attempted possession of drugs in prison), *Lamb v Oake* 1999-01 MLR N11 (possession of drugs in prison), *Stevenson v Oake* 1999-01 MLR N

	11 (simple possession), *Davies v Oake* 1996-98 MLR N 7, *F v Oake* 1996-98 MLR 50 (simple possession), *Lamb v R* 1999-01 MLR N 12, *Devereau v R* (Appeal Division judgment 4th August 2009), *Crosbie* (Appeal Division judgment 23 September 2009), *Myers* (Appeal Division judgment 29th October 2009), *Clinton* (Appeal Division judgment 29th October 2009), *Pemberton and Sinclair* (Appeal Division judgment 25th June 2010) and *Batty* (Appeal Division judgment 30th July 2010)
Counterfeit currency:	*R v Howard* (1985) Cr App R (S) 320, *Shah* (1987) 9 Cr App R (S) 167, *Wake* (1991) 13 Cr App R (S) 422
Burglary:	*Smith* (Appeal Division judgment 25th May 2004), *Quirk v Turnbull* 1961-71 MLR 227 at 229, *R v Saw* [2009] EWCA Crim 1
Theft/breach of trust:	*Roberts* 2001-03 MLR N 28, *Carney* (Appeal Division judgment 27th September 2004)
Falsification of accounts:	*Roberts* 2001-03 MLR N 28, *Bull* 1993-95 N 14
Dealing in counterfeit medicinal products:	*R v Haywood* [2009] EWCA Crim 69
Perverting the course of justice:	*Constantinou v R* 1987-89 MLR 312
Acts of violence:	*Watterson* (Appeal Division judgment 4th December 2009, manslaughter), *Lindon* (Appeal Division judgment 28th October 2005 manslaughter), *Gosling* (Appeal Division 20th November 2006 manslaughter by reason of diminished responsibility, discretionary sentence of life imprisonment), *King* 2005-06 MLR N3 (Appeal Division judgment 27th July 2005 in respect of an offence contrary to section 35 of the Criminal Code 1872 as amended), *Thompson* (Appeal Division judgment 27th July 2005 another section 35 case), *Harrison v AG* 2004 JLR 111, *Watterson* (Appeal Division judgment 24th March 1993, unreported), *Kewley* (Appeal Division

judgment 1st July 2002 re assault on very young child), *Losty* 1996-98 MLR 7 (Appeal Division judgment 23rd September 1996 re use of shod feet), *Freeman* (Appeal Division judgment 15th July 2003 section 33 of the Criminal Code 1872 as amended offence), *McVey* (Appeal Division judgment 2nd July 2002), *McGivern* (Appeal Division judgment 6th January 2004), *R v Julian Clare* (2002) 2 Crim App R (S) 97 one blow cases, *R v Goodwin* (1999) 2 Crim App R (S) 128 re sentencing young violent offenders, *Patterson* (Appeal Division judgment 2nd July 2002 in respect of one punch manslaughter cases), *Attorney General's Reference No 64 of 2008 (Wyatt)* [2009] EWCA Crim 88 (one punch manslaughter), *R v Povey* [2008] EWCA Crim 1261 (knife crime) and see *Brummit* (Appeal Division judgment 13th January 2009) for a useful review of sentences imposed in respect of acts of violence

Causing death by Dangerous driving:	*Webb* 2005-06 MLR N 34 (Appeal Division) *Greaney* (Appeal Division judgment 31st July 2001) *Cooksley* [2004] 1 Cr App R (S) 1, *Martin* [2005] 2 Cr App R (S) 99, *Noble* [2003] Cr App R (S) 65
Arson:	*R v Moore* (Appeal Division judgment 22nd November 2006)
Unlawful detention:	*R v Cockeram* [1988] EWCA Crim 3446 *R v Holman* [2006] EWCA 1638
Money-laundering:	*Baines* (Appeal Division judgment 29th September 2010).

General comments on sentencing

366. Judge of Appeal Hytner in *Attorney General's Reference* (*Kneale*) 1993-95 MLR 239 stated at pages 242-243:

> "Sentencing frequently appears an easy task to those who are not burdened with the task of carrying it out. The essential principle is the protection of the public. This can be achieved either by reform and rehabilitation or by deterrence, which can be general or individual. By and large, custodial sentences are not effective as

deterrents. The certainty of detection is the best deterrent and if there is little risk of being apprehended heavy sentences rarely deter. However, in the background there must always be a judicial regard for the concern of the public in general and the feelings of the victim or, in the case of death, the feelings of the family. Courts can never and certainly ought never to pass such sentence as may be demanded by or on behalf of the victim. In many cases, indeed most cases, where death has resulted from an offence, no sentence can satisfy the relatives and certainly no sentence can reverse the tragedy. Further, the courts must be astute to gauge public concern without reference to immediate campaigns in the media arising out of a particular offence.

In this case, the probation officer quite properly recommended a non-custodial sentence. I say quite properly because the task of the probation officer is not to tell the court what sentence to impose but to recommend such sentence as may be best suited to the defendant's needs. We have no doubt that, in the absence of the concerns of the public and the feelings of the relatives of the deceased in this case, a non-custodial sentence was the correct one and the probation officer's recommendations were sensible. Further, it must be emphasized that Deemster Cain was misled into believing that the respondent was a boy of good character; and furthermore, he followed Manx sentencing practice in imposing a non-custodial sentence."

367. The headnote to *Perry v Clague* 1961-71 MLR 162 (Appeal Division judgments of Deemster Kneale and Deemster Moore delivered on the 15th October 1965) stated:

"The courts served the public interest not just by punishing crime but also by attempting to prevent it, by deterring others, by deterring the offender from committing a crime again, and by inducing the offender to turn from a criminal to an honest way of life, and the court in this instance acted in the hope that the appellant might be induced by the alteration [of a prison sentence or a fine] to turn back from a criminal to an honest life."

368. Judge of Appeal Hytner in *Faragher v R* 1990-92 MLR 428 at 432 stated:

"In our view the protection of the individual is far more important than the protection of property and physical violence of this nature [glassing] really must be discouraged."

369. *Faragher* is also authority for the proposition that any issues which arise in respect of the running of prisons are for the prison management. See also *Newbery* (Chancery Division judgment delivered on the 13th January 2009) on this point. In *Faragher* it was also indicated that the fact that the defendant was the sole female prisoner was not significant mitigation. Stress and delay suffered in getting the matter to court may be mitigating factors.

370. Counsel should be conscious of the position of the sentencing judge and the task he has to undertake. Counsel should assist the sentencing judge in that task.

371. Lord Woolf in *A New Approach to Sentencing* (9th April 2003) stated that there needed to be a greater emphasis on the prevention of crime and greater priority given to the police and the probation services. He wanted to see greater emphasis on community punishment, restorative justice and rehabilitation. Concentrate on what works. Reduce crime and protect the public. Lord Woolf felt that there was a need to eradicate politics from legislation in respect of sentencing. Lord Woolf wanted to avoid short term law reform to catch the law and order votes. Lord Woolf wanted to concentrate on bold law reform for the long term protection of the public.

372. Lord Carswell in *R v G* [2008] UKHL 37 at paragraph 57 stated:

> "57. Determining the appropriate sentence in cases involving sexual activity between young people is one of the more difficult tasks facing judges in criminal courts. They have to attempt to uphold the intention of Parliament in attaching penalties to acts of various kinds, while recognising the changes in sexual morality and behaviour which have taken place, involving greater sexual activity at younger ages than would have been accepted in previous generations. The appeal before your Lordships demonstrates some of these difficulties."

373. Sir Igor Judge in *Public Protection* 20th November 2006 stressed that the most salutary form of deterrence is the certainty of being caught. The most effective form of prevention starts in childhood in proper upbringing and education, in loving discipline. Punishment and deterrence, but not inhumanity to the criminal and his possible reformation. Education and rehabilitation may themselves serve to produce greater long term public protection from the offender. Consider the public protection in the long term.

374. In *R v Seed* (judgment delivered 13th February 2007) the English Court of Appeal commented that a prison environment is more punitive when the prison is overcrowded.

375. Lord Woolf in *Making Sense of Sentencing* (12th May 2005) argued that judges should be prepared to impose the unconventional sentence if this is what the case requires. Judging must never be mechanistic. The court should determine what is the correct sentence irrespective of the criticism to which it may give rise. If the offender is returned to society at the end of his sentence with increased skills a job to go to and accommodation the risk of that offender reoffending is

significantly reduced. Consider community punishments. Lord Woolf stated that keeping a prisoner within a prison averages roughly £37,500 per year. Consider restorative justice. Lord Woolf indicated that the use of imprisonment should be focused primarily on four situations:

(1) where imprisonment is necessary because the offender is sufficiently dangerous to make imprisonment essential for the protection of the public;
(2) where the crime is so serious that it can only be marked by a significant prison sentence;
(3) where the clang of the prison door sentence is required (very short period of imprisonment in conjunction with other punishments);
(4) where the crime itself does not make imprisonment necessary but it becomes necessary because an offender will not comply with other sentences.

376. Nelson Mandela once stated: "No one truly knows a nation until one has been inside its jails."

377. Marcus Tullius Cicero, Orator/Lawyer 106-43 BC has been quoted as having said:

"The true mark of any society that would declare itself to be civilized, lies in its treatment of those whom it would hold in its custody."

378. Extract from *Prisongate* by David Ramsbotham (2003) at pages 66-67:

"There are four aspects to a Healthy Prison:
• Everyone is, and feels, safe - staff, prisoners, and those who work in or visit the prison.
• Everyone is treated with respect as a fellow human being.
• Everyone is encouraged to improve themselves and given the opportunity to do so through access to purposeful activity.
• Everyone is enabled to maintain contact with their family and is prepared for release.
We felt that this concept was entirely in line not only with Michael Howard but also with famous words spoken by another previous Home Secretary. Had I been in the Strangers' Gallery of the House of Commons shortly before 10 p.m. on the evening of 20 July 1910, I would have heard the 36-year-old Winston Churchill wind up a debate on Prison Estimates as follows:
'We must not forget that when every material improvement has been effected in prisons, when the temperature has been rightly adjusted, when the proper food to maintain health and strength has been given, when the doctors, chaplains and prison visitors have come and gone, the convict stands deprived of everything that

a free man calls life. We must not forget that all these improvements, which are sometimes salves to our consciences, do not change that position.
The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country. A calm and dispassionate recognition of the rights of the accused against the State and even of convicted criminals against the State, a constant heart-searching by all charged with the duty of punishment, a desire and eagerness to rehabilitate in the world of industry all those who have paid their dues in the hard coinage of punishment, tireless efforts towards the discovery of curative and regenerating processes, and an unfaltering faith that there is a treasure, if you can only find it, in the heart of every man - these are the symbols which, in the treatment of crime and criminals, mark and measure the stored-up strength of a nation, and are sign and proof of the living virtue in it.'
Marvellous words that stayed on my desk from the moment that I first read them! What better guidance for a Chief Inspector required to assure the quality of the treatment and conditions of prisoners? What better description of a humane and purposeful Criminal Justice System? Churchill's sentiments are the clearest possible condemnation of punitive, as opposed to rehabilitative, imprisonment. They challenged the national conscience in 1910 by referring to the civilisation of the country. How strong was a nation that sanctioned what I saw in Holloway 85 years later? They provided the clearest possible answer to questions about what the Prison Service should be attempting to do with and for prisoners. After sentencing, while the convicted discharge their dues to society, prison should rehabilitate them with the aim of turning them into useful and law-abiding citizens. In order to determine what curative and regenerating processes to apply, it should discover the talents and abilities of even the most hardened criminals. How much attention would the stakeholders pay to demands for the end of unacceptable treatment and conditions? If ministers chose to ignore anything condemnatory, and instigated no change as a result of Inspectorate disclosures, it suggested that they had another agenda. Some said that they simply wanted the Prison Service to keep prisons under control so that there was nothing for the media to highlight. Winning the next election was far more important than risking public outcry by trying to reform prisons."

379. At a sentencing seminar in 2003 conducted by David Thomas on the Isle of Man shortly after my appointent as Second Deemster I stated the following by way of brief introductory comments:-

"There is no doubt in my mind that for serious criminal offences, in particular serious acts of violence, custodial sentences will continue to be imposed for the foreseeable future. It is the protection of the public that must be paramount. We must never forget however that sentencing serves the purpose of crime reduction and reparation as well as punishment. The three objectives of any criminal justice sentencing system are to punish, to deter and to re-habilitate. All this is with a view to protecting the public. But how are the public best protected? The available evidence suggests that greater support for reform and rehabilitation reduces the risk of re-offending and offers the best prospects for improved outcomes for victims, for offenders and for society as a whole.

We need to concentrate on the protection of the public, the impact of crime on victims and the prevention of further criminal activity by the offender.

I would like to place on record my thanks to all those who are working so hard in this respect including the prison authorities, Victim Support, the Drug and Alcohol team, the Probation Services, the law enforcement agencies and the dedicated prosecutors and defence advocates to name just a few.

We should not underestimate the impact that the rehabilitation of offenders – especially young offenders – will have on the protection of the public. People need to understand that rehabilitation of offenders will, in the long run, reduce the number of victims. There needs to be a greater emphasis on community punishment and rehabilitation not as soft options but as options that really work in the long run to the great benefit of the public. The reduction of crime and the protection of the public must be the main priorities of the criminal justice sentencing system.

A separate topic would be what re-habilitation takes place within a prison environment. It was a young Winston Churchill who stressed in 1910 that one judges the civilization and strength of a society by how that society deals with criminals and how that society treats its prisoners. It would be inappropriate of me to make any comment this evening on the existing state of the prison which I visited only a few weeks ago but suffice to say – hopefully it will not be too long before we have a new prison with modern conditions conducive to the re-habilitation of offenders and the protection of the public." [The new prison in Jurby opened in 2008]

380. Consider the then President of the Queen's Bench Division in England and Wales Sir Igor Judge's talk at Lincoln's Inn London on 29th October 2007 on *Current Sentencing Issues*. Extracts as follows:

"… sentencing a fellow human being is indeed an art, a human skill, a skill in humanity, not a science, and it is this skill, and its application, that is embodied in the possibly pompous sounding phrase, "judicial discretion".

What I am encouraging this audience to do is to think, and to encourage others to think, about issues which have been obscured by political rhetoric, and indeed a general approach to sentencing issues which implies that some goodies, or baddies, depending on your point of view, are "tough" on crime, and others, again, goodies or baddies depending on your point of view, are "soft" on crime.

To those who like it, "tough" implies strong-minded, robust sentencing, or, to those who do not, it is said to be wild excessive sentencing imposed ignorant of the social deprivation and emotional damage to which many offenders were subjected in their early years. "Soft" implies soggy, woolly, liberal-minded sentencers, ignorant of the deprivation and emotional damage suffered by the victims of crime.

The same sentencers, and their "soft" sentences, are thought by others to be balanced, and careful, seeking to ensure the rehabilitation of the offender, to the advantage of the community. Some sentences of course we have to accept are just plain wrong, either too 'tough' or too 'soft, but proportionate to the number of sentences imposed overall, they are a very small proportion.

There is so much more to it than that, and like so much that is written and spoken about the sentencing process, these epithets are misleading. First and foremost, the sentencer is administering justice. But tempering justice with mercy is a concept which we know about in literature, in the very Bible itself, along with the "eye for an eye, and tooth for a tooth". Every Christian of whatever denomination, saying his or her prayers, asks for forgiveness for his own trespasses, "as we forgive those who trespass against us". Is that merely an incantation? Or is it a prayer that means something? Incidentally, and in passing, as a salutary admonition to those with power and influence, and that includes judges, politicians, and newspaper editors, I cannot resist my current favourite quotation from Shakespeare (Measure for Measure, Act two, Scene two):

Isabella says:

"How would you be, if
He, which is the top of judgment, should
But judge you as you are? O, think on that;
And mercy then will breathe within your lips".

The admonition in that passage, although it is not the whole of Isabella's theme in Measure for Measure, is not that mercy should out-trump justice, but that each and every one of us is a fallible human being. In the end, we all need forgiveness for our mistakes.

We must have prisons: we must have rehabilitation services. Appropriate punishment must be imposed. For judges, public protection against serious crime comes first. Sometimes where it can be achieved, rehabilitation itself provides the significant forum of long-term protection.

And is it just beyond our wildest imagination that we might, as a society, and adapt the phrase made famous by Willie John McBride's Lions in South Africa, get our rehabilitation in first? By that I mean, that as a society we should recognise the reality that the vast majority of offenders, and the vast majority of crimes are committed by those who have had a dreadful start in life. No real family life. No loving discipline. No understanding that actions have consequences. No example. No guidance by good example. That is the reality of the lives of most offenders who appear in the Crown Court. And the logical conclusion: for every offender rehabilitated before he starts committing crime, there are the victims of those uncommitted crimes who will not have to endure the consequent pain and distress. In the context of resources, you cannot calculate the value to the victim of a crime which has not been committed. It would not show on the accountant's figures. The truth is that it would be too valuable for that. The essence of the point I am making, and the theme which I have been seeking to address, is in the end perfectly simple.

On sentencing issues we, as a community, must focus on the long as well as the short term view. We need strategy and we need foresight. In fact what we need is wisdom."

381. Consider also Sir Igor Judge's talk in Sydney Australia in August 2007 *The Criminal Justice System in England and Wales Greater*

Efficiency in the Criminal Justice System Time for Change? and the address by Phillips LCJ to the Howard League for Penal Reform 15th November 2007 *How Important is Punishment* ? Sir William Young, President of the Court of Appeal of New Zealand, in *The Effects of Imprisonment on Offending: A Judge's Perspective* [2010] Crim LR 3 concluded that retribution was the predominant rationale for the use of imprisonment in both England and New Zealand.

382. Mario A Paparozzi and Roger Guy in *The Giant That Never Woke*: *Parole Authorities as the Lynchpin to Evidence – Based Practices and Prisoner Re-entry* (Journal of Contemporary Criminal Justice 2009, 25) dealt with recidivism reduction and the promotion of offender rehabilitation, reintegration and long term public safety.

Assistance to court in respect of sentencing issues

383. Both prosecution and defence counsel have duties to assist the court in respect of sentencing issues (see *Parton* Court of General Gaol Delivery judgment delivered 30th July 2009).

384. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Myers* (judgment delivered 26th November 2008) at paragraph 10 of their judgment stressed the necessity of advocates making focused submissions as to the appropriate length of sentence and added:

> "We have no doubt that, particularly when judges are dealing with a busy list, they are entitled to expect assistance from advocates as to their powers and what sentence it is submitted would be appropriate and the reasons for such submission."

385. The prosecution should make plain in advance of the sentencing hearing any further orders requested for example, exclusion, registration of sex offender, travel notification requirements, sex offenders prevention order and forfeiture and destruction orders. The prosecution should highlight in advance of the sentencing hearing any outstanding breaches of suspended sentences or probation orders. The prosecution should refer to the relevant statutory provisions giving the court jurisdiction to make any orders the prosecution are requesting. The prosecution should refer to the sentencing options and highlight any aggravating matters. The prosecution should file updated previous convictions and draw to the attention of the court any victim impact issues and ensure the relevant evidence is before court and included in the agreed summary of facts. Prosecution and defence counsel should make their views on starting points clear in advance of the sentencing

hearing (see *Goodman* Appeal Division judgment 1st June 2007). Prosecution and defence counsel should refer to any relevant guideline cases and make specific recommendations as to sentence.

386. *R v Cain* was a decision of the English Court of Appeal on the 5th December 2006 and reported in the Times on the 26th December 2006 under the heading *Prosecution duty to assist in sentencing process.* The following are extracts:

> "It was unacceptable for defence and prosecution counsel not to ascertain and be prepared to assist a judge with the statutory provisions governing sentencing, in order to ensure that the judge did not impose a sentence which was unlawful …
>
> THE LORD CHIEF JUSTICE, giving the judgment of the court, said that the four appeals had one thing in common: in each case the judge had imposed a sentence that was unlawful.
> In some of the cases that fact formed no part of the grounds of appeal drafted by counsel. It was identified by the diligence of the court staff who were preparing the papers to be placed before the single judge.
> Such a situation reflected adversely on the advocates whose duty it was to represent the interests of their clients when the appropriate sentences were being considered by the judge.
> It was, of course, the duty of a judge to impose a lawful sentence, but sentencing had become a complex matter and a judge would often not see the papers very long before the hearing and did not have the time for preparation that the advocates should enjoy. In those circumstances, a judge relied on the advocates to assist him with sentencing.
> It was unacceptable for advocates not to ascertain and be prepared to assist the judge with the legal restrictions on the sentence that he could impose on their clients. That duty was not restricted to defence advocates.
> The advocates for the prosecution also owed a duty to assist the judge at the stage of sentencing. It was not satisfactory for a prosecuting advocate, having secured a conviction, to sit back and leave sentencing to the defence.
> Nor could a prosecuting advocate, when appearing for the purpose of sentence on a guilty plea, limit the assistance that he provided to the court to providing an outline of the facts and details of the defendant's previous convictions.
> The prosecuting advocate should always be ready to assist the court by drawing attention to any statutory provisions that governed the court's sentencing powers. It was prosecuting counsel's duty to ensure that the judge did not, through inadvertence, impose a sentence that was outside his powers.
> The prosecuting advocate should also be in a position to offer to draw the judge's attention to any relevant sentencing guidelines or guideline decisions of the Court of Appeal, Criminal Division.
> Those propositions were clearly stated by Lord Woolf, Lord Chief Justice, in *Attorney General's Reference (No 52 of 2003*); *R v Webb* (The Times December 12, 2003) and by Lord Justice Rose, Vice President, in *R v Pepper* (The Times May 10, 2005).
> What caused particular concern was that, as the present appeals demonstrated, there appeared to be widespread disregard of those judicial admonitions.

It might be that the only way of achieving an acceptable standard of practice was to require the prosecuting advocate to prepare a schedule or memorandum that identified the matters relevant to sentence identified above. Such a requirement had been imposed in New Zealand in 2003.
Their Lordships invited the Criminal Procedure Rules Committee to consider whether it would be desirable to impose some such requirement in this jurisdiction.
All that had been said was equally applicable to those appearing in magistrates courts."

387. See also *Archbold* at paragraph 5-46. Judges should not be slow to invite assistance from prosecuting counsel in sentencing matters and counsel should be ready to offer assistance if asked. It is the obligation of counsel for the prosecution to bring to the attention of the court any matters relevant to sentence (*R v Beglin* [2003] 1 Cr. App. R (S) 21 CA). The English authorities stress that it is the duty of counsel for the prosecution, in a case where there are guideline sentencing cases, to indicate, before sentencing, to the judge that there were such authorities, and that copies were available should the judge wish to see them: this practice should be meticulously followed and counsel who failed to do so could expect a frosty reception in the English Court of Appeal (*R v Webb* [2004] Crim LR 306, CA).

388. The following extract has been taken from the *Code for Crown Prosecutors* which can be found at www.cps.gov.uk:

"11 PROSECUTORS' ROLE IN SENTENCING .

11.1 Crown Prosecutors should draw the court's attention to:

- any aggravating or mitigating factors disclosed by the prosecution case;
- any victim personal statement;
- where appropriate, evidence of the impact of the offending on a community;
- any statutory provisions or sentencing guidelines which may assist;
- any relevant statutory provisions relating to ancillary orders (such as anti social behaviour orders).

11.2 The Crown Prosecutor should challenge any assertion made by the defence in mitigation that is inaccurate, misleading or derogatory. If the defence persist in the assertion, and it appears relevant to the sentence, the court should be invited to hear evidence to determine the facts and sentence accordingly."

Goodyear indications

389. Where appropriate defence counsel should consider an application to the court with a copy to the prosecution for a *Goodyear* indication namely an advance indication by the court of the maximum sentence which would be imposed if the defendant pleaded guilty at that stage of the proceedings. See *Goodyear* [2005] 2 Cr App R 20. This procedure has been followed on a number of occasions at first instance in the Court of General Gaol Delivery but has yet to receive the blessing of the Appeal Division.

390. The procedure may briefly be outlined as follows. There is a facility whereby a defendant may request an advance indication of the maximum sentence that would be imposed if the defendant pleads guilty (see *Archbold* at paragraphs 4-78 and 5-79b and 5-79c).

391. The principle is that a defendant's plea must always be made voluntarily and free from any improper pressure. A defendant may however personally instruct his advocate to seek an indication from the Deemster of his current view of the maximum sentence which would be imposed on the defendant in the event of a guilty plea at that stage. A five judge English Court of Appeal in *R v Goodyear* [2005] 2 Cr App R 20 laid down guidelines for indications from the judge as to sentence.

392. The hearing should normally take place in open court in the defendant's presence. The indication should only be given if sought by the defendant but a judge is entitled to remind the defence advocate of the defendant's entitlement to seek such an indication.

393. The judge has an unfettered discretion to refuse to give an indication or to reserve his position until such time as he felt able to give such an indication.

394. The indication should not be sought on the basis of hypothetical facts; there should be an agreed summary of facts and where appropriate a written basis of plea without which the judge should decline to give an indication.

395. Once the indication was given the court was bound by it, but the indication would cease to have effect if, after a reasonable opportunity had been given to consider it, the defendant declined to plead guilty.

396. No indication should be sought without the defence obtaining written and signed authority from the defendant. The defence advocate remained responsible for advising the defendant that he should not plead guilty unless he was guilty, that he understood (in an appropriate case) that the sentence might be the subject of an unduly lenient reference to the Appeal Division and that if a plea of guilty did not follow on the indication the indication would cease to have effect. The judge should not be asked to give an indication where there was any uncertainty as to the facts or the basis of plea and the judge should not be asked to indicate levels of sentence on the basis of possible alternative pleas. Prosecution and defence counsel should refer the Deemster to the relevant sentencing guidelines. Prosecution counsel should not say anything which might tend to create the impression that the sentence indication had the support or approval of the Crown.

397. At least 7 days notice should be given of an intention to seek an indication and failure to give such notice where it resulted in an adjournment could lead to a reduced discount for any guilty plea that followed. Any reference to a sentence request would be inadmissible in a subsequent trial; reporting restrictions should normally be imposed but they could be lifted once a guilty plea had been entered or the defendant had been found guilty.

Trials

Trial bundles and general preparation

398. Counsel should ensure that case management directions are promptly and fully complied with. The prosecution should file well in advance of the trial duly paginated court and jury bundles.

399. The court file should contain copies of all relevant documents necessary for the information of the court in the conduct of the trial including the information which will be going before the jury containing the relevant counts, the prosecution's opening note, statements of witnesses who will be attending to give evidence, any statements and admissions that are agreed and are to be read, any expert reports and schedules of disagreements, any previous orders in the proceedings, bail bonds, defendant's previous convictions (if any), relevant correspondence, judgments on any preliminary issues, list of agreed issues and list of issues in dispute (if available), list of any issues to be raised by the defence at trial (if available), list of exhibits, list of witnesses and schedule of dates upon which witnesses will be giving their evidence and time estimates of such evidence and any other documents which it is desirable for the court to have available. The file should be duly indexed, divided and paginated.

400. In the jury bundle should be a copy of the duly checked and agreed transcripts of the defendant's interviews with the police, any statements made by the defendant to the police and any photographs, plans, charts or other documents that are to be produced to the jury.

401. The contents of the court and jury file must be filed in accordance with the court's case management order and not left until the day before the start of the trial or produced piecemeal during the course of the trial.

402. In advance of the trial prosecution and defence counsel should agree the contents of the court and jury bundles. In the event of disagreement counsel should seek a ruling from the Deemster well in advance of the trial. The defence should, well before the trial, raise with the prosecution any objections to the admissibility of evidence and any issues in respect of the prosecution's opening note. Counsel should ensure that only admissible evidence is presented at trial. If the prosecution agree that references should be excluded then they should be and the witness warned that the excluded reference should not be mentioned in court. If the prosecution do not agree then the matter

should be raised with the Deemster at the first available opportunity and thereafter fully argued at the appropriate time. If issues as to admissibility of evidence arise for the first time during the evidence of the witness at trial then counsel should raise the issue and it should be dealt with in the absence of the jury.

403. In respect of the need to focus preparation on the main issues and the desirability of agreeing aspects of the evidence see *Dobbie* (Court of General Gaol Delivery judgment 23rd March 2009) and *McVey* (Court of General Gaol Delivery judgment 30th October 2009). Defence advocates should sensibly consider what witnesses will be required to be called and notify prosecution in early course. The defence should not require witnesses to be called unnecessarily. Where possible sensible admissions in respect of matters not in dispute should be made and the trial should concentrate on the main issues in dispute. Prosecution and defence counsel and the defendant should sign written admissions where appropriate. The reason it is suggested that the defendant also sign the admission is to minimise disputes between defendant and his advocate as to authority to sign and the content of admissions. See also section 16 of the Criminal Jurisdiction Act 1993 and Schedule 4 Part II of the Criminal Law Act 1981. Admissions, as with timely guilty pleas, will attract sentencing discounts where appropriate if convictions are subsequently recorded. Moreover unreasonable conduct may have adverse costs consequences.

404. Counsel should ensure that any preliminary points that can be dealt with prior to trial are dealt with prior to trial. If a point is likely to arise during the trial counsel should put markers down and ensure that no one is taken by surprise. Surprises increase the risk of injustice and do not assist in the best use of time. Counsel should not leave matters to the first day of the trial which would necessitate in some cases members of the public waiting for a considerable period of time before the jury is empanelled.

405. Advocates representing the prosecution and the defence should ensure that only admissible evidence is presented. It is not for counsel representing the prosecution or the defence in a specific case to give evidence. Counsel must ensure that evidence is properly admitted.

406. Counsel should liaise with court administration to ensure that any necessary facilities for the trial are made available. Any proposals for site views should be made at an early stage of the proceedings.

407. If there is to be a defence bundle this should generally be agreed in advance and duly paginated. Copies should generally be provided to the court in advance of the commencement of the hearing.

408. Counsel should ensure that trial bundles are prepared and filed well in advance of the commencement of the trial where possible. His Worship High Bailiff Moyle made the following comments in *Corkill* (judgment 30th October 2006):

> "[84] There is one other matter I would wish to mention. In this case there were obvious difficulties caused by the illness of Mr Kelly. However delays were caused by the "peculiar" practice of the Prosecution, virtually every day seemingly, of producing a considerable number of additional exhibits. It is not as if the Prosecution were not given more than ample notice of these proceedings. Furthermore, the exhibit bundles as produced did not appear to follow any logical sequence, or if there were any logic behind the order in which the exhibits were put, I was unable to discern it. In any event, it must have been apparent that there were some 25-30 'key' documents. They should have been reduced to a "core bundle" which should have been paginated, and an index provided. A lot of confusion and delay may have been spared had such elementary procedures been adopted. I trust such a situation will not arise again and that the Prosecution in future similar cases will be fully prepared, well before the actual hearing, to conduct their case without the need for unnecessary and frustrating delays."

409. See in a different context the issues raised by Munby J in *In re X and Y (Bundles)* [2008] EWHC 2058 (Fam) and warnings in relation to the consequences which may flow if proper bundles are not filed on a timely basis.

410. The prosecution should ensure that the relevant witnesses attend and are reminded of the need to attend. In *Adams* [2007] EWCA Crim 3025 the English Court of Appeal dealt with an issue under section 116 of the English Criminal Justice Act 2003 and made general comments in respect of the prosecution making arrangements for the attendance of witnesses. The need to keep in contact with witnesses and the need to remind them of the need to attend was stressed. All the experience of the criminal courts demonstrated that witnesses were not invariably organised people with settled addresses who responded promptly to letters and telephone calls and who managed their calendars with precision. They often did not much want to come to court. If they were willing they might not accord the appointment the high priority that it needed. Even if they did, it was only too foreseeable that something might intervene either to push the matter out of their minds or to cause a clash of commitments. Holidays, work, move of house, illness of self or relative and commitments within the family were just simple examples of the kind of considerations which day in, day out, led to witnesses not appearing.

Leaving contact with the witness until the last working day before the trial was not good enough and it certainly did not satisfy the statutory criterion. In addition, once the message was not known to have been received, reasonably practicable steps which ought to have been taken included a visit to his address and/or to his place of work or agency, or at least contact with those places, perhaps by telephone. These were not expensive steps (noting that police resources were relevant to the reasonableness of the steps to be taken: *R v Coughlan* [1999] EWCA Crim 553). Prosecution and defence counsel should stay in touch with their witnesses and ensure that they attend as required.

Compliance with case management directions

411. The importance of compliance with case management directions cannot be overstated. Such compliance is absolutely vital for the fair and efficient administration of justice.

412. Sir Robin Auld in *Review of the Criminal Courts of England and Wales 2001* (at paragraph 231) stated that he had anxiously searched in England and abroad for just and efficient sanctions and incentives to encourage better preparation for trial. He said that England and Wales were not "alone in this search and that as to sanctions at any rate, it is largely in vain."

413. A failure to comply with case management and other court orders may involve serious consequences such as judicial criticism, a negligence claim by the client, disciplinary proceedings, contempt proceedings and adverse costs orders. Counsel should ensure that all case management directions and other court orders are complied with. "I was busy and had other urgent matters to attend to", "we were considering a plea to a lesser charge", "the experts were too busy to provide their reports on time", "we were having difficulties with legal aid", "it is not my file, I am dealing with it for another colleague", "I have only just come back off holiday and other urgent matters arose" "I didn't finalise the jury bundle in advance because further admissions were due to be filed" and the like are not adequate excuses. Counsel should ensure that preparation and compliance with court orders is conducted on a timely basis. Counsel should diarise deadlines and ensure compliance well in advance of the deadline. If the deadline cannot be met counsel should make a prompt application for an extension of time giving full reasons as to the difficulties in complying with the deadline.

414. In *R v Phillips* [2007] EWCA Crim 1042 Clarke J stated:

"36. In a number of recent decisions of this court it has been made clear to Crown Court judges that they should be robust in case management decisions and that this court will strive to uphold them. Active hands-on case management, both pre-trial and during the trial, is an essential part of the judge's task. The decisions of this court should be well- known, but we refer to *Chaaban* [2003] EWCA Crim 1012, *Jisl* [2004] EWCA Crim 696 and most recently *Lee* [2007] EWCA Crim 764. No doubt it was with these judgments in mind that the recorder was robustly determined to proceed with the trial that afternoon, but against the history which we have summarised, it would, in our judgment, have been better if he had been prepared to grant some more time for counsel to read and absorb the material which had been so belatedly disclosed. The decision that it should proceed then, yet still interposing further enquiries at the end of the day, in our judgment placed defence counsel, notwithstanding his experience, in considerable difficulties and distracted him from the primary task of conducting the defence.

37. We are not inclined to be unduly critical of the judge, however. The responsibility, as he and Judge Campbell had both remarked, lay with the Crown. Not only must judges be robust in their case management decisions, as Judge Campbell and the other judges who handled this case had been, but the parties who are ordered to take steps must take them. Case progression staff, both on the prosecution and defence side, must ensure compliance with case management orders. The responsibilities of prosecution and defence, particularly in accordance now with the Criminal Procedure Rules, are well- known. We are not, we must say with some regret, impressed by the grudging tone of one remark in the Crown's skeleton argument on this point, where counsel says "Appellant's counsel seemed to have the support of the trial judge and had been able to persuade previous judges that there was merit in these complaints". What is singularly lacking is any explanation, even now, of why the proper orders had not been complied with."

415. In *R v Glover, Glover & Priestnal* (judgment 25th August 2006) I stated:

"121. Advocates should not treat court orders including case management directions as simply pieces of papers which can be ignored or compliance with them delayed to suit their convenience. Orders and directions in respect of contested trials or sentencing hearings should be strictly complied with. Serious consequences can follow if they are not. The efficient and fair administration of justice depends on advocates and the parties complying strictly with court orders. Everyone concerned with the trial process, the prosecution, the defence and all advocates involved in a case should ensure that court orders including case management directions are strictly complied with on a timely basis and that the case is ready for hearing and proceeds accordingly. Late preparation and late applications are to be discouraged. They involve delay. They waste time and costs and they cause inconvenience. There are few reasonable excuses for late preparation. It is not reasonable to say I did not comply with the court order because I was too busy or I was only a few days late or other matters took priority. Compliance with court orders should take priority. If advocates are too busy and cannot devote sufficient time to existing matters then they should arrange for additional resources and support or refuse to take on new instructions. Preparation for a hearing should commence at an early date rather than at a late

date. Proper time and attention should be given to every case. Leaving preparation until a couple of days or a couple of weeks before trial invites disaster together with judicial criticism and adverse costs orders or other penalties."

416. In *R v Winsland and others* (transcript of judgment delivered on 2nd April 2008) I stated:

"10. I find myself, yet again, referring to the comments I made in *R v Glover, Glover and Priestnal* (judgment 25th August 2006) at paragraph 121:

"… Orders and directions in respect of contested trials or sentencing hearings should be strictly complied with. Serious consequences can follow if they are not. The efficient and fair administration of justice depends on advocates and the parties complying strictly with court orders. Everyone concerned with the trial process, the prosecution, the defence and all advocates involved in a case should ensure that court orders including case management directions are strictly complied with on a timely basis and that the case is ready for hearing and proceeds accordingly. Late preparation and late applications are to be discouraged. They involve delay. They waste time and costs and they cause inconvenience. There are few reasonable excuses for late preparation."

10. Miss Braidwood who appeared for the Crown fairly and courageously accepted that the delay in the filing of the Defence Application was consequent upon the delays in the Prosecution providing information. Mrs Watts was unable to attend court to deal with the Application as she was engaged in another trial. Miss Braidwood was therefore fielded to deal with the Application at short notice. I make no criticism of Miss Braidwood. Indeed I congratulate her for her assistance to the court in difficult circumstances and at such short notice. The fact remains however that this case, in particular the failure of the Prosecution to respond promptly to important correspondence from the Defence, does not show the Prosecution in a good light. The Prosecution's failings in this case do not lie at the door of Miss Braidwood. They appear on the face of the correspondence to lie at the door of Mrs Watts.

11. The bad habits of failing to respond to correspondence promptly and of failing to comply with case management directions on a timely basis must be stopped and replaced with a settled practice of early responses to correspondence and strict compliance with court orders on a timely basis. Prosecution counsel have on occasions complained of lack of resources within the Attorney General's Chambers. If there is a lack of resources within the Attorney General's Chambers then urgent action needs to be taken by the appropriate authorities to remedy that situation otherwise the administration of justice on this Island will suffer

…

37. Before I leave this judgment I am duty bound to comment on the lateness of the Application and the failure to comply with the order of the 24th August 2007. It is not pleasant to have to say this but it has to be said if matters are to improve in the future.

38. In previous cases when Prosecution counsel have been challenged as to their failure to comply with court orders they have complained of lack of resources within the Attorney General's Chambers. If additional resources are required then they should be provided forthwith. Lack of resources is not a satisfactory excuse for continual failures to comply with court orders. See also judicial comments in respect of prosecution resources in *Gray* 1990-92 MLR 74 at 92-93.

39. I will not refrain from criticism simply because it may cause counsel some discomfort. The efficient and fair administration of justice on this Island is more important than the comfort of counsel and the comfort of Deemsters. I again stress the need for court orders to be complied with strictly. I do criticise counsel in this case. I am frankly unimpressed with the considerable delays of the Prosecution in responding to correspondence from the Defence and the failure to file the court and jury bundles in compliance with the order of the 24th August 2007. I am also unimpressed with the late timing of the Defence Application which Miss Braidwood accepts is consequent upon the delays in the Prosecution providing information. In my judgment the Application could and should have been filed much earlier. There must come a time if the Defence are not receiving responses from the Prosecution when the matter needs to be referred to the Court by way of formal application. That time should be well before the last week prior to the commencement date of the trial.

40. I make those critical comments in the hope that counsel will accept in the future the importance of responding to correspondence, of ensuring compliance with court orders and case management directions on a timely basis and making applications to the court on a timely basis. The bad habits of delayed responses to letters, failures to comply strictly with timetables set by the court and the filing of late applications will not be tolerated. It may be that in future if court orders are not strictly complied with sanctions will have to be considered in an endeavour to focus the minds of counsel on the importance of strictly complying with court orders."

417. In *R v Collister* 2003-05 MLR 150 the defendant was committed for trial on the 21st May 2003. It was not however until 3rd November 2003 that the information against Mr Collister was signed by the Attorney General. On the 16th December 2003 I invited the prosecution to provide its opening note before 4pm on 30th December 2003. On the 29th December 2003 Mrs Linda Watts, the chief prosecutor in the Attorney General's Chambers, wrote to the court stating that owing to other commitments it had not been possible to provide a prosecution opening note. At paragraph 111 of my judgment I stated:

"The prosecution should have had sufficient resources to prosecute this case properly, efficiently, fairly and within a reasonable time."

At paragraph 112 I added:

"There have already been significant and inexcusable delays by the prosecution in this case. The prosecution has had ample time to amend the first count and to prepare and finalise their opening note. They should get on with it. They should amend the first count and provide the opening note as soon as possible."

418. In that case the prosecution were in breach of an order made on the 16th December 2003 in that they had not provided the required additional particulars in respect of the first count. At paragraph 105 of the judgment I stated:

"Deliberate disregard of court orders could in the future lead to contempt proceedings – with all the consequences that follow. It is not for the prosecution to decide whether they will comply with a court order or not. Court orders, until they are varied or set aside, need to be complied with. Moreover, if the prosecution continues to fail to comply with orders of this court one cannot rule out the possibility of the proceedings being stopped on the grounds of abuse of process. We have not yet reached that stage. As there are no contempt proceedings before me, I say no more at this stage on that point but I am sure the prosecution appreciate the importance of complying with court orders."

419. See *Archbold News* Issue 5, June 8, 2007 and the case of *Phillips* [2007] EWCA Crim 1042, April 26 2007 which stressed the importance of obedience to court orders. Crown Court judges should be robust in case management decisions (*Chaaban* [2003] EWCA Crim 1012, *Jisl* [2004] EWCA Crim 696 and *L* [2007] EWCA Crim 764). Not only must judges be robust in case management decisions, but the parties who were ordered to take steps must take them.

420. In *L* [2007] EWCA Crim 764 Thomas L J stated :

"(d) The duty of a trial judge

27. Rule 3 of the Criminal Procedure Rules which had come into force shortly before this trial began make it clear that it is the duty of court to manage the case and trial actively. This court has also emphasised the essential importance of the duty of the trial judge actively to manage the trial. The three most important judgments were all given by Sir Igor Judge, President, and in view of their importance to the conduct of trials and to this appeal, we set the passages out in full.

i) In *R v. Chaaban* [2003] EWCA Crim 1012 ([2003] Crim.L.R. 658) the trial judge had made it clear that he intended the case to proceed expeditiously; it was contended on behalf of the appellant that the impression was left that convenience and speed were treated as having higher importance that the fairness of the trial, but could point to no material which had not been made available or where proper examination was obstructed. Judge LJ (as he then was) said in the course of giving the judgment of the court:

"35. …The trial judge has always been responsible for managing the trial. That is one of his most important functions. To perform it he has to be alert to the needs of everyone involved in the case. That obviously includes, but it is not limited to, the interests of the defendant. It extends to the prosecution, the complainant, to every witness (whichever side is to call the witness), to the jury, or if the jury has not been sworn, to jurors in waiting. Finally, the judge should not overlook the community's interest that justice should be done without unnecessary delay. A fair balance has to be struck between all these interests…

37. We must also consider whether the case was somehow rushed, a submission which gives this court the opportunity to highlight a significant recent change, perhaps less heralded than it might have been, that nowadays, as part of his responsibility for managing the trial, the judge is expected to control the timetable and to manage the available time. Time is not unlimited. No one should assume that trials can continue to take as long or use up as much time as either or both sides may wish, or think, or assert, they need. The entitlement to a fair trial is not inconsistent with proper judicial control over the use of time. At the risk of stating the obvious, every trial which takes longer than it reasonably should is wasteful of limited resources. It also results in delays to justice in cases still waiting to be tried, adding to the tension and distress of victims, defendants, particularly those in custody awaiting trial, and witnesses. Most important of all it does nothing to assist the jury to reach a true verdict on the evidence.

38. In principle, the trial judge should exercise firm control over the timetable, where necessary, making clear in advance and throughout the trial that the timetable will be subject to appropriate constraints. With such necessary even-handedness and flexibility as the interests of the justice require as the case unfolds, the judge is entitled to direct that the trial is expected to conclude by a specific date and to exercise his powers to see that it does. We find that nothing in the criticisms of the way in which the judge dealt with the timetable, and nothing in the remaining complaints about his management of the case which would justify us interfering with the decisions made while exercising his discretion as the trial judge."

ii) *In R. v. Jisl, Tekin, Konakli* [2004] EWCA Crim 696 (set out very helpfully in *Blackstone* 2007 edition at paragraph D3.6), Judge LJ, giving the judgment of the court again drew attention to the duty of the trial judge to manage a trial:

"114. The starting point is simple. Justice must be done. The defendant is entitled to a fair trial: and, which is sometimes overlooked, the prosecution is equally entitled to a reasonable opportunity to present the evidence against the defendant. It is not however a concomitant of the entitlement to a fair trial that either or both sides are further entitled to take as much time as they like, or for that matter, as long as counsel and solicitors or the defendants themselves think appropriate. Resources are limited. The funding for courts and judges, for prosecuting and the vast majority of defence lawyers is dependent on public money, for which there are many competing demands. Time itself is a resource. Every day unnecessarily used, while the trial meanders sluggishly to its eventual conclusion, represents another day's stressful waiting for the remaining witnesses and the jurors in that particular trial, and no less important, continuing and increasing tension and worry for another defendant or defendants, some of whom are remanded in

custody, and the witnesses in trials which are waiting their turn to be listed. It follows that the sensible use of time requires judicial management and control.

115. Almost exactly a year ago in *R v Chaaban [2003] EWCA Crim. 1012* this Court endeavoured to explain the principle:

116. The principle therefore, is not in doubt. This appeal enables us to re-emphasise that its practical application depends on the determination of trial judges and the co-operation of the legal profession. Active, hands on, case management, both pre-trial and throughout the trial itself, is now regarded as an essential part of the judge's duty. The profession must understand that this has become and will remain part of the normal trial process, and that cases must be prepared and conducted accordingly.

117. The issues in this particular trial were identified at a very early stage, indeed during the course of the previous trial itself. In relation to each of the defendants, in a single word, the issue was knowledge. And indeed, the issue in most trials is equally readily identified.

118. Once the issue has been identified, in a case of any substance at all, (and this particular case was undoubtedly a case of substance and difficulty) the judge should consider whether to direct a timetable to cover pre-trial steps, and eventually the conduct of the trial itself, not rigid, nor immutable, and fully recognising that during the trial at any rate the unexpected must be treated as normal, and making due allowance for it in the interests of justice. To enable the trial judge to manage the case in a way which is fair to every participant, pre-trial, the potential problems as well as the possible areas for time saving, should be canvassed. In short, a sensible informed discussion about the future management of the case and the most convenient way to present the evidence, whether disputed or not, and where appropriate, with admissions by one or other or both sides, should enable the judge to make a fully informed analysis of the future timetable, and the proper conduct of the trial. The objective is not haste and rush, but greater efficiency and better use of limited resources by closer identification of and focus on critical rather than peripheral issues. When trial judges act in accordance with these principles, the directions they give, and where appropriate, the timetables they prescribe in the exercise of their case management responsibilities, will be supported in this Court. Criticism is more likely to be addressed to those who ignore them.

119 …..We are not seeking to analyse each and every aspect of the present trial where modern case management would have avoided delay. We are simply illustrating some of the more obvious areas where the modern approach would probably have saved time.

120. Experience shows that once the forward impetus has been lost, it becomes extremely difficult to recover it. Imperceptibly at first, drift infiltrates the proceedings and develops into unacceptable delay…… The trial judge is

responsible for providing the necessary example and leadership to prevent accumulating drift. In the longer cases in particular, the organisation of his administrative and other judicial burdens should, so far as practical, be reduced or organised to start at times which enable him to sit every day for full court days.

121. As already explained, these observations are directed to future arrangements for case management of criminal trials. They do not impinge on the safety of these convictions, or the appropriate levels of sentence."

iii) These principles were reiterated in *R v K & others* [2006] EWCA Crim 724:

"Case management decisions are case specific. We are simply emphasising that the new Criminal Procedure Rules impose duties and burdens on all the participants in a criminal trial, including the judge, and the preparation and conduct of criminal trials is dependent on and subject to these rules.

These principles are clearly set out in the Protocol on Disclosure dated 20 February 2006. This protocol should be applied by trial judges, and those who act both for the prosecution and the defence should ensure that they familiarise themselves with it." "

421. In *R v Bury Magistrates Court* judgment delivered 13th December 2007 (172 JP 19) the prosecution were ordered to serve video tapes of police interviews with children. The prosecution failed to serve the evidence. Both parties filed certificates of readiness for trial. The prosecution made an application for an adjournment. The judge made an order for costs against the prosecution. The Divisional Court (Maurice Kay L J and Burnton J) held that the judge had been entitled to make a costs order against the prosecution where it had failed to comply with a court order that it should have served its witness evidence on the defence by a specified date as it had given no reasonable explanation for that failure.

422. Consider *Newbery* (judgment delivered 13th January 2009), *R v Gray* 1990-92 MLR 74 at 93 and *R v Winsland and others* (judgment delivered 2nd April 2008) at paragraphs 12 and 38 in respect of lack of resources. In *Winsland* at paragraph 38 it was stated that: "Lack of resources is not a satisfactory excuse for continual failures to comply with court orders."

423. In *Owens* [2006] EWCA Crim 2206 the defence complained in respect of the prosecution's drip-feeding of notices of additional evidence. The trial judge made an order that anything served after a period of 21 days would not be admitted. Approximately two weeks before the trial and after the deadline imposed by the trial judge the prosecution served further voluminous witness statements and

exhibits. The defence wanted the evidence excluded but the judge refused. Rix L J at paragraph 52 stated:

> "The Judge was entitled, having satisfied himself that there was ultimately no unfairness and no undue prejudice in the service of this material, to conclude that, his own order notwithstanding, it would be in the interests of justice to permit the material encompassed by the NAE to go forward for consideration as to its admissibility or exclusion on its own merits."

424. In *R (Robinson) v Sutton Coldfield Magistrates* [2006] EWHC 307; [2006] 2 Cr App R 13 the Divisional Court stressed at paragraphs 14-16:

> "The first point to make is that time limits must be observed … Secondly, Parliament has given the court a discretionary power to shorten a time limit or extend it even after it has expired. In the exercise of that discretion, the court will take into account of all the relevant considerations, including the furtherance of the overriding objective … In this case there were two principal material considerations: first the reason for the failure to comply with the Rules. As to that, a party seeking an extension must plainly explain the reason for its failure. Secondly, there was the question of whether the Claimant's position was prejudiced by the failure …any application for an extension will be closely scrutinised by the court. A party seeking an extension cannot expect the indulgence of the court unless he clearly sets out the reasons why it is seeking the indulgence."

425. See *Lawson* [2006] EWCA Crim 2572; [2007] 1 Cr App R 11 at paragraphs 17, 18 and 41 in respect of the duties of defence counsel in the context of a multi-defendant trial and the need to give advance notice where it is proposed that steps be taken in respect of bad character evidence. See also *Musone* [2007] EWCA Crim 1237 described by Judge Denyer QC in his useful book on *Case Management in the Crown Court* at page 11 as a "rare and (with great respect) in some ways a slightly doubtful illustration of the use of the Rules (and their breach) being used to prevent one defendant pursuing a line of enquiry against a co-defendant."

426. Sir Robin Auld in *Review of the Criminal Courts of England and Wales 2001* at paragraphs 229 and 230 stated:

> "I have mentioned the lack of effective sanctions and the need for better incentives to encourage all concerned in the preparation of criminal cases for trial to cooperate when they reasonably can and to get on with it. Orders of costs, wasted costs orders, the drawing of adverse inferences or depriving one or other side of the opportunity of advancing all or part of its case at trial, are not, in the main, apt means of encouraging and enforcing compliance with criminal pre-trial procedures. In these respects criminal courts have much less control than civil courts . . .

In criminal cases an order for costs against a defendant personally is rarely an option because of his lack of means and because it may be hard to apportion fault as between him and his legal representative. And there are problems about the fairness of a trial if a defendant is under threat of a sanction of that sort ... an order for costs against the prosecution for procedural default is possible and sometimes imposed. But, though it serves as a mark of the court's disfavour and dents a departmental budget, judges are disinclined in publicly funded defence cases to order what amounts to a transfer of funds from one public body to another. The third possible financial sanction is to make a wasted costs order against the legal representative on one side or the other. But again there are often practical limitations on the court in identifying who is at fault—on the prosecution side Counsel, those instructing him or the police—and on the defence side, Counsel, his solicitors or the defendant."

427. In *R v S and L* [2009] EWCA Crim 85 (a case concerning the defence of necessity) the English Court of Appeal held that in principle a preparatory hearing could be conducted for the purposes of ensuring a properly controlled trial during which fanciful and speculative defences were not raised (thus confining the trial to a reasonable time and ensuring that the jury focused upon the real issues). A trial judge is entitled to seek particulars of what material it was suggested the defence might adduce and to restrict or refuse cross-examination absent some indication of material to be called in support of the propositions advanced. Further the trial judge is entitled to know how long the case would take, how long the jury would be detained and what the programmed timetable was. In order to be satisfied of those matters the trial judge would need to be able to assess how long the defence should be allowed to cross examine any particular witness, to what issues cross examination would go, and what day or days would be occupied with the defence case. Furthermore, once the trial judge had heard the cross examination it would be perfectly open to him to conclude that there was no material upon which the defence could be left to the jury. The following are extracts from the court's judgment delivered by Moses L J:

"10 …The purpose of the preparatory hearing was to ensure that there was a properly controlled hearing during which fanciful and speculative defences were not raised, for the purposes of confining the trial to a reasonable time, and of more importance, ensuring that the jury focused upon the real issues. No complaint has been made, nor could be made, as to the propriety of conducting such a preparatory hearing, but there are dangers. The main danger is as to the evidential or factual basis upon which any ruling could be given.

…

28. Our conclusion, therefore, is that, at this stage, the defence ought not be shut out from advancing the defence of necessity. But the control and management of these proceedings does not stop there. We have already pointed out that the

material set out in the latest note dated 25 January 2009 was laid before the judge. Indeed, some of the defence statements went so far as to refer, as we have already indicated, to general fears of robbery, theft and other violence which seem miles away from the case the defendants now seek to adopt.

29. The remedy lies in the judge's control of the proceedings by seeking particulars of what material it is suggested the defence may adduce in relation to those matters specifically set out at paragraph 5. During the course of this judgment we have already indicated the absence of particularity. The judge would be perfectiy entitled to restrict or indeed refuse cross-examination in relation to the first point absent some indication of a basis for saying there will be material called in support of the propositions set out in paragraph 5. It is not for us to exercise case management over the case when so experienced and respected a judge has control of it, but there is nothing to stop the judge requiring those particulars and written material in support of them before he allows the defence to be deployed; otherwise he may reach the conclusion that the matter is purely speculative. If there is such material, at least the categories of that material can be shown to the prosecution and to the judge, if he wishes to see it.

30. The next way of controlling this case is in relation to the cross-examination. The judge is entitled to know how long the case will in fact take, how long the jury will be detained and what the programme is. In order to be satisfied of those matters, he will need to be able to assess how long the defence should be allowed to cross-examine any particular witness, to what issues it will go, and what day or days will be occupied with the defence case, That too will require identification of particular documents or witnesses that the defendants seek to advance. In that way, the question as to whether this is merely a fanciful defence or otherwise may emerge."

Unnecessary adjournments and vacation of trial dates

428. With proper preparation on all sides there should be no unnecessary applications for adjournments or vacation of trial dates. If circumstances arise whereby such applications have to be made consider the relevant law and the likely consequences and ensure that such applications are made at the earliest possible time. Where appropriate ensure that all necessary evidence (for example medical evidence) is filed in support of the application.

429. In *Watterson* (judgment 19th October 2005) I dealt with the relevant law in respect of adjournments and cases proceeding in the absence of defendants. I stated:

"10. In relation to the relevant law I will deal firstly with the general law in respect of adjournments and secondly with the special position where a defendant is absent from the court.

Adjournments generally

11. If there is an application for an adjournment or for trial dates to be vacated then the court has a discretion to exercise.

12. The following general principles appear from the authorities :

    (1) The court should fully examine the circumstances leading to the application, the reasons for the application and the consequences to the prosecution and defence and indeed all others involved in the process. Ultimately the court must decide what is fair in light of all the circumstances.

    (2) Both sides should be given an opportunity to prepare and present their cases at trial properly but proceedings have to be progressed in the public interest. Court resources must not be unnecessarily wasted. Moreover if the reason for the delay is the failure of counsel to properly prepare the case despite having had an opportunity to do so or if the application for an adjournment arose due to the fact that counsel had failed to obtain an expert report in time or had failed to arrange for witnesses to be summoned in good time, the applicant should not expect much sympathy from the court. All these matters lie within the control of the applicant and his advisers. Counsel should ensure that they are duly prepared for trial. Last minute preparation and last minute applications are to be discouraged. Moreover a defendant who dispenses with the services of his advocate shortly before a trial is due to commence or indeed part way through the trial should ensure that he is ready to proceed with alternative legal representation or if need be as an unrepresented defendant. A defendant should not simply assume that a court will automatically adjourn a trial if a defendant feels unable to proceed in such circumstances. It will not.

    (3) When asked for an adjournment the court should scrutinise the application closely and unless satisfied that it was indeed necessary and fully justified the court should refuse it. The court considering the application needs to be alert to the needs of everyone involved in the process including but not limited to the prosecution and the defendant. It extended also to the complainant, to every witness, to the jury or those jurors in waiting. Moreover the court should not overlook the community's interest that justice should be done without unnecessary delay. A fair balance needs to be struck between all those interests. Adjournments have to be fully justified and if at all possible should be avoided. (See also the interesting research into the causes of adjournments in Scottish summary criminal cases by Fiona Leverick and Peter Duff *Court Culture and Adjournments in Criminal Cases : A Tale of Four Courts* [2002] Crim LR 39).

    (4) The court needs to consider whether a trial can proceed without injustice. The court needs to consider whether there can be a fair trial. The aim to be achieved by an adjournment must be in proportion to the effect of adjourning the case. It is in the public interest that unnecessary applications for adjournments be discouraged.

13. When considering an application for an adjournment or the vacation of hearing dates the legal authorities indicate that there are various factors that the court

needs to take into account when considering how to exercise its discretion including the following:

(1) the nature of the application and the background to the proceedings
(2) the reasons for the application and the timing of it
(3) the importance of the proceedings and what is at stake
(4) the likely adverse consequences and the risk of prejudice to the person seeking an adjournment if an adjournment is not granted
(5) the likely adverse consequences and the risk of prejudice to others if the application is granted
(6) the commitments of the court, and where appropriate of witnesses, of jurors and indeed all others involved in the proceedings
(7) the interests of justice in ensuring that cases are dealt with efficiently and fairly to all concerned in the process
(8) the undesirability of delays
(9) the extent to which the applicant or his legal representative has been responsible for the circumstances which have led to the application for an adjournment

The absence of the Defendant

14. Special considerations apply where a defendant has absented himself from the trial process and these were usefully reviewed by the House of Lords in *R v Jones* [2003] 1 AC 1 (the *Jones* case) where it was held that a judge had a discretion to commence a trial in the defendant's absence though it was to be exercised with great caution; that it was generally desirable that a defendant should be represented, even if he had voluntarily absconded; and that the commencement of a trial in the voluntary absence of the accused did not contravene Article 6 of the European Convention on Human Rights.

15. I noted the facts of the *Jones* case and the helpful comments of their Lordships on the relevant legal factors to consider when deciding whether to continue with a criminal trial in the absence of a defendant.

16. Lord Bingham in the *Jones* case at page 10 recognised that, in a case where a defendant was absent, the court had:

> "a discretion, to be exercised in all the particular circumstances of the case, whether to continue the trial or to order that the jury be discharged with a view to a further trial being held at a later date. The existence of such a discretion is well established, and is not challenged on behalf of the appellant in this appeal. But it is of course a discretion to be exercised with great caution and with close regard to the overall fairness of the proceedings; a defendant afflicted by involuntary illness or incapacity will have much stronger grounds for resisting the continuance of the trial than one who has voluntarily chosen to abscond".

17. There can be no doubt that in the normal course of events a fair hearing requires a defendant to be notified of the proceedings against him. A person should as a general principle be entitled to be present at his trial. A defendant in a criminal trial should have the opportunity to present his argument adequately and participate effectively. A defendant should as a general principle be entitled to be

represented by counsel at trial and on appeal whether or not he is present or has previously absconded.

18. Lord Bingham in the *Jones* case referred to the Strasbourg jurisprudence and at page 12 concluded that:

"There is nothing in the Strasbourg jurisprudence to suggest that a trial of a criminal defendant held in his absence is inconsistent with the Convention".

Lord Bingham added:

"If a criminal defendant of full age and sound mind with full knowledge of a forthcoming trial, voluntarily absents himself, there is no reason in principle why his decision to violate his obligation to appear and not to exercise his right to appear should have the automatic effect of suspending the criminal proceedings against him until such time, if ever, as he chooses to surrender himself or is apprehended".

19. Lord Bingham stated at page 12 that "one who voluntarily chooses not to exercise a right cannot be heard to complain that he has lost the benefits which he might have expected to enjoy had he exercised it".

20. Lord Bingham stressed that the discretion to commence a trial in the absence of a defendant should be exercised with the utmost care and caution and that it was generally desirable that a defendant be represented even if he has voluntarily absconded. At page 13 he continued:

"…the presence throughout the trial of legal representatives, in receipt of instructions from the client at some earlier stage, and with no object other than to protect the interests of that client, does provide a valuable safeguard against the possibility of errors and oversight. For this reason trial judges routinely ask counsel to continue to represent a defendant who has absconded during the trial, and counsel in practice accede to such an invitation, and defend their absent client as best they properly can in the circumstances".

21. Lord Nolan at page 14 in the *Jones* case also recognised the existence of a discretion of a trial judge to proceed with a trial in the absence of the defendant as did Lords Hoffmann and Hutton at page 15. Lord Hutton at page 19 in the *Jones* case stated:

"The discretion of a judge to proceed with a trial in the absence of the defendant is one to be exercised with great care, but in my opinion there can be circumstances where in the interests of justice a judge is entitled to decide to proceed, particularly where the defendant has deliberately absconded to avoid trial".

22. Lord Rodger at page 26 in the *Jones* case agreed with the need for caution and also associated himself with the comments of Lord Bingham as to the desirability of a defendant being represented even if he has voluntarily absconded.

23. See also the interesting article by P. W. Ferguson *Trial in Absence and Waiver of Human Rights* [2002] Crim L.R. 554. In his conclusions at page 564 the learned author states that :

"…there must be safeguards of a fair trial where the decision is exercised in favour of trial in absence : the presence of legal representatives previously instructed is a valuable protection of the defendant's interests in the course of the trial. If that safeguard is missing, any conviction will more likely be overturned".

24. The legal authorities confirm that the court has a discretion to permit a trial to proceed in the absence of a defendant but that discretion needs to be exercised with great care taking into account all the circumstances of the case."

430. See the useful judgment of Acting Deemster Montgomerie in *Tonneson* (judgment delivered on the 30th June 2009) and the desirability of warning defendants that if they fail to attend the trial it may proceed in their absence and without defence legal representation.

431. See *R v Ulcay* [2007] EWCA Crim 2379 to the effect that the court should not oblige a lawyer to continue to act when he had made a proper professional judgment that he was obliged, for compelling reasons, to withdraw from the case. Counsel instructed late were professionally required to do the best they could in the circumstances. Lawyers acting for parties were officers of the court and had obligations to the court to comply with its orders and to do the best for the client in the light of those orders. Basically counsel was professionally required to "soldier on and do their best."

432. See also *O'Hare* [2006] EWCA Crim 471, *Boodhoo* [2007] EWCA Crim 14 and *R v Pomfrett* [2010] 2 Cr App R 28.

433. In *R v North and East Hertfordshire Justices* (judgment 17th January 2008) 172 JP 74 [2008] EWHC 103 (Admin) a prosecution witness could not attend due to extreme weather conditions and lack of provision of child care. The justices refused an adjournment and the case against the defendant was dismissed. The Divisional Court allowed the appeal. The following is an extract from the report:

"Every sympathy could be had with the desire to get cases on quickly, but the issue on an application for an adjournment was the question of doing justice to all those involved in the case. A prosecution should not be shut out as punishment for fault on the part of the Crown Prosecution Service, let alone on the part of a witness. If, through no fault of a defendant, witnesses do not attend who should have attended, magistrates ought generally to grant adjournments. No fault could be ascribed to the witness, unless it could be said that she had failed to arrange for childcare on a contingency basis. Similarly, there was no basis for criticizing the prosecution, unless it could be said that they had failed to suggest to her to make

childcare arrangements in case, unexpectedly, the school remained closed. There was nothing to place in the balance against an adjournment other than further delay. In all the circumstances, the decision to refuse the adjournment had been irrational and perverse."

434. In *R v Bradford Justices* (1990) 1 Crim App R 390 crucial material defence witnesses who had not been summoned failed to turn up on two occasions and the justices refused to issue warrants. Mann L J at 392 stated:

"The Justices have a duty to hear a case which a defendant wishes to advance … the power to grant a witness warrant is one which ought to be exercised when the evidence is critical."

435. In *Jorgic v Germany* (App no 74613/01) 25 BHRC 287 the European Court of Human Rights considered whether the defence had a right for witnesses resident abroad to be summoned to attend to give evidence.

436. Judge Denyer QC in *Case Management in the Crown Court* at pages 80-81 states that when an adjournment is sought on the basis that an important witness is absent, the court is entitled to enquire about the nature of the evidence that the witness may be able to give. In *R v Bracknell Justices* (1990) Crim LR 266 the Divisional Court said if the legal representative does not himself volunteer sufficient information about the nature of the proposed evidence, then the court itself should ascertain what sort of support to the defence case that absent witness could give.

437. In *R (Taylor) v Southampton Magistrates' Court* [2008] EWHC 3006 (Admin) the Queen's Bench Division did not interfere with the exercise of discretion of magistrates who adjourned a case to permit the prosecution to adduce further evidence in respect of the service of a notice of intended prosecution. See *Gleeson* [2003] EWCA Crim 3357, *DPP v Chorley Justices* [2006] EWHC 1795 and *Writtle v DPP* [2009] EWHC 236 to the effect that the days when the defence can assume that they will be able to successfully ambush the prosecution are over. See Judge Denyer *The End of the Ambush* Criminal Law & Justice Weekly Vol 173 5th December 2009.

438. The Appeal Division (Judge of Appeal Tattersall and Deemster Doyle) in *Williams* (judgment delivered on the 19th August 2003) stated:

"13. It is agreed that the question of whether to grant an adjournment was one for the exercise of the Acting Deemster`s discretion. The considerations affecting the

exercise of the court`s discretion in such a situation will vary greatly from case to case. However there can be no doubt that the Acting Deemster applied the correct test, namely whether, in the absence of Mr Griffin, it was possible for the Appellant to have a fair trial, which is simply another way of asking whether any injustice would result from the trial proceeding. She concluded that a fair trial was possible even in the absence of Mr Griffin.

14. We entirely agree. The matters which Miss Hannan wished to canvass with Mr Griffin were substantially uncontroversial. We were told that the Appellant gave evidence that Mr Griffin had agreed that she could stay at his flat that night and of the previous good relations between them. That evidence was not disputed by the prosecution and there was no reason for the jury not to unreservedly accept it. It is noteworthy that although the defence were anxious to rebut any suggestion that the Appellant participated in the assault on Mr Griffin in order to obtain possession of the keys and thereby gain access to his flat, that suggestion was never pursued by the prosecution. As to the remaining matters, for example what clothing was being worn or who did what, there can be no doubt that Mr Griffin could have given no material evidence. In our judgment, in such circumstances the Acting Deemster was entitled to exercise her discretion in the manner in which she did.

15. We add only that, if during the trial, matters had arisen which highlighted the need for Mr Griffin to give evidence, Miss Hannan could have renewed her application to the Acting Deemster or the Acting Deemster, of her own volition, could have raised the matter. Neither Miss Hannan nor the Acting Deemster did so."

439. Judge Denyer QC in *Case Management in the Crown Court* at pages 81-82 reviewed some of the relevant authorities as follows:

"In *R v Ealing Justices* [1999] Crim LR 840 after defence witnesses had failed to turn up, the Justices refused an adjournment because they felt that the defendant should have taken steps prior to the hearing to obtain witness summonses for their attendance. Quashing the conviction, the Divisional Court held that when witnesses were persons who were apparently willing to attend voluntarily, the fact that the defence had failed to apply for a witness summons was irrelevant. The Justices should not focus on the perceived irresponsibility of a witness but on the germane question of whether on the material before them, there was proper room for the conclusion that the applicant was himself the author of the difficulties in question. The fundamental question was whether, in all the circumstances of the case, including the legitimate interests of the prosecution and the court, it was fair to continue the hearing. The overriding consideration had to be the fairness of the proceedings.

When the absence of evidence or of a witness is related to a failure or fault on the part of a defendant, that may be highly relevant to the decision as to whether the proceedings should be adjourned. In *Lappin v HM Customs & Excise* [2004] EWHC (Admin) 953 there was a failure by the defendant to obtain an expert report in flagrant breach of a previously laid-down timetable. He complained on the basis that in spite of his breach, an adjournment should have been granted. Goldring J [at paragraphs 23 and 24] said:

"I, of course, accept that the appellant was entitled to a fair trial ... Whether he received one depends upon all the circumstances of the case. In assessing those circumstances, a court is entitled to take into account, not only the desirability of the appellant having an expert report ... but the reasons for his failure to do so at the time of trial. If the reality is that he did not have such a report because of his persistent failure to obtain one over a period of time, it cannot be said that the resulting trial was unfair and in breach of his Article 6 rights. In my view, the reason for the absence of the report was the appellant's persistent failure to obtain one. It cannot be said in the light of that failure, that the action of the Crown Court in insisting on the hearing going ahead was in any sense disproportionate or unfair."

A very neat summary of the proper approach is to be found in the judgment of Simon Brown L J in *R v Kingston upon Thames Justices* (1994) Immigration Appeal Reports 172. During the course of his judgment upholding the decision of the Justices not to adjourn the trial, he said:' [at page 177] :

"Whether or not an adjournment should be granted in any particular case, more particularly whether or not fairness so clearly demands an adjournment that a refusal will found a successful judicial review application, must inevitably depend on a variety of considerations. These are likely to include: the importance of the proceedings and their likely adverse consequences to the party seeking the adjournment; the risk of his being prejudiced in the conduct of the proceedings if the application is refused; the risk of prejudice or other disadvantage to the other party if the adjournment is granted; the convenience of the court and interests of justice generally in the efficient despatch of court business; the desirability of not delaying future litigants by adjourning early and thus leaving the court empty; and the extent to which the applicant himself has been responsible for creating the difficulty which is said to require the adjournment in the first place; the extent to which, in short, he has brought the problem on himself."

13.4 It is worth considering separately the position that arises when a manipulative defendant recognises that the case is going badly for him and seeks to bring about a situation whereby the existing trial has to be aborted and a new trial held. Such a situation can arise when the defendant, for no objectively good reason, sacks his existing team or so changes his instructions that his existing team feel obliged to withdraw. This was the position in *Ulcay* [2007] EWCA Crim 2379. Having brought about a situation where those then representing him felt obliged to withdraw, the Judge granted a short adjournment to enable fresh lawyers to take over. To over-simplify a complicated situation, the second set of lawyers requested a further two weeks' adjournment which the trial Judge refused, because to grant it would have the effect of completely derailing the trial. Upholding the decision of the trial Judge not to grant that adjournment, the President said [at paragraph 24]:

"It is however equally elementary that the processes designed to ensure the fairness of his trial cannot be manipulated or abused by the defendant as to derail it and a trial is not to be stigmatised as unfair when the defendant seeking to derail it is prevented from doing so by robust judicial control. Such a defendant must face the self-inflicted consequences of his own actions."

He went on to say [at paragraph 36]:

"In all these circumstances, the Judge was entitled to exercise his discretion to refuse the lengthy adjournment sought by Counsel ... A lengthy adjournment would have produced either an inordinate delay in the trial of all the defendants, in which case the jury would have been discharged and a new trial started again at huge public inconvenience and cost, and possibly prejudice to the remaining defendants as well as the prosecution, or alternatively, that which the appellant was seeking, for the trial of the remaining defendants to continue, with the jury discharged from giving a verdict in his case and the subsequent trial of the appellant on his own. That would have been contrary to the interests of justice overall. The fact that the Judge was prepared to transfer the legal aid certificate does not mean that he was saying that, whatever the consequences to the trial, new representatives must be obtained and that thereafter he would conduct the trial in accordance with whatever applications were made by new Counsel." "

440. In *R v Symmons* [2009] EWCA Crim 654 the English Court of Appeal dismissed an appeal where the appellant had submitted that a trial judge had erred in rejecting an application for an adjournment after the appellant had complained of feeling ill. The following are extracts from the judgment of the court delivered by Dyson L J:

"43. Mr Fitzgerald submits that the appellant was not able to participate effectively in the proceedings. He refers to *V v UK* (2000) 30 EHRR 121 at [84] and *Makhfi v France* (19 January 2005 ECtHR 59335/00) at [39] to [41] in support of the proposition that article 6 of the ECHR requires that a defendant should be able to defend himself effectively by participating effectively in the proceedings …

46. We reject this ground of appeal. Other judges might have adjourned the proceedings on 30 November until 4 December. But the judge thought that the appellant might benefit from making a start on giving his evidence. In our judgment, that was a reasonable judgement to make despite the strong submission made by Mrs Radford that the trial should be adjourned until 4 December. There undoubtedly were concerns about the appellant's fitness to give evidence. The judge was alive to these. He said that he intended to keep a careful watch over how the appellant gave his evidence. If it became apparent that he was to any significant degree impaired in his ability to give evidence, he would stop the case. There is no reason to suppose that the judge was not true to his word. Moreover, if the appellant's legal advisers had thought that he was having difficulty, then, mindful of what the judge had said, they would surely have made an application. The appellant himself is an intelligent and articulate man. He had heard what the judge had said. We think that, if he had felt during his evidence that he was unfit to carry on, he would have said so. The reason why the appellant was permitted to carry on until 16.00 hrs on 30 November was because there was no indication that the appellant was unfit to give evidence. That view of his performance was supported by the notes made by the prison doctor in the evening of 30 November and the contemporaneous evidence of the views of the appellant's legal representatives as well as the impression created on counsel for the prosecution …

> 49. We have been shown passages from the transcripts of the appellant's evidence for 4 and 5 December. There were times when he was tearful and almost inaudible. But there were also times during his cross-examination when he gave as good as he got and he showed a remarkable grasp of the detail of the case. There is no doubt that, viewed overall, he did not perform well under cross-examination. Things went wrong for him when he was confronted by the tape on 4 December. But there is nothing in the transcripts of his evidence to suggest that he was unfit to give evidence. It is clear that his cross-examination on the taped phone conversation (see [38] above) was a defining moment in the trial. The appellant must have appreciated this. His low mood at times during his cross-examination is readily explicable by the fact that he must have understood that he had not performed well under highly damaging cross- examination to which there was no answer. For the reasons that we have given, there is no real basis for a finding by this court that he was unfit to give evidence."

441. The fundamental issue which any court must grapple with when an adjournment is sought is the question of justice to all those involved. The interests of the defendant and any complainants must always be borne in mind, including their legitimate expectation that the case be dealt with fairly and within a reasonable time. A proper balance has to be struck between the interests of the parties and the general public interest in prosecutions proceeding fairly and without undue delay and convicting those guilty of criminal conduct and acquitting those innocent of criminal conduct within a reasonable time.

Prompt time keeping

442. Counsel should not be late for court. It is a good discipline to be in a position to proceed at least five minutes prior to the time the court is due to commence. It is a discourtesy to the court and to other court users if you are late. Taken together it wastes a great deal of valuable time. It also reflects badly on organisational skills. Much time can be lost if there are not prompt starts. If the court adjourns for fifteen minutes counsel and all others attending court should ensure that they are back in court in good time to facilitate a prompt restart of the proceedings.

443. Judge L J in *Jisl* [2004] EWCA Crim 696 emphasised the need for prompt starts:

> "120. The proper progress of this case was also interrupted by additional administrative burdens on the judge, performed and eating into the ordinary sitting hours of the court. Experience shows that once the forward impetus has been lost, it becomes extremely difficult to recover it. Imperceptibly at first, drift infiltrates the proceedings and develops into unacceptable delay. Again, we shall simply illustrate the phenomenon by example. If the jury is asked to be ready for the trial to start at 10.00 am or 10.30 am, and the start is delayed by even a few minutes, a pattern of late sitting eventually engulfs everyone. The ten minute

break for the jury then lasts fifteen minutes. Counsel or the defendants, or one or other of them, is then not quite ready for the court to sit at 2.00 pm sharp. And so on. Witnesses whose evidence should have been completed on one particular day have to return on the next. Then, as by definition their evidence is not completed, the next day's hearing inevitably involves some repetition of what has already been explored on the previous day sometimes inadvertently, sometimes to enable a particular forensic point to be repeated. The inconvenience to the witness, and the problem of repetition would both have been avoided if the evidence had been completed by the end of the previous day. The trial judge is responsible for providing the necessary example and leadership to prevent accumulating drift. In the longer cases in particular, the organisation of his administrative and other judicial burdens should, so far as practical, be reduced or organised to start at times which enable him to sit every day for full court days."

444. In *R v Scott* [2007] ALL ER (D) 191 (Oct) judgment delivered October 15, 2007 the English Court of Appeal indicated that if a culture of lateness were tolerated, the effects would be cumulative and bad for the administration of justice. A defendant appearing half an hour late is in breach of bail. Surrender to custody means surrendering at the appointed time and place and not "at or about" the appointed time.

Interventions by Deemsters

445. Deemsters should only have to intervene on limited occasions in criminal cases. Deemsters should keep out of the arena and take care what they say especially in front of the jury (See *R v Hulusi and Purvis* 58 Cr App R 378 and 385 *Jahree v State of Mauritius* [2005] 1 WLR 1952 PC). Evidence should flow but the jury must follow and understand it. All interested parties should perceive a sense of fairness and a sense of balance. See *R v Lashley* [2006] Crim LR 83 in respect of conduct of a judge towards defence counsel during trial interfering with due process and rendering the conviction unsafe. See also *R v Bryant* [2005] EWCA 2079. Deemsters should avoid personal comments on any apparent lack of counsel's ability and integrity in presence of jury or in the presence of a defendant or indeed generally unless such comments are necessary and serve a useful purpose. See *R v Cole* (17th December 2008 English Court of Appeal Criminal Division).

446. The Privy Council in *Michel v The Queen* [2009] UKPC 40 had to consider the conduct of a Commissioner of the Royal Court of Jersey. It had been accepted that a significant part of the interventions of the Commissioner amounted to cross examination, sometimes apparently hostile or incredulous in tone. They were also much too frequent especially during examination in chief of the applicant. The Privy

Council in a judgment delivered by Lord Brown on the 4th November 2009 referred to a number of cases dealing with judicial interventions during the course of trial starting with *R v Hulusi* (1973) 58 Cr. App. R 378, 382, adopting Lord Parker C J's statement of principle in *R v Hamilton* (unreported, 9 June 1969):

"Of course it has been recognised always that it is wrong for a judge to descend into the arena and give the impression of acting as advocate. . . Whether his interventions in any case give ground for quashing a conviction is not only a matter of degree, but depends to what the interventions are directed and what their effect may be. Interventions to clear up ambiguities, interventions to enable the judge to make certain that he is making an accurate note, are of course perfectly justified. But the interventions which give rise to a quashing of a conviction are really three-fold; those which invite the jury to disbelieve the evidence for the defence which is put to the jury in such strong terms that it cannot be cured by the common formula that the facts are for the jury… The second ground giving rise to a quashing of a conviction is where the interventions have made it really impossible for counsel for the defence to do his or her duty in properly presenting the defence, and thirdly, cases where the interventions have had the effect of preventing the prisoner himself from doing himself justice and telling the story in his own way."

447. The following are further extracts from Lord Brown's judgment:

"27. There is, however, a wider principle in play in these cases merely than the safety, in terms of the correctness, of the conviction. Put shortly, there comes a point when, however obviously guilty an accused person may appear to be, the Appeal Court reviewing his conviction cannot escape the conclusion that he has simply not been fairly tried: so far from the judge having umpired the contest, rather he has acted effectively as a second prosecutor. This wider principle is not in doubt. Perhaps its clearest enunciation is to be found in the opinion of Lord Bingham of Cornhill speaking for the Board in *Randall v R* [2002] 2 Crim App R, 267, 284 where, after remarking that "it is not every departure from good practice which renders a trial unfair" and that public confidence in the administration of criminal justice would be undermined "if a standard of perfection were imposed that was incapable of attainment in practice," Lord Bingham continued:

"But the right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial."

28. Lord Bingham was, of course, right to recognise that by no means all departures from good practice render a trial unfair. So much, indeed, was plainly implicit in the judgment of the European Court of Human Rights in *CG v United Kingdom* (2002) 34 EHRR 31, 789 which rejected the complaint that the trial proceedings as a whole were unfair notwithstanding the Court's finding that the

judicial interventions had been "excessive and undesirable". Ultimately the question is one of degree. Rarely will the impropriety be so extreme as to require a conviction, however safe in other respects, to be quashed for want of a fairly conducted trial process …"

448. Lord Brown considered further authorities including the judgment of Toulson L J in *R v Perren* [2009] EWCA Crim 348 and added:

"31. To that admirable analysis the Board would add that not merely is the accused in such a case deprived of "the opportunity of having his evidence considered by the jury in the way that he was entitled". He is denied too the basic right underlying the adversarial system of trial, whether by jury or Jurats: that of having an impartial judge to see fair play in the conduct of the case against him. Under the common law system one lawyer makes the case against the accused, another his case in response, and a third holds the balance between them, ensuring that the case against the accused is properly and fairly advanced in accordance with the rules of evidence and procedure. All this is elementary and all of it, unsurprisingly, has been stated repeatedly down the years. The core principle, that under the adversarial system the judge remains aloof from the fray and neutral during the elicitation of the evidence, applies no less to civil litigation than to criminal trials. All will be familiar with Denning L J's celebrated judgment in *Jones v National Coal Board* [1957] 2 QB 55*,* 64, a personal injury claim ending with each party complaining that he had been unable to put his case properly:

"A judge's part. . . is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevances and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the role of an advocate; and the change does not become him well. Lord Chancellor Bacon spoke right when he said that: 'Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal.'"

32. The need for the judge to steer clear of advocacy is more acute still in criminal cases. It is imperative that a party to litigation, above all a convicted defendant, will leave court feeling that he has had a fair trial, or at least that a reasonable observer having attended the proceedings would so regard it.

33. None of this, of course, is to say that judges presiding over criminal trials by jury cannot attempt to assist the jury to arrive at the truth. On the contrary, they should. That is part of their task. Judges exist to see that justice is done and justice requires that the guilty be convicted as well as that the innocent go free. But for the most part they must do so, not by questioning of the witnesses but rather by way of a carefully crafted summing up. As to that, Simon Brown L J, giving the judgment of the Court of Appeal in *R v Nelson* (Garfield Alexander) [1997] Crim. LR 234 (transcript dated 25 July 1996) put it thus:

"Every defendant, we repeat, has the right to have his defence, whatever it may be, faithfully and accurately placed before the jury. But that is not to say that he is entitled to have it rehearsed blandly and uncritically in the summing up. No

defendant has the right to demand that the judge shall conceal from the jury such difficulties and deficiencies as are apparent in his case. Of course, the judge must remain impartial. But if common sense and reason demonstrate that a given defence is riddled with implausibilities, inconsistencies and illogicalities … there is no reason for the judge to withhold from the jury the benefit of his own powers of logic and analysis. Why should pointing out those matters be thought to smack of partiality? To play a case straight down the middle requires only that a judge gives full and fair weight to the evidence and arguments of each side. The judge is not required to top up the case for one side so as to correct any substantial imbalance. He has no duty to cloud the merits either by obscuring the strengths of one side or the weaknesses of the other. Impartiality means no more and no less than that the judge shall fairly state and analyse the case for both sides. Justice moreover requires that he assists the jury to reach a logical and reasoned conclusion on the evidence. . . . Judges who go to the trouble of analysing the competing cases and who give the jury the benefit of that reasoned analysis . . . are to be congratulated and commended, not criticised and condemned."

In all of this, of course, it goes without saying that the judge in his summing up must make it abundantly plain that the all important conclusion on the facts is for the jury alone."

449. The Privy Council in the *Michel* case advised Her Majesty that the appeal should be allowed and the conviction quashed, the respondent should pay the appellant's costs and the case be remitted to the Court of Appeal of Jersey for that court to decide whether or not to order a fresh trial.

450. If an advocate believes that a Deemster is wrong the advocate should politely but firmly tell him so and tell him why he is wrong and what the advocate says the correct position is with reference to the relevant authorities. Hytner J A in *Clucas v Clucas* 1981-83 MLR 5 at 15 stressed that judges should not be sensitive to criticism. The very presence in most jurisdictions and in all civilised jurisdictions of a court of appeal is a constant reminder to the public and to judges that mistakes from judges are in fact expected. Advocates should always stand up to judges and it is their duty to do so. This is the strength of having an independent Bar and independent advocates. The liberty of the subject depends upon a strong and independent-minded advocate when it is his duty to do so standing up to a judge and embarrassment should never prevent him from doing so.

451. The judge has a discretionary power to recall or allow the recall of witnesses at any stage of the trial prior to the conclusion of the summing up. A defendant has no right to be recalled in order to rebut evidence given by a defence witness (*R v Tuegal* [2000] 2 All ER 872).

Disclosure

452. Despite repeated judicial calls (the Appeal Division on the 15th November 1993 in *Teare v R* 1993-95 MLR 154 at 159 and Deemster Kerruish in the *Newbery Report* in March 2005) for a review of the procedure in respect of disclosure and for it to be placed on a more formal footing the position is still governed by Manx common law.

453. Judge of Appeal Hytner briefly touched upon disclosure issues in *Teare v R* 1993-95 MLR 154 but since then there have not been many cases involving the legal principles governing disclosure in criminal proceedings on the Island which have arisen for determination by the Appeal Division. There were some passing comments on lack of disclosure by the prosecution in *Devo* (Appeal Division judgment 29th October 2008). Moreover the legal position in respect of disclosure generally has not been fully argued in the Court of General Gaol Delivery but there have been a number of judgments on some specific points which have arisen for determination from time to time. Some of those judgments are referred to below. The legal position in respect of disclosure has not yet therefore been fully determined and what follows must be read in light of any future Appeal Division judgments and in the light of any future statutory provisions. See now *Dobbie* (Appeal Division judgment 13th January 2010). See also *Allison v Her Majesty's Advocate* [2010] UKSC 6 and *McInnes v Her Majesty's Advocate* [2010] UKSC 7.

454. In addition to the evidence upon which the prosecution intend to rely on at trial the prosecution are also under a duty to disclose certain other relevant material to the defence. The relevant materiality test appears to be that a disclosable matter is that which can be seen on a sensible appraisal by the prosecution:

    (1) to be relevant or possibly relevant to an issue in the case;
    (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use;
    (3) to hold out a real, as opposed to a fanciful prospect of providing a lead on evidence which goes to (1) or (2).

455. It is the duty of the prosecuting authority to determine what is material. The defence can assist in this process by raising with the prosecution any relevant defence issues. In practice the prosecution write to the defence identifying what the prosecution have taken to be the issues in the case and inviting the defence to respond.

456. The authorities stress the following points: (1) The defence are not permited to go on fishing expeditions to trawl for information and documentation (2) The duty of disclosure relates to material matters relevant or possibly relevant to issues in the case (3) Fairness requires that any material held by the prosecution that weakens its case or strengthens the defence case if not relied upon as part of its formal case against the defendant should be disclosed to the defence (4) It is also essential that the trial process is not overburdened or diverted by erroneous and inappropriate disclosure of unused prosecution material, or by misconceived applications in relation to such material.

457. Simon Brown L J in *R v Bromley Magistrates ex parte Smith* [1995] 4 All ER 146 at 152 expressed the hope that those representing defendants will not too readily seek to challenge a prosecutor's assertion that documents are in his considered view not material. Simon Brown L J stated:

> "Although ultimately the defence cannot be prevented from raising such an issue and seeking the court's ruling upon it, courts should, in my judgment, treat such applications with some scepticism and should certainly decline even to examine further documents unless the defendant can make out a clear prima facie case for supposing that, despite the prosecutor's assertion to the contrary, the documents in question are indeed material."

458. The authorities also stress the following points: (1) It is the duty of the prosecuting authority to sift and evaluate the material in good time (2) Relevant material which must be disclosed (subject to any exceptions such as matters covered by public interest immunity) may include material affecting the credibility of a prosecution witness, previous inconsistent statements, the fact that a reward has been requested by a prosecution witness and previous convictions of prosecution witnesses (3) Disclosable matter, which satisfied the materiality test, may include that which is not admissible. It may also include oral statements, preparatory material and drafts of witness statements.

459. In *Shetty* (judgment delivered 4th January 2007) I stated:

> "23. In *Tully* 2003-05 MLR N1 (judgment 2nd July 2003 a case involving an application for a stay) Mrs Watts who appeared for the prosecution indicated that we did not have in the Isle of Man the Criminal Procedure and Investigations Act 1996 (Parliament). In that case I endeavoured to explore with counsel for the prosecution and the defence the duties and obligations of the prosecution in connection with the evidence to be presented to the court in criminal prosecutions in the Isle of Man. Paragraphs 77-82 of the *Tully* judgment read as follows:

"77 I explored with counsel for the prosecution and the defence the duties and obligations of the prosecution in connection with evidence to be presented to the court in criminal prosecutions in the Isle of Man. The prosecution indicated that we do not have in the Isle of Man the Criminal Procedure and Investigation Act 1996 (of Parliament). The defence indicated that the prosecution need to present the case in a fair and proper manner. I do not believe the prosecution took issue with that principle. No legal authorities were brought to my attention in connection with the specific duties of the prosecution regarding the gathering together of relevant medical evidence, where that evidence goes to the credibility of a prosecution witness rather than to the actual injuries or facts forming part of the Information.

78. Paragraph 4-275 point 7 on page 430 of *Archbold 2003* states that:

"A prosecutor properly exercising his discretion is not obliged to offer to proffer a witness merely in order to give the defence material with which to attack the credit of other witnesses on whom the prosecution rely. To hold otherwise would in truth, be to assert that the prosecution are obliged to call a witness for no purpose other than to assist the defence in its endeavour to destroy the Crown's own case. No sensible rule of justice could require such a stance to be taken".

79. Paragraph 4-278 of *Archbold 2003* indicates that where the prosecution are anxious to call witnesses who they regard as reliable and are prevented from doing so by circumstances beyond their control various principles are applicable. In such a case the prosecution should take all reasonable steps to secure the attendance of a witness required by the defence but if it is impossible to have a witness present the court might in its discretion permit the trial to proceed provided that no injustice be done thereby. The considerations affecting the exercise of the court's discretion would vary greatly from case to case. The matter must be looked at in the round and even if the prosecution had not taken all reasonable steps to ensure the attendance of the witness or for the production of the evidence it is for the Judge to decide whether or not, in justice, the trial should proceed. These are the principles usefully summarised in *Archbold 2003*. Similar principles referred to in the 1999 edition of *Archbold* were applied by His Honour Deemster Cain in the case cited at paragraph 60(2) above.

80. The well known case of *Judith Theresa Ward* (1993) 96 Cr App R 1 confirmed that the prosecution were obliged to make available to the defence any witnesses whom they did not propose to call but whom they knew could give material evidence, which tended either to weaken the prosecution case or strengthen the defence case and they had a positive duty to disclosure any scientific evidence which might arguably assist the defence. There was reference in that case to the equally well known *Attorney General's Guidelines* (1982) 74 Cr App R 302 and the prosecution's duties of disclosure. The *Ward* case in the main regarded the non disclosure of information and documentation that was in the possession or control of the prosecution. The case sheds little light on the position where medical records which may go to the credibility of the complainant are not available or have gone missing. There are however some general statements in the *Ward* case to the effect that the courts must bear in mind that those who prepare and conduct prosecutions owe a duty to the courts to ensure that all relevant evidence of help to an accused is either led by them or made available to the defence. It is emphasised that "all relevant evidence of help to the accused" is not limited to evidence that would obviously advance the accused's case. It is of help to the accused to have the opportunity of considering all the material evidence which the prosecution have gathered, and from which the prosecution have made their own selection of the evidence to be led.

Prosecutors should bear in mind at all times that they are responsible for the presentation and general conduct of the case and it is their duty to ensure that all relevant evidence is either presented by the prosecution or made available to the defence. There are certain exceptions to this general principle and one would, of course, be the doctrine of pubic interest immunity.

81. At paragraph 12-47 on page 1212 of the 1997 edition of *Archbold* there is reference to the prosecution's duty of disclosure and the case of *R v Cannon* unreported (January 30th, 1995), C.A. Lord Taylor CJ stated:

"Onerous though the duty of the prosecution is to disclose material to the defence which may be of assistance.. it is not, and cannot be, the duty of the prosecution to disclose that of which they are unaware .. To require the prosecution in every case .. to make exhaustive enquiries as to the possibility of some previous history which might affect a witness's credibility would be to put too heavy a burden upon them".

Those comments are of interest but I do not place any great reliance upon them and they can be distinguished from the facts of the case I am dealing with in any event. In the case I am dealing with there is available some evidence to suggest that there could be in existence further evidence of some previous history which may well assist the defence and we are not just dealing with "an ordinary witness" we are dealing with the alleged victim who is the complainant and the main prosecution witness.

82. In my judgment a prosecutor is personally responsible with conducting prosecutions fairly, as a minister of justice assisting in the administration of justice, in accordance with the common law duties of a prosecutor. The prosecution may not be under a duty to make speculative enquiries of third parties in the hunt for potentially relevant material but the prosecution do have a duty to invite third parties to retain such material. If the material is obtained the prosecution should disclose it to the defence in the normal course of events. In my judgment the prosecution have an overriding duty to do their utmost to ensure that a defendant receives a fair trial. When the substantive provisions of the Human Rights Act 2001 are implemented they may well impact upon the law in relation to the prosecution's duty in this respect. I heard no submissions on the application or otherwise of the Convention Rights and therefore I say no more at this stage."

24. I note in *Ward* [1993] 1 WLR 619 a case decided before the 1996 Act that the English Court of Appeal held that the prosecution's general duty of disclosure extended to anything that might arguably assist the defence. Materiality would include evidence which tended either to weaken the prosecution case or strengthen the defence case. The court stressed that in the normal course of events the prosecutor should ensure that all relevant evidence of help to an accused is either led by them or made available to the defence. I note the wide ranging test of relevance/materiality as specified at para 4-270 onwards of *Archbold* 1995

"4-270 The test of materiality was set out by Jowitt J. in *R v Melvin* (*Graham*), unreported, December 20, 1993, C.C.C. and later adopted by the Court of Appeal in *R v Keane*. 99 Cr. App. R. 1, and *R v Brown*. According to this test, disclosable matter is:

"that which can be seen on a sensible appraisal by the prosecution:
(1) to be relevant or possibly relevant to an issue in the case;
(2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to

use;

(3) to hold out a real, as opposed to fanciful, prospect of providing a lead on evidence which goes to (1) or (2)".

25. The prosecution's duty of disclosure is governed by the common law. The historical position under the common law of England and Wales was outlined in *Archbold* (1995) at paragraphs 4-265 onwards. Material matters must be disclosed. *Archbold* (1995) at paragraph 4-272 states that material matters will include matter affecting the credibility of a prosecution witness. Reference is made to *R v Brown* The Times June 20th, 1994 CA and the following example of disclosable material is given:

"previous convictions of prosecution witnesses (*R v Collister and Warhurst*, 39 Cr App R 100 CCA) or any other matter which is adverse to the character of a prosecution witness".

26. In *R v Collister and Warhurst* the English Court of Appeal on the 26th May 1955 held that it was the duty of the prosecution to inform the defence of any known convictions of prosecution witnesses but they were not under a further duty of examining every kind of record to see whether anything existed which might affect his character. Hilbery J at page 104 stated:

"If the conviction was disclosed, that was sufficient so far as the police were concerned. The police are not expected to examine the records or see whether possibly there exists anywhere in the country any matter which might affect the character of a witness. It is their duty to disclose to the defence … actual convictions of crime standing on the record …"

27. Ms Hannan refers to *Jespers v Belgium* (1983) 5 EHRR CD 305 and the principle of equality of arms and the obligation on prosecuting and investigating authorities to disclose any material in their possession, or to which they could gain access, which may assist the accused in exonerating himself or in obtaining a reduction in sentence. Ms Hannan also produced extracts from *Archbold* 2006 at paragraph 16-83 which states:

"This principle extends to material which might undermine the credibility of a prosecution witness … non disclosure of evidence relevant to credibility may also raise an issue under Article 6(3) (d)". These statements are repeated in the 2007 edition of Archbold.

28. In *Sinclair v Her Majesty's Advocate* (Privy Council DRA No 2 of 2004 judgment delivered 11th May 2005) the Privy Council had to deal with a Scottish case where the Crown had not provided the defence with witness statements which could have been used to cross examine a crucial Crown witness about her credibility and reliability. The appellant appealed on the ground that he had been denied a fair trial by reason of the Crown's failure to disclose the statements. It was held that the primary rule was that all witness statements in the possession of the Crown had to be disclosed and there was no duty on the defence to ask for them. Although there might be cases where a statement might have to be withheld or redacted in the public interest, such cases were rightly treated as exceptions which the Crown would need to be in a position to explain to the court in the event that an application for disclosure was made by the defence. It was further held that it

was a fundamental aspect of the accused's right to a fair trial that there should be an adversarial procedure in which there was equality of arms between the prosecution and the defence. Furthermore the prosecution was under a duty to disclose to the defence all material evidence in its possession for or against the accused. For that purpose any evidence which would tend to undermine the prosecution's case or to assist the case for the defence was to be taken as material. Moreover the defence did not have an absolute right to disclosure of all relevant evidence. While there might be competing interests which it was in the public interest to protect, decisions as to whether the withholding of relevant information was in the public interest could not be left exclusively to the Crown. It was held that the appellant's complaint that there was a breach of his article 6(1) convention right to a fair trial was well founded.

29. In his report into the reasons for the vacation of the *Newbery* trial (March 2005) His Honour Deemster Kerruish stated that:-

"It is in the interests of justice that full and appropriate disclosure is made in a timely fashion, I commend to the Attorney General that he undertakes a review of the practices and procedures relevant to disclosure of material in criminal proceedings"."

460. In *Teare v R* 1993-95 MLR 154 at 159 Judge of Appeal Hytner stated:

"We do wish to say one or two things about the non-disclosure of evidence. Some of the fresh evidence which has become available to the defence has not been available because, although in the hands of the police, it was unused material which was not disclosed previously. We are told that at the time of this trial the criteria followed by the prosecution were not necessarily those which were laid down by the English Attorney General for the Director of Public Prosecutions and the Crown Prosecuting Service to follow.

It seems to us, from what Mr Moyle has said, that the procedure was somewhat informal and that, in our view, is not wholly satisfactory. It is more satisfactory if formal procedure is laid down and followed."

461. At paragraph [7] of his report into the reasons for the vacation of the *Newbery* trial (March 2005) Deemster Kerruish stated:

"In this jurisdiction, the prosecution's duty of disclosure may be considered to be similar to the practice in England and Wales prior to the coming into force of the Criminal Procedure and Investigating Act 1996 (of Parliament)."

462. In *Oates* (judgment delivered 13th March 2007) I stated:

"28 Frankly Mr Kermode has left the Application far too late and has not allowed sufficient time to enable it to be dealt with properly prior to trial with all interested parties being given an adequate opportunity to make informed submissions. Mr Kermode will have to take responsibility and the consequences for such failings. The Application raises serious and fundamental issues. Those issues include confidentiality of Ms Teare's medical records and potential public interest immunity concerns of the DHSS. I have to balance those interests with

the necessity for a fair trial. I accept, of course, that the Defendant is entitled to a fair trial. The Defendant and Mr Kermode however had the opportunity to file an application much earlier but failed to do so. I refer to the comments of Goldring J in *Lappin v HM Customs & Excise* [2004] EWHC 953 at paragraphs 23 and 24 albeit in a different context:

"23. I of course accept that the appellant was entitled to a fair trial in the determination of his civil rights and obligations. Whether he received one depends upon all the circumstances of the case. In assessing those circumstances, a court is entitled to take into account not only the desirability of the appellant having an expert's report on contamination, but the reason for his failure to do so at the time of the trial. If the reality is that he did not have such a report because of his persistent failure to obtain one over a period of time, it cannot be said that the resulting trial was unfair and in breach of his Article 6 rights.

24. In my view, the reason for the absence of the report was the appellant's persistent failure to obtain one. It cannot be said, in the light of that failure, that the action of the Crown Court in insisting in the hearing going ahead was in any sense disproportionate or unfair. There was, although it was not expressed to be in terms of Article 6, a balancing exercise carried out by the court. It reached a decision. In my view, it was a decision it was entitled to reach".

29. This court's views on lack of timely preparation, lack of compliance with court orders and the vacations of trial dates are or should be well known. By way of example I would refer to the comments at paragraphs 120 and 121 of the judgment in *R v Glover, Glover and Priestnal* (judgment 25th August 2006):

"120. The vacation of trial dates is a serious step to take. It wastes a great deal of court time and resources and it is a great inconvenience to the court, to the prosecution, to the defence, to the witnesses, to the jury and to other court users. It wastes time, valuable resources and costs. It delays justice. It has an impact on other cases awaiting trial. It impedes an efficient use of valuable judicial time. It should be avoided. The risk of vacation of trial dates can be significantly reduced if all counsel focus on the issues in the case at an early stage and ensure that early preparation in connection with the case is undertaken and not left until the last moment and that the availability of important witnesses is not overlooked.

121. Advocates should not treat court orders including case management directions as simply pieces of papers which can be ignored or compliance with them delayed to suit their convenience. Orders and directions in respect of contested trials or sentencing hearings should be strictly complied with. Serious consequences can follow if they are not. The efficient and fair administration of justice depends on advocates and the parties complying strictly with court orders. Everyone concerned with the trial process, the prosecution, the defence and all advocates involved in a case should ensure that court orders including case management directions are strictly complied with on a timely basis and that the case is ready for hearing and proceeds accordingly. Late preparation and late applications are to be discouraged. They involve delay. They waste time and costs and they cause inconvenience. There are few reasonable excuses for late preparation. It is not reasonable to say I did not comply with the court order because I was too busy or I was only a few days late or other matters took

priority. Compliance with court orders should take priority. If advocates are too busy and cannot devote sufficient time to existing matters then they should arrange for additional resources and support or refuse to take on new instructions. Preparation for a hearing should commence at an early date rather than at a late date. Proper time and attention should be given to every case. Leaving preparation until a couple of days or a couple of weeks before trial invites disaster together with judicial criticism and adverse costs orders or other penalties."

30. In *R v Watterson* (judgment 19th October 2005) I endeavoured to cover the factors a court should consider when dealing with applications for adjournments or vacation of trial dates. At paragraph 12(2) I stressed that last minute preparation and last minute applications were to be discouraged. I stated that if the reason for the delay was the failure of counsel to properly prepare the case despite having had an opportunity to do so or if the application for an adjournment arose due to the fact that counsel had failed to obtain an expert report in time or had failed to arrange for witnesses to be summoned in good time, the applicant should not expect much sympathy from the court. All these matters lie within the control of the applicant and his advisers.

31. In *R v Shetty* (judgment 4th January 2007) I dealt with an application for the disclosure of school and employment records. At paragraph 41 I referred to *R (on the application of B) v Stafford Combined Court* [2007] 1 All ER 102 as a good example of the concerns that can be raised in respect of disclosure of medical records.

32. In the *Stafford Combined Court* case the English Queen's Bench Division (Divisional Court) held that procedural fairness in light of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms required that a child victim of alleged sexual abuse who was to be a prosecution witness should be given notice of an application for disclosure of her medical and psychiatric records and an opportunity to be heard and to make submissions before any order was made.

33. May L J at paragraph [30] on page 111 felt that this approach should extend to all medical records including those of adults. May L J referred to medical records together with school, social services and tax records. May L J referred to the balance between a patient's rights of privacy and confidentiality and a defendant's right to have his defence informed of the content of relevant medical records.

34. I have considered my judgments in *Shetty* and *Tully* in respect of disclosure and the credibility of prosecution witnesses.

35. I have briefly considered the relevant law on public interest immunity matters. I note the non-exhaustive categories of public interest immunity specified from paragraphs 12-34 of *Archbold* 2007 onwards. There is reference to information relating to children and documents and records maintained by social services at paragraph 12-43.

36. I also note the judgment of May L J in the *Stafford Combined Court* case. At paragraph [16]:

"Medical records, in particular perhaps psychiatric records, are confidential between the medical practitioner and the patient. The patient undoubtedly has a right of privacy within art 8 of the convention…"

37. Baroness Hale's comments in *Campbell v MGN Ltd* [2004] 2 AC 457 are referred to at paragraph [17]

38. At paragraph [19] May L J states:

"The confidentiality of a patient's medical records belongs to the patient. For the particular importance of confidentiality in psychiatric medical notes, see *Ashworth Hospital Authority v MEN Ltd* [2002] UKHL at [63]".

39. I am not satisfied that adequate notice of the Application has been given to Ms Teare and the DHSS. I am not satisfied that Ms Teare and the DHSS have been given an adequate opportunity to make submissions in respect of the Application.

40. Notice of any applications for the disclosure of medical records should in the normal course of events be given to the person whose records are sought to be disclosed. Moreover if there is an application for a witness (such as the Chief Executive of the DHSS) to be issued with a witness summons requiring production of medical records such application should in the normal course of events be made with notice to the prosecution, the witness and the person whose records are sought to be disclosed.

41. In previous cases such as *Tully* (Crim 2002/20 judgment 2nd July 2003) it would appear that the prosecution have considered requests from the defence in relation to disclosure of a complainant's medical records and obtained the informed consent of a complainant and subsequently produced copies of the records to the defence. Clearly in cases where the prosecution are of the view that such records are relevant and necessary that is a sensible approach to adopt. If informed consent cannot be obtained and the defence wish to proceed then an application needs to be made to the court in good time well before the trial dates and with adequate notice to all interested parties.

42. I have to balance the rights of Ms Teare to the privacy of her records and the rights of the Defendant to a fair trial. To make an order overriding Ms Teare's confidentiality in her records is a serious step to take. Before making such an order I would have to be satisfied that Ms Teare has had adequate notice and an adequate opportunity to be heard in relation to the Application. I am not so satisfied. Moreover I would also have to be satisfied that such order was proportionate, in accordance with the law and necessary for the protection of the rights of others. I would have to balance Ms Teare's rights of privacy and confidentiality and the Defendant's right to a fair trial. I may also have to consider other matters in the public interest and the involvement of the DHSS and those who come into contact with it. As no notice of the Application was given to the DHSS I have not had the benefit of submissions on their behalf.

43. At the hearing this morning I expressed my concerns over the lateness of the Application and the inadequate notice given to Ms Teare. I also indicated that I was uncomfortable in considering the matter further without giving Ms Teare

and the DHSS a reasonable opportunity of considering their positions, taking advice and making submissions.

44. Ms Braidwood helpfully indicated that she could contact the DHSS in an endeavour to progress matters.

45. I adjourned the hearing of the Application to enable counsel to liaise further and to make contact with Ms Teare and the DHSS to ascertain their positions in respect of the Application to see if the matter could be progressed.

46. Ms Braidwood on her return stated that she had considered the matter with the DHSS who were content that an order be made permitting Ms Braidwood to have access to the records and to take copies of any relevant and disclosable records.

47. I am not willing to make an order for Ms Teare and/or the DHSS to release the records to the Defendant as I am not satisfied that Ms Teare and the DHSS have received adequate notice of the Application or an adequate opportunity of putting their submissions before the court. In such circumstances I am not persuaded that it would be appropriate for me to grant the order or issue the summons as requested by the defence in the Application.

48. The best that can be done at this late stage, and endeavouring to balance the various competing interests, is to make an order in the following terms:

The Department of Health and Social Security do permit Ms Braidwood of the Attorney General's Chambers or any other advocate within those chambers to have access to and to take copies of any relevant and disclosable medical records of Tracey Olwen Teare for the period 1st January 2005 to date.

49. Having considered the matter further with the DHSS and Ms Teare it will be for the prosecution to come to a conclusion as to whether it would be appropriate for them to release to Mr Kermode, the advocate acting for the Defendant, copies of such records insofar as they relate to any mental health issues in respect of Ms Teare. If copies of such records are released to Mr Kermode they should only be used for the purpose of these proceedings and all copies should be returned by Mr Kermode to Ms Braidwood at the conclusion of these proceedings or any appeal arising therefrom.

50. I also make an order that the prosecution do forthwith disclose to the defence the previous convictions of the prosecution witnesses whose evidence has not been agreed and whose evidence is not to be read.

51. Mr Kermode to prepare draft orders for my approval and ensure that copies of the orders are served on Ms Teare and the DHSS forthwith. If Ms Teare and/or the DHSS wish to apply to have the orders I have made set aside they may do so on short notice and I will endeavour to consider such applications as a matter of urgency this week."

463. The following are extracts from the judgment of Simon Brown L J in *R v Bromley Magistrates ex parte Smith* [1995] 4 All ER 146 at 152-153:

"Generally speaking, only in relation to documents which the prosecution regard as prima facie relevant to an issue but which they wish to withhold will the [court] need to rule. Rare indeed should be the case where the [court] will required to rule on materiality. It is, after all, for the prosecution to decide in accordance with clearly established principle what is material. The responsibility rests with them. That is made clear in R v *Keane* [1994] 2 All ER 478 at 484-485, [1994] 1 WLR 746 at 752:

'The prosecution must identify the documents and information which are material according to the criteria set out above ... Only that part which is both material in the estimation of the prosecution and sought to be withheld should be put before the court for its decision. If in an exceptional case the prosecution are in doubt about the materiality of some documents or information, the court may be asked to rule on that issue.'

Of course the defence are entitled to raise with the prosecution the suggestion that other documents not yet disclosed are material and should be disclosed. As was also said in *Keane* [1994] 2 All ER 478 at 484, [1994] 1 WLR 746 at 752:

'… it is open to the defence to indicate to the prosecution a defence or an issue they propose to raise as to which material in the possession of the prosecution may be of assistance, and if that is done the prosecution may need to reconsider what should be disclosed.'

The prosecution, indeed, should always be prepared to review the question of materiality. Generally, no doubt, even if they are still unconvinced of the materiality of the document, they would presumably prefer to disclose it rather than go to the lengths of seeking a ruling on the point—always supposing no issue of public interest immunity or legal professional privilege arises. But, on occasion, the prosecution will for good reason contest the defendant's request for further material to be disdosed. That, indeed, is what happened in the present cases and to those I shall shortly return.

First, however, I would express the hope that those representing defendants will not too readily seek to challenge a responsible prosecutor's assertion that documents are in his considered view not material. Although ultimately the defence cannot be prevented from raising such an issue and seeking the court's ruling upon it, courts should, in my judgment, treat such applications with some scepticism and should certainly decline even to examine further documents unless the defendant can make out a clear prima facie case for supposing that, despite the prosecutor's assertion to the contrary, the documents in question are indeed material.

The court in *R v Brown (Winston)* [1994] 1 WLR 1599 at 1609 referred to 'the undoubted fact that defence lawyers sometimes bombard the prosecution with requests for thousands of documents with little regard to their relevance' and the

need for trial judges to 'firmly discourage unnecessary and oppressive requests for discovery'.

That, of course, was said particularly in the context of large cases. But it would scarcely be less aptly said of summary trials before magistrates. On the contrary: it is dearly desirable that such proceedings should retain their essentially speedy and summary character and not become complicated and delayed by ill-judged applications for needless further disclosure of documents. There may be occasions, indeed, when the court will wish to consider its powers of making wasted costs orders."

464. See *Her Majesty's Advocate v Murtagh* (Privy Council judgment 3rd August 2009) in respect of disclosure to the accused of all previous convictions and outstanding charges of Crown witnesses and whether such disclosure is limited to those as materially weaken the Crown's case or materially strengthen the case for the defence. The Privy Council considered Article 6 and Article 8 issues in the context of disclosure.

465. In *Chief Constable of Humberside Police v The Information Commissioner* [2009] EWCA Civ 1079 the English Court of Appeal at paragraph 109 stated that there was an obligation on the Crown to reveal to the defence any convictions of any witness on whom it relies. That does not mean that the conviction can automatically be put in evidence by the defendant but it enables the court to give proper consideration to any application under section 100 Criminal Justice Act 2003 to do so. Similarly, it will sometimes happen that it is relevant to challenge a witness called on behalf of the defendant on the basis of his record, especially for example if he has professed to a respectability which he does not enjoy.

466. If the prosecution fail to make adequate disclosure the trial may have to be adjourned in order that adequate disclosure is made (See *Swash v DPP* [2009] WLR 506 394 (DC) 4th March 2009). If adequate disclosure is not given well before trial the defence should make a timely application to avoid the adjournment of the trial. Such application should not be left to a few weeks prior to the trial.

467. The following are extracts from *Disclosure : a protocol for the control and management of unused material in the Crown Court* Archbold 2009 Supplement:-

"*Third party disclosure*

52. The disclosure of unused material that has been gathered or generated by a third party is an area of the law that has caused some difficulties: indeed, a Home Office Working Party has been asked to report on it. This is because there is no

specific procedure for the disclosure of material held by third parties in criminal proceedings, although the procedure under section 2 of the *Criminal Procedure (Attendance of Witnesses) Act* 1965 or section 97 of the *Magistrates' Courts Act* 1980 is often used in order to effect such disclosure. It should, however, be noted that the test applied under both Acts is not the test to be applied under the *CPIA,* whether in the amended or unamended form. These two provisions require that the material in question is material evidence, *i.e.,* immediately admissible in evidence in the proceedings (see in this respect *R. v. Reading JJ., ex p. Berkshire County Council* [1996] 1 Cr.App.R. 239, *R. v. Derby Magistrates' Court, exp. B* [1996] AC. 487 and *R. v. Alibhai* [2004] EWCA Grim. 681)…

54. Where material is held by a third party such as a local authority, a social services department, hospital or business, the investigators and the prosecution may seek to make arrangements to inspect the material with a view to applying the relevant test for disclosure to it and determining whether any or all of the material should be retained, recorded and, in due course, disclosed to the accused. In considering the latter, the investigators and the prosecution will establish whether the holder of the material wishes to raise PII issues, as a result of which the material may have to be placed before the court. Section 16 of the *CPIA* gives such a party a right to make representations to the court.

55. Where the third party in question declines to allow inspection of the material, or requires the prosecution to obtain an order before handing over copies of the material, the prosecutor will need to consider whether it is appropriate to obtain a witness summons under either section 2 of the *Criminal Procedure (Attendance of Witnesses) Act* 1965 or section 97 of the *Magistrates' Court Act* 1980. However, as stated above, this is only appropriate where the statutory requirements are satisfied, and where the prosecutor considers that the material may satisfy the test for disclosure. *R. v. Alibhai (supra)* makes it clear that the prosecutor has a "margin of consideration" in this regard.

56. It should be understood that the third party may have a duty to assert confidentiality, or the right to privacy under article 8 of the ECHR, where requests for disclosure are made by the prosecution, or anyone else. Where issues are raised in relation to allegedly relevant third party material, the judge must ascertain whether inquiries with the third party are likely to be appropriate, and, if so, identify who is going to make the request, what material is to be sought, from whom is the material to be sought and within what time scale must the matter be resolved.

57. The judge should consider what action would be appropriate in the light of the third party failing or refusing to comply with a request, including inviting the defence to make the request on its own behalf and, if necessary, to make an application for a witness summons. Any directions made (for instance, the date by which an application for a witness summons with supporting affidavit under section 2 of the 1965 should be served) should be put into writing at the time. Any failure to comply with the timetable must immediately be referred back to the court for further directions, although a hearing will not always be necessary.

58. Where the prosecution do not consider it appropriate to seek such a summons, the defence should consider doing so, where they are of the view (notwithstanding the prosecution assessment) that the third party may hold material which might

undermine the prosecution case or assist that for the defendant, and the material would be likely to be 'material evidence' for the purposes of the 1965 Act. The defence must not sit back and expect the prosecution to make the running. The judge at the PCMH should specifically enquire whether any such application is to be made by the defence and set out a clear timetable. The objectionable practice of defence applications being made in the few days before trial must end.

59. It should be made clear, though, that 'fishing' expeditions in relation to third party material-whether by the prosecution or the defence-must be discouraged, and that, in appropriate cases, the court will consider making an order for wasted costs where the application is clearly unmeritorious and ill-conceived.

60. Judges should recognise that a summons can only be issued where the document(s) sought would be admissible in evidence. While it may be that the material in question may be admissible in evidence as a result of the hearsay provisions of the *CJA* (sections 114 to 120), it is this that determines whether an order for production of the material is appropriate, rather than the wider considerations applicable to disclosure in criminal proceedings: see *R. v. Reading Justices (supra),* upheld by the House of Lords in *R. v. Derby Magistrates' Court (supra).*

61. A number of Crown Court centres have developed local protocols, usually in respect of sexual offences and material held by social services and health and education authorities. Where these protocols exist they often provide an excellent and sensible way to identify relevant material that might assist the defence or undermine the prosecution.

62. Any application for third party disclosure must identify what documents are sought and why they are said to be material evidence. This is particularly relevant where attempts are made to access the medical reports of those who allege that they are victims of crime. Victims do not waive the confidentiality of their medical records, or their right to privacy under article 8 of the ECHR, by the mere fact of making a complaint against the accused. Judges should be alert to balance the rights of victims against the real and proven needs of the defence. The court, as a public authority, must ensure that any interference with the article 8 rights of those entitled to privacy is in accordance with the law and necessary in pursuit of a legitimate public interest. General and unspecified requests to trawl through such records should be refused. If material is held by any person in relation to family proceedings *(e.g.,* where there have been care proceedings in relation to a child, who has also complained to the police of sexual or other abuse) then an application has to be made by that person to the family court for leave to disclose that material to a third party, unless the third party, and the purpose for which disclosure is made, is approved by rule 10.20A(3) of the *Family Proceedings Rules* 1991 (S.I. 1991 No. 1247). This would permit, for instance, a local authority, in receipt of such material, to disclose it to the police for the purpose of a criminal investigation, or to the CPS, in order for the latter to discharge any obligations under the *CPIA.*

Conclusion

63. The public rightly expects that the delays and failures which have been present in some cases in the past where there has been scant adherence to sound disclosure principles will be eradicated by observation of this Protocol. The new

regime under the *Criminal Justice Act* and the *Criminal Procedure Rules* gives judges the power to change the culture in which such cases are tried. It is now the duty of every judge actively to manage disclosure issues in every case. The judge must seize the initiative and drive the case along towards an efficient, effective and timely resolution, having regard to the overriding objective of the *Criminal Procedure Rules* (Pt 1). In this way the interests of justice will be better served and public confidence in the criminal justice system will be increased."

468. For the position in Australia see *Mallard v The Queen* [2005] 224 CLR 125; [2005] HCA 68 and *Grey v The Queen* [2001] HCA 65. For the position in Scotland see *Her Majesty's Advocate v Murtagh* (Privy Council judgment 3rd August 2009). For a detailed commentary on the position in England and Wales see *Disclosure in Criminal Proceedings* (2009) by Corker and Parkinson. See also *H* [2004] UKHL 3, *Wood* [2006] EWHC 32 (Admin) and *Flook* [2009] EWCA Crim 682.

469. See generally *Disclosure : a protocol for the control and management of unused material in the Crown Court* Archbold 2009, Supplement, Appendix N -52 to N-60 pages 725-735. Extracts as follows:

"*Introduction*

1. Disclosure is one of the most important-as well as one of the most abused-of the procedures relating to criminal trials. There needs to be a sea-change in the approach of both judges and the parties to all aspects of the handling of the material which the prosecution do not intend to use in support of their case. For too long, a wide range of serious misunderstandings has existed, both as to the exact ambit of the unused material to which the defence is entitled, and the role to be played by the judge in ensuring that the law is properly applied. All too frequently applications by the parties and decisions by the judges in this area have been made based either on misconceptions as to the true nature of the law or a general laxity of approach (however well-intentioned). This failure properly to apply the binding provisions as regards disclosure has proved extremely and unnecessarily costly and has obstructed justice. It is, therefore, essential that disclosure obligations are properly discharged - by both the prosecution and the defence - in all criminal proceedings, and the court's careful oversight of this process is an important safeguard against the possibility of miscarriages of justice.

2. The House of Lords stated in *R. v. H. and C.* [2004] 2 A.C. 134 at 147: Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made.

3. However, it is also essential that the trial process is not overburdened or diverted by erroneous and inappropriate disclosure of unused prosecution material, or by misconceived applications in relation to such material.

4. The overarching principle is therefore that unused prosecution material will fall to be disclosed if, and only if, it satisfies the test for disclosure applicable to the proceedings in question, subject to any overriding public interest considerations. The relevant test for disclosure will depend on the date the criminal investigation in question commenced (see the section on Sources below), as this will determine whether the common law disclosure regime applies, or either of the two disclosure regimes under the *Criminal Procedure and Investigations Act* 1996 *(CPIA)*.

5. There is very clear evidence that, without active judicial oversight and management, the handling of disclosure issues in general, and the disclosure of unused prosecution material in particular, can cause delays and adjournments.

6. The failure to comply fully with disclosure obligations, whether by the prosecution or the defence, may disrupt and in some cases even frustrate the course of justice.

7. Consideration of irrelevant unused material may consume wholly unjustifiable and disproportionate amounts of time and public resources, undermining the overall performance and efficiency of the criminal justice system. The aim of this Protocol is therefore to assist and encourage judges when dealing with all disclosure issues, in the light of the overarching principle set out in paragraph 4 above. This guidance is intended to cover all Crown Court cases (including cases where relevant case management directions are made at the magistrates' court). It is not, therefore, confined to a very few high profile and high cost cases."

470. See also paragraphs 18-05 to 18-30 of May and Powles *Criminal Evidence* 5th edition in respect of disclosure of unused material and pages 53 to 68 of Judge Roderick Denyer's *Case Management in the Crown Court* in respect of disclosure.

471. The defence may, in principle, have copies of and access to documents and other items seized from a defendant unless refusal of such copies and access can be justified. Sections 24 and 25 of the Police Powers and Procedures Act 1998 provide as follows:-

"24 Access and copying

(1) A constable who seizes anything in the exercise of a power conferred by any enactment, including an enactment contained in an Act passed after this Act, shall, if so requested by a person showing himself-

(a) to be the occupier of premises on which it was seized; or

(b) to have had custody or control of it immediately before the seizure, provide that person with a record of what he seized.

(2) The officer shall provide the record within a reasonable time from the making of the request for it.

(3) Subject to subsection (8), if a request for permission to be granted access to anything which-

(a) has been seized by a constable; and

(b) is retained by the police for the purpose of investigating an offence, is made to the officer in charge of the investigation by a person who had custody or control of the thing immediately before it was so seized, or by someone acting on behalf of such a person, the officer shall allow the person who made the request access to it under the supervision of a constable.

(4) Subject to subsection (8), if a request for a photograph or copy of any such thing is made to the officer in charge of the investigation by a person who had custody or control of the thing immediately before it was so seized, or by someone acting on behalf of such a person, the officer shall-

(a) allow the person who made the request access to it under the supervision of a constable for the purpose of photographing or copying it; or

(b) photograph or copy it, or cause it to be photographed or copied.

(5) A constable may also photograph or copy, or have photographed or copied, anything which he has power to seize, without a request being made under subsection (4).

(6) Where anything is photographed or copied under subsection (4)(b), the photograph or copy shall be supplied to the person who made the request.

(7) The photograph or copy shall be so supplied within a reasonable time from the making of the request.

(8) There is no duty under this section to grant access to, or to supply a photograph or copy of, anything if the officer in charge of the investigation for the purposes of which it was seized has reasonable grounds for believing that to do so would prejudice-

(a) that investigation;

(b) the investigation of an offence other than the offence for the purposes of investigating which the thing was seized; or

(c) any criminal proceedings which may be brought as a result of-

(i) the investigation of which he is in charge; or

(ii) any such investigation as is mentioned in paragraph (b).

25 Retention

(1) Subject to subsection (4), anything which has been seized by a constable or taken away by a constable following a requirement made under section 22 or 23 may be retained so long as is necessary in all the circumstances.

(2) Without prejudice to the generality of subsection (1)-

(a) anything seized for the purposes of a criminal investigation may be retained, except as provided by subsection (4)-

(i) for use as evidence at a trial for an offence; or

(ii) for forensic examination or for investigation in connection with an offence; and

(b) anything may be retained in order to establish its lawful owner, where there are reasonable grounds for believing that it has been obtained in consequence of the commission of an offence.

(3) Nothing seized on the ground that it may be used-

(a) to cause physical injury to any person;

(b) to damage property;

(c) to interfere with evidence; or

(d) to assist in escape from police detention or lawful custody, may be retained when the person from whom it was seized is no longer in police detention or the custody of a court or is in the custody of a court but has been released on bail.

(4) Nothing may be retained for either of the purposes mentioned in subsection (2)(a) if a photograph or copy would be sufficient for that purpose.

(5) Nothing in this section affects any power of a court to make an order under section 34 of the Summary Jurisdiction Act 1989 (disposal of property in possession of police)."

472. See also Chapter 7 paragraphs 7-062 to 7-073 of Clayton and Tomlinson on *Civil Actions Against the Police* (3rd Edition) dealing with retention, access and copying. The English Court of Appeal dealt with the English common law position regarding the supply of copies of seized "documents" in *Arias v Commissioner of Police* (The Times August 1, 1984).

473. In *Scopelight Ltd v Chief Constable of Northumbria Police* [2009] EWCA Civ 1156 (English Court of Appeal judgment delivered 5th November 2009) it was held that the police could retain property they had seized after the Crown Prosecution Service decided not to prosecute but a private prosecution was being contemplated or taking place.

Expert evidence

474. Any permitted admissible expert evidence should be filed and exchanged well in advance of the trial. Counsel should ensure that any necessary and duly authorised experts are instructed promptly and that they are available to produce reports on a timely basis and to attend court where necessary. If the prosecution and defence instruct experts the experts should liaise and endeavour to limit the areas of disagreement. The experts are there to assist the court. If there are areas of disagreement the experts should liaise and provide a schedule outlining the areas of disagreement and the reasons for disagreement. The experts should also be conscious of the reality that it is the jury who decide the guilt or innocence of a defendant and not the experts. Counsel should take care to ensure that the correct issues are put to the experts and that the experts limit their evidence to issues upon which they are able to express their opinions.

475. Section 16 of the Criminal Justice Act 1991 provides as follows:

"16 (1) An expert report shall be admissible as evidence in criminal proceedings, whether or not the person making it attends to give oral evidence in those proceedings.
(2) If it is proposed that the person making the report shall not give oral evidence, the report shall only be admissible with the leave of the court. (3) For the purpose of determining whether to give leave the court shall have regard -
(a) to the contents of the report;

(b) to the reasons why it is proposed that the person making the report shall not give oral evidence;
(c) to any risk, having regard in particular to whether it is likely to be possible to controvert statements in the report if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them; and
(d) to any other circumstances that appear to the court to be relevant.
(4) An expert report, when admitted, shall be evidence of any fact or opinion of which the person making it could have given in oral evidence. (5) In this section 'expert report' means a written report by a person dealing wholly or mainly with matters on which he is (or would if living be) qualified to give expert advice."

476. If further experiments or for example car handling tests are being undertaken in a causing death by dangerous driving case all relevant instructed experts should be given an opportunity to be present and to participate or at least observe the tests (*Bates* judgment of Acting Deemster Montgomerie delivered 7th May 2007). See also Acting Deemster Montgomerie's judgment delivered on the 10th January 2006 in *Halligan*. In *Halligan* Acting Deemster Montgomerie succinctly summed up the relevant law as follows:

"10. As a general rule, parol evidence is not admissible with regard to anything not immediately within the knowledge of the witness; he must speak of facts which happened in his presence or within his hearing. This rule excludes both hearsay and the expression of opinion or belief.

11. A recognised exception to this rule is expert opinion evidence. At trial, the judge acts as gatekeeper to the admissibility of such evidence. There are three vital pre-requisites to the admissibility of expert testimony.

12. Firstly, is it something outside the competence of the jury (or does it fall within ordinary human experience and so not require an expert's assistance)?: R.*v. Turner (Terence*).

13. Secondly, is the tendered witness an expert within his field?: R v Silverlock (1894) 2 Q.B. 766.

14. Thirdly and finally, does the evidence relate to what is recognised by the Courts to be a legitimate field of expertise (even if the proposed field is obviously outside the jury's competence and the tendered witness is clearly a specialist within it)?: see R. v. Robb (1991) 93 Cr. App. R. 161 at page 164 where Bingham L.J. pointed out that the Courts would not receive the evidence of an astrologer or a soothsayer (even if they had spent decades mastering their discipline)."

477. *R v B* (*T*) [2006] EWCA Crim 417; [2006] Cr App R 3 dealt with the duties of an expert witness at a criminal trial, the need for expert reports to be prepared with great care and guidelines as to what should be included in an expert report. See *Drawing on Expertise: Legal*

decision-making and the reception of expert evidence Andrew Roberts [2008] Crim LR 443.

478. In *Hawthorne v Jones* (judgment 11th September 2007) I endeavoured to set out some of the general law applicable to expert evidence in civil proceedings. Some of this law is equally applicable to experts in the criminal arena. The following are extracts from the judgment:-

"*Law and Procedure*

26. I turn now to consider the relevant law and procedure in connection with the petition presently before the court. Order 28 rules 30-39 of the Rules of the High Court of Justice of the Isle of Man deal with expert evidence.

27. Order 28 rule 31(1) provides that except with leave of the Court or where all parties agree, no expert evidence may be adduced at the trial or hearing of any cause or matter unless the party seeking to adduce the evidence has applied to the court by petition to determine whether a direction should be given under rule 32, 33 or 36 (whichever is appropriate) and has complied with any direction given on the application.

28. Order 28 rule 32(1) provides that where in an action for personal injuries an application is made under rule 31(1) in respect of oral expert evidence relating to medical matters then unless the court considers that there is sufficient reason for not doing so, it shall direct that the substance of the evidence be disclosed in the form of a written report or reports to such other parties and within such period as the court may specify.

29. Order 28 rule 38 provides that where a party to any cause or matter calls as a witness the maker of a report which has been disclosed in accordance with a direction given under rule 32 the report may be put in evidence at the commencement of its maker's examination in chief or at such other time as the court may direct.

30. At what stage should a point on the admissibility of evidence that is said to be expert evidence be taken? It appears from the commentary to the Old English Supreme Court Practice 1999 on page 722 that a judge in England who is not the trial judge may not be entitled, at the interlocutory stage, to rule on the admissibility of such evidence. (*Sullivan v West Yorkshire Passenger Transport Executive* [1985] 2 All ER 134, CA and *Rawlinson v Westbrook*, The Times January 25, 1995, CA). The White Book commentary continues:

"A judge, sitting interlocutorily, has no power to edit an expert's report in advance of the trial even when it appeared to him that the report contained evidence that was not relevant to the action *(The Scotch Whiskey Association v Kella Distillers Ltd* The Times December 27, 1996)."

31. I should add that in the 1980s it appears that in England judges other than the judge who eventually presided over the action at the trial would frequently deal with interlocutory applications in respect of such action. In *Sullivan* the

English Court of Appeal was stressing that issues of admissibility of evidence should in general be left to the trial judge. In the Isle of Man the Deemster who presides over the action at trial is frequently the same Deemster who hears interlocutory applications in respect of the action prior to trial. To that extent the procedures referred to in *Sullivan* may be distinguished. I accept however that in civil matters it is sometimes difficult to decide on issues of admissibility of evidence prior to trial and prior to such evidence being put in context once all issues in dispute have been properly identified.

32. In *Sullivan* it was stressed that the issue of admissibility is a matter for the trial judge. In England the powers of the judge in chambers in respect of expert evidence appear at the time when *Sullivan* was decided to have been limited to ruling on the number of experts to be utilised and whether the evidence is genuinely expert evidence and whether pre-trial disclosure of it should be directed. Stephenson L J at page 135:

"Broadly speaking it is for the parties to decide what witnesses they wish to call and for the judge, before whom the evidence is put, to rule whether it is admissible, and if it is whether he can accept it or reject it as incredible or unhelpful".

33. Stephenson L J then referred to the old English Order 38 which restricts, as Order 28 of our rules does, the giving of medical evidence in actions for personal injuries. Stephenson L J at page 138 stated in effect that it was possible for the judge at the interlocutory stage to "rule on any submission or question as to it being genuine expert evidence". It was not suggested in *Sullivan* that the evidence was not genuinely expert evidence. Stephenson L J bore in mind the general law embodied in section 3 of the Civil Evidence Act 1972 to the effect that where a person is called as a witness in civil proceedings his opinion on any relevant matter on which he is qualified to give expert evidence, shall be admissible in evidence. The Manx equivalent is contained in section 3 of the Evidence Act 1983.

34. Ackner L J felt that Order 38 was designed to extend the ambit of disclosure:

"it was not directed to the question of the admissibility of the evidence" (page 139).

35. Sir David Cairns (at page 139) could find nothing "which would enable any limitation to be placed on the right of a party to call an expert witness: at least, no right for the court to make any order on an interlocutory application barring the party calling an expert witness". The learned judge at page 140 added:

"In my view there is nothing in that rule [Order 38 rule 38] which would enable the court to say that the expert evidence should not be called. It would be for the judge at the trial, if the evidence is tendered, to rule on admissibility and on the relevance of the evidence tendered, but that is not, in my view, a function which can be exercised on an interlocutory application".

36. Who is qualified to give expert evidence? It is for the court at the appropriate time, to decide whether a witness is qualified to give expert evidence

or not. Such competence may have been derived either from a course of study or from experience. A witness may be an expert but not in the relevant subject. In that case his opinion will not be admissible. It is for the judge to decide whether a witness has sufficient knowledge and experience to qualify as an expert. There is no need for it to have been acquired professionally (*R v Silverlock* [1894] 2 QB 766). *Silverlock* concerned a handwriting expert in a criminal case. Lord Chief Justice Russell at page 771 felt that reliable opinions based on past experience were sufficient but stated that once it is determined that the evidence is admissible the question of its value or weight is another matter to consider. In each case the decision is one of fact and degree (*R v Somers* [1963] 3 All ER 808).

37. In *Mackenney* (1983) 76 Cr App R 271 a witness with training in psychology was not allowed to give medical evidence. In *Mackenney* it was held that a psychologist with no medical qualifications could not be called to give expert evidence as to whether a defendant was suffering from any specific disease or defect or abnormality of mind. However if a witness was suffering from a mental disability it may, in a proper case, be permissible to call psychiatric evidence to show that the witness is incapable of giving reliable evidence. *DPP v ABC Chewing Gum* [1967] 2 All ER 504 also dealt with the admissibility of evidence of psychiatrists.

38. An expert's evidence is necessarily founded on his training and experience. It has been held that a doctor can give evidence of what he was told by a patient about his condition for the purpose of evaluating his diagnosis though his testimony is inadmissible to show what symptoms were actually being experienced by the patient (*R v Bradshaw* (1986) 82 Cr App R 79, CA). An expert can give evidence on specific matters within his personal knowledge or of which admissible evidence will be given by another witness. Where the opinion of experts is based on reports of facts, those facts unless within the experts' own knowledge or unless the subject of admissions must be proved independently.

39. In *National Justice Compania Naviera SA v Prudential Assurance Co. Ltd* (*the Ikarian Reefer*) [1993] 2 Lloyd's Rep. 68 Cresswell J at page 81 referred to some of the duties and responsibilities of experts in civil cases as follows:

" 1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (*Whitehouse v. Jordan*, [1981]1 W.L.R. 246 at p. 256, per Lord Wilberforce).

2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise (see *Polivitte Ltd. v. Commercial Union Assurance Co. Plc.,* [1987] 1 Lloyd's Rep. 379 at p. 386 per Mr. Justice Garland and Re *J*, [1990] F.C.R. 193 per Mr. Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.

3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (Re *J* sup.).

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.

5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (Re *J* sup.). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report *(Derby & Co. Ltd. and Others v. Weldon and Others*, The Times, Nov. 9, 1990 per Lord Justice Staughton).

6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.

7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports (see 15.5 of the *Guide to Commercial Court Practice*)".

40. In the *Ikarian Reefer* Cresswell J was dealing with expert evidence in respect of a claim that a vessel was lost by being deliberately run aground and deliberately set on fire by or with the connivance of those beneficially interested in the plaintiffs.

…

46. I cannot leave this judgment without referring to the undisclosed report of Mr David Miller. Miss Oates indicated that she had written instructions not to disclose the report of Mr David Miller (a consultant orthopaedic surgeon) referred to in paragraph 1 (iii) of Dr McAndry's report under the heading "Documents Available". The English Court of Appeal in *Vasiliou v Hajigeorgiou* [2005] EWCA Civ 236; [2005] 3 All ER 17 disapproved of expert shopping. There is no application presently before the court for the disclosure of Mr David Miller's report and therefore I make no order in that respect. I leave Mr Cordwell to pursue his request to the Plaintiff pursuant to Order 23 rule 10. All I would say at this stage is that as the Plaintiff is relying on the report of Dr McAndry and in that report Dr McAndry makes express reference to the report of Mr David Miller then on the face of it I would have thought, without the benefit of hearing detailed submissions, that such report should be disclosed forthwith.

47. For the sake of completeness, on the issue of physical injuries (in particular injuries to bones and joints) and the prognosis of recovery of a plaintiff from such injuries, I should make the obvious point that if a court is asked to prefer the opinion of a specialist consultant orthopaedic surgeon over that of a general practitioner with some accident and emergency experience at a cottage hospital it may well be, depending of course on all the other relevant evidence before the court, that the court may be minded to prefer the specialist consultant's opinion. I say no more on that obvious point."

479. In *B* [2006] EWCA Crim 417 the English Court of Appeal gave further guidance. Gage L J said:

> "In addition to the specific factors referred to by Cresswell J in *The Ikarian Reefer* [1993] 2 Lloyd's Report 68 … we add the following as necessary inclusions in an expert report—
>
> (1) Details of the expert's academic and professional qualifications, experience and accreditation relevant to the opinion expressed in the report and the range and extent of the expertise and any limitation upon the expertise.
>
> (2) A statement setting out the substance of all the instructions received ... questions upon which an opinion is sought, the materials provided and considered, and the documents, statements, evidence, information or assumptions which are material to the opinion expressed or upon which those opinions are based.
>
> (3) Information relating to who has carried out measurements, examinations, tests etc and the methodology used and whether or not such measurements etc were carried out under the expert supervision.
>
> (4) Where there is a range of opinion in the matters dealt with in the report, a summary of the range of opinions and the reason for the opinion given. In this connection any material facts or matters which detract from the expert's opinions and any points which should fairly be made against any opinion expressed should be set out.
>
> (5) Relevant extracts of literature or any other material which might assist the court.
>
> (6) A statement to the effect that the expert has complied with his or her duty to the court to provide independent assistance by way of objective unbiased opinion in relation to matters within his or her expertise and an acknowledgement that the expert will inform all parties and where appropriate the court, in the event that his or her opinion changes on any material issues.
>
> (7) Where on an exchange of experts' reports matters arise which require a further or supplemental report, the above guidelines should of course be complied with."

480. *Whitewind* [2005] EWCA Crim 1092 dealt with the position where experts disagree. *R v Atkins* [2009] EWCA Crim 1876 dealt with expert evidence in respect of facial mapping. *Thomas* (General Gaol Delivery judgment delivered 9th July 2010) dealt with expert evidence issues in proceedings under the Misuse of Drugs Act 1976.

481. In *R v Holdsworth* [2008] EWCA Crim 971 and *R v Harris* [2005] EWCA Crim 1980 the position as to the power of the court to make provision for experts to consult together and produce a summary of points of disagreement was dealt with.

482. See the standard textbooks on evidence including *Criminal Evidence* 5th Edition Richard May and Steven Powles Chapter 6 and *Mental Disability Law, Evidence and Testimony* Parry and Drogin (American Bar Association).

483. See also *Clark (Sally) (No 2)* [2008] EWCA 1020 and *Cannings* [2004] EWCA Crim 1 and the English Law Commission Consultation Paper Number 190 *The Admissibilty of Expert Evidence in Criminal Proceedings in England and Wales*.

484. The Judicial Studies Board Specimen Direction 33 dealt with expert evidence as follows:

> "33. Expert Evidence
>
> In this case you have heard the evidence of X, who has been called as an expert on behalf of the prosecution/defendant. Expert evidence is permitted in a criminal trial to provide you with scientific [or e.g. accountancy] information and opinion, which is within the witness' expertise, but which is likely to be outside your experience and knowledge. It is by no means unusual for evidence of this nature to be called; and it is important that you should see it in its proper perspective, which is that it is before you as part of the evidence as a whole to assist you with regard to one particular aspect of the evidence, namely [...].
>
> [In a case where e.g. handwriting (see Note 1, below) is in issue or there might otherwise be a danger of the jury coming to its own 'scientific' conclusions, add: With regard to this particular aspect of the evidence you are not experts; and it would be quite wrong for you as jurors to attempt to [compare specimens of handwriting/perform any tests/experiments of your own] and to come to any conclusions on the basis of your own observations. However you are entitled to come to a conclusion based on the whole of the evidence which you have heard, and that of course includes the expert evidence.]
>
> A witness called as an expert is entitled to express an opinion in respect of [his findings or the matters which are put to him]; and you are entitled and would no doubt wish to have regard to this evidence and to the opinion/s expressed by the expert/s when coming to your own conclusions about this aspect of the case.
>
> You should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert/s, you do not have to act upon it. [Indeed, you do not have to accept even the unchallenged evidence of an expert.] (In a case where two or more experts have given conflicting evidence:) It is for you to decide whose evidence, and whose opinions you accept, if any. You should remember that this evidence relates only to part of the case, and that whilst it may be of assistance to you in reaching a verdict, you must reach your verdict having considered all the evidence.

Notes

1. In relation to a matter such as handwriting, it is desirable to give the jury (in addition to any directions in the summing up) an early direction when the matter arises in evidence that they should not embark upon a comparison exercise on their own. They may, e.g. be told, if the issue is likely to be of importance, that they must decide it on the evidence only (which may legitimately take the form of agreed facts, the evidence of the maker or alleged maker of the document, the evidence of a person proved to be familiar with the maker's handwriting, expert evidence and circumstantial evidence); but they must not decide it on the basis of any comparison carried out privately by them.

See *R v Stockwell* 97 Cr App R 266; *R v Fitzpatrick* [1999] Crim LR 832;

Archbold (2003) 10-61 page 1232 et seq.

Blackstone (2003) F10.3 page 2126 et seq"

Evidence of speed

485. As to evidence of impressions of speed from non-expert witnesses in causing death by dangerous driving cases see *Bates* (judgment of Acting Deemster Montgomerie delivered on the 7th May 2007). In that case evidence as to the rate of speed and estimates as to speed were considered relevant and admissible. It was doubted that remarks of witnesses such as "blast over the Mountain" were admissible and the court expected "the Prosecution to exercise its customary common sense/expertise when adducing its evidence" (paragraph 40 of judgment).

Site views

486. If a site view is desirable counsel should make an application. Counsel and court administration should ensure that all necessary arrangements are made including transport to the site for the Deemster and clerk and transport for the jury separately from the Deemster but together in their own vehicle. Prosecution and defence advocates to be present at the site view together with the defendant. The court should determine the purpose of the site view. What is to be seen and why? What if anything is to be said and by whom? Has anything changed at the site since the relevant date? Consider any health and safety and security issues. If the site view is of a road prosecution counsel should consider any necessary road closure orders. The site view should be regarded as a part of the proceedings in court. There should be no discussion. The jury should not discuss matters with third parties and should not permit third parties to discuss matters with them.

487. See *Archbold* paragraphs 4-83, 4-84, 4-418, 4-264. At paragraph 4-83 it is indicated that the judge may permit the jury to view the locus in quo at any time during the trial but he should take precautions not to allow any improper communications being made to them at the view. The judge must be present at any view to control the proceedings and ensure that the correct procedure is followed. A view is part of a criminal trial and, in the absence of exceptional circumstances, the presence of the accused at a view is as necessary as at any other part of the trial. No view should take place after the retirement of the jury. See for further detail the authorities referred to in *Archbold.*

488. See also *Blackstone's Criminal Practice* 2003 at paragraph F8.35. A view should be attended by the judge, the tribunal of fact (jury), the parties, and their counsel.

489. In *M v Director of Public Prosecutions* [2009] EWHC 752 (Admin); [2009] 2 Cr App R 12 the English Queen's Bench Divisional Court held that what was critical before a court embarked upon a view was that there was absolute clarity as to precisely what was to happen at the view, about who was to stand in what position, about what, if any, objects should be placed in a specific position and about who would do that. A view of a scene should be conducted without discussion.

The jury

490. The provisions of the Jury Act 1980 deal with the procedure in respect of the jury selection process including challenges by the prosecution and the defence.

491. *DPP of the Virgin Islands v William Penn* (Privy Council judgment delivered 8th May 2008) dealt with defects in the preparation and publication of a list of those qualified to serve as jurors. *Tibbetts v Attorney General of the Cayman Islands* [2010] UKPC 8 dealt with issues concerning whether a verdict was infected by apparent bias on the part of the jurors. The question being whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the jury were biased.

492. The following are extracts from the Jury Act 1980:

> "24 Number of persons on jury in criminal matters
>
> The offence of treason or the offence of murder shall be tried by a jury of twelve persons.

All other offences triable on information shall be tried by a jury of seven persons: Provided that a Deemster may in the case of the trial of any person for any offence, by reason of the gravity of the matters in issue, direct that the offender shall be tried by a jury of twelve persons …

27 Challenges in criminal trials

(1) As heretofore accustomed, upon the trial of any person for an offence on information the Attorney General or any advocate on behalf of the Attorney General shall continue to have the unlimited right to challenge without cause individual members of a jury before they are sworn.
(2) A person (other than the Attorney General) who having a right to do so prefers an information and a person tried on information may challenge not more than three jurors without cause and any juror or jurors for good and sufficient cause.
(3) Upon the trial of any person for an offence on information any challenge to jurors for cause shall be tried by the Deemster before whom the accused is to be tried.
(4) Upon the trial of any person on information the whole or any two of the jury may be sworn together, provided that an opportunity to challenge each man separately shall be furnished to the prosecutor and the accused before the oath is administered.
(5) If, by reason of the prisoner or the prisoners (if two or more prisoners shall be placed on their trial together) exercising his or their right of several challenges or by reason of the challenges by or on behalf of the Attorney General, or by reason of the challenges of the person (other than the Attorney General) preferring the information or from the illness or absence of jurors, or from all or any of the said causes, a sufficient number of the jurors returned on the panel for the then Court of General Gaol Delivery shall not remain to try the said prisoner or prisoners, such jurors (if any) as shall be present and able to serve, and shall remain unchallenged, shall serve on the said jury and the said panel shall be again called and the challenge shall be allowed in such case of such jurors only as shall be challenged for good and sufficient cause.

28 Death or illness, etc of member of jury in a criminal trial

Where, in the course of any trial on information, any member of the jury dies or is discharged by the Deemster as being through illness incapable of continuing to act or for any other reason, the jury shall nevertheless, subject to the consent being given in writing by or on behalf of both the Attorney General and the accused and so long as the number of its members is not reduced below ten (in the case of a trial by a jury of twelve persons) or below six (in the case of a trial by jury of seven persons), be considered as remaining for all the purposes of that trial properly constituted, and that trial shall proceed and a verdict may be given accordingly."

493. In Manx law the verdict of the jury must be unanimous.

494. If a note is received from a juror whilst the jury are deliberating that note should be considered by the presiding Deemster and prosecution and defence counsel. The Deemster may indicate to counsel how he is minded to deal with the note and what further directions, if any, may

be appropriate. Counsel should make submissions as to how they suggest the Deemster should respond to the note. In *Crossley v R* 1993-95 MLR N4 the Appeal Division (Judge of Appeal Hytner and Deemster Corrin) held that if a jury wishes to ask a question of the judge once it has retired, the question should be written down and, without the jury being brought into court, shown to the judge who should in turn show it to both counsel. Any submissions or assistance sought from counsel should take place in the absence of the jury, which should return to court only to hear the resulting direction. The Appeal Division in *Chambers* (judgment 12th August 2010) dealt with a submission in respect of how the trial Deemster had dealt with a question from the jury.

495. *R v Smith* [2005] UKHL 12, [2005] 2 Cr App R 10 emphasised the need for the trial judge to give the jury comprehensive and emphatic directions to follow the judge's directions as to the law and to consider the evidence without speculating. In that case a juror felt that other jurors were disregarding the judge's directions as to the law and were indulging in speculation contrary to the judge's instructions.

496. *R v Wilson* [2008] 2 Cr App R 3 held that where an application was made for a trial judge, in his discretion, to discharge a jury, the test to be applied was to decide whether circumstances had arisen as a result of which a fair-minded and informed observer would conclude that there was a real possibility or danger that the jury would be biased. Where admissible material, (such as bad character) was inadvertently disclosed to a jury and it was capable of more than one reasonable interpretation by jurors, the test should be applied on the basis of the most damaging reasonable interpretation.

497. See also the Appeal Division's judgment in *Devo* (judgment delivered 29th October 2008) from paragraph 170 onwards in respect of possible interference with the jury. There was an order that a senior police officer undertake an inquiry. The court heard evidence and the Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) stated:

> "177 At such hearing it was agreed that the test we should adopt was firstly, whether there was a real danger that there had been contact between a member of the jury and an employee of Y's firm and secondly, if there had been such contact whether there was a real danger that Mr Devo and Mr Riedel had been prejudiced."

498. *AG v Seckerson and Times Newspapers Limited* [2009] EWHC 1023 (Admin) dealt with the position in English law of the secrecy of the deliberations of the jury. The English Court of Appeal in *R v S(K)*

(The Times 25th November 2009) dealt with the position under section 46 of the English Criminal Justice Act 2003 where a judge may continue with a case having discharged the jury because of jury tampering.

499. It is assumed that if jurors are told to put matters out of their mind they will do so. In *R v Carter* [2010] EWCA 201 it was held that no direction is required to remaining jurors to ignore views expressed by discharged jurors. In *R v Roberto Malasi* [2008] EWCA Crim 2505 Thomas L J stated:

> "18 … First of all, it is very much within the discretion of the trial judge as to the way in which he handles a difficult matter of this kind. It is all too easy these days for people to seek to intimidate an individual member of the jury. It must be for the judge to decide whether it is, in all the circumstances, right to continue with the trial in respect of all or part of the jury concerned, and, secondly, what warnings to give. In most cases it is the experience of each and every member of this court that when a jury is told that it must put a matter out its mind, it is true to its oath, as we would expect from an institution so central to the image and discharge of our system of justice. In this case it is clear that the judge felt that the jury could continue and that they would, in accordance with the directions he immediately gave, be true to their oaths."

500. A jury should normally be trusted to faithfully adhere to any directions given to them by the presiding Deemster. In *Snape* (Court of General Gaol Delivery judgment 14th May 2004) there was an issue with some evidence as to the defendant's fingerprints being held on the national database and an inference of bad character. The jury had to be discharged on a separate point. I stated:

> "14. If the prosecution wish to proceed and there is a re-trial the jury will be directed to decide the case on the evidence before them and not to engage in speculation. These are standard directions. As was stated by the English Court of Appeal (Criminal Division) in the case of *R v Barraclough* [2000] Crim L.R. 324 although people and members of the jury are fallible and they can ignore warnings given to them by judges "The court will usually proceed on the assumption that jurors will obey clear instructions." We can rely on the common sense and sense of fair play of a Manx jury. Counsel, and indeed on occasions judges, have a habit of putting microscopes and spotlights on fine legal points and in some cases throwing matters out of all proportion. Members of the jury and potential members of the jury do not live with criminal matters and *Archbold* on a daily basis as Counsel and the Deemsters do. What Counsel may consider as a reasonable inference for the jury may be a matter that never crosses the minds of the jury who come to the matter afresh, with a blank piece of paper and open minds uncluttered with the legal baggage that advocates and Deemsters carry with them on a regular basis. I think it dangerous to speculate on what may or may not be in the minds of jurors.
>
> 15. I am not for one moment suggesting that Mrs Jones is playing a tactical game

indeed quite the contrary. Mrs Jones as an experienced criminal defence lawyer with her usual skill and vigour is doing her utmost to ensure that the Defendant's interests are well protected and that he receives a fair trial. I have to consider the interests of the Defendant and the interests of the prosecution. I am acutely conscious of the need to balance the interests of the prosecution and the defence when dealing with issues of fairness. As was re-emphasised in *Munnery* (1992) 94 Cr App R 164 it is justice that matters both to the public as represented by the prosecution as well as to the defence. As Lord Justice Auld stated in *R v Gleeson* judgment October 16 2003 'A criminal trial is not a game. Its object is to ensure that the guilty are convicted and the innocent acquitted.' "

501. If counsel has an issue to raise which is properly dealt with in the absence of the jury counsel should simply invite the Deemster to request the jury to withdraw so that a matter can be raised on which the ruling of the Deemster is required.

502. In *Evanson Mitcham v the Queen* (Privy Council judgment delivered on the 16th March 2009) the Privy Council dealt with the situation where inappropriate comments had been made in court in the presence of the jury. In that case counsel in the presence of the jury stated that "certain destructing developments have occurred which threaten the orderly conduct of the matter. It relates to threats." The judge enquired as to whether it was something the jury should hear and defence counsel stated that they did not object to the jury being excused for the purpose of prosecution counsel's observation. The following are useful extracts from the judgment of the Privy Council:

"12. Mr Nicol QC submitted on behalf of the appellant that the reference before the jury to "destructing developments" and "threats" was capable of prejudicing the appellant. If there were two or more possible meanings which could be taken out of the remark, it should be assumed that the jury may have taken that which was most damaging to the defendants. There was therefore a real risk that it could be construed as a reference to threats from one or more defendants. The jury might, he argued, have attributed the issue of threats to the appellant, particularly since his co-defendants sought in their statements to exculpate themselves and throw the blame for the shooting on to the appellant as the third man present. Although the defendants' counsel did not ask for the jury to be discharged, it was the judge's duty to advert to the possible need to take that course, as part of his function to ensure a fair trial. The necessity for discharge was reinforced by the mention of threats in the subsequent evidence, when Lake said that he was warned by the appellant "ah you ain't seen me" and Ms Hendrickson was cross-examined about threats alleged to have been made by her to get the appellant sent to prison. Accordingly, even if, contrary to his submission, the judge was right not to discharge the jury immediately after the reference by the Director of Public Prosecutions to threats on 22 May 2002, he should have reviewed the necessity in the light of the later evidence and then discharged them.

13. When an issue arises such as that which occurred in the present case, where a matter has to be mentioned to the judge which the jury should not hear,

the preferable course is for a procedure to be followed analogous to that described by the Board for initiating a voir dire relating to the admissibility of a contested confession statement. This was set out by Lord Steyn in *Mitchell v The Queen* [1998] AC 695, 704:

> "At the appropriate time counsel must ask the judge to request the jury to withdraw so that a matter can be raised on which the ruling of the judge is required. No discussion of an intended objection must take place in front of the jury. The judge should simply tell the jury that a matter has arisen on which his ruling is required and that they must please retire for the time being. When the voire dire has been completed, and the judge has given his ruling, the judge should give no explanation of the outcome of the voire dire to the jury."

If counsel had taken this course, no question could have arisen. The judge did, however, follow an appropriate procedure once the matter was mentioned in open court.

14. Once a matter has been referred to in the presence of the jury which could give rise to possible prejudice, the trial judge has a choice of courses open to him. He could elect to take no action, on the basis that the matter was insufficient to create a degree of prejudice which would make the trial unfair and that to refer to it again would only draw attention to it. He could at the appropriate stage or stages give the jury a warning to disregard what was said, if he considers that that would be sufficient to minimise the prejudice and prevent the trial from being unfair. Finally, he could decide to discharge the jury, if he considers that there is prejudice which would make the trial potentially unfair and that warnings would not diminish it to a sufficient extent. He should give consideration to the course which he should take, even if counsel have, for whatever reason, not asked for the jury to be discharged or even submitted that he should not do so: cf *R v Azam* [2006] EWCA Crim 161, [2006] Crim LR 776; *Millar v Dickson* [2001] UKPC D4, [2002] 1 WLR 1615. It is a decision which lies within the discretion of the trial judge, and an appellate court will not interfere with a decision made by him about the proper conduct of the case, unless satisfied that it was wrong and that the trial was unfair to the defendant, in consequence of which the conviction would be unsafe and in contravention of article 10(1) of the Constitution of Saint Christopher and Nevis. It is always relevant for an appeal court to bear in mind that the trial judge had the advantage of knowing the atmosphere of the case and the way in which the matter later complained of appeared in court at the time.

15. The principles to be applied were set out by Auld LJ in *R v Lawson* [2005] EWCA Crim 84, [2007] 1 Cr App R 20, a case concerning the improper admission of potentially prejudicial evidence, at para 65:

> "Whether or not to discharge the jury is a matter for evaluation by the trial judge on the particular facts and circumstances of the case, and this court will not lightly interfere with his decision. It follows that every case depends on its own facts and circumstances, including: 1) the important issue or issues in the case; 2) the nature and impact of improperly admitted material on that issue or issues, having regard, inter alia to the respective strengths of the prosecution and defence cases; 3) the manner and circumstances of its admission and whether and to what extent it is

potentially unfairly prejudicial to a defendant; 4) the extent to and manner in which it is remediable by judicial direction or otherwise, so as to permit the trial to proceed. We repeat, all these matters and their combined effect are very much an evaluative exercise for the trial judge in all the circumstances of the case. The starting point is not that the jury should be discharged whenever something of this nature is put in evidence through inadvertence. Equally, there is no sliding scale so as to increase the persuasive onus on a defendant seeking a discharge of a jury on this account according to the weight or length of the case or the stage it has reached when the point arises for determination. The test is always the same, whether to continue with the trial would or could, by reason of the admission of the unfairly prejudicial material, result in an unsafe conviction."

As Auld LJ pointed out, this does not purport to be an exhaustive list of factors, and their relative importance will vary from case to case: for example, the strength of the respective cases will be more relevant in an appeal concerning the improper admission of evidence. The issue in a case such as the present will always come back to the question whether a fair-minded and informed observer, having considered the facts, would consider that there was a real possibility or danger that the jury would have been prejudiced against the appellant: cf *Porter v Magill* [2001] UKHL 67, [2002] AC 357.

16. Mr Nicol submitted that the words of the Director of Public Prosecutions should be given the most unfavourable interpretation which the jury might take from them, which could be that they took them as referring to threats made by the appellant against a witness or witnesses. In so submitting he relied on *R v Docherty* [1999] 1 Cr App R 274, a case of indecent assault in which a witness had made a reference to the defendant's having been in prison. The trial judge refused to discharge the jury, stating that the remark could well have been taken to mean that that the defendant was a dishonest person whose word could not be believed, rather than that he had been convicted of a sexual offence, which was not the inevitable inference to be drawn from the remark. The Court of Appeal stated in the course of their judgment that the judge had been wrong to apply the test which he adopted. Roch LJ stated at page 280:

"In weighing up the danger of bias on the part of this jury arising from these answers, the judge should, in our judgment, have approached the issue on the basis of the more prejudicial meaning that could reasonably be placed on these answers rather than some lesser prejudicial interpretation."

In *Docherty* it was quite possible to place a prejudicial interpretation on the words spoken, which would have been a reasonable conclusion for the jury to draw from them. In the present case it is rather less clear that threats had been made by any of the defendants, rather than some other person, and it was submitted in the respondent's printed case that it was not a reasonable interpretation to attribute to the appellant, rather than a co-defendant, any threat that might have been made. In their Lordships' view such an interpretation of the remark might be regarded as possible, although other meanings might readily be taken from it, and they approach the matter on that basis.

17. The trial judge did not overtly refer to an exercise of his discretion, although he may have given the matter consideration without discussing it. In these circumstances it is for the Board to determine whether it considers that the risk of prejudice to the appellant was sufficient to make the trial unfair, applying the test set out in paragraph 15 above.

18. Their Lordships do not consider that the risk of prejudice was more than minimal. The reference to threats by the Director of Public Prosecutions was fleeting and oblique, very far from being a specific reference to any action of the appellant. The jury were sent out for a short time, then there was no more reference to the matter during the rest of the trial, which continued until 10 June 2002, some 19 days later. In their Lordships' view it was best that the matter be left in that way, rather than that the judge should highlight it by giving the jury directions about disregarding it. No request was made to him to discharge the jury, and if one had been made he would have been justified in refusing it. Nor was any point taken about the incident when the case went to the Court of Appeal. Their Lordships are satisfied that the trial was fair and the appellant's conviction safe.

19. For these reasons the Board will humbly advise Her Majesty that the appeal should be dismissed."

Opening remarks

503. The Deemster at the outset of the trial will make certain opening remarks and may request confirmation from counsel that the court and jury bundles have been checked by counsel and are agreed. The potential members of the jury are ushered in by the Coroner (an officer of the court) and the Deemster makes introductory comments to the potential members of the jury. The clerk and Coroner then ballot for the jury. The Deemster deals with any challenges to potential jurors. After the balloting is complete the defendant is asked to stand and the jury are informed that the defendant is entitled to be tried fairly and impartially.

504. The prosecution are invited to read the list of witnesses and others connected with the case. The jury are asked to consider whether they have any connections with the defendant, the witnesses or the other names referred to by counsel. The jury are asked to write a note for consideration by the Deemster if they do not feel able to try the defendant fairly or impartially and if they have any connections with the defendant or the witnesses.

505. The jury then take the relevant oath or affirmation that they will faithfully try the defendant and give true verdicts according to the evidence. The Deemster makes further introductory comments to the jury warning them not to make their own enquiries and to decide the

case only on the evidence adduced during the trial. The Deemster directs the jury not to discuss the case with any third parties and highlights their duty to bring to the attention of the court through the Coroner any behaviour amongst themselves or by others in relation to the case that causes them real concern or upsets them either inside or outside the court room. For example in the unlikely event of someone attempting to talk to them about the case.

506. The prosecution are then invited to outline their case. The prosecution should well before the trial file with the court and serve on the defence a copy of their opening note and the defence should liaise with the prosecution immediately if they have any issues on the contents of the opening note for example references to inadmissible evidence. Those issues should be dealt with well before the first day of the trial.

Interpreters

507. See *Archbold* at paragraph 4-34 indicating that the procedure is that the prosecution and the defence will be responsible for arranging interpreters for their own witnesses. Interpreters will be expected to have knowledge of court procedures. Ideally they will be selected from the National Register of Public Service Interpreters.

508. At paragraph 4-37 of *Archbold* it is indicated that the accused must fully comprehend the charge which he faces, the full implications of it and the ways in which a defence may be raised to it, and further must be able to give full instructions to his advocate so that the court can be sure that he has pleaded with a full and understanding mind. See *R v Iqbal Begum* 93 Cr App R 96 where the English Court of Appeal indicated in effect that if these requirements are not fulfilled the trial is a nullity. If the prosecution or defence require an interpreter they should ensure that the necessary arrangements have been made.

509. See *Kunnath v The State* 98 Cr App R 455 (a decision of the Privy Council). When a defendant is ignorant of the English language and is unrepresented the evidence at the trial must be translated to him. Where the accused is represented, the evidence should be interpreted to him, except when he or his counsel expresses a wish to dispense with the translation, and the judge thinks fit to permit the omission. The judge should not permit it unless he is of the opinion, by reason of what has passed before the trial, that the accused substantially understands the evidence to be given and the case to be made against him at the trial. However any substantial variation from accounts

given in previous statements or any additional evidence should be translated to the accused even though he may be indifferent upon the matter or might not wish it.

510. The judge, being the ultimate guardian of the fairness of the proceedings, has a duty to ensure that the accused understands the proceedings.

511. In respect of interpreters for witnesses it is important to ensure that the interpreter is a person who can be expected to interpret impartially (*R v Mitchell* [1970] Crim LR 153, CA). The English Court of Appeal in *R v Sharma* [2006] Cr App R (S) 63 dealt with the need for an interpreter to be determined by the court and not by the witness.

512. The interpreter's oath is as follows:

> "I swear by Almighty God that I will well and faithfully interpret and true explanation make of all such matters and things as shall be required of me according to the best of my skill and understanding."

Evidence

513. See generally the excellent publication entitled *Criminal Evidence* (5th Ed) by May and Powles (Thomson Sweet & Maxwell). Counsel should ensure that questions are directed at adducing relevant and admissible evidence. Counsel should ensure that questions are well focused. Counsel should beware of open ended questions. Counsel should encourage the witness to speak slowly and clearly. Counsel should ensure that the jury can follow and understand the evidence. Counsel should ensure that exhibits are properly produced and given an appropriate exhibit number and that the court is provided with an updated list of exhibits.

514. In *DS v Her Majesty's Advocate* (Privy Council judgment delivered 22nd May 2007) at paragraph 73 it is stated:

> "… any evidence or questioning at trial must be relevant to the issues to be decided by the jury: at common law evidence or questioning on collateral matters is generally excluded."

515. In *Dobbie* (Court of General Gaol Delivery judgment 23rd March 2009) it was stressed that there should be proper cooperation with counsel and with the court. Sensible concessions should be made and cross examination should be kept short and to the point. Counsel should focus on the critical issues rather than peripheral issues. A

blanket defence request that all witnesses are required without due regard to the main issues in the case does not assist in the proper and efficient administration of justice. If too much time is given to one case other cases then suffer. Counsel must be reasonable in their time estimates and must be reasonable in their requests for the attendance of witnesses at trial. Counsel should concentrate on the main issues in the case. Counsel should consider if any evidence can be agreed. Counsel should consider if any statements can be read. Counsel should consider whether any admissions can be made. See section 16 of the Criminal Jurisdiction Act 1993. In *McVey* (Court of General Gaol Delivery judgment 30th October 2009) it was stressed that counsel should take steps to agree uncontentious evidence and that where admissions could be made and where evidence could be agreed admissions should be made and evidence should be agreed. At paragraph 16 of my judgment in *McVey* I stated:

> "Justice is not a game to be played with defendants trying to unreasonably require attendance of unnecessary witnesses and trying unreasonably to delay trial dates in the hope that the case against them will disappear. These cases will not disappear. These cases will go to trial and justice will be done."

516. For the importance of the prosecution to adduce evidence in respect of formal matters (such as the need to prove that an individual was disqualified from driving at the appropriate time where there was no admission in that respect and no certificate of conviction produced) see *Mills v DPP* [2008] EWHC 3304 (Admin). Scott Baker L J stated:

> "7. We have been referred to the decision of Newman J in the case of *Pattison v. DPP* (2006) 170 JP 51, [2005] EWHC 2938 (Admin). He referred to a number of authorities and then recited various principles. Two of them are of significance, in my judgment, in the present appeal. The first is that, as with any other essential element of an offence, the prosecution must prove to the criminal standard that the person accused was a disqualified driver, and secondly it can be proved by any admissible means, such as an admission - even a non-formal one by the accused - that he was a disqualified driver. As I have already mentioned, there was no formal admission in this case. There is a clear procedure under the Criminal Procedure Rules for formal admissions in criminal proceedings. That was not followed in this case. What is said is that at the preliminary hearing it was agreed by the parties that the appellant was disqualified on the relevant date, October 30, 2006. There is however nothing to support that …
>
> 13. This, in my judgment, is an unsatisfactory case, where neither the prosecution nor the defence come out of it with any credit because the issue about disqualification could easily have been resolved one way or the other at the hearing before the justices. It appears that the prosecution in particular simply sat back and did nothing. They had the opportunity to apply for an adjournment to rectify the matter by proper formal proof, and if costs were thrown away in doing so, to ask for a wasted costs order against the appellant's solicitor. They chose,

however, to do nothing, and the result is this case stated that comes before this court today."

517. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Flanagan* (judgment 29th July 2004) at paragraph 25 stated:

"We believe it is the responsibility of the prosecution to ensure that only items which have a probative value are introduced into evidence."

518. Counsel should ensure that only relevant evidence is adduced. The English Court of Appeal in *Gordon* [1995] 2 Cr App R 61 held that evidence of marginal relevance may and should be excluded if it would lead to a multiplicity of subsidiary issues. Henry L J stated:

"The judge cannot in advance know what evidence is or will be prejudicial to the defendant. When he is conscious that such evidence has been heard, he must ensure in his summing-up that the jury disregard it. And in cases like this, where the evidence can, if not contained by the ring fence of relevance, range far and wide, the judge should ascertain in advance what the prosecution case is, and how the defence propose to meet it. He should not be too easily deterred by non-cooperation from the defence in this process."

519. Counsel should ensure that evidence to be adduced before the jury is relevant and admissible. It is a matter for the jury what weight they attach to admissible evidence. Lord Morris, who was a Judge of Appeal on the Island some years ago now, in *Lowry v R* [1974] AC 85 at 99 stated:

"When considering evidence which is tendered to a court it is always helpful to distinguish between relevance and admissibility and weight … Questions of weight are for a jury … The questions arise whether the evidence was (a) relevant and (b) admissible : not all evidence that is relevant is admissible. In some circumstances evidence that may have some relevance is not admissible because its prejudicial effect heavily over balances its probative value and as a matter of fairness or of public policy a court will not allow the prosecution to call such evidence."

520. *R v Horncastle and others* [2009] EWCA Crim 964 dealt with the admission of hearsay evidence in English criminal proceedings. In *R v J (DC)* [2010] 2 Cr App R 2 (a case involving disclosure of documents from social security files to demonstrate bad character of complainants) it was stressed that it was essential, where evidence was to be put to the jury by agreement and an order of the court was not required, that the court was informed what had been agreed and how the advocates proposed that the agreed evidence was to be placed before the jury. If an agreement was made during the trial, then the

judge should be told immediately after the agreement. This is in the interests of good trial management, so that the judge can consider the advocates' proposals as to the timing and manner of putting the evidence before the jury and the directions of law that are needed in the summing up.

521. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish)in *Devo* (judgment delivered 29th October 2008) at paragraph 133 stated:

> "133 It is settled law that if the prosecution intend to ask the jury to disbelieve the evidence of a witness called by the defendant, such witness ought to be challenged in cross-examination or at the very least it should be made plain, while the witness is in the witness box, that his evidence is not accepted: see *R v Hart* [1932] 23 Cr App R 302."

522. Lord Bingham delivering the judgment of the Privy Council in *Bain* on the 10th May 2007 at paragraph 115 stated:

> " … a fair trial ordinarily requires that the jury hears the evidence it ought to hear before returning its verdict, and should not act on evidence which is, or may be, false or misleading. Even a guilty defendant is entitled to such a trial."

523. The prosecution should ensure that all relevant evidence is served well in advance of the trial. If the prosecution serve, for example, further expert evidence late and shortly before trial leaving the defence inadequate time to respond the prosecution run the risk of judicial criticism and the risk of such evidence being excluded rather than the trial dates being vacated. See *Bates* judgment of Acting Deemster Montgomerie delivered on the 7th May 2007.

524. Consider the detailed provisions of Police Powers and Procedures Act 1998 and the various Orders, Regulations and Codes in respect of evidential matters. Consider especially section 70 (inferences from accused's silence), section 71 (effect of accused silence at trial), section 72 (effect of accused's failure to account for objects substances or marks) and section 73 (effect of accused's failure or refusal to account for presence at a particular place).

525. See *Maguire* [2008] EWCA 1028 April 25, 2008 in respect of evidence, inferences from silence, differing accounts at interview and trial and the danger of over-formalising directions. In that case where the Crown sought to rely on inconsistencies between M's interviews and his evidence at trial, and M argued on appeal that the judge had been wrong to accede to a prosecution application that he give a Criminal Justice and Public Order Act 1994, s.34 direction, the

English Court of Appeal did not consider that the question of s.34 should even have been raised. With or without the direction, the Crown's case would include the argument that the way M's account had changed indicated that he was lying, and the judge would have adverted to it and directed the jury that it was up to them whether M's explanation might be innocent or whether his evidence was untruthful. The s.34 direction was simply a rather formalised way of saying precisely the same. Section 34 was necessary to reverse the old common law that because defendants were entitled to remain silent in interview they could not be criticised as untruthful if they availed themselves of that entitlement. But for generations, a defendant would be cross-examined upon the difference between an account given in interview and at trial. Endorsing what had been said in *Brizzalari* [2004] EWCA Crim 310, [57] (prosecutors should be cautious about too readily inviting the directions under s.34), the court added that it also discouraged anything which over formalized common sense. Advocates should be cautious about making submissions which sought unnecessary formalism from judges in their directions, and equally judges should avoid employing it, unless it became essential.

526. In *R v Cowan* [1996] 1 Cr App R 1 9G Lord Taylor C J stated:

> "We wish to make it clear that the rule against advocates giving evidence dressed up as a submission applies in this context. It cannot be proper for a defence advocate to give the jury reasons for his clients' silence at trial in the absence of evidence to support such reasons."

527. See also *R v Becouarn* [2005] UKHL 55; [2006] 1 Cr App R 2 and Zander's *The Police and Criminal Evidence Act 1984*.

528. Consider also the provisions of the Criminal Justice Act 1991, *Shillito* (Appeal Division judgment delivered on the 29th July 2004), *Grant* (Privy Council judgment delivered 16th January 2006) and *Cole* [2007] EWCA Crim 1924 in respect of statements where the maker is unable to attend as a witness.

529. In *R v Horncastle and others* [2009] EWCA Crim 964; [2009] 2 Cr App R 15 the English Court of Appeal held that the right to confront prosecution witnesses under art.6(3)(d) of the European Convention on Human Rights was not absolute and could in certain limited circumstances be restricted, provided that the trial was fair. In considering whether the trial was fair, a legitimate justification for the admission of an absent witness's statement must be established and appropriate counterbalancing measures must be taken to ensure that the defendant was not placed at an unfair disadvantage and that his

rights were respected. The adequacy of such counterbalancing measures could only be judged by the criterion whether the proceedings as a whole were fair. There was no breach of art.6 , and in particular art.6(3)(d) , if a conviction was based solely or to a decisive degree on the hearsay evidence of an identified but absent witness, provided that the provisions of Criminal Justice Act 2003 (Act of Parliament) were observed. Where a witness was absent through fear, s. 116 of the 2003 Act did not impose a requirement that the fear must be attributable to the defendant. If the witness could give evidence which should be heard by the court in the interests of justice but was clearly too frightened to attend court then it mattered not whether that fear was brought about by or on behalf of the defendant: there was a justifiable reason for the absence. Accordingly, on the facts, the hearsay evidence in the first two cases was properly admitted and the convictions were safe. In the third case the judge's failure to explain the use that might be made of the memorandum was a material misdirection and the conviction would be quashed. The hearsay provisions of the 2003 Act are concerned with identified but absent witnesses. They do not permit the admission of the evidence of anonymous witnesses, to which different considerations apply. The right to confront prosecution witnesses is only to be departed from in the limited circumstances and under the conditions set out in the 2003 Act. It is of special importance that assurances are never given to potential witnesses that their evidence will be read. Unless the defendant consents, it is only the court applying the strict conditions of the 2003 Act based on evidence that can admit such a statement.

530. In *Horncastle* the English Court of Appeal considered the phrase 'sole or decisive' and felt that the observations of the court in *Luca v Italy* (2003) EHRR 46 (emphasised and relied upon by the Appeal Division in *Shillito* judgment delivered 29th July 2004) went further than the facts that that or previous cases required. The 5 person English Court of Appeal in *Horncastle* distinguished *Doorson v The Netherlands* (1996) 22 EHRR 330 and declined to apply *Al-Khawaja and Tahery v United Kingdom* [2009] ECHR 110. An appeal against the Court of Appeal's judgment was unanimously dismissed by the Supreme Court on the 9th December 2009 and is reported at [2009] UKSC 14.

531. Section 14 of the Criminal Jurisdiction Act 1993 deals with the admission of depositions generally and section 15 deals with the admission of depositions of absent witnesses.

532. Section 16 of the Criminal Jurisdiction Act 1993 provides that a person accused of an offence triable on information may, at the trial

or any previous inquiry, himself or by his advocate admit any fact alleged against him so as to dispense with proof of it.

533. In *R v DT (Absent witness : evidence*) [2009] EWCA Crim 1213 the English Court of Appeal held, that on an application for the admission of the statement of an absent witness, meeting the condition in section 116(2)(d) Criminal Justice Act 2003 that the relevant person could not be found although such steps as it was reasonably practicable to take to find him had been taken, required the calling of formal evidence, unless the relevant facts were set out in an agreed statement of facts.

534. The Times Law Report of the *DT* case published on the 16th July 2009 summarised the judgment as follows:

> "LORD JUSTICE THOMAS said that the appeal related to a written statement by a witness that the defendant had admitted the crime. The witness had said that she was leaving the area and would not give evidence in court.
>
> The prosecution called no evidence but applied for the admission of the written statement on the basis that an attempt to serve a witness summons had failed and her mobile telephone was turned off.
>
> His Lordship said the right to confront a prosecution witness was fundamental: see R v Horncastle (The Times June 3, 2009). Informality would not do.
>
> In the absence of a written statement of agreed facts, evidence had to be called to establish that all reasonably practicable steps had been taken but the witness could not be found."

535. The following are extracts from the judgment of Thomas L J (sitting with King J and Judge Moss QC sitting as a judge of the Court of Appeal Criminal Division) in *R v DT (Absent witness : evidence)* :

> "The approach to s116(2)(d)
>
> 25. In the recent decision of this court in Horncastle [2009] EWCA Crim 964 the court dealt with the position of witnesses who were in fear. At paragraph 87 the court said:
>
> "It is, however, important that all possible efforts are made to get the witness to court. As is clear, the right to confrontation is a longstanding requirement of the common law and recognised in Article 6(3)(d). It is only to be departed from in the limited circumstances and under the conditions set out in the CJA 2003. The witness must be given all possible support, but also made to understand the importance of the citizen's duty ..."
>
> 26. Although the court was in that instance dealing with witnesses who were kept from court through fear, the principle applicable is the same in the case of a witness who is reluctant to come to court and absents himself. It is important that

all efforts are made to get the witness to court; this must start with the witness being given all possible support and made to understand the importance of the citizen's duty to give evidence.

27. The right to confrontation is a long-standing right of the common law and is reflected in the European Convention at Article 6(3)(d). The right to confrontation is not to be lightly departed from. The provisions of the Criminal Justice Act 2003, described in Horncastle as a carefully crafted code, need to be observed carefully.

28. It seems to us that in a case of this kind, unless there is a written agreed statement of facts, it is simply not possible to proceed to consider an application without evidence as to the steps taken to find the witness.

29. Our conclusion

30. If an agreed statement of facts had been produced in this case, it would have exposed the error in the approach of the learned judge, which was to look at the matter, as if this witness was reluctant from the time when the police started to make enquiries after the PCMH in the month before the trial. It is apparent from the witness's own statement that she was reluctant from the day she made the statement. She said she would not come and therefore was at risk of breaking contact so she could not be found.

31. There was, because matters proceeded so informally before the judge, no attempt to try and explore what steps the police had taken through the well-known programme established for Witness Care to keep contact with her, to explain to her her duty, to try and find where she had gone in the months before the PCMH. No doubt the constabulary at Portsmouth have a Witness Care Unit, but there was no evidence before the judge as to what steps it had taken. Nor was there any evidence when enquiries came to be made in the early part of 2008 and in the month or two before the trial as to what information the witness's mother had about her location, no evidence as to what enquiries had been made of social security (as one assumes that the witness concerned was on social security). She had been on the telephone. There was no evidence as to whether any attempt had been made to trace her through cell site analysis. It is said that all of this might be expensive. It may be. We do not know, however, because there was no evidence about that either.

32. It seems to us, and in particular from the judge's remarks, that there must be a suspicion that this kind of application is being dealt with far too informally. Given the importance of the right to confrontation under our law, it is quite impermissible to proceed with an application of this kind informally.

33. It is to be hoped in applications of this kind that the facts can be agreed, but, if not, evidence must be called and the judge must make findings of fact. With respect to the judge in this case, he did not make any findings. He merely expressed a summary of what he was told. It follows, therefore, first that there was no evidence properly before the judge on which he could have made any findings at all. Secondly, even if the limited matters that had been relied on by the Crown had been facts upon which they had established by evidence, it would have been hopeless to expect a judge to say that such steps as were reasonably

practicable had been taken. If there was a problem with the cost of caring for a reluctant witness and finding her, then that needed to be dealt with by evidence. There was no such evidence.

34. In the result, therefore, we are of the clear view that this evidence was wrongly admitted as there was no evidence to establish that such steps as were reasonably practicable to find SD had been taken. It is accepted that if the evidence was wrongly admitted, the conviction cannot be considered safe. In the circumstances, therefore, we have no alternative but to quash this conviction."

536. See section 27 of the Criminal Justice Act 1990 and the relevant rules. Consider also *Davies* [2008] UKHL 36, May and Powles on *Criminal Evidence* 5th Edition and *Forsyth* [1997] 2 Cr App R 299. The English Court of Appeal in that case considered section 32 of the Criminal Justice Act 1988 and concluded that once it is established that there is difficulty in obtaining the evidence of witnesses abroad where the evidence is relevant to the defence the judge should normally exercise his discretion in favour of admitting the evidence to be given by television link though in particular cases there may be reasons to refuse it. Consider also the *Camberwell Green Youth Court* case [2005] UKHL 4, *McGlinn v Waltham Contractors Ltd* [2006] EWHC 2322, *Polanski v Condé Nast Publications Ltd* [2005] UKHL 10 and *Yamaichi* 22nd April 1999 (QBD).

537. See also *R v Ukpabio* [2007] EWCA Crim 2108 in respect of live video links.

538. See the provisions of the Criminal Justice, Police and Courts Act 2007 in respect of use of live television links at preliminary hearings and video evidence and the relevant rules. See Section 30 of the 2007 Act and *Forsythe* [1997] 2 Cr App R 299. Section 30(1) of the Criminal Justice, Police and Courts Act 2007 provides that a witness (other than the accused) may if the court so directs, give evidence through a live link in criminal proceedings, in, amongst other courts, the Court of General Gaol Delivery. Such a direction should not be given unless the court is satisfied that it is in the interests of the efficient or effective administration of justice for the person concerned to give evidence in the proceedings through a live link. Section 33(2) of the Criminal Justice, Police and Courts Act 2007 provides that the Deemster may give the jury (if there is one) such direction as the Deemster thinks necessary to ensure that the jury gives the same weight to the evidence as if it had been given by the witness in the courtroom or other place where the proceedings are held. Section 36 concerns evidence by video recording.

539. See section 40 of the Criminal Justice, Police and Courts Act 2007 in respect of the abolition of the right of the accused to make an unsworn statement.

540. Section 56 of the Criminal Justice Act 2001 abolished the need for corroboration.

541. *Devo* (Appeal Division judgment delivered 29th October 2008) dealt with certificates of foreign law pursuant to section 37(2) of the Misuse of Drugs Act 1976.

542. In *R v Finch* [2007] EWCA Crim 36 it was held that a defendant in a joint trial could not only cross examine his co-defendant on his confession if the latter gave evidence, but could also adduce the confession if the co-defendant declined to give evidence. A co-defendant who pleaded guilty was compellable as a witness for any remaining defendant on trial. It will often not be in the interests of justice for evidence which the giver is not prepared to have tested to be put untested before the jury.

543. On a separate point in what circumstances are out of court admissions made by one accused admissible in evidence against another? See *R v Hayter* [2005] 1 WLR 605 and *Persad* (Privy Council judgment 23rd July 2007). In *Hayter* the House of Lords held (3:2) that in a joint trial of two or more defendants a jury is entitled to consider first the case in respect of one defendant (defendant A) based on his own out of court admissions and then use their findings of A's guilt and the role A played as a fact when considering the case in respect of defendant B. The Privy Council in *Persad* explored the limits of this decision and stressed that the facts of cases and the charges must be carefully considered. The Privy Council at paragraph 15 of *Persad* said that "In the ordinary way, of course, out of court admissions are inadmissible against a co-accused for all purposes." *Hayter* concerned a joint trial of defendants for a joint offence. In *Persad* the offences were not joint offences. In that case, on the facts, the Privy Council held that the out of court statement by one defendant should not have been regarded as evidence admissible against the appellant for any purpose. If, consistently with *Hayter*, it is right in any particular case to allow an out of court admission to be used in evidence against a co-accused, the jury must also be directed to have regard to any part of the statement which could be understood to assist that co-accused's defence.

544. *Myers* [1998] AC 124 dealt with the right of the co-accused to lead evidence relevant to his defence. See also *R v Johnson* [2007] EWCA Crim 1651.

545. In *Atrium Trading Ltd* 2003-05 MLR 91 the Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) held that information given under compulsion pursuant to the Banking Act 1998 by directors as individuals rather than as representatives of the company can be used against the company in criminal proceedings. See also an interesting note by Professor Joseph of the University of Canterbury, New Zealand entitled *Self-incrimination and Retrospectivity* (2004) 120 LQR 378 which begins with the sentences:

> "Judicial decisions from the Isle of Man do not often excite academic interest warranting comments in the journals. The decision of the Manx Court of Appeal in *Re Atrium Trading Ltd* (*in liquidation*), *Garrett and others*, 2 DS 2001/32, September 19, 2003 is an exception."

546. Perhaps Professor Joseph and other academics should read and comment upon more of the judgments at *www.judgments.im*

547. In *R v Baines* (Court of General Gaol Delivery judgment 24th November 2008) I concluded that it would be unfair to allow the prosecution to admit into evidence in criminal proceedings before the Court of General Gaol Delivery a deposition of one of the defendants taken pursuant to the terms of a settlement agreement in civil proceedings. I also ruled that an affidavit of one of the defendants filed in civil proceedings could not be adduced into evidence by the prosecution in proceedings before the Court of General Gaol Delivery. Put simply I held that it would have been unfair in the circumstances of the case to allow the prosecution to admit into evidence in the criminal proceedings before the Court of General Gaol Delivery the deposition and the affidavit taken in civil proceedings. In arriving at my conclusion in that case I took into account all the circumstances including the fact that the deposition and affidavit were produced in a context other than the context of a criminal investigation and criminal proceedings where the defendants would have had certain safeguards to their rights in respect of silence and the privilege against self incrimination.

548. Section 14 of the Criminal Justice Act 1991 deals with the time for taking the accused's evidence during the course of the trial and provides as follows:

> "If at the trial of any person for an offence -

(a) the defence intends to call 2 or more witnesses to the facts of the case; and
(b) those witnesses include the accused,
the accused shall be called before the other witness or witnesses unless the court in its discretion otherwise directs."

549. Section 15 of the Criminal Justice Act 1991 makes provision for the competence and compellability of the accused's spouse. It provides as follows:

"(1) In any proceedings the wife or husband of the accused shall be competent to give evidence-
(a) subject to subsection (4), for the prosecution; and
(b) on behalf of the accused or any person jointly charged with the accused.
(2) In any proceedings the wife or husband of the accused shall, subject to subsection (4), be compellable to give evidence on behalf of the accused.
(3) In any proceedings the wife or husband of the accused shall, subject to subsection (4), be compellable to give evidence for the prosecution or on behalf of any person jointly charged with the accused if and only if-
(a) the offence charged involves an assault on, or injury or a threat of injury to, the wife or husband of the accused or a person who was at the material time under the age of 16; or
(aa) the offence charged is a sexual offence against the wife of the accused; or
(b) the offence charged is a sexual offence alleged to have been committed in respect of a person who was at the material time under that age; or (c) the offence charged consists of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, an offence falling within paragraph (a) or (b) or of attempting to commit any offence falling within paragraph (aa).
(4) Where a husband and wife are jointly charged with an offence neither spouse shall at the trial be competent or compellable by virtue of subsection (1)(a), (2) or (3) to give evidence in respect of that offence unless that spouse is not, or is no longer, liable to be convicted of that offence at the trial as a result of pleading guilty or for any other reason.
(5) In any proceedings a person who has been but is no longer married to the accused shall be competent and compellable to give evidence as if that person and the accused had never been married.
(6) Where in any proceedings the age of any person at any time is material for the purposes of subsection (3), his age at the material time shall for the purposes of that provision be deemed to be or to have been that which appears to the court to be or to have been his age at that time.
(7) In subsection (3) 'sexual offence' means an offence under the Sexual Offences Act 1992.
(8) The failure of the wife or husband of the accused to give evidence shall not be made the subject of any comment by the prosecution."

550. In respect of the protection of witnesses see the offences specified in Part 8 of the Criminal Justice, Police and Courts Act 2007 (section 25 deals with intimidation in respect of police investigations, section 26 intimidation of witnesses and section 27 deals with harming witnesses).

Exhibits

551. The general rule is that objects which may be the evidence of crime and which come into the possession of the prosecuting authorities should be preserved and retained for use in court (*Lushington v Otto* [1894] 1 QB 420, 423 Wright J, *Uxbridge JJ ex p Sofaer* (1987) 85 Cr App R 367, 377). Sometimes exhibits go astray. In these circumstances it may be possible for the prosecution to rely on secondary evidence (See *DPP v BT plc* [1991] Crim LR 532).

552. An object does not have to be produced in order that evidence may be given about it (*Hocking v Ahlquist* [1944] KB 120 DC *Miller v Howe* [1969] 1 WLR 1510, DC).

553. Video recordings of relevant events can be produced as exhibits. They can be real evidence to prove what is recorded on the tape i.e. what was seen happening at a particular time and place. See paragraph 2-31 onwards of May and Powles *Criminal Evidence* 5th Edition. The authenticity and provenance of the recording must be established. The recording must be relevant to an issue in the case. The usual exclusionary rules apply. The judge has a discretion to exclude a recording which it would be unfair to admit. If the original is not available a copy may be admissible (*Kajala v Noble* (1982) 75 Cr App R 149. If the original or copy is not available evidence from a witness who viewed video may be admissible (*Taylor v Chief Constable of Cheshire* [1986] 1 WLR 1479). Once a tape is admitted in evidence any question relating to its interpretation is ultimately for the jury. As a general rule no evidence is admissible to explain the tape and it is produced and played to the court without comment. There are exceptions to this general rule. May and Powles helpfully set them out as follows:-

> "(1) Eye-witnesses
>
> 2-35 If a witness himself made a videotape of an event he is entitled to authenticate it, produce it in evidence and describe what he saw by reference to it. Similarly, if the tape was made by another witness and produced in evidence by him, an eye-witness of the events shown on the tape may be asked about incidents which he saw. Such a witness may be asked to look at the tape and say what is happening; he may also be asked to identify people he knows. He is not then giving evidence of opinion since he is describing (a) something he himself saw and (b) somebody he recognises.
>
> (2) Experts
>
> 2-36 An expert may give evidence about incidents within his field of expertise which are shown on a tape. Thus, if a video recording of a game of cards or

chance were shown to a jury, a suitably qualified expert could give evidence explaining how the game was played and explaining the steps in the game as they appeared on the recording. Without such evidence the jury would be completely in the dark.

(3) Identifying witnesses

2-37 If the identification of a defendant on a video recording is in dispute, a witness who knows him may give evidence identifying him as the person on the recording. This is because there is no distinction between the evidence of a witness who sees an occurrence and recognises somebody he knows and a witness seeing somebody he knows on videotape. In *Grimer* [1982] Crim LR 674 a security officer saw the tape and recognised the thief as the defendant whom he knew. The Court of Appeal held that the evidence of the security officer was admissible to identify the defendant. But where the prejudicial effect outweighs probative value, the court should exclude the evidence, as in *Fowden and White* [1982] Crim LR 588 where the witnesses who identified the defendants knew them from a similar offence committed a week later. However, the mere fact that a police officer's knowledge of a defendant comes from the latter's criminal activities cannot operate to bar this type of evidence: that would give an unfair advantage to criminals [*Caldwell* (1994) 99 Cr App R 73].

There is clearly a danger of misidentification in such cases, particularly if the tape recording is not clear or the suspect is under arrest at the police station. Accordingly, the Court of Appeal in *Caldwell* recommended that procedures be instituted for regulating the showing of recordings in cases where there were known suspects. (The Court pointed out that there was an analogy with the showing of photographs to a witness in order to identify a suspect (para.14—35, below)).

The same rules may also apply in the case of a witness who does not know the accused, provided that by close study he has made himself sufficiently familiar with the material on which the identification is based so that he can assist the court with his special knowledge. In *Clare and Peach* [1995] 2 Cr App R 333 a number of defendants were charged with offences involving violent disorder following a football match. There was an unclear video recording of the actual events together with better quality film and photographs taken before and during the match. A police constable made a lengthy and detailed comparison of the video and the film and photographs and was thus able to identify the defendants as being among the perpetrators of the violent acts. The Court of Appeal held that the constable's evidence was admissible because he had acquired special knowledge which the Court did not possess by lengthy and studious application to material which was itself admissible evidence; and to afford the jury the time and facilities to conduct the same research would be impracticable. The Court said that it was legitimate to allow the constable to assist the jury by pointing to what he asserted was happening on the film and to identify the individual actors: such identifications were not secondary evidence and, although the officer did not know the defendants, he was well-qualified to identify them as a result of his repeated study of their likenesses on the colour film and photographs.

A further example is to be found in a similar case in New Zealand, *Howe* [1982] NZLR 618. In that case a police officer, having viewed video-tapes of a riot and studied films and photographs, was allowed to give evidence identifying individual defendants and describing what they appeared to be doing. The New Zealand Court of Appeal said that the police officer should be regarded as sufficiently "expert ad hoc" to give identification evidence and held that his evidence was admissible as an aid to the jury in a case where the action was confused. In *Clare and Peach* the Court of Appeal (although not commenting on whether the phrase "expert ad hoc" was appropriate or not) said that the trial judge was right to follow *Howe* [See also *Steele v HM Advocate* 1992 SCCR 30]."

554. Having reviewed some of the relevant authorities May and Powles conclude at paragraph 2-40 as follows:

"It is submitted that a similarly practical approach should be normally adopted in order to prevent the jury being deprived of necessary assistance. Accordingly, the judge has a discretion to admit such evidence provided (a) the jury require assistance in interpreting the tape because, without it, the significance of what is shown would not be apparent; (b) the witness is thoroughly familiar with the material; and (c) the jury are directed that ultimately it is for them to decide whether they accept the witness's evidence or not."

Transcripts of interviews

555. *Hollyoak v R* 1990-92 MLR 329 stresses the importance of counsel carefully checking the recordings and transcripts of the defendant's interviews with the police. In that case transcripts of the recordings had been sent to the defence in advance of the trial and the defence had not objected to their contents. Parts of the tapes were played in the course of the hearing and were referred to by the jury during its deliberations, although a document referred to in the course of the police interviews contained possible hearsay information and might well have been inadmissible. Counsel for the appellants referred in her opening address to the jury to evidence that her clients would give that would refute or challenge evidence given by a prosecution witness. In the event the appellants did not give evidence, and in his closing address counsel for the prosecution referred to the fact that the witness's evidence stood alone. In his summing up Deemster Callow failed to direct the jury that evidence given in interview by one accused should not be used against another. On appeal the appellants submitted that the court should have directed the jury that (a) the taped interviews were inadmissible as containing hearsay information and that (b) the evidence given in interview by one appellant could not be used against the other.

556. The Appeal Division dismissed the appeal and held that (1) the court had not erred in admitting the contents of the tapes. Since full arguments on the subject of tape recordings of police interviews to be

used in evidence had not yet been addressed to the Manx courts, English practice should be followed pending a case where full arguments are forthcoming. On that basis, it was not open to the appellants to claim on appeal that the tapes had been inadmissible, even though part of the transcript should properly have been excluded, when they had failed to ask the prosecution to edit the tapes, or to notify the court of their objections so that it could order a pre-trial review of the tapes. As a general rule, however, it was undesirable for a jury to listen, while deliberating, to tape recordings which had not previously been played in open court and heard by the judge and counsel (2) the court should have directed the jury that what one of the appellants said in interview with the police could not be used in evidence against the other. The omission was not, however, sufficient for the appeal to succeed, since the prosecution case did not depend on those interviews : it was based largely on the allegation of a third party and neither of the appellants, whose defence was identical, had given any evidence to challenge or explain those allegations (3) it was inadvisable for defence counsel, in an opening statement, to inform the jury of the details of any evidence the accused would given because there was no guarantee that this evidence would in fact be given. It was also inadvisable for counsel for the prosecution to comment in any way on the fact that the accused did not give evidence, although in the present case counsel's actual words could be faulted. Judge of Appeal Hytner delivering the judgment of the court at page 336 stated:

"In this particular case, as I have indicated, no application of any sort was made to the learned Deemster either to alter the transcript or cut out parts of the tape. It is very difficult to fault the judge who makes no order when no objection has been made to him."

557. May *Criminal Evidence* 4th Edition at paragraphs 2-29 to 2-30 provides a useful summary of the procedure to be taken in respect of transcripts of interviews with the police:

"11.If a transcript has been prepared, the interviewing officer (or other officer present at the interview) may produce it, provided that he has first checked its accuracy against the tape: there is no need to call the audiotypist. Of course, if the typist is called he can produce the transcript and prove it as an accurate record of what he heard on the tape.
12. Once a transcript is produced, copies are usually given to the jury to assist them in following the evidence and to take with them into the jury room when they retire. In most cases copies go before the jury without dispute. However, if there is a dispute, the judge will have to decide whether to allow the jury to have copies or not. In *Rampling* the defence objected to a transcript going before the jury on the ground that it was not evidence and could not be produced to the jury without the consent of the defence. The Court of Appeal held that the judge had

correctly exercised his discretion in allowing the jury to have the transcript: the consent of the prosecution and defence was not required; the transcript is an administrative convenience comparable to a schedule and its use is a matter to be decided within the judge's-discretion. In many cases it is essential that the jury have a transcript. If they did not, the recording would have to be played over time and again, *e.g.* cases where the sound quality is poor. In *Maqsud Ali* the Court of Appeal held that the jury may have a copy of the transcript, properly proved, provided that they are guided by what they hear themselves and base their decisions upon that.

13. If a translation is produced, it will usually be appropriate for it to be exhibited and for the jury to have copies. This is for reasons of practicality. If the jury do not have copies, they cannot follow the case. Thus, in the Australian case of *Butera v. D.P.P (Vic.)* a tape recording had been made of a conversation in English and other languages. Two interpreters listened to the tape and prepared English translations. At the trial the tape was played to the jury and the interpreters listened to the tape and produced and verified their respective translations in evidence. The translations were exhibited and copies given to the jury. The High Court of Australia held that this course was appropriate because if the jury had not had the copies it would have been impossible for the jury to follow the lengthy cross- examination relating to the translations."

558. May and Powles *Criminal Evidence* 5th Edition:

"C. Procedure at trial

2-25 1. In most cases, it is anticipated that the summary of the tape recorded interview contained in the interviewing officer's statement will be sufficient for evidential purposes. In these cases it will not be necessary to play the tape. The fact that counsel agree that a summary should be put before the jury will not prevent the tape itself being played. For instance, if an issue emerges during the trial which can only be resolved by playing the tape, it should be admitted. Indeed, the tape may be played after the speeches of counsel (provided that no injustice would be done thereby to the defendant).

2. In other cases where a transcript of the tape recording has been prepared, the defence will agree that the transcript is correct. In these cases the transcript can be read and the tape need not be played.

3. The procedure for the preparation of transcripts and editing of tapes is now governed by the *Practice Direction (Evidence of Tape Recorded Interviews)*. The *Practice Direction* lays down a timetable to be followed if the parties are unable to agree a record of interview and specifies that editing should be based on the usual principles: discussed at para.9-54, below.

4. If it is necessary to produce the tape, the interviewing officer or any other officer present at the interview should produce and prove it: *Practice Direction,* above. The officer should listen to the tape before the trial. He can then give evidence as to who spoke the recorded words and deal with questions of accuracy and suggestions of falsification. In the case of recordings other than police interviews, the person who made the tape recording must produce it.

5. The tape is then played to the jury [Counsel should indicate the parts which it is necessary to play in order to avoid the playing of irrelevant matter]. In this way the court obtains the evidence of the conversation or other sounds recorded. If the authenticity of the tape is in issue, the jury must be satisfied of its authenticity beyond reasonable doubt before relying on its contents. It is then for the jury to

determine what was said, if this be in dispute. It is also for the jury to decide what weight to give to the evidence.

6. Once the tape has been played, it is normally made an exhibit. It is then available for reference during the trial. Parts can be played during counsel's speeches and the summing-up. The jury, if they wish, should be able to hear it after they have retired to consider their verdict. In an appropriate case they may be able to hear it in their room. It is not improper for the judge to allow them to do so. On the other hand, it may be more appropriate for the parts which they wish to hear to be played to them in court, for example if there is a danger that they will receive a partial or misleading impression of the evidence on a particular point unless all the relevant parts are played to them.

In *Emmerson* the Court of Appeal said that if any part of the tape had been played in court the jury could take (a) the whole tape if they had a transcript, but (b) only that part played in court if they had no transcript. The Court of Appeal also said that there was no need for the trial judge to re-assemble the court to hear passages already heard in open court. How ever, in *Riaz and Burke* a differently constituted Court of Appeal disagreed and said that, while it was a matter for the judge's discretion, the better practice was for the jury to be brought back and for the tape to be played in open court. While it is submitted that this is the appropriate course in most cases, particularly where a tape has been edited, it must be doubted whether it is necessary if the interview is straightforward and neither side objects. Thus in *Tonge* the Court said the judge should normally require the tape to be played in open court unless he thought it more convenient for the jury to hear it in their room. If the tape is to be heard in the jury room, the court must make arrangements. Normally this will present no difficulty. It will be a matter for the court to ensure that no injustice is done. In *Dempster* the Court of Appeal held that there had been no material irregularity in a case where arrangements had been made for the jury to communicate by radio to a technician in court who played the required part to them in their room. The Court said that some system had to be devised for the jury to hear the tape in order to assess the evidence given by experts about it and it was impracticable for them to have to come into court every time they wished to hear it.

7. If, after retirement, a jury who have been provided with a transcript wish to hear a tape which has not been played in open court they should be allowed to do so: Riaz *and Burke,* above. They may wish to do so, for instance, to assess the tone of voice on the recording. However, the judge must first consider whether in the particular circumstances of the case it is fair to allow the tape to be played for the first time after the jury have retired.

8. If the tape is available, secondary evidence of its contents should not be admitted (except in the circumstances mentioned above, where there is no dispute about the contents). If it is available the tape should be played. On the other hand, if there is difficulty in deciphering what is said on the tape, the evidence of a person who has heard it several times may be admissible to assist the jury. In *Hopes and Lavery v H.M. Advocate* the High Court of Justiciary doubted whether the evidence of an unskilled person was admissible for this purpose. (In that case a tape recording of a conversation between a blackmailer and his victim had been played to the jury. A typist made a shorthand analysis of what she heard on the tape after hearing it played several times). However, as was pointed out, the difficulty would be overcome if the prosecution could call a witness skilled in the interpretation of tape recordings. Such an expert may be able to decipher the sounds on the recording by using machinery which repeats particular parts of the tape. Thus, in *Robb* the Court of Appeal held that evidence of voice identification

given by a suitably qualified expert was admissible even if he used a technique supported by a minority of his profession.

9. If the original tape is not available, the court may admit a copy in order to prove the sounds or conversation recorded, provided that the court is satisfied of the provenance and authenticity of the original tape and the copy tape. Thus, the Divisional Court held in *Kajala v Noble* that justices were entitled to rely on a copy of a film shown on a BBC television news bulletin provided that they were satisfied that it was an authentic copy of the original. The court said that the old rule that a party must produce the best evidence was limited to written documents and had no relevance to tapes and films.

10. If neither original nor copy is available it would seem that the court, if satisfied that the absence of the tape can be explained satisfactorily, may receive secondary evidence of its contents from a witness who has heard it. This evidence would not be hearsay because A is not repeating what B told him, but what he (A) heard on the tape.

11. If a transcript has been prepared, the interviewing officer (or other officer present at the interview) may produce it, provided that he has first checked its accuracy against the tape: there is no need to call the audio-typist. Of course, if the typist is called he can produce the transcript and prove it as an accurate record of what he heard on the tape.

12. Once a transcript is produced, copies are usually given to the jury to assist them in following the evidence and to take with them into the jury room when they retire. In most cases copies go before the jury without dispute. However, if there is a dispute, the judge will have to decide whether to allow the jury to have copies or not. In *Rampling* the defence objected to a transcript going before the jury on the ground that it was not evidence and could not be produced to the jury without the consent of the defence. The Court of Appeal held that the judge had correctly exercised his discretion in allowing the jury to have the transcript: the consent of the prosecution and defence was not required; the transcript is an administrative convenience comparable to a schedule and its use is a matter to be decided within the judge's discretion.

In many cases it is essential that the jury have a transcript. If they did not, the recording would have to be played over time and again, for example cases where the sound quality is poor. In *Maqsud Ali* the Court of Appeal held that the jury may have a copy of the transcript, properly proved, provided that they are guided by what they hear themselves and base their decisions upon that.

13. If a translation is produced, it will usually be appropriate for it to be exhibited and for the jury to have copies. This is for reasons of practicality. If the jury do not have copies, they cannot follow the case. Thus, in the Australian case of *Butera v DPP (Vic.)* a tape recording had been made of a conversation in English and other languages. Two interpreters listened to the tape and prepared English translations. At the trial the tape was played to the jury and the interpreters listened to the tape and produced and verified their respective translations in evidence. The translations were exhibited and copies given to the jury. The High Court of Australia held that this course was appropriate because if the jury had not had the copies it would have been impossible for the jury to follow the lengthy cross- examination relating to the translations."

No comment responses

559. In *R v Lashley* [2006] Crim LR 83 defence counsel submitted that questions asked in interview which elicited no comment responses were not evidence. It was held that the questions asked by the police officer did not constitute evidence for or against the defendant. Although the answers to those questions might do so, if the only answers given in the course of the interview consist of 'no comment' then in reality the questions were not being answered at all. At that stage 'no comment' did not amount to evidence for or against the defendant. See section 71 of the Police Powers and Procedures Act 1998 in respect of the effect of the accused's silence at trial. See *Chambers* (Appeal Division judgment 12th August 2010) in respect of section 70 of the Police Powers and Procedures Act 1998 and inferences that may be drawn by the jury from a defendant's failure to answer questions when interviewed.

Examination in chief

560. Examination in chief is designed to elicit evidence favourable to one's own case. Two important restrictions are placed on the advocate's conduct of the examination. The first rule is that counsel must not prompt his own witness on contentious matters. He therefore must not ask "leading questions" i.e. questions framed so as to suggest a particular answer. Questions that begin with "is it fair to say" or "do you say" or "I would suggest that" are classic examples of questions containing some of the ingredients of leading questions. Counsel is also not allowed to refer his own witness to any statement the witness has made (for example at committal proceedings). This is sometimes inconvenient where the witness has simply forgotten some detail or is so overwhelmed by the atmosphere of the court that he cannot recollect it. There are two partial exceptions to the rule:

    (1) The witness may "refresh his memory" by referring to any notes or documents including a witness statement made either at the time of the matter in question or shortly afterwards while the events were fresh in his memory.
    (2) The witness may be shown his statement to the police before he comes into court.

    The second rule is that counsel may not contradict the testimony of his own witness by referring to a prior inconsistent statement (except in the very unusual case of a witness who can be shown to be hostile).

Thus if the witness says something quite different from what is contained in counsel's proof of evidence, he must accept the answer given, and is not allowed to refer the witness to what he had said when the proof was taken.

561. It is a general rule that in a direct examination of a witness, he shall not be asked leading questions or in other words questions framed in such a manner as to suggest to the witness the answers required of him. The primary test as to whether a question is leading is whether it suggests to the witness what the answer should be. There are exceptions. For example where a witness swears to a certain fact and another witness is called for the purposes of contradicting him, the latter may be asked in direct terms whether that fact ever took place. Questions on undisputed matters can in general be allowed without objection. Counsel should check with their opposite number in advance. If an irrelevant or leading question is put on a contentious issue counsel on the other side should object and state clearly the reasons for the objection. If a witness is asked whether a certain written representation was made the writing should be put to him.

562. It is undesirable for the prosecution to attempt to take the defence by surprise by endeavouring to adduce from a witness significant fresh evidence not canvassed in the witnesses statement served in advance on the defence.

Cross-examination on the character of a witness

563. Within certain limits the character of witnesses may be attacked and they may be cross-examined about their previous convictions and bad character (*Criminal Evidence* 4th Edition May at page 155). Cross examination as to credit is to show that the witness ought not to be believed on oath.

564. In respect of a prosecution witness, the provisions of section 1(f) (ii) of the Criminal Evidence Act 1946 apply so that imputations made on prosecution witnesses will result in the defendant becoming liable to cross examination as to his own previous convictions and bad character.

565. The Deemster should stop a purely vexatious cross examination. To be admissible questions must be relevant to the standing of the witness and the tribunal of fact – the jury. If they are designed purely to smear the witness's character and can have no material bearing on

the witness's standing after cross-examination they will be disallowed (See *Sweet-Escott* (1971) 55 Cr App R 316 per Lawton J).

566. Lord Carswell delivered the judgment of the Privy Council in *Bernard* (10th May 2007) and at paragraph 27 stated:

> "it should be pointed out, however, that as it was a matter of credit, counsel would have been bound by his answer if it had been put to him in cross-examination and it is hardly to be supposed that he would have made any damaging admissions."

Defendant's loss of shield

567. Section 1(f)(ii) of the Criminal Evidence Act 1946 in effect provides that the defendant is a competent witness for the defence provided that a person charged and called as a witness pursuant to the Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless he has asked questions of the witnesses for the prosecution with a view to establishing his own good character or has given evidence of his good character or "the nature and conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution or the deceased victim of the alleged crime." It can be seen that the defendant has a shield in relation to his bad character that can be lost in certain circumstances.

568. Section 1(f)(i) concerns the situation where proof that a defendant has committed or been convicted of some other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged and section 1(f) (iii) deals with a situation where a defendant has given evidence against any other person charged in the same proceedings.

569. The judge has a discretion whether to allow cross-examination even if the nature and conduct of the defence fall within the statutory provisions. The overriding duty of the trial judge is to secure that the trial is fair. Where a defendant has a particularly bad or damaging record a judge is likely to admit it only if the imputations made against the prosecution witnesses were correspondingly grave (*R v Taylor and Goodman* [1999] 2 Cr App R 163, CA).

570. It is desirable that a warning should be given by the judge when it becomes apparent that the defence is taking a course which may expose the accused to cross examination under the section. In the

absence of the jury and the witness the defence should be asked is it the intention of the defendant to lose his shield? What is the proposed cross examination?

571. If the defence do not admit the previous convictions the prosecution have to prove the defendant's previous convictions if defendant loses his shield and the prosecution wish to refer to them.

572. Consider the caselaw on the phrase "imputations on the character of the prosecutor or the witnesses for the prosecution." An imputation on character includes charges of faults or vices whether reputed or real which are not criminal offences. However merely to put to witness he was drunk or swearing is insufficient to result in the loss of the defendant's shield. If the defence suggest that a prosecution witness committed the crime the defendant's shield could be lost. If what is said amounts in reality to no more than an emphatic denial of the charge it should not however be regarded as an imputation.

573. Counsel should have regard to section 1(f) of the Criminal Evidence Act 1946 and to the authorities referred to at May *Criminal Evidence* 4th Edition page 141 onwards, *Archbold* 8-182 onwards, the important case of *Selvey v DPP* [1970] AC 304 and the subsequent authorities.

574. See also the old Judicial Studies Board Direction 24 set out at paragraph 744.

Cross-examination generally

575. Cross-examination is designed to elicit evidence favourable to the case of the party cross examining and to discredit the testimony of the witness.

576. Leading questions are permissible and counsel may refer the witness to any prior inconsistent statement he made and ask him to explain why his evidence is now different. If a previous inconsistent statement is being put to a witness the date of the statement, the specific wording of the statement and the apparent inconsistency should be clearly and fully put to the witness who should be given an opportunity to respond. The witness should be supplied with their original statement and asked to identify it and should be given a fair opportunity to consider it. The extract should be put in context and the witness should be given time to read the statement and consider the extract being put to him.

577. Consider the position in respect of previous inconsistent and previous consistent statements. There is a general rule of evidence that statements may be used against a witness as admissions but that you are not entitled to give evidence of statements on other occasions by the witness in confirmation of the testimony. The rule is sometimes expressed as being that a party is not permitted to make evidence for himself. Thus a defendant is not permitted to call evidence to show that after he had been charged with an offence he told a number of persons what his defence was. The evidential value of such testimony is nil. At common law there were three well established exceptions to the general rule:

(1) statements constituting recent complaints in sexual cases
(2) statements forming part of the res gestae
(3) statements which tended to rebut an allegation of recent fabrication.

In (1) and (3) the statement was not admissible as evidence of the truth of its contents. A recent complaint was admitted to show consistency on the part of the complainant and as tending to negative consent.

578. Questions put in cross-examination must be either relevant and pertinent to the matter in issue or calculated to attack the credibility of the witness.

579. *Hobson* [1998] 1 Cr App R 32 at 35 indicated that defence advocates were not mere mouthpieces. Counsel should exercise judgment as to the way the client's case can best be put: "Because a client wishes a particular question to be asked, point to be made or witness to be called it does not follow that the question must be asked, the point made or the witness called."

580. A judge should endeavour to restrain unnecessary cross-examination.

581. Although counsel must not be deterred from doing his duty counsel should exercise a proper discretion not to prolong the case unnecessarily. It is no part of his duty to embark on lengthy cross examination on matters which are not really in issue (*R v Kalia* (1974) 60 Cr App R 200 CA, *R v Maynard* 69 Cr App R 309, CA). See also *R v Flynn* [1972] Crim LR 428 *McFadden* (1976) 62 Cr. App R. 187, *Chaaban* (2003) EWCA Crim 1012 and *Simmonds* (1967) 51 Cr App R 316).

582. Counsel should not, during the giving of evidence by a witness, comment on any replies to questions such as "excuse me if I find that difficult to believe" or "I don't believe you." Those are matters for the jury.

Counsel should avoid sarcasm or being argumentative with a witness. Counsel should not express personal opinions.

583. In *R v Naylor* February 6th, 1995 (unreported) the English Court of Appeal discouraged advocates from "time wasting and argumentative cross examination." Although the court would always be astute to guard against unfairness it would robustly support judges who intervened to prevent cross examination of this type. The Court of Appeal went on by stating that time wasted in one person's defence was court time and legal aid money denied to another. Judges could and should stop time being wasted. In *R v B* [2006] Crim LR 54 it was held that where counsel indulged in prolix and repetitious questioning judges were fully entitled, indeed obliged, to impose reasonable time limits. It was no part of the duty of counsel to put every point of a defendant's case, however peripheral, to a witness or to embark on lengthy cross examination on matters not really in issue. It was the duty of counsel to discriminate between important and relevant features of a defence case which had to be put to a witness and minor and/or unnecessary matters which did not need to be put. Counsel should focus on the core central issues in the case. See also *Dobbie* (Court of General Gaol Delivery judgment delivered on the 23rd March 2009) and *McVey* (Court of General Gaol Delivery judgment delivered on the 30th October 2009).

584. The trial takes place in public and names of third parties should not be bandied about unless it is necessary for the proper conduct of the trial. Care should be taken in making allegations against third parties who are not present to answer such allegations.

585. Counsel should not make cross examination unduly lengthy. An effective cross examination does not have to take up a great deal of time and there are dangers in asking too many questions. Counsel should focus on the main issues and make economic use of the limited time available. Time is not an endless commodity. Judges are entitled to impose time limits on cross examination where it was repetitious and time being wasted (*R v Butt*, The Times May 2, 2005 English Court of Appeal – gentle plea to counsel, followed by imposition of time limit to conclude – take care of adverse comments in presence of jury). See also *R v Brown* (*Milton*) [1998] 2 Cr. App R 364.

586. In cross-examination counsel may ask leading questions, that is he may ask questions which suggest what the answer should be. Questions should not be put in such a manner as to be in the nature of

invitations to argument rather than to elicit answers to matters of fact which is the true purpose of cross-examination.

587. Where two defendants are jointly charged and are defended by different counsel the established rule is that, in the absence of agreement between counsel, the court will call on them to cross-examine and address the jury in the order in which the names of the defendants whom they represent stand on the indictment or information (*R v Barber* (1844) 1 C & K 434; *R v Richards* (1844) 1 Cox 62).

588. The defence advocate must not in the course of cross examination state matters of fact or opinion or say what someone else has said or is expected to say. Cross examination must not be used for making comments which should be confined to speeches. *Archbold* at paragraph 8-116 indicates that some flexibility should be allowed where strict adherence to the rules may hinder the witness or the jury. Thus in a long or complex case a witness may be reminded of the evidence of another witness but should not be invited to comment on or explain any discrepancy in the evidence.

589. See Code of Conduct for the Bar of England and Wales, Bar Council Statements and *Archbold* paragraphs 4-307 and 8-118.

590. In addition to his duties to the defendant, counsel also has a duty to the court and to the public. This duty includes the clear presentation of the issues and the avoidance of waste of time, repetition and prolixity. In the conduct of every case counsel must be mindful of this public responsibility.

591. Where the defence make strong attacks on witnesses (e.g. police beat defendants to get confessions *R v O'Neil* 34 Cr App R 108, *R v Callaghan* 69 Cr App R 88) and the defendant is not called to give evidence to support such allegations the judge will probably make a very strong comment upon his failure to support the allegation on oath (*R v Brigden* [1973] Crim LR 579).

592. A failure to put to a witness a matter which tends to contradict the evidence of the witness does not render such matter inadmissible, the proper course is for the witness to be recalled in order that he has the opportunity to deal with the matter (*R v Cannan* [1998] Crim LR 284). See also *R v McFadden* 62 Cr App R 187.

593. If cross examining counsel puts a paper in the witness's hands and puts questions on it, and anything comes of those questions, his opponent has a right to see the paper and re-examine on it. Before cross examining counsel should put the paper to their opposite number if they have not seen it before. It should also be shown to the Deemster.

594. A document which is inadmissible cannot be made admissible simply because it is put to a witness in cross examination.

595. A witness may be cross examined as to credit. The credibility of a witness depends upon (a) his knowledge of the facts to which he testifies (b) his disinterestedness (c) his integrity (d) his veracity and (e) his being bound to speak the truth.

596. In addition to questions concerning a witness's means of knowledge, opportunity of observation, reasons for recollection, or belief, a witness may be asked questions about his antecedents, associations or mode of life which although irrelevant to the issue would be likely to discredit his testimony. However such cross examination must be within the prescribed limits. Since the purpose of cross examination as to credit is to show that the witness might not be believed on oath the matters about which he is questioned must relate to his likely standing after cross examination with the tribunal which is trying him or listening to his evidence (*R v Sweet-Escott* 55 Cr App R 316 and *R v Funderburk* 90 Cr App R 466).

597. Generally evidence is not admissible to contradict answers given on cross examination as to credit i.e. the answer cannot be impeached by the other party calling witnesses to contradict a witness on collateral matters (See *Archbold* at paragraph 8-146). There are exceptions to the general rule including bias, previous convictions, evidence of reputation for untruthfulness and medical evidence relating to reliability of the evidence of a witness. The list of exceptions is not closed. In general the answers given by a witness in cross examination in respect of credibility matters are final except where they can easily be rebutted for example by the production of a list of previous convictions where the witness denies having any.

598. It is the duty of counsel for the defence to put his case to the prosecution witness i.e. to cross-examine them on all points where the defence case differs from the evidence of the witness. In general defence counsel may ask a prosecution witness any question in cross examination provided it is relevant and provided the answer will not

involve inadmissible material such as hearsay or non-expert opinion. A question is relevant if it concerns an issue in the case, i.e. it relates directly as to whether the accused committed the offence, or it relates to a fact which increases or decreases the likelihood of his having done so. A question is also relevant if it concerns the credit of the witness, i.e. it relates to a fact from which the jury may conclude that he is not the sort of person who can be trusted to speak the truth.

599. *MWJ v R* [2005] HCA 74 dealt with the rule in *Browne v Dunn* concerning fair conduct in the examination of witnesses in civil cases at paragraphs 38 and 39:

> "38 …The rule is essentially that a party is obliged to give appropriate notice to the other party and any of that person's witnesses, of any imputation that the former intends to make against either of the latter about his or her conduct relevant to the case, or a party's or a witness' credit.
>
> 39. One corollary of the rule is that judges should in general abstain from making adverse findings about parties and witnesses in respect of whom there has been non-compliance with it. A further corollary of the rule is that not only will cross-examination of a witness who can speak to the conduct usually constitute sufficient notice, but also, that any witness whose conduct is to be impugned, should be given an opportunity in the cross-examination to deal with the imputation intended to be made against him or her."

600. *Libke v R* [2007] HCA 30 concerned the duties of prosecution counsel in respect of fair trials and cross examination.

601. Defence counsel may call for a police officer's note books (whether used to refresh memory or not). See *Owen v Edwards* (1983) 77 Cr App Rep 191.

602. There can be strong and direct challenges to the evidence of a witness and strong criticisms can be made of a witness or a defendant but evidence is for factual matters not the exchanging of insults. Any justifiable and relevant disparaging comment on a witness or defendant should be reserved for a closing speech.

603. Counsel should take care to formulate precise questions. Counsel will be in difficulties in complaining if inadmissible evidence is given in response to a badly framed, vague, argumentative or provocative question put by counsel. Counsel should ask precise questions.

604. Counsel for a co-defendant can cross examine another co- defendant whether or not his evidence is in any way adverse to his client

(*Archbold* at paragraph 8-163 and *R v Bingham and Cooke* [1999] 1 WLR 598 HL).

605. Counsel should respect rulings on admissibility and not attempt to "appeal" them in counsel's speech to the jury. See *R v Lashley* [2006] Crim LR 83 where it was held that right or wrong a judge's ruling was the end of an argument or application. The remedy for an incorrect ruling is to appeal at the appropriate stage.

606. Heydon J in *Libke v The Queen* [2007] HCA 30 provided a detailed and useful guide to those who undertake cross examinations of witnesses. The following are extracts from his comprehensive judgment (footnotes omitted which should please Justice Stephen Breyer of the United States Supreme Court):

> "117. I agree with Hayne J, and would add only the following remarks about the cross-examination. The criticisms made must be read keeping in mind that the cross-examiner was not represented in this appeal.
>
> The powers of a cross-examiner
>
> 118. There were many respects in which the cross-examination of the appellant was in breach of ethical duties flowing from the position of the cross-examiner as counsel for the prosecution, and in breach of other ethical duties. For present purposes, what is important is that those breaches were also breaches of rules established by the law of evidence. While breaches of these evidentiary rules do not often result in appeals being allowed, while there are relatively few reported cases about them, and while writers have given less attention to them than to more fashionable or interesting subjects, there is no doubt that they exist and no doubt that they are well settled.
>
> 119. They are rules which necessarily developed over time once it came to be established that oral evidence should be elicited, not by means of witnesses delivering statements, and not through questioning by the court, but by means of answers given to a succession of particular questions put, usually by an advocate, and often in leading form. A cross-examiner is entitled to ask quite confined questions, and to insist, at the peril of matters being taken further in a re-examination which is outside the cross-examiner's control, not only that there be an answer fully responding to each question, but also that there be no more than an answer. By these means a cross-examiner is entitled to seek to cut down the effect of answers given in chief, to elicit additional evidence favourable to the cross-examiner's client, and to attack the credit of the witness, while ensuring that the hand of the party calling the witness is not mended by the witness thrusting on the cross-examiner in non-responsive answers evidence which that witness may have failed to give in chief. To this end a cross-examiner is given considerable power to limit the witness's answers and to control the witness in many other ways.

120 "Cross-examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story. It is entrusted to the hands of counsel in the confidence that it will be used with discretion; and with due regard to the assistance to be rendered by it to the Court, not forgetting at the same time the burden that is imposed upon the witness." Hence the powers given to cross-examiners are given on conditions, and among the relevant conditions are those which underlie the rules of evidence contravened in this case.

Offensive questioning

121. The most striking characteristic of the cross-examination in this case was its wild, uncontrolled and offensive character.

122. A prosecutor must "conduct himself with restraint and with due regard to the rights and dignity of accused persons. A cross-examination must naturally be as full and effective as possible, but it is unbecoming in a legal representative - especially in a prosecutor - to subject a witness, and particularly an accused person who is a witness, to a harassing and badgering cross-examination." One reason why there is a rule prohibiting this type of questioning was put thus by Wigmore:

"An intimidating *manner* in putting questions may so coerce or disconcert the witness that his answers do not represent his actual knowledge on the subject. So also questions which in form or subject *cause embarrassment, shame or anger* in the witness may unfairly lead him to such demeanor and utterance that the impression produced by his statements does not do justice to his real testimonial value." (emphasis in original)

Another was advanced by Lord Langdale MR when he deprecated "the confusion occasioned by cross-examination, as it is too often conducted", for it tended to "give rise to important errors and omissions". Yet another was suggested by an American judge: "a mind rudely assailed, naturally shuts itself against its assailant, and reluctantly communicates the truths that it possesses."

123. In this case the questioning was conducted "without restraint and without the courtesy and consideration which a witness is entitled to expect in a Court of law", and, as a result, it was "indefensible". The cross-examination was improper because it was "calculated to humiliate, belittle and break the witness". Its tone "was often sarcastic, personally abusive and derisive". It resorted to remarks "in the nature of a taunt". It amounted to "bullying, intimidation, personal vilification or insult", none of which is permissible.

124. The cross-examination not only offended these common law rules. Many of the questions were annoying, harassing, intimidating, offensive or oppressive, contrary to s21 of the *Evidence Act 1977* (Q).

Comments

125. The cross-examination also contravened the rules of evidence in that many things said by the cross-examiner were not questions at all. To adopt the language of the Ontario Court of Appeal, counsel for the prosecution infringed the rules of

evidence when he "regularly injected his personal views and editorial comments into the questions he was asking". One vice of comments made in the course of questioning is that although they may be potentially damaging in the jury's eyes, they are not questions, and thus the witness has no opportunity of dealing with the sting in the comments. Another vice is that the jury may regard counsel as a person of special knowledge and status and therefore pay particular regard to the comments - particularly where it is counsel for the prosecution who chooses "to throw the weight of his office" into the case. The time for comments, at least legitimate ones - for disparaging comments based on evidence or the lack of it can be legitimate - is the time of final address. "Statements of counsel's personal opinion have no place in a cross-examination." The role of prosecution counsel in the administration of justice should not be "personalized". Their own beliefs should not be "injected" into the case. Thus in *R v Hardy* junior counsel (the future Gibbs J) for one of the accused asked a witness who had attended certain allegedly seditious meetings: "Then you were never at any of those meetings but in the character of a spy?" The future Lord Ellenborough CJ, appearing for the prosecution, objected to this line of questioning. Eyre LCJ said to defence counsel:

> "[Y]our questions ought not to be accompanied with those sort of comments: they are the proper subjects of observation when the defence is made. The business of a cross-examination is to ask to all sorts of acts, to probe a witness as closely as you can; but it is not the object of a cross-examination, to introduce that kind of periphrasis as you have just done."

After junior counsel for the accused sent for leading counsel (the future Lord Erskine LC), and the point was debated further, Eyre LCJ upheld the objection:

> "I think it is so clear that the questions that are put are not to be loaded with all of the observations that arise upon all the previous parts of the case, they tend so to distract the attention of every body, they load us in point of time so much, and that that is not the time for observation upon the character and situation of a witness is so apparent, that as a rule of evidence it ought never to be departed from ...".

126. Comments are particularly objectionable when they are sarcastic or insulting. They are even more objectionable when they are statements indicating the personal belief of prosecution counsel in the credibility or guilt of the accused: that is not something to be said in address, and a fortiori is not something to be said during questioning.

Compound questions

127. Partly by reason of the interspersing of both comments and questions between the accused's answers, and partly by reason of other defects in the form of the questions, some "questions" asked during this cross-examination were not single questions, but were compound questions. "A compound question simultaneously poses more than one inquiry and calls for more than one answer. Such a question presents two problems. First, the question may be ambiguous because of its multiple facets and complexity. Second, any answer may be confusing because of uncertainty as to which part of the compound question the witness intended to address." But compound questions have additional vices. It is

unfair to force a witness into the position of having to choose which questions in a compound question to answer and in which order. Cross-examiners are entitled, if they can, to frame questions so as to seek a particular answer - either "Yes" or "No". Even though the answers desired by the cross-examiner to a compound question may be all affirmative or all negative, the witness may wish to answer to some affirmatively and some negatively. To place witnesses in the position of having to reformulate a compound question and answer its component parts bit by bit is unfair to them in the sense that it prevents them from doing justice to themselves. Some "questions" asked in this case contained at least four questions within them.

Cutting off answers before they were completed

128. On occasion during his cross-examination the accused's answers were cut off either by a comment or by some further question even though it was clear that there was more which the accused wished to say. "Evidence should ordinarily be given without interruption by counsel." The cutting off of an answer by a further question, though always to be avoided as far as possible, can happen innocently when a questioner is pursuing a witness vigorously and the witness pauses in such a fashion as to suggest that the answer is complete; it can happen legitimately if a witness's answer is non-responsive. But very few of the interruptions here can be explained away on these bases. They were usually interruptions of responsive answers, often by offensive observations. The rule against the cutting off of a witness's answer follows from the encouragement which the law gives to short, precise and single questions. It is not fair to ask a question which is disparaging of or otherwise damaging to a witness and to cut off an answer which the cross-examiner does not like. The right of a cross-examiner to control a witness does not entail a power to prevent the witness from giving any evidence other than that which favours the cross-examiner's client.

Questions resting on controversial assumptions

129. The cross-examiner on occasion alleged that the accused was inventing evidence when in fact the proposition supposedly invented corresponded with evidence given by the complainant in the prosecution case. The cross-examiner also put implicitly unfounded assertions that the accused was being evasive. And the cross-examiner, in putting a question about the accused's dishonesty, wrapped up in it an assumption that there had been an earlier and different piece of dishonesty.

130. A question put in chief which assumes a fact in controversy is leading and objectionable, "because it affords the willing witness a suggestion of a fact which he might otherwise not have stated to the same effect." While leading questions in the cross-examination of non-favourable witnesses are not intrinsically objectionable, "[w]itnesses should not be cross-examined on the assumption that they have testified to facts regarding which they have given no testimony. Such questions have a tendency to irritate, confuse and mislead the witness, the parties and their counsel, the jury and the presiding judge, and they embarrass the administration of justice." This is because a leading question put in cross-examination which assumes a fact in controversy, or assumes that the witness has in chief or earlier in cross-examination given particular evidence which has not been given, "may by implication put into the mouth of an unwilling witness, a

statement which he never intended to make, and thus incorrectly attribute to him testimony which is not his." A further vice in this type of questioning is: "An affirmative and a negative answer may be almost equally damaging, and a perfectly honest witness may give a bad impression because he cannot answer directly, but has to enter on an explanation." Questions of this character are misleading and confusing, within the meaning of both the statutory and common law rules.

Argumentative questions

131. Another vice in the questioning in this case stemmed from the fact that some of the questions and observations of counsel for the prosecution did not seek to elicit factual information, but rather provided merely an invitation to argument. Examples include: "That doesn't tell us much, does it?", "Look, I'm giving you every opportunity?", "I'll shift to another topic whenever you're prepared to finish it", and "We want honesty at all times, of course". In form these remarks seemed apt to trigger a debate about how much the accused's hearers had been told, whether he was being given every opportunity, whether he had finished a topic, and whether he was being honest. The vice in a particular type of argumentative cross-examination was described thus by the English Court of Appeal:

> "One so often hears questions put to witnesses by counsel which are really of the nature of an invitation to an argument. You have, for instance, such questions as this: 'I suggest to you that ...' or 'Is your evidence to be taken as suggesting that ...?' If the witness were a prudent person he would say, with the highest degree of politeness: 'What you suggest is no business of mine. I am not here to make any suggestions at all. I am here only to answer relevant questions. What the conclusions to be drawn from my answers are is not for me, and as for suggestions, I venture to leave those to others.' An answer of that kind, no doubt, requires a good deal of sense and self-restraint and experience, and the mischief of it is, if made, it might very well prejudice the witness with the jury, because the jury, not being aware of the consequences to which such questions might lead, might easily come to the conclusion (and it might be true) that the witness had something to conceal. It is right to remember in all such cases that the witness in the box is an amateur and the counsel who is asking questions is, as a rule, a professional conductor of argument, and it is not right that the wits of the one should be pitted against the wits of the other in the field of suggestion and controversy. What is wanted from the witness is answers to questions of fact."

Like several other of the rules discussed above, the rule against argumentative questioning rests on the need not to mislead or confuse witnesses.

The effect of the rules on the value of testimony

205. It is not unique in the law of evidence to find that the more closely the rules for admissibility are complied with, the greater the utility of the testimony from the point of view of the party eliciting it. It is certainly the case in this field. The rules permit a steady, methodical destruction of the case advanced by the party calling the witness, and compliance with them prevents undue sympathy for the witness developing. It is perfectly possible to conduct a rigorous, testing, thorough, aggressive and determined cross-examination while preserving the most

scrupulous courtesy and calmness. From the point of view of cross-examiners, it is much more efficient to comply with the rules than not to do so."

Cross-examination in rape and other sexual offences cases

607. Section 36 of the Sexual Offences Act 1992 provides as follows:

"36 Evidence: general

(1) If at a trial any person is for the time being charged with an offence under this Act to which he pleads not guilty, no evidence and no question in cross-examination shall, without the leave of the court, be adduced or asked at the trial by or on behalf of any defendant at the trial about any sexual experience of a complainant with a person other than that defendant.

(2) Leave shall not be given under subsection (1) except on an application in that behalf, made (in the case of a trial on information) in the absence of the jury.

(3) Leave shall not be given under subsection (1) unless the court is satisfied that it would be unfair to the defendant to refuse to allow the evidence to be adduced or the question asked.

(4) Where a court of summary jurisdiction inquires into an offence under this Act pursuant to section 5 of the Summary Jurisdiction Act 1989, no evidence and no question shall, without the leave of the court, be adduced or asked at the inquiry which, if-

(a) the inquiry were a trial at which a person is charged as mentioned in subsection (1); and

(b) each of the accused were at the trial charged with the offences of which he is accused,

could not be adduced or asked without leave under subsection (1).

(5) Leave shall be given under subsection(4) if, and only if, the court is satisfied that leave under subsection (1) in respect of the evidence or question would be likely to be given at the relevant trial.

(6) If at a trial for an offence under this Act the jury has to consider whether a person believed that a person with whom he was committing a sexual act was consenting to the act, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, [which can properly be put before the jury : *Barton* (1987) 85 Cr App R 5] in considering whether he so believed.

(7) In this section 'complainant' means a person with respect to whom, in a charge for an offence under this Act to which the trial relates, it is alleged that the sexual act was committed, attempted or proposed."

608. See May on *Criminal Evidence* 4th Edition commenting on section 2(1) of the old English Sexual Offences (Amendment) Act 1976 at page 156 paragraph 7-79:

> "… the purpose of the Act is to protect the complainant from offensive and irrelevant cross-examination, while not preventing the defendant from developing his defence. Accordingly the first question for the judge in deciding whether to grant leave for cross-examination is whether the proposed questions are relevant or not under the common law rules of evidence. If the questions are irrelevant they may not be put. Relevance in this context means relevant both to an issue in the case and to the witness's credibility."

609. Whether there is material or not to support the cross examination may not matter but counsel must have reasonable grounds for making the assertion and the trial judge is entitled to ask what the proposed questions are and what supports them. The points to be put in cross examination should not be based on rumour or gossip. They should be supported by reasonable grounds.

610. If the questions are relevant and before deciding whether it would be unfair to refuse leave the judge must be satisfied that the proposed cross examination might lead the jury to take a different view of the complainant's evidence.

611. In deciding whether to allow cross examination the judge has to balance justice to the defendant and fairness to and protection of the complainant (*Fenlon* (1980) 71 Cr App R 307). In striking this balance leave may be granted subject to limitations in particular to prevent fishing expeditions by the defence as to the complainant's previous sexual experience with other men. If the sole purpose of the questions is to establish such experience in order to suggest that he or she should not be believed on oath leave should be refused. In*Viola* (1982) 75 Cr App R 125 it was stated:

> "On the other hand if the questions are relevant to an issue in the trial in the light of the way in which the case is being run … they are likely to be admitted, because to exclude a relevant question on an issue in the trial as the trial is being run will usually mean that the jury are being prevented from hearing something which, if they did hear it, might cause them to change their minds about the evidence being given by the complainant."

612. May continues:

> "A test for cases in which consent is in issue may be formulated in this way: does the complainant's attitude to sexual relations provide material upon which a jury could reasonably rely in determining whether she consented or not?

… The section appears to have been interpreted so as to give it a wide ambit. Thus, in *Hinds v. Butler,* Swanwick J. held that leave was needed when it was proposed to cross-examine a 14-year-old complainant about a conversation immediately before the alleged offence, in which she spoke of having sexual intercourse with young men other than the defendant. It was held that leave was needed because inferentially the questions could be said to be about the sexual experience of the complainant with a person other than the defendant.

The Act does not authorise the asking of questions which could not be asked at common law. The questions in *Hinds and Butler* were permissible because they were relevant to an issue in the case, *i.e.* the preliminaries to sexual intercourse.

Two examples of the operation of the section may be given:

1. In *Cox* the complainant made no complaint of rape until many hours after sexual intercourse had occurred. The defendant alleged that it had occurred with consent. There was no evidence of any injury to the complainant or damage to her clothing. Defence counsel sought to cross examine the complainant about another occasion when she had had sexual intercourse with another man and then falsely alleged that he had raped her. The defence had a proof of evidence from the man. Leave to cross- examine was refused. The Court of Appeal held that it should have been given because the chances were that, if the cross-examination had been allowed, the jury might have come to a different conclusion from the one to which they actually came.

2. In *Redguard* the issue was consent. In evidence the complainant said that she would not allow anyone other than her boyfriend to stay in her flat and have sexual relations with her. The defendant was refused leave to cross-examine her about a sexual encounter with another man who stayed the night in her flat two weeks after the alleged rape. The Court of Appeal held that the cross-examination should have been permitted because it was relevant to the complainant's credibility and her evidence that only her boyfriend would be permitted to stay the night: it was also relevant to the issue of consent. The fact that the encounter occurred after the alleged rape was held not to matter. The Court said that the trial judge's decision was not a matter of discretion but of judgment in which the Court of Appeal could form as valid a view as the trial judge."

Re-examination

613. Re-examination of a witness is designed to obviate the effects of cross examination and must be confined to points arising therefrom and not be used as a means of producing new evidence which should have been led in chief.

614. In re-examination counsel is limited to asking questions in relation to matters arising from cross-examination. There is no right to go further and to introduce matter new in itself. It is not a right at a second bite of the cherry to cover a matter that counsel forgot to cover in examination in chief. It is not an opportunity for counsel to endeavour to summarise their case.

Identification evidence issues

615. May and Powles *Criminal Evidence* (5th Edition) at Chapter 14 deal comprehensively with identification evidence issues and a lot of what follows is based on the useful summary provided by May and Powles supplemented by some local Manx caselaw and some judgments of the Privy Council.

616. Experience shows that visual identification is imperfect.

617. The following are extracts of the judgment of the Appeal Division (Judge of Appeal Tattersall and Deemster Doyle) delivered on the 20th August 2003 in *Williams* 2003-05 MLR N 8:

> " *The failure to withdraw the case from the jury*
>
> 16. Miss Hannan submitted that at the conclusion of the prosecution case the Acting Deemster should have acceded to the defence application for the case to be withdrawn from the jury on the ground that the identification evidence was poor and unsubstantiated. She referred to the evidence of Miss Middlesborough and Mr Brady. As to the former we were reminded that Miss Middlesborough described a woman jumping on a man lying on the ground and that there was a discrepancy in the description of the clothing such woman was wearing. Furthermore what she had seen was by means of a momentary glance from a distance. That having been said, the Appellant concedes that she was at the scene at the time of the assault on Mr Griffin.
>
> 17. Relying on *R v Turnbull* [1977] 1 QB 224, Miss Hannan submits that although a *Turnbull* direction is not required where a defendant admits that he is present at the scene of criminal activity but denies any participation therein, the better and safer course is to give a warning to the jury modified to meet the facts of the case. In due course this submission became more refined and amounted to an obligation on a Deemster to expose the weaknesses of the prosecution case when summing the case up to the jury. At first sight this is a somewhat startling proposition, given that, certain situations such as identification apart, the Deemster`s role has invariably been seen to be one of neutrality when reminding the jury of the evidence.
>
> 18. In refusing Miss Hannan`s application that the case be withdrawn from the jury, the Acting Deemster made two particular observations. Firstly, that the Appellant`s case, as put forward when interviewed by the police and at the trial, was that she was present when Mr Griffin was assaulted. Accordingly the Acting Deemster rejected the contention that identification was in issue : what was in issue was what, if anything, the Appellant had done or said. The fact that there was a dispute as to what clothing the Appellant was wearing did not make identification an issue at the trial. Secondly, the fact that what Miss Middlesborough observed was by means of a momentary glance, did not mean that it was not proper for the jury to consider it, particularly given that identification was not an issue. The weight which was to be given to such evidence was for the jury to assess.

19. We agree that if identification is in issue in a case, a Deemster ought to withdraw the case from the jury when the quality of the identification evidence is poor and there is no other evidence to support the correctness of the identification.

20. Visual identification of an offender by a person unknown to him is a particularly fallible process. Such perception was powerfully articulated in the *Devlin Report* [*Report to the Secretary of State for the Home Department of the Departmental Committee of Evidence on Identification in Criminal Cases* : 29th April 1976] which stated [at paragraph 8.1] :

`We are satisfied that in cases which depend wholly or mainly on eye-witness evidence of identification, there is a special risk of wrong conviction. It arises because the value of such evidence is exceptionally difficult to assess : the witness who has sincerely convinced himself and whose sincerity carries conviction is not infrequently mistaken`.

21. In *Turnbull*, at 229, Lord Widgery CJ stated :

`When in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification.`

22. In *R v Fergus* [1994] 98 Cr App R 313, at 318, the Court of Appeal recognised that such observation may appear to be trite but stressed that the trial judge`s duty to withdraw the case from the jury in an identification case is wider than the general duty of the trial judge in respect of a submission of no case to answer.

23. Further *Turnbull* establishes that even if the case is allowed to go to the jury, the judge is required to warn the jury of the special need for caution before convicting a defendant in reliance on visual identification, to explain that a mistaken identification may be a convincing one, to direct the jury to examine the circumstances in which the identification was made and, probably most importantly, to remind the jury of any specific weaknesses which had appeared in the identification evidence.

24. We think that the facts of this case can be distinguished from *Turnbull.* The Appellant admits that she was present when the assault on Mr Griffin took place and that she was the only woman present. As we have previously emphasised this is not a case where the identification of the Appellant was an issue. The only issue for the jury to determine was what the Appellant did or said. Such issue did not require the Acting Deemster to give a *Turnbull* direction and in particular it did not require her to remind the jury of any specific weaknesses in the prosecution case although she remained obligated to give a fair summary of the evidence which had been given.

25. We have considered the directions of the Acting Deemster when she reminded the jury as to the evidence which had been given. In fact she did give a very careful direction to the jury as to how they should approach the evidence. She said:

`The next direction I give you is regard to the question of eye-witness evidence or identification. …You must assess that evidence with great care. No one in this case suggested that any of the prosecution witnesses were dishonest or deliberately lying or giving you evidence in an attempt to deceive you. But we all know from experience that honest witnesses can be mistaken. They may think they saw something that they did not. You must assess their evidence carefully. You must assess what opportunity they had to see what they say they saw. Was it a momentary glance, or were they looking for a long [time], did they have an opportunity of a longer observation ? Is a witness describing somebody they know or are they merely describing what someone is wearing and is a stranger to them ? Some … people are more observant than others. They notice more things. They notice better. In this case, some witnesses may well have seen the same events but from a different angle, a different stand point or they may have seen different stages in the incident. Some witnesses may have seen the beginning, some may have seen the middle, some may have seen the end, some may have seen it all. But you have to take that into account. From what vantage point did a witness see an incident ? Was it from close by or was it from far away ? What obstacles were in the way ? …

The Acting Deemster then continued by examining the evidence in the case.

26. We are satisfied that such directions were proper and fair and that no legitimate complaint can be made about them. If any criticism were to be made of the Acting Deemster`s directions, and we stress that we make no such criticism, in our judgment it could only be that the Acting Deemster gave extensive *Turnbull* directions in a case where, because identification was not an issue, such were unnecessary. However, we are satisfied that, as directed by the Acting Deemster, the jury were properly able to determine the extent, if any, of the Appellant`s participation in the assault on Mr Griffin."

618. In *Turnbull* [1977] QB 224 the English Court of Appeal laid down various guidelines as follows:

"First, whenever the case against an accused depends wholly or substantially on the correctness of one of more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.
Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in anyway, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual

appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

619. May and Powles summarise the position as follows:

> "*Turnbull* thus makes it clear that: (a) there is a special need for caution when the prosecution case depends on evidence of visual identification; (b) the summing-up should contain a warning of the need for caution and an explanation as to why caution is needed; (c) the summing-up should deal with the circumstances of the identification in the particular case; and (d) the judge should point out that a convincing witness may be mistaken."

620. The principles in *Turnbull* should be followed but *Turnbull* should not be treated as a statute and followed slavishly and inflexibly. Each summing up must be tailored to each particular case. A mechanistic approach should not be adopted. The Privy Council in *R v Mills* [1995] 1 WLR 511 at 518 stressed that what was required was to comply with the sense and spirit of the guidance in *Turnbull.* See also *R v Ley* [2007] Crim LR 642.

621. The judge should warn the jury that a mistaken witness may be a convincing one. The judge should list the weaknesses in the identification evidence either when dealing with the *Turnbull* directions or at appropriate points when reviewing the evidence. It would be useful for prosecution counsel to provide the court with submissions as to the perceived strengths of the identification evidence and for defence counsel to provide the court with submissions as to the perceived weaknesses of the identification evidence.

622. *Turnbull* is concerned with the identification of a defendant. In *Bath* [1990] Crim LR 716 the English Court of Appeal held that where in such a case there is evidence that at the relevant time the defendant was with another person, the purported identification of the other person should be the subject of a *Turnbull* direction.

623. Lord Widgery in *Turnbull* emphasised that when in the judgment of the trial judge the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer

observation made in difficult conditions, the judge should withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. It is the quality of the evidence that counts. If the quality is good the case can, with the appropriate directions, be left to the jury even though there is no other supporting evidence. If on the other hand the quality of the evidence is poor and there is no evidence to support the identification the judge should withdraw the case from the jury. See paragraph 14-08 of May and Powles for examples of supporting evidence of a visual identification. Odd coincidences can, if unexplained, be supporting evidence. The judge should point out to the jury evidence which is capable of supporting the identification. The judge may direct the jury that the identification by one witness can constitute support for the identification by another provided the judge warns them that even a number of honest witnesses can all be mistaken (*Weeder* (1980) 71 Cr App R 228). See also *Barnes* (1995) 2 Cr App R 491.

624. Consider carefully the position of false alibi and lies (*Keane* (1977) 65 Cr App R 247, *Drake* (1996) Crim LR 109 and *Lucas* [1981] QB 720). The judge should also warn the jury about circumstances which the jury may think support an identification but which in fact do not do so, for example the fact that the defendant has not given evidence or the fact that the jury reject alibi evidence (*Pemberton* (1994) 99 Cr App R 228). The judge must make it clear that it is for the jury to decide whether they accept the evidence and, if they do, whether it in fact supports the evidence of identification (*Akaidere* [1990] Crim LR 808).

625. *Turnbull* was intended primarily to deal with cases involving "fleeting encounters" (*Oakwell* [1978] 1 WLR 32, 37). Where however, for instance, one or two known people are responsible for an offence and the issue is which of the two was the offender it is not appropriate to apply *Turnbull*. In *Hewitt* [1978] RTR 174 the issue was who of two known people in the car was driving the car. A *Turnbull* direction is not necessary when the defendant's presence at the scene of an offence is admitted and the only issue is as to what he is doing. See *Slater* [1995] 1 Cr App R 584, *Oakwell* [1978] 1 WLR 32 and *Williams* 2003-05 MLR N 8 (Appeal Division judgment 20th August 2003). On the other hand a *Turnbull* direction will be necessary if there is a possibility that a witness may have mistaken one person (who was at the scene) for another. In *Thornton* [1995] Cr App R 578 the English Court of Appeal held that a warning was necessary in a case where the defendant had admitted he was present at the scene but

there were others similarly dressed also present and there was a possibility that the witness may have mistaken the defendant for one of them. In *Cape* [1996] 1 Cr App R 191 the English Court of Appeal said that a *Turnbull* warning is not necessary where the only issue is whether the witness is truthful or not. But in *Shand* [1996] 2 Cr App R 204 the Privy Council said that, even where credibility is the sole line of defence, the judge would normally have to tell the jury to consider whether they are satisfied that the witness was not mistaken in view of the dangers of mistake referred to in *Turnbull.*

626. A *Turnbull* direction is also necessary:

(1) if the prosecution rely chiefly on circumstantial evidence and, only additionally, on evidence of visual identification (*Spencer* [1995] Crim LR 235)
(2) where there are a number of identifications (all alleged to be mistaken) which are said to support one another (*Grant* [1996] 2 Cr App R 272)
(3) where a person is seen on a video camera going into a place and is arrested there shortly afterwards (*Campbell* [1996] Crim LR 500).

627. See *Browning* (1992) 94 Cr App R 109, 121-123 in respect of the identification of motor cars.

628. In *Maharaj v The State* (Privy Council judgment delivered 8th May 2008) the trial judge did not give a detailed *Turnbull* direction. In that case the complainant was the stepdaughter of the appellant and it was not suggested that any other man had been present on the relevant evenings. The Privy Council were of the view that the complaint that the judge did not give the full *Turnbull* direction on identification was wholly without merit. Lord Rodger stated at paragraph 9:

"So the challenge to the virtual complainant's evidence was not so much that she was mistaken in her identification of the appellant as her assailant, as that she had fabricated the accusation against him."

And at paragraph 10:

"In his summing-up the trial judge reminded the jury of the point put to the virtual complainant, that it would have been dark in the room and difficult for her to see. She had replied that the light was on in the kitchen and reflected into the bedroom. He also reminded the jurors that she had said that, from 1996 to 1998, she would see the petitioner almost every day. The judge told the jury that, in these circumstances, it was up to them to decide whether they had any doubts about the virtual complainant's identification of the petitioner. If the jury accepted

her evidence that these incidents had occurred on seven consecutive evenings, then it seems utterly inconceivable that she could have been mistaken about the identity of the man who came into her bed on those evenings. In that situation - especially since it was not suggested that any other man had been in the house - their Lordships are satisfied that the directions on identification were quite adequate."

629. The following are extracts from the majority judgment of the Privy Council in *Ronald John v The State of Trinidad and Tobago* (judgment delivered 16th March 2009):

"14 As a basic rule, an identification parade should be held whenever it would serve a useful purpose… Plainly an identification parade serves a useful purpose whenever the police have a suspect in custody and a witness who, with no previous knowledge of the suspect, saw him commit the crime (or saw him in circumstances relevant to the likelihood of his having done so, for example en route to a robbery). Often, indeed usually, that is the position and, when it is, an identification parade is not merely useful but, assuming it is practicable to hold one, well-nigh imperative before the witness could properly give identifying evidence. In such a case, Lord Hoffmann said in *Goldson*, "a dock identification is unsatisfactory and ought not to be allowed," although he added: "Unless the witness had provided the police with a complete identification by name or description, so as to enable the police to take the accused into custody, the previous identification should take the form of an identification parade."

15. At the opposite extreme lies a case where the suspect and the witness are well known to each other and neither of them disputes this. It may be, of course, that on the critical occasion when the witness saw the crime being committed (or, for example, the person concerned en route), he thought it was the person he knew but was mistaken as to this. An identification parade obviously cannot help in this situation. Indeed, as Lord Hoffmann pointed out in *Goldson,* a parade then would be not merely unnecessary but could be "positively misleading":

"The witness will naturally pick out the person whom he knows and whom he believes that he saw commit the crime. In fact, the evidence of the parade might mislead the jury into thinking that it somehow confirmed the identification, whereas all that it would confirm was the undisputed fact that the witness knew the accused. It would not in any way lessen the danger that the witness might have been mistaken in thinking that the accused was the person who committed the crime. (sic)

16. A third situation arises when the witness claims to know the suspect but the suspect denies this…

27. It by no means follows, however, that the failure to hold a parade here can be regarded as having caused a miscarriage of justice…"

630. The following are extracts from the concurring judgment of Lord Hoffmann in the *Ronald John* case :

"35. There are three points upon which the Board is agreed. The first is that it would have been better if there had been an identification parade. The second is that the absence of a parade was not a ground for withdrawing the case from the jury. That is important, because if it was fatal to the State's case that the appellant was not given the opportunity to demonstrate, by a failed identity parade, that Lewis was lying or mistaken, then logically the case should have been stopped. The third is that the judge gave the jury careful directions about assessing the accomplice's credibility and the possibility that even a credible witness might make a mistaken identification."

631. The following are extracts from the dissenting judgment of Baroness Hale in the *Ronald John* case:

"42. The Board has held more than once in Caribbean cases that a parade should be held unless it would serve no useful purpose …

44. The failure to hold an identification parade therefore deprived the accused of the possibility (whether fanciful or not is a matter to which I will return) that Mr Lewis would not have picked him out. (I appreciate that, had there been a parade, and Mr Lewis had picked him out, the jury would have had to be given some careful directions about that. But we are concerned with a different situation.) What then is the consequence? In England and Wales, there would have been a vigorous debate about whether the judge should have allowed the accused to be identified in the dock or admitted evidence of the dock identification in the committal proceedings. The test which appears in some of the cases is whether the judge is sure that the witness knew the accused so well that he would inevitably have picked him out: see *R v Trevor Elton Gardner* [2004] EWCA Crim 1639. In the circumstances of this case, that would have been difficult for him to conclude without knowing what the jury made of Mr Lewis' evidence. But no-one questions that evidence of a dock identification is admissible.

Once a dock identification was permitted, the jury should have been directed about the circumstances in which an identification parade should have been held and warned that the failure to hold one deprived the accused of the possibility of an inconclusive parade…

48 In my view, therefore, thorough and careful though this summing up undoubtedly was, it did not deal satisfactorily with the lack of an identification parade and the potential advantage that this might have brought, whether or not they believed that Mr Lewis did know the accused by sight beforehand.

52… The reality is that Mr Lewis provided the police with two clues which enabled them to pick up the accused and after that no further steps were taken to confirm that they were right. This was a serious failure in a case which depended entirely upon the evidence of an accomplice. The majority may believe that the possibility that the police had leapt to the wrong conclusion is so slim that there is no risk of a miscarriage of justice. But this would not be the first time that the police had, quite understandably, leapt to a conclusion which turned out to be wrong. I may be more cynical than the majority, but I could not in all conscience send a man to his death on that basis."

632. See *R v Chaney* [2009] 1 Cr App R 35 in respect of CCTV identification issues.

633. See *Archbold* paragraph 14-42 in respect of dock identifications. The practice of inviting a witness to identify a defendant for the first time when the defendant is in the dock has long been regarded as undesirable (*R v Cartwright* 10 Cr App R 219). The judge however retains a discretion to permit a dock identification. The authors of *Archbold* submit that in practice the exercise of such discretion should not even be considered unless:

(a) a defendant has (presumably unreasonably) refused to comply with a formal request to attend an identification parade *(John* [1973] Crim LR 113) and
(b) none of the other identification procedures has been carried out as a result of the defendant's default.

634. There may be cases where there is an issue of identification because the witness had to pick out one person from two or more persons known to him previously. In these circumstances a dock identification may be proper (*Fergus* [1992] Crim LR 366 and May and Powles).

635. Where a witness volunteers a dock identification the summing up should make it plain that such evidence is undesirable; that the proper practice is to hold a parade; and that the evidence should be approached with great care (*Williams* [1997] 1 WLR 548 Privy Council and *R v Graham* [1994] Crim LR 212). If the jury is not discharged the safer course would normally be to inform them why such evidence is unreliable and to direct them to disregard it. See *Pop v The Queen* [2003] UKPC 40, *Holland v HM Advocate* Times June 1st 2005 Privy Council and *Pipersburgh v R* 21st February 2008 Privy Council. See also *Young v The State* (Privy Council judgment delivered 6th May 2008) on the desirability of identification parades, the undesirability of dock identifications and the necessary directions to the jury on identification matters.

636. May and Powles state that the general principle is that unless there are exceptional circumstances a witness should not be allowed to identify a defendant for the first time in the dock. The reason is that the witness might well be influenced in making an identification by the sight of the defendant in the dock and therefore more likely to be mistaken. See *Hunter* 1969 Crim LR 262, *Howick* [1970] Crim LR 403, *Horsham JJ ex p Bukhari* (1981) 74 Cr App R 291, *Williams*

(1995) 159 JP 303, *Barnes* Times May 6th 1997, *John* [1973] Crim LR 113 and *Caird* The Times August 20th 1970. If counsel inadvertently elicits a dock identification the judge should either discharge the jury or consider a warning to jury in respect of the dangers. Juries are frequently discharged if an inadvertent dock identification has taken place.

637. If the prosecution apply to the court for leave to ask a witness to make a dock identification consider the following. Evidence of dock identification is legally admissible. There is however a discretion to exclude it if the prejudicial effect of the proposed evidence outweighs the probative value (See *Horsham Justices ex p. Bukhari* (1982) 74 Cr. App R 291).

638. Dock identifications are usually undesirable. See the judgment of the Privy Council in *Pipersburgh and Robateau v R* (judgment delivered 21st February 2008). In that case prosecuting counsel adduced a total of five dock identifications of the appellants who were charged with murder. The police did not hold an identification parade for either of the appellants. Lord Rodger at paragraph 6 stated:

> "In the Lordships' view, in a serious case such as the present, where the identification of the perpetrators is plainly going to be a critical issue at any trial, the balance of advantage will almost always lie in holding an identification parade."

639. Lord Rodger added:

> "9. As Mr Fitzgerald very frankly admitted, his primary submission - that evidence by way of a dock identification is inadmissible where the witness has not previously attended an identification parade - flies in the face of what the Board said in its judgment in *Pop v The Queen* [2003] UKPC 40. In that case, no identification parade had been held and the dock identification of the appellant by a witness, Adolophus, had occurred as a result of what appeared to have been a slip by prosecuting counsel in formulating one of his questions. Against that background, the Board said this, at para 9:
>
> "First, the police held no identification parade and in consequence the identification of the appellant was a dock identification. The failure to hold an identification parade was contrary to the practice in Belize as explained by the Court of Appeal in *Myvett and Santos v The Queen* (unreported) (9 May 1994, Criminal Appeals Nos 3 and 4 of 1994):
>
> 'The detailed code adopted in England for the holding of identification parades to have suspects identified is intended to ensure that the identification of a suspect by a witness takes place in circumstances where the recollection of the identifying witness is tested objectively under safeguards by placing the suspect in a line

made up of like looking suspects; the English procedure is in practice followed here in Belize.'

The facts that no identification parade had been held and that Adolphus identified the appellant when he was in the dock did not make his evidence on the point inadmissible. It did mean, however, that in his directions to the jury the judge should have made it plain that the normal and proper practice was to hold an identification parade. He should have gone on to warn the jury of the dangers of identification without a parade and should have explained to them the potential advantage of an inconclusive parade to a defendant such as the appellant. For these reasons, he should have explained, this kind of evidence was undesirable in principle and the jury would require to approach it with great care: *R v Graham* [1994] Crim LR 212 and *Williams (Noel) v The Queen* [1997] 1 WLR 548."

10. Their Lordships see no reason to depart from their clear decision in *Pop* that the facts that no identification parade had been held and that the witness identified the appellant when he was in the dock did not make his identification evidence inadmissible. They accordingly reject the first of the grounds of appeal advanced by Mr Fitzgerald."

640. At paragraph 16 of *Pipersburgh* the following is stated:

" 16. The problems posed by dock identifications as opposed to identifications carried out at an identification parade are well known and were summarised in *Holland* 2005 SC (PC) 1, 17, at para 47:

> "In the hearing before the Board the Advocate-depute, Mr Armstrong QC, who dealt with this aspect of the appeal, accepted that identification parades offer safeguards which are not available when the witness is asked to identify the accused in the dock at his trial. An identification parade is usually held much nearer the time of the offence when the witness's recollection is fresher. Moreover, placing the accused among a number of stand-ins of generally similar appearance provides a check on the accuracy of the witness's identification by reducing the risk that the witness is simply picking out someone who resembles the perpetrator. Similarly, the Advocate-depute did not gainsay the positive disadvantages of an identification carried out when the accused is sitting in the dock between security guards: the implication that the prosecution is asserting that he is the perpetrator is plain for all to see. When a witness is invited to identify the perpetrator in court, there must be a considerable risk that his evidence will be influenced by seeing the accused sitting in the dock in this way. So a dock identification can be criticised in two complementary respects: not only does it lack the safeguards that are offered by an identification parade, but the accused's position in the dock positively increases the risk of a wrong identification."

Allowing for any differences in practice, their Lordships consider that these observations apply equally to the position in Belize."

641. Where there has been no identification parade in a case where such should have taken place the trial judge must refer to the lack of the identification parade and point out the advantages of such a parade. The judge should stress in such a situation that the defendant has lost the potential advantage of an inconclusive parade. In dock identification cases the judge should warn the jury of the distinct and positive dangers of a dock identification without a previous identification parade. In particular the judge should draw to the jury's attention the risk that witnesses might have been influenced to make their identifications by seeing the defendant in the dock. The judge should stress that this type of identification evidence is undesirable in principle and explain that they must approach it with great care. All this, of course, assumes that the judge has decided not to discharge the jury.

642. I turn now to consider issues concerning identification out of court. A witness of an offence may very soon after it identify the offender. The witness in these circumstances may be permitted to give evidence of his previous identification and identify the offender in the dock. On the other hand if there has been a lapse of time since the offence the witness (depending on the circumstances) may identify the defendant at a video identification, an identification parade, a 'group' identification or a confrontation. Police practice in relation to such identification is governed by Code D issued under the Police Powers and Procedures Act 1998.

643. The procedures set out in Code D are designed to test the witness' ability to identify the person they saw on a previous occasion, and to provide safeguards against mistaken identification.

644. Section 75 of the Police Powers and Procedures Act 1998 provides that the Department of Home Affairs shall by order provide for codes of practice in connection with numerous matters including "identification of persons by police officers." Section 76 of the Police Powers and Procedures Act 1998 provides that a police officer shall be liable to disciplinary proceedings for a failure to comply with any provision of a Code. Moreover courts can take the provisions of a Code into account if they are relevant to the determination of any question arising in the proceedings.

645. The Police Powers and Procedures Codes (Amendment) Order 2007 came into operation on the 18th May 2007 and set out a new Code D (Code of Practice for the identification of persons by police officers).

646. Paragraph 2.0 of the Code provides that a record shall be made of the description of the suspect as first given by a potential witness. This must be done before the witness takes part in the forms of identification listed in paragraph 2.1 or Annex E and a copy provided to the suspect or his advocate before any such procedure is carried out.

647. Paragraph 2.3 of the old Code provided that whenever a suspect disputes an identification an identification parade shall be held if the suspect consents unless certain paragraphs of the Code applied.

648. Under the new Code (paragraph 2.1) in a case which involves disputed identification evidence and where the identity of the suspect is known to the police and he is available the methods of identification by witnesses which may be used are:

(i) a video identification
(ii) an identification parade
(iii) a group identification
(iv) a confrontation.

649. Paragraph 2.17 of Code D provides:-

"*Circumstances in which an identification procedure must be held*

2.17 Whenever:

(i) a witness has identified or purported to have identified a suspect prior to any identification procedure set out in paragraphs 2.6 to 2.16 having been held; or

(ii) there is a witness available, who expresses an ability to identify the suspect, or where there is a reasonable chance of the witness being able to do so, and the witness has not been given an opportunity to identify the suspect under any of the procedures set out in paragraphs 2.6 to 2.16,

and the suspect disputes being the person the witness claims to have seen, an identification procedure shall be held unless it is not practicable or it would serve no useful purpose in proving or disproving whether the suspect was involved in committing the offence. For example, when it is not disputed that the suspect is already well known to the witness who claims to have seen the suspect commit the crime."

650. In *Forbes* [2001] AC 473 the House of Lords held that under a previous version of the Code an identification parade was necessary where the suspect disputed identification evidence and consented to a parade, the only exception being those expressed in the Code or in a case of "pure recognition of someone well-known to the eye-witness." A prior

identification, however complete, was held not to mean that a parade need not be held and a failure to hold a parade in such circumstances could amount to a breach of the Code. May and Powles state that under the version of the English Code in force until April 2002 in most cases of disputed identification a parade was mandatory (see footnote 78 on page 410 of May and Powles).

651. May and Powles say that following the amendment of the Code in England there are conflicting views as to whether *Forbes* remains applicable and whether a formal identification procedure is required where the suspect has already been identified following a street identification.

652. See May and Powles in respect of video identification procedure, group identification or confrontation and street identifications.

653. When an identification procedure is required, in the interests of fairness to both suspects and witnesses, it must be held as soon as practicable.

654. In *Smith* (Privy Council judgment delivered 23rd June 2008) at paragraph 26 it is indicated that even in jurisdictions where there are not mandatory requirements for identification parades "it should be regarded as desirable practice to hold an identification parade where there has been an identification which is disputed by the suspect." At paragraph 27 of the judgment it was noted that if a parade is not held the court may have to consider the effect of its absence on the fairness of the trial and the safety of the conviction and in doing so it will have regard to the strength of the prosecution case on the evidence adduced, including the quality of the identification of the suspect by the witness.

655. In *Beveridge* (1987) 85 Cr App R 255 the court said that when a point is taken on an identification parade the trial judge must consider the depositions, statements and submissions of counsel but the court also said that there may be occasions (which will be very rare) when the judge may think it desirable to hold a trial within a trial. In *Martin and Nichols* [1994] Crim LR 218 the English Court of Appeal said that the trial judge should not determine issues of fact but make an objective assessment.

656. In accordance with their duty of disclosure the prosecution should disclose the notes relating to an identification procedure. It is also normal for the police to disclose any description of an offender given

by a witness and any photograph of the defendant taken on arrest (See *Fergus* (1994) 98 Cr App R 313 and *Ward* (1993) 96 Cr App R1).

657. See page 422 onwards of May and Powles in respect of evidence of out of court identification. See in particular *Christie* [1914] AC 545, *Osbourne and Virtue* [1973] 1 QB 678 and *McCay* [1990] 1 WLR 645.

658. See May and Powles page 425 onwards in respect of the use of photographs for identification, page 428 in respect of admissibility of identification based on photographic images, and page 429 in respect of admissibility of photofits and sketches.

659. As to other forms of identification refer to May and Powles at page 431 onwards in respect of identification by fingerprints and at page 432 onwards in respect of identification by DNA.

660. As to possession of incriminating articles as evidence of identity see May and Powles at page 435 onwards and see page 436 onwards in respect of voice identification and pages 437-439 in respect of miscellaneous identification cases.

661. Specimen Direction 30 of the Specimen Directions of the Judicial Studies Board provides as follows:

> "30. Visual Identification
>
> The case against the defendant depends [wholly][to a large extent] on the correctness of one [or more] identification[s] of him which he alleges to be mistaken. To avoid the risk of any injustice in this case, such as has happened in some cases in the past, I must therefore warn you of the special need for caution before convicting the defendant in reliance on the evidence of identification. A witness who is convinced in [his][her] own mind may as a result be a convincing witness, but may nevertheless be mistaken. [The same may apply to a number of witnesses.] *[Add if and as appropriate*: Mistakes can also be made in the recognition of someone known to a witness, even of a close friend or relative.]
>
> You should therefore examine carefully the circumstances in which the identification [by each witness] was made. For how long did he have the person he says was the defendant under observation? At what distance? In what light? Did anything interfere with the observation? Had the witness ever seen the person he observed before? If so, how often? If only occasionally, had he any special reason for remembering him? How long was it between the original observation and the identification to the police? Is there any marked difference between the description given by the witness to the police when he was first seen by them, and the appearance of the defendant?

(If appropriate:) I must remind you of the following specific weaknesses which appeared in the identification evidence ...

Notes

1. See *R v Turnbull* 63 Cr App R 132.

2. The importance of the rules laid down in *R v Turnbull* was emphasised by Lord Lane CJ in *R v Clifton* [1986] Crim LR 399.

The basic principle is the special need for caution when the issue turns on evidence of visual identification. The summing-up in such cases must not only contain a warning but expose to the jury the weaknesses and dangers of identification evidence both in general and in the circumstances of the particular case. *Turnbull* is intended, primarily, to deal with the 'ghastly risk' in cases of fleeting encounters: see Lord Widgery CJ in *R v Oakwell* 66 Cr App R 174 and also *R v Pattinson and Exley* [1996] 1 Cr App R 51. The rule is equally applicable to police witnesses: see *R v Reid* 90 Cr App R 121, PC.

3. Where the quality of the identifying evidence is poor the judge should withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. See *R v Fergus (Ivan)* 98 Cr App R 313, CA. The identification evidence can be poor, even though given by a number of witnesses. They may all have had only the opportunity of a fleeting glance or a longer observation made in difficult conditions. Where, however, the quality is such that the jury can safely be left to assess its value, even though there is no other evidence to support it, the trial judge is entitled (if so minded) to direct the jury that an identification by one witness can constitute support for the identification by another, provided that he warns them in clear terms that even a number of honest witnesses can all be mistaken: see *R v Weeder* 71 Cr App R 228 and *R v Breslin* 80 Cr App R 226. The judge should identify the evidence he regards as capable of supporting the evidence of identification.

4. In *R v Etienne* (1990) *The Times,* 16 February, the court was not at all sure that previous sightings of the suspect could render the identification more reliable if the identification was, on any view, an identification amounting to no more than a fleeting glimpse recognition. The court was left with a lurking doubt as to the safety of the conviction.

5. Such a direction is not required in every case, e.g. where the identification is not challenged or where it is not regarded by the judge as requiring supportive evidence. See *R v Deeble*, unreported (836461B82) and *R v Penman* 82 Cr App R 44. Neither is such a direction required when the identification is by description rather than by facial features - see eg *R v Doldur* [2000] Crim LR 178 and *R v Gayle* [1999] 2 Crim App R 131. See also *R v Byrne*, unreported (98/02206/W3).

6. Where identification involves recognition, remind the jury that mistakes in recognition, even of close friends and relatives are sometimes made. As to the cumulative effect of a number of identifying witnesses, see *R v Barnes* [1995] 2 Cr App R 491.

7. Care should be taken in directing about support to be derived from the jury's rejection of an alibi. There may be many reasons for putting forward a false alibi. Alibi witnesses may be genuinely mistaken as to dates, etc. Only if satisfied that the sole reason for the fabrication was to deceive them, may the jury find support for poor identification evidence. The mere fact that the defendant has lied about his whereabouts does not of itself prove that he was where the identifying witness said he was.

8. *R v Galbraith* 73 Cr App R 124 was not intended to affect in any way the *Turnbull* guidelines as to the withdrawal of a case dependent upon poor identifying evidence: see *R v Fisher*, unreported, (835923C82).

9. For the relationship between the *Turnbull* directions and (now discretionary) directions on corroboration in sexual cases where identification is in issue, see the important case of *R v Chance* 87 Cr App R 398 and *R v Barnes* [1995] 2 Cr App R 491. See Note replacing the Corroboration direction, page 21.2, ante.

10. As to the obligation to hold an identity parade after a street identification see *R v Forbes* [2002] 1 Crim App R 1. Wherever evidence is admitted, despite a breach of the Codes, the jury should be informed of the breach and directed to take it into account along with the other evidence in the case: see Archbold (2003) 14-33b and 41. Note the new provisions relating to identification procedures under PACE Act 1984 (Codes of Practice) (Temporary Modifications to Code D) Order 2002 (in force 1 April 2002).

11. As to identification by comparison of a defendant with a film or photograph from the crime scene, see the useful summary in AG's Reference (No 2 of 2002) *The Times*, 17 October."

"30a. Identification by DNA

In *R v Doheny and Adams* [1997] 1 Crim App R 369 at p 375, Phillips LJ gave the following guidance on summing-up in a DNA case:

The judge should explain to the jury the relevance of the random occurrence ratio in arriving at their verdict and draw attention to the extraneous evidence which provides the context which gives that ratio its significance, and that which conflicts with the conclusion that the defendant was responsible for the crime stain. In so far as the random occurrence ratio is concerned, a direction along these lines may be appropriate, although any direction must always be tailored to the facts of the particular case:

'Members of the jury, if you accept the scientific evidence called by the Crown, this indicates that there are probably only four or five white males in the United Kingdom from whom that semen stain could have come. The defendant is one of them. If that is the position, the decision you have to reach, on all the evidence, is whether you are sure that it was the defendant who left that stain or whether it is possible that it was one of that other small group of men who share the same DNA characteristics.'"

"30b. Identification by Fingerprints

The effect of *R v Giles*, unreported (97/05495/W2), *R v Charles*, unreported (98/00104/Z2) and *R v Buckley* (1999) *The Times*, 12 May [1999] 6 Archbold News 4 is to allow the admission of fingerprint evidence where the number of matching characteristics is less than 16. In Buckley Rose LJ laid down the following guidelines:

(a) If there are fewer than 8 similar ridge characteristics, it is highly unlikely that the judge will admit such evidence. Save in wholly exceptional circumstances, the Crown should not seek to adduce such evidence.

(b) If there are 8 or more similar characteristics, a judge may allow the evidence to be admitted. How the discretion will be exercised will depend on all the circumstances of the case, including:

(i) the experience and expertise of the witness;
(ii) the number of similar ridge characteristics;
(iii) whether there are dissimilar characteristics; and
(iv) the size, quality and clarity of the print relied on.

(c) In every case where the evidence is admitted and challenged, it will generally be necessary to warn the jury that it is evidence of opinion, that the evidence is not conclusive, and that it is for the jury to determine guilt or otherwise in the light of all the evidence."

"30c. Identification by Voice

In *R v Hersey* [1998] Crim LR 281 and *R v Gummerson and Steadman* [1999] Crim LR 680, the Court of Appeal held that in cases of identification by voice, the judge should direct the jury by the careful application of a suitably adapted Turnbull direction (see Direction 30). See also 'Sounds Familiar' by David Ormerod [2001] Crim L R 595, in particular at page 619.

In *R v Roberts* [2000] Crim LR 183, the Court of Appeal referred to academic research indicating that voice identification was more difficult that visual identification, and concluding that the warning given to jurors should be even more stringent than that given in relation to visual identification.

It is clear from these authorities that it is not necessary to hold a voice identification procedure to render admissible evidence of identification by voice.

In *R v Doherty* [2003] 1 Crim App R 77 (Northern Ireland Court of Appeal) it was held that where the prosecution rely on voice identification, expert evidence both of auditory and of acoustic analysis should normally be adduced."

662. See *R v Flynn* [2008] EWCA Crim 970 in respect of voice recognition evidence.

663. In *R v Kempster* (English Court of Appeal Criminal Division Times 16th May 2008) it was held that evidence of those experienced in

comparing ear-prints was capable of being relevant and admissible but such comparison would provide information which could identify the person who had left it on a surface only when sufficient minutiae could be identified and matched.

Breaches of codes of practice

664. In *R v Shillito* 2001-03 MLR 356 Deemster Kerruish considered the position where there had been a significant and substantial breach of Code C and excluded certain parts of the evidence under section 13 of the Criminal Justice Act 1991. See also the Appeal Division's judgment in *Openshaw* (judgment delivered 28th September 2000).

665. Section 13 of the Criminal Justice Act 1991 provides:

> "13 Exclusion of unfair evidence
>
> (1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
>
> (2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence."

666. Consider *Ironside* 1999-01 MLR 177, *Williams* 2003-05 MLR N 8 (Appeal Division judgment 20th August 2003), *Sayle* 2005-06 MLR 196, *Forbes* [2001] 1 AC 473 and *Slater* (judgment delivered 24th March 2009).

667. May and Powles state that a breach of Code D may lead to the exclusion of evidence of identification if its admission would have an adverse effect on the fairness of the proceedings. This was accepted by the English Court of Appeal without argument in *Gall* (1990) 90 Cr App R 64. In that case there was a breach of the Code and the Court of Appeal held that the evidence of identification should have been excluded. In *Jones* (1994) 158 JP 293, however, the English Court of Appeal emphasised that Code D set out practices to be followed by the police and was not concerned directly with the admissibility of evidence, even though the consequences of a breach of the Code might be the exclusion of the evidence. Accordingly the fact that there have been breaches of the Code is not conclusive as to whether evidence of identification will be admitted or not. While the importance of compliance with the Code could not be over-emphasised, failure to comply with it is not necessarily fatal in every

case (*Kelly* (1998) 162 JP 231). This will depend on the nature of the breach and all the circumstances.

668. May and Powles submit that if the police have deliberately flouted the Code so as to make any identification inherently unfair, the identification should be excluded.

669. In *Finley* [1993] Crim LR 50 the police persistently breached the Code (the Court of Appeal suspected deliberately). The Court held that the judge should have withdrawn the case from the jury at the close of the prosecution.

670. Even in cases of accidental non-compliance with the Code by police, in certain circumstances, it will be right to exclude the identification evidence (*Lennon* 63 Jo Crim L 459).

671. But not every breach of the Code will lead to exclusion of evidence of identification. In *Gammell* (1990) 90 Cr App R 149 procedures relating to group identification were not followed. The Court of Appeal said that simply because there was a breach of the Code it did not mean that the evidence was inadmissible. It was important to see whether any unfairness followed from the evidence.

672. In *DPP v D* The Times August 7th 1998 a witness identified two suspects before during and after the commission of an offence : he then described them to the police by reference to their clothing and approximate age. Acting on this information the police arrested the defendants at the scene. One suspect asked for an identification parade but none was held in breach of the Code. The justices admitted evidence of this "informal identification." The Divisional Court held that the breach was not of such substance, having regard to the nature of the identification evidence, as to cause unjust prejudice to the defendant. The Court observed that there never was an actual identification to the police and the holding of a parade would serve no useful purpose since nothing of what the witness had seen could usefully be challenged on a parade.

673. Even if there has been a substantial breach of the Code a judge may admit the evidence of identification in the exercise of his discretion. In *Ryan* [1992] Crim LR 187 the trial judge found that there had been a 'major' breach of Code D but admitted the evidence in the exercise of his discretion.

674. May and Powles state:

"In exercising discretion … the court must take into account the relevant provisions of the Code, and all the circumstances of the case. It is otherwise not possible to lay down general rules for the exercise of discretion: it will depend on the nature of the breach and the circumstances of the particular case. A technical breach which had no effect on the reliability of the identification will hardly lead to exclusion. On the other hand, it is submitted that if a breach caused the parade to be so unfair that no identification could be properly relied on, the court should exclude it."

675. The Court of Appeal has said that it will not interfere with the exercise of the judge's discretion unless it is satisfied that no reasonable judge, having heard the evidence, could have reached the conclusion that he did (*Quinn* [1995] 1 Cr App R 480, 489). The judge should give reasons for admitting the evidence when breaches of the Code were admitted or proved (*Allen* [1995] Crim LR 643).

676. In *Forbes* [2001] 1 AC 473 the House of Lords held that in any case where a breach of Code D had been established and the trial judge has refused to exclude the evidence the judge in summing up should (a) explain to the jury that there has been a breach (forcefully if needs be) and how it has arisen, and (b) invite the jury to consider the possible effect of that breach. The terms of the appropriate direction will vary from case to case and breach to breach. But where the breach relates to the failure to hold an identification parade the jury should ordinarily be told that an identification parade enables a suspect to put the reliability of an eye-witness's identification to the test and that the suspect has lost the benefit of that safeguard, so that the jury should take account of that failure in its assessment of the case giving it such weight as it thinks fair.

677. The following are further relevant extracts from the judgment of the Appeal Division (Judge of Appeal Tattersall and Deemster Doyle) in *Williams* 2003-05 MLR N 8, delivered on the 20th August 2003:

"27. Paragraph 2-3 of Code D [`*Code of Practice for the Identification of Persons by Police Officers*`] of the Codes of Practice made under the Police Powers and Procedures Act 1998 provides that :

`Whenever a suspect disputes an identification, an identification parade shall be held if the suspect consents unless paragraphs 2.4 or 2.7 or 2.10 apply. A parade may also be held if the officer in charge of the investigation considers that it would be useful and the suspect consents`

28. It is thus clear that the holding of an identification parade is only mandatory where a suspect `disputes an identification` : in all other cases it is discretionary.

29. It is agreed that the police held no identification parade in respect of the Appellant. The Appellant contends, and it is not disputed, that at all times she was willing to consent to the holding of an identification parade.

30. Miss Hannan submitted that notwithstanding that the Appellant admitted her presence at the incident, because she disputed that she was involved in the assault on Mr Griffin, there was an obligation on the police, pursuant to paragraph 2-3, to hold an identification parade.

31. The Acting Deemster rejected this submission. In her directions to the jury, she stated :

`Detective Constable Pearson described himself as being the Officer in the case. He said that so far as he was concerned, he was not aware that there was any question of identification. He accepted that there was a code of practice which said that if identification is in issue, an identification [parade] shall take place. But he said as Michelle Williams was admitting [the] fact that she was the only woman … up on the colonnade he did not consider that she was, in effect, calling in question the identification, merely denying that she`d done what the witness had said the witness had seen. … As a matter of law, I rule that there is no breach of the code of practice, but of course you take into account in Mrs Williams` favour that Miss Middlesborough did not have an opportunity subsequently to see whether she could identify the woman and you will remember the description of the clothes that was given was of the woman wearing [a] blue tracksuit with white stripes and we know from other evidence that that does not appear to be what Mrs Williams was wearing.`

32. In our judgment Miss Hannan`s submission fails on the simple ground that the Appellant was not disputing her identification. If the Appellant had denied being present when the assault on Mr Griffin took place, she would have been disputing the identification of any witness who contended that she was so present, and there would have been an obligation to hold an identification parade. However, the mere fact that the Appellant disputed committing the act alleged to constitute the offence did not trigger the provisions of paragraph 2-3. Were it otherwise the holding of an identification parade would be mandatory in most cases where a defendant denied his guilt, albeit that the purpose of an identification parade is to establish presence and not the degree of participation. Such is not the law - see *R v Chen* [2001] EWCA Crim 885 : a person who admits presence at the scene of criminal activity but denies criminal participation therein, is not disputing identification for the purposes of Code D.

33. It follows that we agree with the Acting Deemster`s ruling."

Refreshing memory

678. A witness giving evidence may refresh his memory by reference to any writing, concerning the facts to which he testifies, made or verified by himself at a time when his memory was clear (See *Archbold* 2004 at paragraph 8-74 and *AG's Ref (No 3 of 1979)* 69 Cr App R 411).

679. An alternative (common) way of stating the rule is to say that the writing must have been made contemporaneously with the events.

680. A witness can also, in certain circumstances, be permitted to refresh his memory from previous statements made when his memory was clearer even though such a statement was not "contemporaneous."

681. The courts must take care not to deprive themselves by artificial rules of the best chances of learning the truth.

682. Testimony in the witness box becomes more a test of memory than of truthfulness if witnesses are deprived of the opportunity of refreshing their memories in the witness box from statements or notes made when the events were clear in the mind.

683. The memory may be refreshed from a document in court in front of the witness. It would be unusual to allow an adjournment for the witness to consider the document outside court.

684. "Contemporaneous" is a matter of fact and degree. The mere fact that the note was not written at the first available opportunity does not mean that if fails the test of contemporaneity. The true test is that the document must have been written (or checked) either at the time of the transaction or so shortly afterwards that the facts were still fresh in the witness's memory. The definition provides a measure of elasticity and should not be taken to confine witnesses to an over-short period.

Recent complaints in criminal cases

685. The general rule is that a witness may not seek to confirm or strengthen his evidence by saying in the witness box that he has made a similar statement on a previous occasion.

686. One of the exceptions to the rule is where complaints are made at an early opportunity, in sexual cases known as "recent complaints." See May and Powles *Criminal Evidence* 5th Edition chapter 20. The following, in the main, is taken from that chapter.

687. In cases of rape, indecent assault and other sexual offences evidence that the complainant made a complaint is admissible to show that the complainant's conduct in complaining was:

(a) consistent with the complainant's evidence in the witness box; and
(b) (if consent is in issue) inconsistent with her consent to the actions complained of.

688. It should be borne in mind that the evidence of complaint is only admissible to show consistency. Such evidence is not admissible as evidence of the facts complained of.

689. It follows that the judge must direct the jury that the evidence should not be treated as evidence of the facts complained of but used only for the purpose mentioned (i.e. to show consistency).

690. The Judicial Studies Board standard direction which was approved by the English Court of Appeal in *Islam* [1999] 1 Cr App R 22 is to the effect that the evidence may help the jury decide whether the complainant has told them the truth but it cannot be independent confirmation of the complainant's evidence since it does not come from a source independent of the complainant.

691. Note that in England the position is now governed by section 120 of the Criminal Justice Act 2003. Under that section a complaint of any offence is now admissible as evidence of the matters complained of if certain conditions are met and certain kinds of previous statements are also available of the truth of their contents if certain conditions are met. If the previous statement was made in a document which becomes an exhibit it must not accompany the jury when they retire to consider their verdict unless the court considers it appropriate or all the parties agree that it should (see section 122).

692. The August 2000 Specimen Direction 31 of the Judicial Studies Board provided as follows:

> "31. Sexual Offence, Recent Complaint
>
> *In* R v Islam, *[1999] 1 Crim App R 22 and in* R v NK *[1999] Crim LR 980, the Court of Appeal stated the need to direct the jury on the evidential significance of a complaint in a sexual case. In* White *v The Queen [1999] 1 Crim App R 153, it was emphasised that there must be evidence of the complaint from a third party who heard the complaint being made…*
>
> You have heard evidence that shortly after this alleged incident X made a complaint to Y [her mother, a passer-by, the police etc]. This is not evidence as to what actually happened between X and the defendant. Y was not present, and did not see what happened between them. It is evidence which you are entitled to

consider because it may help you to decide whether or not X has told you the truth. [The prosecution say that her complaint is consistent with her account and therefore she is more likely to be truthful. On the other hand the defence say …] I It is for you to decide whether the evidence of this complaint helps you to reach a decision, but it is important that you should understand that the complaint is not independent evidence of what happened between X and the defendant, and it therefore cannot of itself prove that the complaint is true.

Notes
1. The admissibility of a complaint depends upon proof of the facts by other evidence: see *R v Wright and Ormerod* 90 Cr App R 91, CA.
2. If the complaint is one to the emergency services it will likely have been recorded, and the recording itself may constitute 'primary evidence' of the complainant's condition."

693. In *R v Birks* [2003] Crim LR 401 the appellant was charged with three counts of indecent assault and one count of indecency with a child. The complainant who was 19 at the time of the trial gave evidence that she was sexually abused by the appellant for a period of about 12 months when she was six or seven years old. She said in evidence in chief that she first made complaint to her mother some two months after the last incident but in cross examination said it could have been up to six months after the last incident. She explained how she had been watching a programme on television with her mother about child abuse and this acted as a catalyst and she told her mother. Her mother gave evidence and said she thought the complaint related to events that had finished one year before. The judge basing himself on *Valentine* [1996] 2 Cr App R 213 held that the complaint was admissible because it had been made at the first reasonable opportunity. The appellant was convicted and appealed. The Crown argued that in light of new understanding of the difficulties facing victims of sexual abuse in speaking to other people of the abuse to which they had been subjected the courts should be readier than perhaps they were in the past to accept that complaints had been made as soon as reasonably possible even if that was not until months or even years later. It was held:

"allowing the appeal, that although there was sympathy for the Crown's submissions, in the current state of the law it was not possible to extend the test of a complaint being made in a reasonable time as far as the Crown urged. The language that had been used in the authorities, regarding whether a complaint had been made in a reasonable time, had all referred to times of delay which were very short indeed. The doctrine of recent complaint had developed as an exception to the doctrine that evidence of previous consistent statements, whether of witnesses for the prosecution or the defence, was not permitted. As a matter of authority, the test that a complaint had to be made "within a reasonable time of the alleged offence" could not be understood to mean that it had to be made "within a reasonable time of the alleged offence whether the complaint was recent

or not". If the law were to be allowed to develop in the way put forward by the Crown, then the classic directions given to the jury in this context would also have to be developed. Accordingly, with some reluctance, it was concluded that the judge had erred in this case in admitting the evidence in the first place and, *a fortiori,* in not discharging the jury once it emerged that the time in question was perhaps a year. *Cases considered: Lillyman* [1896] 2 Q.B. 167, *Cummings* [1948] 1 All ER. 551 and *Valentine* [1996] 2 Cr.App.R. 213.

Per curiam: It would be preferable if the law could be developed in the way argued for by the Crown because it was undesirable for juries to be kept in the dark as to what had happened between the time, sometimes many years in the past, of the alleged abuse and the time at which they were trying the case. If complaints, even if not recent complaints, had come forward in circumstances which were safe to put before the jury for their evaluation, then that should happen and it would be for the jury, subject to proper directions, to decide what they made of a proper narrative of events which would explain to them how it was that the charges put before them for their decision arose when they did, either against the background, depending on the facts of the case, of a complete silence of decades, however that was explained, or against some other possibly highly significant background."

694. Consider whether a more robust approach could be taken under Manx common law which favours all relevant and admissible evidence going before the jury and the jury being trusted to use their common sense.

695. Both the fact of the complaint and the terms in which it was made may be proved (*Lilyman* (1896) 2 QB 167). This is for the purpose of enabling the jury to judge for themselves whether the conduct of the complainant was consistent with her evidence on oath.

696. Evidence of a complaint is not admissible if the complainant gives no evidence about the matter complained of (*Wallwork* (1958) 42 Cr App R 153 and *Wright and Ormerod* (1987) 90 Cr App R 91).

697. Conversely evidence of a previous complaint is not admissible from the complainant unless the person to whom the complaint was made gives evidence (*White* [1999] 1 AC 210 Privy Council). Accordingly not only must the complainant testify as to the making of the complaint but the recipient should prove its terms.

698. In order to be admissible, the complaint must have been made at the first reasonable opportunity. The complaint must be "recent." It is a matter for the court to determine whether the complaint was made as speedily as could reasonably be expected (*Cummings* [1948] 1 All ER 551). May and Powles add at page 581:

"Circumstances in this sort of case will vary. Thus in one case a complaint made after a day had elapsed was rejected (*Rush* (1896) 60 JP 777); in another, a complaint made after a week had elapsed was admitted (*Hedges* (1909) 3 Cr App R 262). Generally, however, complaints of more than a week old will not be held admissible (*Birks* [2003] Crim LR 401)."

699. In *Valentine* [1996] 2 Cr App R 213 the English Court of Appeal said that a complaint can be recent and admissible although not made at the first opportunity which presented itself, provided it is made at the first reasonable opportunity. At 223 the English Court of Appeal stated:

"What is the first reasonable opportunity will depend on the circumstances including the character of the complainant and the relationship between the complainant and the person to whom she complained and the persons to whom she might have complained but did not do so."

700. There is no reason to prevent more than one complaint being admitted if both were made within a reasonable time (*Lee* (1911) 7 Cr App R 31). However this does not allow the prosecution to adduce evidence of several complaints made in similar terms, where to do so would be prejudicial since it might lead a jury to consider the contents of the complaints to be evidence of the truth of what they asserted (*Valentine*).

701. The complaint must be voluntary in the sense that it was not made as a result of "leading, inducing or intimidating questions" (*Osborne* [1905] I KB 551, *Norcott* [1917] 1 KB 347). Questions such as "Did x assault you" would render the answers inadmissible but neutral questions such as "why are you crying" would not. Whether or not the complaint is voluntary is a matter to be determined by the trial judge.

702. The evidence of the recent complaint is usually given by the person to whom it was made: the complainant's own evidence to this effect is of little value in showing consistency.

703. If such evidence is given by the complainant, (query admissible on its own? See *White*, *Wallwork* and *Wright and Ormerod*) the judge must give the jury a careful direction as to its limited value (*White*, The Times, September 25 1998).

704. In *R v D* [2008] EWCA Crim 2557 the English Court of Appeal dealt with delayed complaints and approved the following direction (the very general terms of which need to be tailored to the facts of each case):

"Experience shows that people react differently to the trauma of a serious sexual assault. There is no one classic response. The defence say the reason that the complainant did not report this until her boyfriend returned from Dubai ten days after the incident is because she has made up a false story. That is a matter for you. You may think that some people may complain immediately to the first person they see, whilst others may feel shame and shock and not complain for some time. A late complaint does not necessarily mean it is a false complaint. That is a matter for you."

705. Consider also the abrogation of corroboration rules. Section 56(1) of the Criminal Justice Act 2001 provides that any requirement whereby at a trial on information it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a person merely because the person is (a) an alleged accomplice of the accused or (b) where the offence charged is a sexual offence, the person in respect of whom it is alleged to have been committed, is hereby abrogated.

Hostile witnesses

706. Section 10 of the Evidence Act 1871 under the title "How a party may contradict his own witness" provides that:

"A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the Court, prove adverse, contradict him by other evidence, or, by leave of the Court, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

(similar to section 3 of English Criminal Procedure Act 1865 – Denman's Act).

707. See also sections 11 (proof of contradictory statements of adverse witness), 12 (cross examination as to previous statements in writing), 13 (proof of previous conviction of a witness may be given) and 14 (impeachment of credit of witness by evidence as to character) of the Evidence Act 1871.

708. See *Archbold* at paragraph 8-94.

709. Before any question arises under the Act counsel and the Deemster should keep in mind the possibility of the witness being allowed to refresh his memory from his witness statement.

710. The question of the hostility of a witness should be determined as a result of his answers and demeanour when being questioned in the presence of the jury.

711. The word "adverse" means "hostile" and not merely "unfavourable".

712. See also Article 147 of Stephen's *Digest of the Law of Evidence*. If a witness called by a party to prove a particular fact in issue or relevant to the issue fails to prove such fact or proves an opposite fact the party calling him may contradict him by calling other evidence and is not thereby precluded from relying on those parts of such witnesses' evidence as he does not contradict. If a witness appears to the judge to be hostile to the party calling him, that is to say, not desirous of telling the truth to the court at the instance of the party calling him the judge may in his discretion permit his examination by such party to be conducted in the manner of a cross examination to the extent to which the judge considers necessary for the purpose of doing justice. Such a witness may by leave of the judge be cross-examined as to (1) facts in issue or relevant or deemed to be relevant to the issue (2) matters affecting his accuracy, veracity or credibility as to the particular circumstances of the case; and as to (3) whether he has made any former statement, oral or written, relative to the subject-matter of the proceedings and inconsistent with his present testimony. In the case of a witness who is treated as hostile proof of former statements oral or written made by him inconsistent with his present testimony may by leave of the judge be given.

713. To be inconsistent the statement need not be directly or absolutely at variance.

714. It is possible to treat a witness as hostile at any stage of his evidence including re-examination. Hostility may be indicated by inconsistent statements, or a witness who is reluctant to say anything, or professes to have forgotten what happened.

715. The judge has a discretion at common law. See for example *R v Thompson* 64 Cr App R 96, CA. Where a witness having been sworn answers certain preliminary questions and then indicates he is not going to give evidence that witness may be treated as hostile.

716. If a witness by his conduct in the witness box during examination in chief shows himself decidedly adverse it is always in the discretion of the judge to allow cross examination.

717. In each particular case there must be some discretion in the presiding judge as to the mode in which the examination shall be conducted in order to best answer the purpose of justice.

718. At common law a previous inconsistent statement is not evidence of the truth of its contents. As to the obvious need for caution when assessing the weight to be attached to the statements of a person who has said different things on different occasions see *Archbold* 2006 at paragraph 8-101 and *R v Maw* [1994] Crim L R 841. See *R v Bilingham* English Court of Appeal Criminal Division 23 January 2009 to the effect that in England it is sufficient that the jury conclude that a previous inconsistent statement exculpatory of a defendant might be true they do not have to be sure it was true.

719. In *R v Greene* [2009] EWCA Crim 2282 the English Court of Appeal held that where a judge ruled that a witness could be treated as hostile at trial by the party calling him but that witness did not in the event prove to be hostile, the judge still had to warn the jury to approach that witness's evidence with caution, and the nature of that direction depended on the particular circumstances of the case. In *Greene* the judge should, without making reference to hostility, have advised the jury to treat the witness's evidence with caution in light of the different accounts he gave, albeit that he ultimately reverted to his original account.

Vulnerable witnesses

720. Counsel should consider the relevant Acts, Rules and authorities in relation to the steps that may have to be taken in respect of vulnerable witnesses. Counsel should make prompt applications for any necessary arrangements in respect of vulnerable witnesses well in advance of the trial and ensure in liaison with court administration that the appropriate facilities are put in place. See the relevant provisions in the Criminal Justice Act 1990 (in particular section 27) and the relevant rules including the Criminal Jurisdiction (Television Link and Video Evidence) Rules 1993 as amended.

721. In respect of hearings involving children endeavour to keep the procedure simple and unintimidating, less formal, wigs off, explain the position clearly and take frequent breaks. See *Archbold* at paragraph 4-96a onwards and the relevant authorities including *T v UK*, *V v UK* 30 EHRR 121 and *Practice Direction* [2007] 1 WLR 1790. The authorities indicate that similar procedures may be adopted

to cover adults suffering from mental disorder or some other significant impairment of intelligence or social function.

722. Consider whether young witness can understand the questions put and give answers that can be understood. Consider whether the child understands the duty of telling the truth (*R v MacPherson* [2006] 1 Cr App R 30).

723. In respect of the competence of young complainants see *R v Powell* [2006] 1 Cr App R 31 and *R v MacPherson* [2006] 1 Cr App R 30. See *R v Hanton* [2005] EWCA Crim 2009 and *R v K* (*Howard)* [2006] EWCA Crim 472 in respect of the test in relation to the standard of conduct of an interview with a minor and the requirement to give guidance to the jury on any breaches of the guidelines.

724. In respect of the video recording of evidence in chief of vulnerable witnesses even where there has been breaches of good practice consider whether the witness has given a credible and accurate account (*R v K (Howard*) [2006] EWCA Crim 472).

725. Counsel should take especial care in relation to dealing with and questioning young children and other vulnerable witnesses.

726. Section 77 of the Children and Young Persons Act 2001 provides that the child's evidence in criminal proceedings shall be given unsworn. Section 3 of the Interpretation Act 1976 provides that a child is a person under 14 and a young person is a person who has reached the age of 14 but is not 17.

727. Counsel should address the court on any appropriate directions. The court should endeavour to put the young witness at ease and to ascertain that the witness knows the difference between the truth and a lie and that the important thing is the need to tell the truth. The court should also stress that it is important not to leave anything out when answering questions. If the witness does not understand a question the witness should not hesitate to say so. It is important that the witness does not guess the answers to questions. Regular breaks should be taken. See the Judicial Studies Board's publication *Fairness in Courts and Tribunals* July 2004 page 3.

728. The full name and age of witness should be given. Counsel should be introduced. The Deemster should check who is in the room with the witness. The Deemster should ask the witness whether the witness knows what telling a lie means and that telling a lie is wrong. The

Deemster should endeavour to put the witness at ease without being patronising or condescending. The Deemster and counsel should speak in a language that the witness can understand.

729. Advocates should not attempt over-vigorous cross examination of vulnerable witnesses. Advocates should use language which is free from jargon and which is appropriate to the age of the child. The questions should be kept short and simple and the witness should be given an opportunity to respond. Counsel should not engage in repetitive questioning.

730. See English Criminal Justice System Home Office Report *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Using Special Measures.*

731. See also the NSPCC video *A case for balance* demonstrating good practice when children are witnesses which makes the following points:

- child witness cases need to be identified and expedited at all stages. Judicial control is essential.
- introductions and explanations should be given prior to the child giving evidence.
- the child's views should be sought as to whether wigs and gowns will be worn.
- the prosecution and defence advocates should be introduced to the child.
- the judge should make sure that the child understands who people are and what is going to happen.
- familiarity with the TV link equipment is important.
- out of the presence of the jury the judge should set ground rules for the examination of children.

732. The judge should request that questions be short and simple; ask how long cross- examination is likely to take and indicate that breaks will be taken if necessary.
The judge should advise children:

- to listen carefully to the questions
- not to guess
- not to rush; people in court are writing down their answers
- when they know the answer to reply and not leave anything out
- to say if they do not understand the question, do not know the answer or do not remember

- that the judge can always see the child on the TV link even though the child cannot always see the judge
- how to catch the judge's attention e.g. by raising a hand
- they need not give their full name and address out loud
- to tell the truth.

When questioning younger children, 'signposting' is helpful:

- tell the child the subject matter (e.g. "Now about guessing. I don't want you to guess."), ask the question, then recap and check that the child understands.

Questions should:

- be short and simple
- be asked one at a time
- use pauses where appropriate
- give the child time to answer
- follow a structured approach
- use the child's own vocabulary e.g. for parts of the body or for family members
- cease if the child loses concentration or becomes distressed.

Intervention is not necessary if questioning is appropriate. However, judges and advocates need to be alert to:

- the child's demeanour
- multiple questions or questions combined with assertions
- questions taken literally but mistakenly
- questions with double negatives
- a sequence of questions which may be regarded as oppressive e.g. those ending with a negative assertion, or repetitious questions which may press the child to change the answer
- inappropriate tone
- conduct which amounts to bullying
- questions about previous inconsistent statements which may confuse the child
- questions about 'inconsistencies' which are, in fact, irrelevant to the charge or trivial
- the need for special techniques to facilitate the child's communication.
- the prosecution advocate should shield the child witness from unnecessary or unfair attack by drawing the judge's attention to questioning which is inappropriate in tone or content or which is framed as an assertion or which is clearly repetitive.

733. Judge Hedley: "The first obligation of intervening on behalf of a witness should actually be on prosecuting counsel, but judges certainly recognize that they have a role to do so."

734. Graham Trembath: "A good cross-examiner will achieve a situation where children relax and become themselves. In these circumstances the cross-examination is more likely to be successful, so far as persuading a jury to question the truthfulness of what is being said. A child should be cross-examined gently and with respect. If I am aggressive, any useful answers that may result will be ignored or overlooked by the jury because they take the view the answer has come simply because I have bullied the child or have been bombastic."

735. Nigel Pascoe QC: "When I start to cross-examine, I say something like, shall we strike a bargain? If I am wrong, will you tell me? And the child says yes. And if I am right, will you also tell me? And the child says yes. That's a perfectly straightforward way of telling the child that I am gong to be putting things that the child won't agree with. The child is going to have the freedom to say, no, I don't agree. If I make a child cry in cross-examination, I have probably failed in the eyes of the jury. They will say, look what he's done. I will also have failed in terms of my duty to the child, because I do not believe that cross-examination, doing your job properly, can ignore the effect of questioning on the child."

Witness anonymity

736. *R v Davies* [2008] UKHL 36 is an important English case in respect of issues relevant to witness anonymity. It is not permissible at common law for a defendant to be fairly convicted where the conviction is based solely or to a decisive extent upon the testimony of one or more anonymous witnesses. Counsel need names and addresses and details of any previous convictions of witnesses to enable credibility and reliability to be tested. The defendant needs to see the accusers. Following *Davies* subsequent legislation was quickly implemented in England and Wales covering this issue in the form of the Criminal Evidence (Witness Anonymity) Act 2008 (Act of Parliament). See *R v Mayers* [2008] EWCA Crim 2989 and *Practice Direction (Criminal Proceedings : Witness Anonymity and Forms*) [2009] 1 WLR 157. See commentary on the *Mayers* case at [2009] Crim LR pages 277-279. See *R v Powar* [2009] EWCA Crim 594; [2009] 2 Cr App R 8. See also the New Zealand Law Commission's Report 42 *Evidence Law: Witness Anonymity* (1997).

Good character

737. If a defendant is of good character this is an issue he may wish to raise at trial. He may elicit confirmation from the officer in charge of the case giving evidence that he has no previous convictions or there may be admissions to that effect. Moreover he may call witnesses to

testify as to his positive good character. If a defendant wishes to rely on his good character he must establish the evidential foundation which will enable him to do so.

738. In *Gilbert* (Privy Council judgment 27th March 2006) it was stressed that defence counsel should ensure that the judge clearly understands whether the defendant is relying upon his good character. Paragraph 11 of the judgment referred to the general rule as to counsel's responsibility of raising the issue of the defendant's good character and calling evidence in this respect or putting the relevant questions to prosecution witnesses. Counsel should consider the impact of good character, the need to adduce evidence of good character and assist the court in respect of the necessary directions to the jury.

739. See also *Muirhead* (Privy Council judgment 28th July 2008) especially at paragraph 32 which stresses that the judge's duty to give the direction only arises when evidence of good character is before the court.

740. In *Smith* (Privy Council judgment 23rd June 2008) the following was stated:

> "29.The final issue is that of the absence of a good character direction. It was not the judge's duty to give such a direction if evidence of good character had not been brought before her, rather it was the responsibility of defence counsel to ensure that it was so brought…
> 30. The law has become clearer since the time of this trial and it hardly needs repetition now that a defendant is entitled to have a good character direction from the judge when the facts warrant it and that its absence may be a ground for setting aside a verdict of guilty. It is the duty of defence counsel to ensure that the defendant's good character is brought before the court, and failure to do so and obtain the appropriate direction may make a guilty verdict unsafe: *Sealey & Headley v The State* [2002] UKPC 52, (2002) 61 WIR 491; *Teeluck & John v The State* [2005] UKPC 14 [2005] 1 WLR 2421. It has, however, been emphasised by the Board in recent cases that the critical factor is whether it would have made a difference to the result if the direction had been given: see, eg *Bhola v The State* [2006] UKPC 9, (2006) 68 WIR 449, para 17, per Lord Brown of Eaton-under-Heywood. In the present case the appellant did not give evidence and merely made an unsworn statement from the dock, so that the credibility limb of the direction would have been of lesser consequence. The propensity limb might have been of some relevance, but their Lordships do not consider that, looking at the trial as a whole, it would have made any difference to the verdict."

741. The Privy Council in *DPP v Varlack* (judgment 1st December 2008) stated:

> "26. The final issue is that of the refusal of a good character direction. It is now well established that in any case where the defendant is of good character, in the

sense of having no criminal convictions, he or she must have the benefit of an appropriate direction, covering both credibility and propensity: see the summary of the applicable principles in *Teeluck v State of Trinidad and Tobago* [2005] UKPC 14, [2005] 1 WLR 2421, 2430-31, para 33. The respondent did not give evidence, although she made a largely self-serving written statement, which removed much of the need for a direction relating to her credibility. That leaves the element directed towards propensity, that a person of good character is less likely to commit a crime, especially a grave crime such as that with which she was charged. The judge declined to give a good character direction because of the respondent's conduct, in that she said that she connived at Todman's liaison with Kishma Martin, contracted for the purpose of exploiting her generosity. This in itself, though reprehensible behaviour, would not have been enough to warrant depriving the respondent of a good character direction, though it could have been tempered by some appropriate comment. The same applies to the rather more serious aspect for present purposes, that the respondent's defence involved suggesting an inference that she may have been contacting Hamm on the evening of 29 August to arrange or confirm a meeting in connection with Todman's drug dealing. It would have been legitimate for the judge to make some comment about the respondent's criminal propensity, but their Lordships do not consider that a good character direction should have been withheld altogether, since that propensity by no means necessarily extends as far as demonstrating a propensity to murder.

28. That is not, however, the end of the matter. It has been emphasised by the Board in a number of recent cases that the critical factor is whether it would have made a difference to the result of the case if a good character direction had been given: see, eg, *Bhola v The State* [2006] UKPC 9, (2006) 68 WIR 449, para 17, per Lord Brown of Eaton-under-Heywood. Their Lordships consider, looking at the trial as a whole, that it would have not made sufficient difference to the trial to alter the verdict."

742. The following is an extract from the Specimen Directions of the Judicial Studies Board in respect of a defendant's good character:

"23. Defendant's Character - Good

Wherever there is any doubt as to whether both limbs of the character direction apply, or wherever it is thought that it may be necessary in the particular circumstances to modify a 'character direction', it is desirable to canvass the proposed direction with counsel before their closing speeches. In R v Durbin [1995] 2 Cr App R 84, 91, the court laid down guidelines for cases in which it might be appropriate to give a modified direction. The court stressed the importance of the principle that 'The jury should not be directed to approach the case on a basis which ... is artificial or untrue.' Generally, however, this direction should not be watered down: see eg Note 5 overleaf.

You have heard that the defendant is a man/young man of good character [not just in the sense that he has no convictions recorded against him, but witnesses have spoken of his positive qualities]. Of course, good character cannot by itself provide a defence to a criminal charge, but it is evidence which you should take into account in his favour in the following way/s:

First limb

If a defendant does not give evidence and he has not made any statement to the police, or other authority or person which is admitted in evidence, ignore 1 below.

1. *(If a defendant has given evidence)* In the first place, the defendant has given evidence, and as with any man of good character it supports his credibility. This means it is a factor which you should take into account when deciding whether you believe his evidence.

(If a defendant has not given evidence, but has e.g. made a statement to the police or has answered questions in interview, see Note 2, below). In the first place, although the defendant has chosen not to give evidence before you, he did, as you know give [an explanation to the police]. In considering [that explanation] and what weight you should give it, you should bear in mind that it was made by a person of good character, and take that into account when deciding whether you can believe it.

Second limb

2. In the second place, the fact that he is of good character may mean that he is less likely than otherwise might be the case to commit this crime now. *(In cases where it is necessary to give the Delay direction, see direction 37, para 4).*

I have said that these are matters to which you should have regard in the defendant's favour. It is for you to decide what weight you should give to them in this case. In doing this you are entitled to take into account everything you have heard about the defendant, including his age, [...] and [...]. *(Obviously the importance of good character will vary from case to case, and becomes stronger if the defendant is a person of unblemished character of mature years, or has a positively good character, and at this stage the benefit of this to a defendant whose good character justifies it may be pointed out to the jury, with words such as:)* Having regard to what you know about this defendant you may think that he is entitled to ask you to give [considerable] weight to his good character when deciding whether the prosecution has satisfied you of his guilt).

Notes

1. See *R v Vye, Wise and Stephenson* 97 Cr App R 134; *R v Aziz and Others* [1995] 2 Cr App R 478. In *Aziz* the House of Lords referred to the 'veritable sea-change in judicial thinking in regard to the proper way in which the judge should direct the jury on the good character of the defendant' and to the recognition that 'the good character of a defendant is logically relevant to his credibility and the likelihood that he would commit the offence in question.' Also see: *R v Fulcher* [1995] 2 Cr App R 251 and *R v Hickmet* [1996] Crim LR 588.

2. In the case of *R v Napper* [1996] Crim LR 591, Lord Taylor CJ held that the requirement to give a *'Vye'* direction is unaffected by the situation arising when it may be appropriate to give an Inference direction under Section 35 of the

Criminal Justice and Public Order Act 1994 (see post, page 39.1). See also *R v Kanuga* [1998] *2 Archbold News* 3, CA.

3. If the judge rules that a defendant should be treated as a man of good character even though strictly speaking he is not (for example because he has spent convictions), the full direction on good character should be given to the jury: *R v Miller and others*, unreported (97 /02841/X4). See also *R v M* (Ian) [1999] *6 Archbold News 3.*

4. For the application of this direction to a case in which a defendant had cautions but no convictions, see *R v Martin* [2000] 2 Cr App R 42.

5. A good character direction should be given in the form of an affirmative statement rather than a rhetorical question (R v Lloyd [2002] Cr App R 355) and should not be qualified by suggesting that its significance in relation to propensity is less when the offence is spontaneous *(R v Fitton* [2001] 3 Archbold News 2)."

Archbold (2003) 4-406 page 482 et seq.
Blackstone (2003) F13.1 page 2177 et seq."

Bad character

743. If the defendant does not lose the shield provided by section 1(f) of the Criminal Evidence Act 1946 then in the normal course of events his bad character and any previous convictions would not be referred to during the course of the trial. If however the defendant loses his shield by attacking prosecution witnesses or if similar fact evidence is properly admitted or if he chooses to put his bad character before the jury it is important that the jury are directed to consider the position in its proper context. See *Chambers* (Appeal Division judgment 12th August 2010) which deals with issues relating to the bad character of a defendant and evidence of the same before the jury.

744. Consider the old Specimen Direction 24 of the Judicial Studies Board (prior to significant changes in English law which have not yet been followed in Manx law). For the position in England see Criminal Justice Act 2003 and *Campbell* [2007] EWCA Crim 1472; [2007] 2 Cr App R 28. The old Judicial Studies Board Direction 24 was as follows : -

"24. Defendant's Character - Bad

(*where not introduced as evidence of propensity*)

You have heard that the defendant has previous convictions [for ....]. This has been given in evidence because he [has attacked the character of a prosecution witness and it is right that in those circumstances you should know the character of the person making that attack] [has claimed to be of good character] [has given

evidence against a co-defendant, who has cross- examined him on his character]. [has chosen to do so] <if defendant puts his previous in evidence>
What is the relevance of the defendant's convictions in this case? The only reason why you have heard about his previous convictions is that knowledge of the character of the defendant [who has made this attack] may assist you to judge the truthfulness of his evidence when you come to consider this matter.
You must not automatically assume either that the defendant is guilty or that he is not telling the truth just because he has previous convictions. His convictions are not relevant at all to the likelihood of his having committed the offence nor are they evidence that the defendant committed the offence for which he stands trial now. They are relevant only as to whether you can believe him. You do not have to allow these convictions to affect your judgement. It is for you to decide the extent to which, if at all, his previous convictions help you about that.
(Add as appropriate:)
[The defendant tells you that although he has convictions, he has always pleaded guilty on his previous appearances before the court. This is a matter which you may take into account when deciding what impact his convictions have upon his truthfulness].
[The defendant has admitted that he has on ... occasion[sJ pleaded not guilty but has been found guilty by a jury after having given evidence on oath in that case. You are entitled to consider this when deciding whether you can believe him].
Notes
1. See R *v Prince* [19901 Crim LR 49, CA and the principles set out in *R v Burke* 82 Cr App R 156, *R v McLeod* [1995] 1 Cr App R 591, R *v Carter* (1996) *The Times,* 14 November and *R v Miller* (1996) *The Times,* 28 November. See also *R v Jones* (1997) 8 *Archbold News* 3, CA.

Archbold (2000) 4-410 page 463, 8-199 page 1111 et seq.
Blackstone (2000) F14.1 page 2147 et seq. F14.29 page 2165 et seq.

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745. In *R v Moore* (Court of General Gaol Delivery judgment 10th September 2004) I dealt with an application which concerned what is commonly referred to as "similar fact evidence" in respect of an arson case. I endeavoured to review some of the relevant law (including *DPP v P* [1991] 2 AC 447 and *In Re Beaumont* 1999-01 MLR 149 judgment of Deemster Kerruish) and concluded as follows:

"43. Great caution needs to be taken in respect of applications of this nature and all the relevant details need to be carefully considered. I note in particular the ten characteristics and the seven additional factors stressed by the prosecution. Although the disputed evidence is prejudicial against the Defendant in my judgment the probative force in support of the allegation being tried is sufficiently great to make it just to admit the disputed evidence notwithstanding that it is prejudicial to the accused. In the present case there is evidence of a number of fires at a number of properties at which Mr Moore was a tenant. The fires all started in similar circumstances and Mr Moore is frequently found at the scene of the fires. In my judgment it would be an affront to common sense to describe that as a mere coincidence…

47. It is time that the law on the admissibility of evidence and common sense got a little closer. We should have confidence in the ability of a Manx jury with an abundance of common sense and fairness to reach a verdict on the evidence before it. In my judgment the disputed evidence does have sufficient probative force to enable it to be admissible. What weight the jury will attach to it is entirely a matter for them. The explanation of the disputed evidence on the basis of coincidence is, in my judgment, an "affront to common sense" and the prosecution should therefore be entitled to put it before the jury for their consideration. To explain the disputed evidence on the basis of coincidence would cause common sense to revolt. It would be artificial in the extreme to keep the evidence from the jury. A criminal case needs to be fair to the defendant, fair to the prosecution, fair to the complainant and fair to the community as a whole. The objective is for innocent defendants to be acquitted and guilty defendants to be convicted. Fairness demands that all relevant and admissible evidence be placed before the jury to enable them to come to a 'not guilty' or 'guilty' verdict.

48. Having had full regard to the issues in this case I rule as a matter of law that the disputed evidence the prosecution seek to adduce is admissible."

746. Lord Carswell in *DPP v Hurnam* (Privy Council judgment delivered 25th April 2007) at paragraph 22 stated:

"…One of the principles underlying the rule allowing the admission of evidence of bad character is that where a defendant has attacked the character of a prosecution witness, with the object of impugning his veracity, he cannot then put himself forward as a man of unblemished character whose word is to be accepted: see, eg, *R v Cook* [1959] 2 QB, 340, 348, per Devlin J. It is a matter then for the discretion of the trial court to determine whether any evidence of bad character which the prosecution proposes to adduce should be excluded. The Board would ordinarily be very slow to interfere with the exercise of such a discretion. Nor did it receive any argument as to the ambit of the evidence of bad character which may be admitted in Mauritius under this principle. Prosecuting counsel attacked the respondent vigorously, but in their Lordships' judgment his conduct did not exceed permissible bounds or come near equating with the type of behaviour exemplified by that portrayed in *Randall v The Queen* [2002] UKPC 19, [2002] 1 WLR 2237 or *Benedetto v The Queen* [2003] UKPC 27, [2003] 1 WLR 1545, both of which were relied on by the respondent."

747. In *Shetty* (judgment 4th January 2007) I stated:

"22. Generally evidence of a defendant's disposition or bad character or acts of previous misconduct is inadmissible. There are exceptions to this general position such as the situation where a defendant loses his shield or the situation where a defendant's previous misconduct may be admitted under the law relating to similar fact evidence. Another important exception is dealt with by *Archbold* 2005 at paragraph 13-42 onwards under the heading "Motive and Background". The common law does permit evidence to be adduced as to the background to an offence where this is relevant to the offence charged and where the account to be placed before the court would be incomplete and incomprehensible without the background evidence, and this is so notwithstanding that such background

evidence might include evidence establishing that the accused was guilty of an offence with which he was not charged."

748. In *Oates* (judgment 14th February 2007) I stated:

"13. In general, as Manx law presently stands, a defendant's bad character is not a matter which is put before the jury (See generally pages 118-155 under the heading Character of the Defendant in May's *Criminal Evidence* 4th Ed). That no longer appears to be the position under English law. See the Criminal Justice Act 2003.

14. The common law allows for the admissibility of evidence that may show the defendant to have had a bad character where it is legitimate to do so for the purpose of proving the case against him. Evidence admissible for this purpose is normally brought under one of two heads namely similar fact evidence and evidence of background or motive. In *Moore* (judgment September 2004) I dealt with the issue of similar fact evidence. Similar fact evidence does not appear relevant in the matter presently before the court. In *Snape* (judgment 14th May 2004) at paragraphs 6 and 7 I stated:

"6. I accept that when one is considering fairness that it is of fundamental importance that the previous convictions or bad character of a Defendant should not in the normal course of events be put before the jury. One only needs to look at the cases referred to in *Archbold* 8-203 and *Blackstone* D12.21 on the position of discharging juries when there are inadvertent references to previous convictions and bad character to appreciate that. See also *Archbold* 4-258.

7. Subject to the Defendant losing or surrendering his shield under Section 1(f) of the Criminal Evidence Act 1946 (or to other specific statutory exceptions, such as the handling cases as referred to by Mrs Jones this morning) the principle is that there should be no reference to the bad character or previous convictions of the Defendant, presumably on the basis that the prejudicial nature of such evidence far outweighs its probative value. Previous convictions are not relevant at all to the likelihood of a defendant having committed future offences. People should not automatically assume that a defendant is guilty or that he is not telling the truth just because he has previous convictions."

15. Archbold 2005 edition at paragraph 13-44 refers to the comments of Purchas LJ in *R v Pettman* unreported May 2 1985 CA and the principle that:

"where it is necessary to place before the jury evidence of part of a continual background of history relevant to the offence charged in the indictment and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence".

This statement was accepted by the English Court of Appeal as a "useful formulation" of the law in *R v Fulcher* [1995] 2 Cr App R 251"."

[In *Oates* an order was made that the information be amended to delete one count which the defendant had pleaded guilty to and one count which the prosecution were not proceeding with leaving one count on the information which was contested]

749. In say an attempted murder case or a grievous bodily harm with intent case in relation to an offence that took place on a specified day it may be the prosecution case that some of the background and the history to the relationship between the complainant and the defendant is relevant and admissible and some of the allegations and evidence in respect of a defendant's previous misconduct or alleged acts of violence against the complainant are also relevant. Consider the applicable legal principles to such a case. See for example May *Criminal Evidence* 4th Edition Chapter 7 and an old edition of *Archbold* 2005 Chapter 13 which deals with the position under English law prior to the commencement of Chapter 1 of Part II of the Criminal Justice Act 2003.

750. A general principle in Manx law is that the evidence of a defendant's bad character is normally inadmissible in a criminal trial.

751. The general rule is that the prosecution may not adduce evidence of bad character of the defendant i.e. evidence of his bad reputation, disposition and previous misconduct.

752. There are exceptions to that general rule including where a defendant loses his shield for example by putting his character in issue or by attacking prosecution witnesses. Another exception is that evidence of a defendant's previous misconduct may be admitted under the rule relating to similar fact evidence.

753. Another important exception is dealt with by *Archbold* 2005 at paragraph 13-42 onwards under the heading 'Motive and Background'. Consider in detail the authorities referred to in *Archbold* in this area of the law. See also *Archbold* paragraphs 13-29 to 13-36.

754. The relationship of a complainant and a defendant can sometimes be properly admitted as an integral part of the history of the alleged crime so far as they might reasonably and fairly shed some significant light on the alleged conduct of the defendant.

755. See the comments of Purchas L J in *R v Pettman* 1985 Court of Appeal unreported May 2nd, 1985 CA (5048/C/82), *R v Fulcher* [1995] 2 Cr App R 251 CA and *R v Ball* [1911] AC 47 HL. Where it is necessary to place before the jury evidence of part of the continual

background of history relevant to offences charged in the information and without the totality of which the account placed before the jury would be incomplete or incomprehensible then the fact that the whole account involves including evidence in relation to previous alleged misconduct on the part of a defendant is not of itself a ground for excluding such evidence.

756. It will often be relevant for the jury to know about the personal relationship of a complainant and a defendant in order to make a properly informed assessment of the entire evidence. For example in a threat to kill case evidence of previous history between the parties is admissible as tending to prove that the defendant intended his words to be taken seriously (*R v Williams* 84 Cr App R 299).

757. See also the provisions of section 13 of the Criminal Justice Act 1991 and the case of *Ironside* 1999-01 MLR 177.

758. Sometimes evidence in relation to previous recent history of the relationship between a complainant and a defendant and alleged previous acts of violence towards the complainant by the defendant is relevant and admissible. It could be vital background evidence which is both explanatory and probative in that it goes to issues in the trial such as the defendant's intent or previous threats by the defendant against the complainant or to rebut certain suggestions. These may be crucial issues in the proceedings.

759. Moreover in certain circumstances the admission of such evidence would not have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. As was referred to in *Ironside* the function of the judge is to protect the fairness of the proceedings and normally proceedings are fair if a jury hears all relevant evidence which either side wishes to place before it (that would mean relevant and admissible evidence and may beg the question but the comments are nevertheless of assistance). The defendant should have a full opportunity of challenging such evidence. If he does not it may be unfair to allow the evidence in.

760. The jury should normally be given all the relevant and admissible pieces of the jigsaw. Which pieces they accept and which pieces they reject and how they put them together will be entirely a matter for the jury.

761. The common law permits evidence to be adduced as to the background to an offence, where this is relevant to the offence

charged and where the account to be placed before the court would be incomplete and incomprehensible without the background evidence. This is so notwithstanding that such background evidence might include evidence establishing that the accused was guilty of an offence with which he was not charged.

762. Consider each case on its own facts, circumstances and merits. Consider fairness to all concerned and any prejudice also.

763. *Snape* (Court of General Gaol Delivery judgment 14th May 2004) concerned the issue of a defendant's bad character being inadvertently placed before the jury and also an issue in respect of the defendant's fingerprints being on the national database. I did not regard the issues raised by the defence in respect of the difficulties presented by the fingerprint evidence as being persuasive enough to indicate that a fair trial was no longer possible. The jury were, however, discharged on a separate ground. I accepted at paragraph 6 of the judgment that, as the law stood, it was considered of fundamental importance that the previous convictions or bad character of a defendant should not in the normal course of events be put before a jury. At paragraph 13 of the judgment I stated:

> "13. If there is to be a re-trial the prosecution and the defence should continue to do their best to ensure that no information is brought to the jury's attention that may indicate or imply that the Defendant has previous convictions and is of bad character. I am impressed with the sensible and pragmatic efforts of both prosecution and defence counsel todate in dealing with these issues including the editing of the transcripts of the interviews and indeed the entire exclusion of some of the interviews and the agreed statement for the jury signed by the advocate for the Defendant and the advocate for the prosecution. It is clearly important that members of the jury are not misled but it is equally important that evidence is duly filtered to ensure that no inadmissible evidence or irrelevant evidence is inadvertently placed before the jury. Although it is not for the prosecution to coach their witnesses it is to my mind incumbent upon the prosecution to ensure that they frame questions to witnesses with great care especially in the circumstances of this case and to ensure, so far as humanly possible, that no witness inadvertently refers to the previous convictions or bad character of the Defendant."

764. Lady Hale in *DS v Her Majestys Advocate* (Privy Council judgment 22 May 2007) at paragraph 64 stated:

> "Our historic reluctance to trust the jury with this information [accused's character and conduct] arises from the fear that they may give it more weight than it deserves or regard it as proving that which it does not prove."

765. Lord Brown in *DS* at paragraph 103 in relation to the legal position in his jurisdiction (which should be contrasted with the present position in Manx law) commented as follows:

> "Plausible and beguiling though at first blush this argument may appear, it is to my mind founded upon a central fallacy. The long and the short of it is that the accused has no fundamental right to keep his past convictions from the jury. There is nothing intrinsically unfair or inappropriate in putting these into evidence and, indeed, in doing so not merely on the limited basis that they go only to the accused's credibility (the fiction which to my mind disfigured the administration of criminal justice in England and Wales for far too long, now at last ended by the Criminal Justice Act 2003 – see particularly sections 101(1)(d) and 103(1)(a)) but on the wider ground that they bear also on the accused's propensity to commit offences of the kind with which he is charged."

766. In causing death by dangerous driving cases it is especially important to focus on the important and relevant issues. The raising of contested collateral issues (such as previous alleged bad driving prior to the incident) had the dangers not only of unduly adding to the length and cost of the trial but of complicating the issues which the jury had to decide and taking the focus away from the most important issue or issues. Allegations of prior but uninvestigated misconduct were likely to involve stale and incomplete evidence possibly unduly prejudicing the defendant by reason of the evidence being difficult to meet (See *R v McKenzie* [2008] RTR 22 a decision based on section 101 of the Criminal Justice Act 2003).

Exclusion of confessions

767. Section 11 of the Criminal Justice Act 1991 provides as follows:

> "11 Confessions
>
> (1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.
>
> (2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained-
>
> (a) by oppression of the person who made it; or
>
> (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

(3) In any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, the court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in subsection (2).

(4) The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence-

(a) of any facts discovered as a result of the confession; or

(b) where the confession is relevant as showing that the accused speaks, writes or expresses himself in a particular way, of so much of the confession as is necessary to show that he does so.

(5) Evidence that a fact to which this subsection applies was discovered as a result of a statement made by an accused person shall not be admissible unless evidence of how it was discovered is given by him or on his behalf.

(6) Subsection (5) applies-

(a) to any fact discovered as a result of a confession which is wholly excluded in pursuance of this section; and

(b) to any fact discovered as a result of a confession which is partly so excluded, if the fact is discovered as a result of the excluded part of the confession.

(7) Nothing in Chapter 1 shall prejudice the admissibility of a confession made by an accused person.

(8) In this section 'oppression' includes torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture)."

Exclusion of unfair evidence

768. Section 13 of the Criminal Justice Act 1991 provides as follows:

"13 Exclusion of unfair evidence

(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
(2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence."

769. See *Archbold* 15-452 and also the *Police and Criminal Evidence Act 1984* 5th Edition by Zander.

770. Deemster Kerruish in *Ironside* 1999-01 MLR 177 at 192-193 stated:

> "I refer to *R. v. Quinn* (2), in which Lord Lane, C.J. underlined the general nature of the discretion under s.78 of the Police and Criminal Evidence Act 1984 (of Parliament), which is equivalent to s.13 of the Criminal Justice Act 1991 ([1990] Crim L.R. at 583):
>
> "The function of the judge is therefore to protect the fairness of the proceedings and normally proceedings are fair if a jury hears all relevant evidence which either side wishes to place before it, but proceedings may become unfair if, for example, one side is allowed to adduce relevant evidence which, for one reason or another, the other side cannot properly challenge or meet. . ."
>
> In this case, I do not consider that the defence is restricted in challenging the relevant evidence at trial.
>
> I also refer to *Archbold (op. cit.,* para. 15-430*(g),* at 1438) which reads: "There are two stages in the application of section 78: first, the circumstances in which the evidence came to be obtained; secondly, whether admission of the evidence would have an adverse effect upon the fairness of the proceedings. In considering fairness, a balance has to be struck between that which is fair to the prosecution and that which is fair to the defence (see *R. v. Hughes* [1988] Crim.L.R. 519, CA). The final aspect of the fairness test appears to relate only to the defendant: whether the admission of the evidence would have 'such an adverse effect on the fairness of the proceedings that the court ought not to admit it'."
>
> In this case I do not consider on the evidence before me that the circumstances in which the relevant evidence came to be obtained would justify my exercising my discretion under s.13 of the Criminal Justice Act 1991 in favour of the defendant. In considering "the fairness test," I do not consider that the admission of the relevant part of Mr. Kelly's second statement and the relevant part of Miss Harvey's fourth statement would have such an adverse effect on the fairness of the proceedings that the court ought not to admit them. Accordingly I reject Mr. Verardi's application."

771. See also *R v Corkill* 1999-01 MLR N 14 unfairly obtained evidence – interrogation when in custody for another offence. Consider whether there have been significant and substantial breaches. See *Shillito* 2001-03 MLR 356, *R v Bell* 2005-06 MLR 327, *Sayle* 2005-06 MLR 196, *Openshaw* (Appeal Division judgment delivered 28th September 2000), *R v P* [2002] 1 AC 146 and *Slater* (Court of General Gaol Delivery judgment delivered 24th March 2009).

772. The following are extracts from the Appeal Division's judgment in *Openshaw* (judgment delivered 28th September 2000):

"The Law

The Code, and specifically Code C, which we are considering is a section of the Police Powers and Procedures Code created pursuant to section 75 of the Police Powers and Procedures Act 1998. It is a code which sets out in plain and untechnical language the obligations falling on those having responsibility for persons held in custody and the rights of those so detained. It is a document which, in theory at least, could be made available to a detained person. The Respondent in the instant case was detained in custody for a period in excess of seven hours. Self-evidently the Codes of Practice and specifically Code C applied to and indeed regulated his detention.

Code C paragraph 9.2 is headed "Medical treatment" and reads so far as is material to this appeal as follows:-

"The custody officer must immediately call the Police Surgeon or in urgent cases for example where a person does not show signs of sensibility or awareness must send the person to hospital or call the nearest available medical practitioner if a person brought to a police station or already detained there:

(a) appears to be suffering from physical illness or mental disorder or

(b) is injured …

(d) fails to respond normally to questions or conversation or

(e) otherwise appears to need medical attention.

This applies even if the person makes no request for medical attention whether or not he has already had medical treatment elsewhere."

This section, in our judgment, sets out the obligation of a Custody Officer to call the Police Surgeon if he believes medical attention may be required. Further assistance to a Custody Officer in determining the ambit of his responsibilities is given in the Notice for Guidance at 9A and 9B.

Paragraph 9.4 is in substantially different terms altogether. It reads as follows:

"If a detained person requests a medical examination the Police Surgeon must be called as soon as practicable. He may in addition be examined by a medical practitioner of his own choice at his own expense."

I should say in passing that it is common ground in this case that the Respondent had sufficient money in his possession to pay any charges incurred in the calling of a medical examiner.

Mr. Montgomerie, on behalf of the Chief Constable, argues that paragraph 9.4 does not give to a detained person an absolute or unfettered right. He submits that paragraph 9.4 must be read in conjunction with paragraph 9.2 and that in some way the right of a detained person to seek to secure the attendance of a doctor, whether the doctor is a Police Surgeon or a doctor of his own choosing, is limited

only to obtaining a medical examination if be feels unwell or feels that for reasons of his own good health such an examination is necessary.

Mr. Montgomerie further submits that the Custody Officer retains a discretion over whether and in what circumstances a detained person's request for a medical examination should be met .

In our judgment there is nothing in the language of paragraph 9.4 which supports such a construction. Indeed we can see Custody Officers being left in a wholly impossible position if we acceded to the submissions being made. The language of the Code is clear and unambiguous. If a detained person requests a medical examination the Police Surgeon must be called. Further, if a detained person wishes to be examined by a medical practitioner of his own choice then he is entitled to be so examined. It is, in our judgment, a right irrespective of whether the detained person's motive is to safeguard his own health or as here to give a blood sample and/or to be examined by a doctor to assess whether he was sober or not… ..

It follows from this that we conclude that the High Bailiff was entitled to come to the conclusion that he did and accordingly we answer the first question posed in the affirmative.

In the course of submissions, we have been invited by Mr. Montgomerie to give guidance as to how police officers should deal with paragraph 9.4 in a variety of different factual situations but we feel, in the context of this judgment, that it would be inappropriate to accept such a general invitation. Our function in this appeal is to consider whether the High Bailiff's conclusion was one to which he was entitled to come having regard to the clear and mandatory nature of the language of the Code and as we have indicated he was plainly so entitled.

The effect of a breach of this or indeed any other part of the Code will depend upon all the circumstances of a particular case; sometimes it may lead to evidence otherwise relevant and probative being ruled inadmissible; sometimes it may have a less significant effect or indeed no effect at all. In his ruling, the High Bailiff recognised that it may have "fatal consequences" as he put it; sometimes as he clearly recognised it would not. He plainly understood and it is accepted before us that he bad a discretion when considering the effect of the breach on other evidence in the case…

Clearly the High Bailiff had to consider the fairness of the proceedings. In *R v Quinn* (1990) Criminal Law Review 581, Lord Lane CJ. considered how a judge should consider a breach of the equivalent codes under the Police and Criminal Evidence Act 1984. He said as follows:

"The function of the judge is therefore to protect the fairness of the proceedings and normally proceedings are fair if a jury hears all the relevant evidence which either side wishes to place before it, but proceedings may become unfair if, for example, one side is allowed to adduce evidence which, for one reason or another, the other side cannot properly challenge or meet, or where there has been an abuse of process e.g. because evidence has been obtained in deliberate breach of procedures laid down in an official code of practice."

In the end we are unhesitatingly of the view that on the facts of this case the High Bailiff was fully entitled to exclude from his consideration the intoxilyser reading and self-evidently, without that, there was no case whatsoever."

773. In *Slater* (judgment delivered 24th March 2009) I stated the following:

"32. I turn now to the relevant law and procedure.

33. I accept, as do the prosecution and the defence, that a judge has a discretion at common law to exclude evidence if it is necessary in order to secure a fair trial for the accused and that evidence may be excluded on the grounds that its prejudicial effect exceeds its probative value.

34. I note the provisions of section 13 of the Criminal Justice Act 1991. The court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

35. I have considered *Ironside* 1999-01 MLR 177, *R v Corkill* 1999-01 MLR N 14 *Shillito* 2001-03 MLR 356, *Bell* 2005-06 MLR 327, *Sayle* 2005-06 MLR 196, *Newbery* (Appeal Division judgment delivered 30th September 2004) *Openshaw* (Appeal Division judgment delivered 28th December 2000), *R v P* [2002] 1 AC 146 and the other authorities referred to by counsel including *Crampton* (1991) 92 Cr App R 369.

36. I have considered Code C. Code C is a code of practice for the detention, treatment and questioning of persons by police officers.

37. Paragraph 6.1 of Code C provides that subject to the provisos in Annex B all people in police detention must be informed that they may at any time consult and communicate privately, whether in person, in writing or by telephone with an advocate, and that independent legal advice is available free of charge from the duty advocate. Paragraph 6.4 of Code C provides that no police officer shall at any time do or say anything with the intention of dissuading a person in detention from obtaining legal advice. Note 6K provides that a person is not obliged to give reasons for declining legal advice and should not be pressed if he does not wish to do so.

38. Paragraph 9.2 of Code C provides that the custody officer must immediately call the police surgeon if a person brought to a police station or already detained there appears to be suffering from physical illness or a mental disorder, is injured, fails to respond normally to questions or conversation (other than through drunkenness alone) or otherwise appears to need medical attention. This applies even if the person makes no request for medical attention and whether or not he has already had medical treatment elsewhere (unless brought to the police station direct from hospital). Paragraph 9.4 of Code C provides that if a detained person requests a medical examination the police surgeon must be called as soon as practicable. He may in addition be examined by a medical practitioner of his own choice at his own expense.

39. Note 9B provides that it is important to remember that a person who appears drunk or behaving abnormally may be suffering from illness or the effects of drugs or may have sustained injury (particularly head injury) which is not apparent, and that someone needing or addicted to certain drugs may experience harmful effects within a short time of being deprived of their supply. Police should therefore always call the police surgeon when in any doubt, and act with all due speed.

40. Paragraph 11.2 of Code C provides that immediately prior to the commencement or re-commencement of any interview at a police station or other authorised place of detention the interviewing officer shall remind the suspect of his entitlement to free legal advice and that the interview can be delayed for him to obtain legal advice (unless the exceptions in paragraph 6.6 or Annex C apply). It is the responsibility of the interviewing officer to ensure that all such reminders are noted in the record of interview.

Determination of the Application

41. I turn now to my determination of the Application.

42. I am not persuaded that there has been a breach of Code C serious, significant and substantial or otherwise. I am not persuaded in the circumstances of this case that the police were duty bound to arrange for a medical examination of the Defendant prior to interview. I am not persuaded that the police were duty bound to encourage the Defendant to take legal advice.

43. The Defendant was advised of his rights both before and during interview and declined the services of an advocate. The police are not under a duty to insist that a defendant takes legal advice prior to interview. The police are not under a duty to persuade a Defendant to take legal advice prior to interview. The duty is simply to inform a defendant of his rights. If a defendant is aware of his legal rights and declines the services of an advocate then that is a matter for a defendant.

44. The duties of the police in such circumstances are plain. They must inform the Defendant of his rights. They did that in this case. They must not say or do anything with the intention of dissuading a person in detention from taking legal advice. There is no evidence that the police said or did anything in this case with the intention of dissuading the Defendant from taking legal advice.

45. The Defendant in this case had been informed of and was well aware of his rights. With knowledge of his rights he declined the services of an advocate. It may well be that he now, with hindsight and advice, regrets that decision but the police cannot take the blame for the Defendant's decisions on the night of 9th May 2008. The Defendant must take responsibility for his own decisions and his own actions. He cannot justifiably blame the police for his predicament.

46. The custody officer plainly did not believe that medical attention was required. The Defendant did not appear to be suffering from physical illness or mental disorder. The Defendant did not appear to be injured. The Defendant did not fail to respond normally to questions or conversation. The Defendant did not appear to need medical attention. The Defendant did not request a medical examination. There was no evidence that the Defendant was acting abnormally.

The police did not believe that a medical examination was necessary and in the circumstances of this case the police were fully justified in holding that belief.

47. I have watched the images of the Defendant within the Custody Suite. I have listened to a tape of the Defendant's interview. I appreciate that I am not medically qualified but my impression of the Defendant within the Custody Suite and during the interview is of a young man who is alert and aware of what is happening. He is cooperative and there is nothing in what I have seen or heard to indicate that he did not appear fit to be interviewed.

48. No acceptable evidence (medical or otherwise) has been presented to this court that leads the court to conclude that the police should have arranged for the attendance of the police surgeon or another doctor.

49. I hear all that the Defendant and Mr Sharpe have had to say in relation to the Defendant being under the influence of cannabis that day. I have also heard the evidence from the police officers who came into contact with the Defendant. No medical evidence has been presented to this court as to the Defendant's medical condition on the 9th May 2008 or indeed as to the possible affects of taking cannabis.

50. Moreover where there is conflict in their evidence I prefer the evidence of the Police Constables Ross and McLean and Sergeant Jones to the evidence of the Defendant and Mr Sharpe. The Defendant may well have smoked some cannabis that day but I find that the Defendant and his friend Mr Sharpe have exaggerated the extent of the Defendant's cannabis intake that day and the affect of it upon the Defendant. Frankly, it is plain to me that the Defendant gave his evidence with a view to having his admissions excluded and I consider it in light of that motivation.

51. The Defendant has, in parts, a very clear and detailed recollection of the events of the 9th May 2008, the time leading up to his arrest, the searches, the detention and interview.

52. The Defendant's answers at interview appear lucid, comprehensive and frank. It appears that he understood the process and the questions and that he was able to respond to them. On some occasions, as is his right, he declined to respond to questions or to give names. The Defendant was making decisions as to how he would respond to questions, if at all. The Defendant was, so far as the police were concerned, fit to be interviewed. He was advised of his rights and proper procedures were followed in respect of the interview. There has been no breach of Code C.

53. The police cannot be validly criticised in the circumstances of this case.

54. There is no unfairness either at common law or under section 13 of the Criminal Justice Act 1991 in adducing the transcripts of the Defendant's interviews into evidence. It is not necessary to exclude such evidence to secure a fair trial. Indeed if such evidence were excluded that would be unfair to the prosecution. Fairness is not all one sided. The court must consider fairness to the defence, fairness to the prosecution and fairness to the community generally.

55. Having regard to all the circumstances in which the evidence was obtained, it does not appear to this court that the admission of the evidence which is the subject of the Application would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. Indeed in fairness that evidence must be admitted.

56. The Defendant's responses at interview contain clear admissions by an individual who had been advised of his rights on several occasions and who appeared fit to be interviewed. There is no medical evidence before the court which indicates that the Defendant was not fit to be interviewed on the 9th May 2008.

57. In justice and in fairness the prosecution should be permitted to adduce into evidence the clear admissions made by the Defendant during the course of his properly conducted interview on the 9th May 2008.

58. I do not therefore exclude the relevant and admissible evidence contained in the transcript of the Defendant's interview on the 9th May 2008.

59. I dismiss the Application for the reasons stated."

774. See *R v Drowner* [2009] EWCA Crim 1361 in respect of the exclusion of guilty pleas of co-defendants where such evidence had no apparent probative value on the issue before the jury and would have had a potentially adverse effect on the fairness of the trial for the accused.

775. In *R v Newbery* (Appeal Division judgment 30th September 2004) the Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) agreed with the Acting Deemster's approach to the exercise of his discretion under section 13(1) of the Criminal Justice Act 1991. The Acting Deemster considered that the admission of the evidence would not have an adverse effect on the fairness of the proceedings and added:

"It must be remembered that the court needs to consider fairness, not only to a defendant, but also for the public acting through the prosecutor."

776. The position in respect of consequences following breaches of the Codes of Practice is dealt with elsewhere in this book at paragraphs 664 to 677.

777. The Privy Council in *Eiley v The Queen* [2009] UKPC 39 at paragraph 49 stated:

"49 A judge enjoys a discretion to exclude evidence if the circumstances in which it has been obtained are such as to render its admission contrary to the interests of justice. One circumstance where it may be appropriate to do so is where the

witness has received an inducement to give evidence for the prosecution that will render the evidence suspect - see *R v Turner* (1975) 61 Cr. App. R. 67 at p. 78. The discretion is one that should be used sparingly. Such promises, when made to an accomplice to a crime, have been described as distasteful - see *Turner* at p. 80. They are nonetheless capable of being justified in the public interest. While the Board has reservations as to whether it was appropriate for the Director of Public Prosecutions to enter into the immunity agreement that was concluded with Mr Vasquez, their Lordships do not consider that the trial judge should have refused to received the evidence of Mr Vasquez of his own motion."

778. In *R v Baines* (General Gaol Delivery judgment 24th November 2008) I reached the conclusion having regard to all the circumstances including the circumstances in which the evidence was obtained that the admission in criminal proceedings of a deposition and affidavit produced in civil proceedings would have such an adverse effect on the fairness of the criminal proceedings that the court ought not to admit it. At paragraphs 76 to 78 of the judgment I touched upon the provisions of section 13 of the Criminal Justice Act 1991 and some of the local jurisprudence on those provisions. See *Rottmann v Brittain* [2009] EWCA Civ 473 in respect of the priviledge against self incrimination in the context of bankruptcy proceedings and foreign criminal proceedings. See also *R v K(A)* [2009] EWCA Crim 1640.

Witness refusing to give evidence and contempt

779. Take care in dealing with a witness who refuses to give evidence. A reluctant witness should be given the opportunity of giving an explanation and of being represented and hasty action by the trial Deemster should be avoided.

780. Rose LJ in *Yusuf* [2003] 2 Crim App R 32 at paragraph 16 stated:

"The role of the courts in seeking to protect the public … can only properly be performed if members of the public cooperate with the courts. That cooperation includes participation in the trial process … as a witness. Witnesses who may have important evidence to give must come to court if they are summoned… if they choose to ignore a summons, they are in contempt of court and can expect to be punished because their failure to attend is likely to disrupt the trial process and in some cases to undermine it entirely."

781. A witness who without just cause disobeys a witness order or summons is guilty of contempt of court as if it were committed in the face of the court (See *Archbold* at paragraph 28-111, *Ex p. Fernandez* (1861) 10 CB (NS) 3). In *Lennock*, 97 Crim App R 228 it was said that culpable forgetfulness could not amount to a "just excuse" for not attending in response to a summons.

782. However where there is no witness summons or witness order a witness is not in contempt if he deliberately fails to attend trial (*R v Wang* [2005] 4 *Archbold News* 1, CA). The position may be otherwise, if knowing that a witness summons is about to be served the witness evades service.

783. See *H v Wood Green Crown Court* [2006] EWHC 2683 (Admin) in respect of a witness who had been arrested after non compliance with a witness summons and then attended and turned hostile in the witness box.

784. It is contempt for a witness to refuse to be sworn or affirmed, to leave the court before his examination is completed or to refuse to answer an admissible question unless he makes a claim of privilege which the court upholds (*Ex p. Fernandez* (1861) 10 CB (NS) 3, *AG v Clough* [1963] 1 QB 773 and *AG v Mulholland and Foster* [1963] 2 QB 477).

785. As to the adoption of a summary procedure in respect of contempt generally see paragraphs 28-115, 28-116 and 28-117 onwards of *Archbold.* The decision to imprison a person for contempt should never be taken too quickly. There should always be time for reflection as to what is the best course to take. If it is possible for the contemnor to have legal advice he should be given an opportunity of having it, but justice does not always require that in every circumstance of contempt the contemnor has a right to legal advice. Situations arise in court sometimes where a judge has to act quickly and to pass such sentence in respect of the contempt as he thinks proper at once. Giving a contemnor an opportunity to apologise is one of the most important aspects of the summary procedure. In *Lewis* (The Times, November 4, 1999) the English Court of Appeal stated that in the face of an outburst of protest from the public gallery it is often wise for a judge to rise, leaving anyone intent on misbehaving to do so in his absence and to face the consequences. Where however, as in *R v Hill* [1986] Crim LR 457 a person disturbs the court by abusing the judge in a way that cannot be overlooked it is for the judge to take steps to safeguard the court's authority. Steps additional to those indicated in *R v Moran* 81 Cr App R 51 include (a) the immediate arrest and detention of the offender (b) telling the offender what the contempt is said to have been (c) considering counsel's submissions (d) if satisfied that punishment is merited imposing it. See also *R v Phelps* [2009] EWCA Crim 2308.

786. Where circumstances dictate that a judge conducts an immediate inquiry into an allegation of intimidation of a prosecution witness by the defendant the questioning of the witness should be undertaken by counsel for the prosecution, so as to avoid any impression of the judge acting as prosecutor; and if the contempt is found proved, it might be better to postpone both the giving of reasons and the imposition of a penalty to the end of the trial (*R v Macleod* [2001] Crim LR 589).

787. In *R v K* 78 Cr App R 82 CA the English Court of Appeal said that a witness who, by refusing to give evidence, is liable to be found in contempt of court and thus risks committal to prison, should be given the opportunity of legal representation. It is wise not to take any action in respect of contempt in haste. See also *Phillips* (1984) 78 Crim App R 88, *Montgomery* [1995] 2 Crim App R 23 and *Robinson* [2006] EWCA Crim 613 in respect of sentences for contempt in this area of the law.

788. If a witness refuses, or appears to be disposed to refuse, to give evidence a judge is perfectly justified in making it clear to the witness that the consequences of his refusing might be serious and might involve punishment of the witness.

789. People who without proper cause refuse to give evidence would normally be punished with imprisonment. In some cases however inaction or a warning is the best policy. See *Archbold* at paragraph 28-126 onwards in respect of appropriate sentences.

790. In *R v Popat* [2008] EWCA Crim 1921 it was held that in addition to service of the summons, bringing the document to the attention of the witness was sufficient to give rise to an obligation to attend so that failure to attend may be contempt of court. Hughes L J stated that where a witness is reluctant and has failed to appear in response to a summons very often the mere issue of a warrant for arrest is enough to achieve attendance. It is very common for judges to give a direction at the time of issuing a warrant for arrest which is designed in the interests of the witness to avoid the witness having to be locked up overnight or perhaps longer. It could be directed that the police officer need not execute the warrant if he is satisfied that the witness is going to attend voluntarily or need not execute it if the witness agrees to come with the officer. In some circumstances a warrant can be issued backed for bail.

791. See *Jackson v Radcliffe* 1921-51 MLR 344 in respect of contempt and publications tending to prejudice a fair trial. The Appeal Division

(Judge of Appeal Hytner and Deemster Callow) in *Barr* 1990-92 MLR 398 dealt with the law of contempt in relation to comments in the media. I, along with T W Cain QC in his capacity as Attorney General, appeared as counsel in that case. I well remember the developments during the weekend hearing and the robust performance of the late Geoffrey Kinley for the appellants.There were some fierce exchanges between Mr Kinley and Judge of Appeal Hytner. The appeal was dismissed and on the 12th May 1993 the Judicial Committee of the Privy Council refused the appellants special leave to appeal.

Witness/defendant becoming ill

792. In respect of a witness becoming ill part way through his evidence see *Archbold* at paragraph 8-254 and *R v Symmons* [2009] EWCA Crim 654.

793. The Appeal Division (Judge of Appeal Tattersall and Deemster Doyle) in *Williams* 2003-05 MLR N 8 (judgment delivered on the 20th August 2003) at paragraph 13 stated:

> " … there is no doubt that the Acting Deemster applied the correct test, namely, whether, in the absence of Mr Griffin [a potential witness], it was possible for the Appellant to have a fair trial, which is simply another way of asking whether any injustice would result from the trial proceeding. She concluded that a fair trial was possible even in the absence of Mr Griffin."

794. In respect of defendants becoming ill part way through the trial see *R v Taylor* [2008] EWCA Crim 680. In that case Moses L J stated:

> "13 Having recorded his views as to the cogency of the defence and recalled the medical evidence, the judge concluded that the appellant was afflicted by an involuntary illness or incapacity. The judge found as a fact that the appellant was not voluntarily absent from the trial. He then considered both the House of Lords' decision in R v Jones [2003] 1 AC 1 and its endorsement of the earlier decision of Rose LJ [1981] Crim LR 720 . Having considered those cases and directed himself as to the factors which had to be considered in such a situation, the judge ruled that there was no realistic possibility of knowing when it would be that the appellant would recover and ordered that the trial should continue.
> 14 Thereafter, the appellant attended court between 15 and 20 September 2006. His presence should not be held against him since it is plain that he had been advised not only of the judge's conclusion but of the way in which the judge had expressed himself. He clearly felt difficulties in attending. This culminated in an application on 21 September 2006 for the judge to recuse himself. The application was made because of the way the judge had expressed himself as to the merits or otherwise of the defence, despite the fact that he had ruled that the appellant had not voluntarily absented himself from the trial. Later that same day the appellant collapsed in the dock. An ambulance was called and a doctor called. No further

medical report was obtained. The doctor reported that tests revealed that the appellant's position had been stabilised and the appellant asked to remain in court. Subsequently the appellant gave a full uninterrupted evidence, which took place over five days.

15 The first question therefore in this appeal is whether the judge correctly directed himself as to the principles to be applied and was correct to conclude that the trial should continue, despite the appellant's obvious health difficulties. These were, as the judge found, involuntary, and for three days, possibly longer, he could not attend court.

16 It is not submitted that where a defendant is involuntarily absent it inevitably follows that the trial cannot continue. The right to be present at court is vital. It is not only a right so that the defendant can participate by giving instructions and following the trial, but also so that he can see and hear the witnesses who are giving evidence against him. This is not only part of the process by which a defendant participates at trial, but is also a sanction by which the public can be confident that there are pressures on those witnesses who give adverse evidence against a defendant to tell the truth. To give an account of events in a witness statement or within the seclusion of a police station is one thing. It is quite another to have to stand up in public, face-to-face with a defendant, and repeat those assertions. Thus Rose LJ in *Halson* emphasised the importance of the right of a defendant to be present at his trial and to be legally represented. In considering the factors which a judge has to take into account, as explained by the House of Lords in *Jones* , it is apparent that that right is not absolute. Even in cases where a defendant is not voluntarily absent, a judge must consider for how long an adjournment is likely to be and also the extent to which legal representatives in the absence of a defendant are able to receive and act upon their instructions. The court is also enjoined to take into account the public interest in the pursuit of a continuous trial and the interest not only of victims but also of witnesses. There is a public interest in not allowing a trial to be put off for an indefinite period.

17 Nevertheless, where a defendant is absent through ill-health, the judge must be astute to see that an adjournment for a short period until he recovers will not be refused, save in circumstances where he is compelled to take the opposite course.

18 It is plain that the judge had concerns as to whether the appellant really was suffering to the extent which the doctor and the appellant said. Were it not so, he would not have made a number of comparatively disparaging comments about not only “the good doctor”, but also as to the appellant's need to “pull himself together”. Those remarks in our judgment were inapposite. If, as he was entitled to do, the judge had doubts about either the genuineness of the symptoms or their gravity, the proper course was to adjourn and invite another medical report to be prepared (if the appellant was agreeable) in order to check upon those symptoms. It was not for the judge to exercise some medical expertise which he did not have.

19 The judge found that the appellant had not voluntarily absented himself. The correct question was, therefore, as Mr Long rightly pointed out, to consider what flowed from that finding. It did not inevitably follow that the judge was bound to allow the adjournment. Uppermost in his mind was whether an adjournment would resolve the problem. There was ample medical evidence, to which we have already referred, to indicate that it would not have done so. The appellant's anxiety and stress was of some considerable standing and length. He had apparently suffered an alcohol problem and was often anxious and of low mood or depressed. The stress of a trial would inevitably exacerbate those symptoms. In those circumstances the judge was entitled to consider whether an adjournment for a few days would have remedied the problem and to conclude that it would

not have done so. He was entitled to take that view. His concern to press on and his belief that the appellant would be able to cope with the trial were, as it turned out, proved to be correct. Moreover, the judge was entitled to consider what was likely to happen during the appellant's absence. It is true that witnesses were called, but their evidence was hardly the subject of any fierce cross-examination. Having regard to the issues, it was not likely to have been subjected to such treatment. Since the appellant's general defence was, "I was in the house, but others in the house would not have noticed", it is difficult to see why those witnesses needed to be there, let alone cross-examined in his presence. Since the appellant's defence in relation to playing music was the general defence, "I do not know who these people were who impersonated me, but they were not me", again it is unlikely that the cross-examination could have been particularly fierce or focused, or that much difference would have been made by the appellant being present in the dock. There was always the danger after all that one of those witnesses might recognise him.

20 In short, whilst the imperative is clear that a defendant ought to be present during the trial and that in most cases an adjournment should be granted where he is ill, this was one of those rare cases where we conclude that the judge was right to allow the prosecution to continue to adduce evidence. He was wrong, however, to be so scathing about the paucity of the defence. That was not relevant to his ruling and can only have excited feelings both in the appellant's representative and in the appellant himself of antagonism towards the case he was advancing. That antagonism was not relevant and ought not to have been expressed. What was relevant was the extent to which the appellant was prejudiced in the context of the defence that he was proffering by not being present whilst those witnesses were called. Having regard to the nature of the defence and having regard to the evidence that the witnesses gave, in our view the appellant was not prejudiced. In those circumstances, whilst we would criticise the terms in which the judge expressed himself, for the reasons we have given we take the view that he reached the correct conclusion entirely consistent with what their Lordships said in Jones and what Rose LJ said in *Halson*. We have not cited the important passages in either of those cases lest mere reiteration detracts from the importance of the words there used. It suffices to say that the right to be present at trial is not absolute; a judgment must in some circumstances be exercised as to whether an adjournment will be of benefit or cause any prejudice. In our judgment the judge was correct to foresee that it would not have done any good and correct to consider that there was no prejudice. For those reasons the first and main ground of the appeal is rejected."

795. In *R v Gray* 1990-92 MLR 74 the first defendant was in a poor state of health and Acting Deemster Field-Fisher held that his trial should be adjourned. The court had a discretion to continue the trial if he were to be absent because of illness, but it was held that such discretion should be exercised sparingly and never when it would seriously prejudice a defence. It was further held that the complicated nature of the case, the mass of detail involved, the recent deterioration in the first defendant's health, particularly in memory and concentration, and the likelihood of hospital visits during the trial period, together all added up to certain prejudice, making an adjournment necessary. A stay of the proceedings was also granted on

the basis of delay and abuse of process. *Gray* was the highwater mark in Manx common law in respect of abuse of process applications. The tide has retreated somewhat since *Gray*. A separate section of this book deals with stays and abuse of process applications at paragraphs 812 to 844.

Failure to call witness

796. In respect of the failure to call particular witnesses see *Archbold* at paragraph 4-400.

797. Beldam L J in *Forsyth* [1997] 2 Cr App R 299 at 323 stated:

> "A question from the jury asking why a particular witness has not been called is not unusual and normally the judge answers such an enquiry by giving a direction that they must not speculate about the evidence such a witness might or might not have given, and that they must decide the case on the evidence they have heard. Where, as in this case, a defendant has no need to call the witness having regard to the issues raised, the judge explains this to the jury."

798. Acting Deemster Montgomerie in *McStay* 2005-06 MLR N9 usefully set out the relevant law in respect of the duty on the prosecution to have witnesses available. The note in the Manx Law Reports reads as follows:-

> "The decision whether to call prosecution witnesses to give evidence at trial is primarily a judgment for the prosecution to make. The court will, in general, only interfere with the decision if it is wrong in principle or if the court is required to do so in the interests of justice and/or to promote a fair trial. The general principles governing such decisions by the prosecution may be summarized as follows (R. v. *Russell-Jones,* [1995] 3 All ER. 239, followed):
>
> (a) the prosecution must generally have at court all witnesses whose statements have been served as witnesses on whom the prosecution intends to rely, if the defence wants those witnesses to attend;
>
> (b) the prosecution has an unfettered discretion over which statements to serve, but must normally disclose all material statements not served;
>
> (c) the prosecution has a further discretion over whether to call or tender any witnesses, but this is not unfettered;
>
> (d) such discretion must be exercised in the interests of justice and to promote a fair trial, with the prosecution having in mind their overall duty of fairness;
>
> (e) further, the prosecution ought normally to call or offer to call all witnesses who give direct evidence of the primary facts of a case, unless it has good reason to regard the witness as unworthy of belief. The defence cannot always be expected to call witness of primary facts whom the prosecution have discarded;

(f) it is for the prosecution to decide which witnesses give direct evidence of the primary facts and whether those witnesses are unworthy of belief, but a witness cannot properly be regarded as unworthy of belief merely because he provides evidence contradicting that of a larger number of other witnesses; and

(g) the jury should have available all direct evidence which the prosecution considered material when serving statements, even if there are inconsistencies between witnesses. The prosecution, however, is not obliged to tender witnesses merely to provide the defence with material with which to attack the other prosecution witnesses.

These principles are not to he regarded as a rule book to provide for all circumstances. Special situations may arise which these principles have not considered.

In view of the conflicting authorities, however, the court's power to order the calling of a prosecution witness remains unclear."

799. Acting Deemster Montgomerie in *Myers* (judgment delivered on the 26th March 2009, unreported) at paragraph [22] of his comprehensive judgment stated:

" [22] The extent of the Prosecution obligation to call witnesses has been raised by the Defence. I shall therefore deal with the law in relation to that. It was considered in R. v. Russell-Jones [1995] 1 Cr. App. R. 538. At page 542 the Court of Appeal set out the following principles which emerge from the authorities and from rules of practice:-

(1) Generally speaking the Prosecution must have at Court all the witnesses whose statements have been served as witnesses on whom the Prosecution intend to rely, if the Defence want those witnesses to attend. In deciding which statements to serve, the Prosecution have an unfettered discretion, but must normally disclose material statements not served.

(2) The Prosecution enjoy a discretion whether to call, or tender, any witness they require to attend, but the discretion is not unfettered.

(3) The first principle which limits this discretion is that it must be exercised in the interests of justice, so as to promote a fair trial. Per Fullagar J. in Ziems v. The Prothonotary of the Supreme Court of New South Wales [1957] 97 C.L.R. 279, 292:

"The present case, however, seems to me to call for a reminder that the discretion should be exercised with due regard to traditional considerations of fairness."

The dictum of Lord Thankerton in Adel Muhammed El Dabbah v. The Attorney-General for Palestine [1944] A.C. 156 that the Court will only interfere if the Prosecutor has been influenced by some oblique motive does not mean that the Court will only interfere if the Prosecutor has acted out of malice. It means that the Prosecutor must direct his mind to his overall duty of fairness, as a minister of

justice. Were he not to do so, he would have been moved by a consideration not relevant to his proper task - in that sense, an oblique motive.

(4) The next principle is that the Prosecution ought normally to call or offer to call all the witnesses who give direct evidence of the primary facts of the case, unless for good reason, in any instance, they regard the witness' evidence as unworthy of belief. In most cases, the jury should have available all of that evidence as to what actually happened, which the Prosecution, when serving statements, considered to be material, even if there are inconsistencies between one witness and another. The Defence cannot always be expected to call for themselves witnesses of the primary facts whom the Prosecution have discarded. For example, the evidence they may give, albeit at variance with other evidence called by the Crown, may well be detrimental to the Defence case. If what a witness of the primary facts has to say is properly regarded by the Prosecution as being incapable of belief, or as some of the authorities say "incredible", then his evidence cannot help the jury assess the overall picture of the crucial events; hence, it is not unfair that he should not be called.

(5) It is for the Prosecution to decide which witnesses give direct evidence of the primary facts of the case. A Prosecutor may reasonably take the view that what a witness has to say is at best marginal.

(6) The Prosecutor is also the primary judge of whether or not a witness to the material events is incredible, or unworthy of belief. It goes without saying that he could not properly condemn a witness as incredible merely because, e.g., he gives an account at variance with that of a larger number of witnesses, and one that is less favourable to the Prosecution case than that of the others.

(7) A Prosecutor properly exercising his discretion will not therefore be obliged to proffer a witness merely in order to give the Defence material with which to attack the credit of other witnesses on whom the Prosecution rely. To hold otherwise would, in truth, be to assert that the Prosecution are obliged to call a witness for no purpose other than to assist the Defence in its endeavour to destroy the Crown's own case. No sensible rule of justice could require such a stance to be taken.

Finally, the Court added that these principles should not be regarded as a lexicon or rule book to cover all cases. There may be special situations that have not been adverted to, and in every case it is important to emphasise the judgment to be made is primarily that of the Prosecutor, and in general the Court will only interfere with it if he has gone wrong in principle."

800. The Appeal Division (Judge of Appeal Tattersall and Deemster Doyle) in *Williams* 2003-05 MLR N 8 (judgment 20th August 2003) stated:

"7. Miss Hannan submitted, and we regard this as uncontroversial, that the prosecution are under a duty to take all reasonable steps to secure the attendance of a witness required by the defence, but that if it is impossible to have the witness present the court, in its discretion, is entitled to allow the trial to proceed

provided that no injustice thereby results - see *Attorney General v Brown, Shaw, Fulcher & Cole* [19th February 1999] and *Attorney General v Tully* [2nd July 2003]."

No case to answer

801. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Devo* (judgment delivered 29th October 2008) stated:-

> 155. It is settled law that a submission of no case to answer should be allowed when there is no evidence upon which, if the evidence adduced was accepted, a reasonable jury, properly directed, could convict : see *R v Galbraith* (1981) 73 Cr App R 124 where the earlier authorities were reviewed and guidance given as to the proper approach by Lord Lane CJ, at 127, in the following terms :
>
> `(1) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty. The judge will stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness`s reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.`
>
> Lord Lane observed that borderline cases could be left to the discretion of the trial judge.
>
> 156. Where the prosecution case depends on the jury drawing an inference, as in this case that since Mr Riedel had been intimately involved in dealing in Somatropin through Hatcher, he was still so involved in dealing in Somatropin through Apelbe, the correct approach is for the judge to ask whether a reasonable jury, properly directed, would be entitled to draw the inference : see *R v Jabber* (2006) 10 Archbold News 3."

802. In *R v Christian* (judgment delivered 5th December 2007) I dealt with a powerful submission of no case to answer and stated:

> "5 I turn now to the relevant law. I have considered Archbold *Criminal Pleading Evidence and Practice* 2008 paragraphs 4-294 to 4-295, Blackstone's *Criminal Practice* 2003 from paragraph D14.26 under the heading of 'Submission of No Case to Answer' to paragraph D14.32, the Privy Council case of *Daley v The Queen* [1994] 1 AC 117 and *R v Colin Shippey* 1988 Crim LR 767.
>
> 6. Archbold paragraphs 4-294 and 4-295 sets the position out as follows:

"In *R. v. Galbraith* 73 Cr.App R. 124 CA, the earlier authorities were reviewed and guidance given as to the proper approach:

'(1) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty—the judge will stop the case.
(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury' (*per* Lord Lane C.J. at p, 127).
The Lord Chief Justice then observed that borderline cases could be left to the discretion of the judge. For an example of the approach of the Court of Appeal to the exercise of this discretion, see *R. v Lesley* [1996] 1 Cr.App.R. 39.CA.
In *R. v. Shippey* [1988] Crim. L.R. 767, Crown Court (a decision on its facts, laying down, no new principle of law: *R v Pryer, Sparkes and Walker*, unreported, April 7, 2004, CA [2004] EWCA Crim. 1163), Turner J. held that the requirement to take the prosecution evidence at its highest did not mean "picking out all the plums and leaving the duff behind' The judge should assess the evidence and if the evidence of the witness upon whom the prosecution case depended was self-contradictory and out of reason and all common sense then such evidence was tenuous and suffered from inherent weakness. His Lordship did not interpret *Galbraith* as meaning that if there are parts of the evidence which go to support the charge then that is enough to leave the matter to the jury, no matter what the state of the rest of the evidence is. It was, he said, necessary to make an assessment of the evidence as a whole and it was not simply a matter of the credibility of individual witnesses or of evidential inconsistencies between witnesses, although those matters may play a subordinate role. In *Brooks v. DPP* [1994] 1.A.C. 568 at 581, PC, it was said (in the context of committal proceedings) that questions of credibility, except in the clearest of cases, do not normally result in a finding that there is no prima facie case.
Where the prosecution case depends upon the jury drawing a particular inference from the evidence, the correct approach at the close of the prosecution ease is to ask whether a reasonable jury, properly directed, would be entitled to draw the inference: *R. v. Jabber* [2006] 10 *Archbold News* 3, CA (rejecting an argument, based on an observation in *Kwan Ping Bong v. The, Queen* [1979] A.C. 609, PC that the inference must be one that no reasonable person could fail to draw from the facts proved).
As to the evidential value of the defendant's statements for the purposes of a submission of no case, see *post* § 15-408; and for reliance upon a co defendant's confession where there is a case for the co defendant to answer and the co-defendant's guilt would be probative in the case against the defendant, see *R.* v *Hayter* [2005] 2 Cr.App.R.3. HL, post § 9-85".

7. Blackstone's *Criminal Practice* 2003 at paragraph D14.26 deals with the topic of a submission of no case to answer and refers in detail to *Galbraith* and

some of the subsequent cases including *Shippey*. At paragraph D14.28 the position in respect of identification cases is outlined as follows:

"The correct approach to submissions of no case to answer in prosecutions turning upon identification evidence was laid down by the Court of Appeal in *Turnbull* [1977] QB 224 (see F18.2 and F18.26). As one of several safeguards against erroneous convictions based on witnesses mistakenly identifying the accused, the Court of Appeal stated that, if the quality of the identification evidence on which the prosecution case depends is poor and there is no other evidence to support it, then the judge should direct the jury to acquit (pp. 229H - 230A). However, supporting evidence capable of justifying leaving a case to the jury even if identifying evidence is poor need not be corroboration in the strict sense (p. 230B - D). Although *Turnbull* predates *Galbraith* [1981]1 WLR 1039, there is no suggestion that the principles in it have been affected by the later decision. In fact, the obligation on the trial judge to uphold a submission if the identifying evidence is poor and there is no supporting evidence may be regarded as the clearest example of the application of the second limb of the *Galbraith* test. This is because the identifying witness undoubtedly provides *some* evidence of the accused's guilt (therefore a submission on the first limb would be bound to fail) but it is so weak or tenuous that no jury properly directed could properly convict on it (see *Daley v The Queen* [1994] 1 AC 117)."

8. Reference should also be made to the Appeal Division's judgment in *Williams* delivered on the 19th August 2003.

9. The headnote to *Daley v The Queen* [1994] 1 AC 117 reads as follows:

"The defendant was charged with the murder of a woman who had been shot by one of two men who had broken into her house. The prosecution case depended wholly on visual evidence of identification by the deceased's husband, which the defence alleged to have been mistaken. At the close of the prosecution case the judge rejected a submission of no case to answer. The judge in her summing up referred to serious weaknesses in the identification evidence. She warned the jury that the identification had not been very good and expressed her opinion that the prosecution had not made the identification clear enough. The defendant was convicted and the Court of Appeal of Jamaica dismissed his application for leave to appeal against conviction. On the defendant's appeal to the Judicial Committee:—
Held, allowing the appeal, that where the trial judge considered that the quality of the identification evidence was poor and insufficient to found a conviction, and there was no other evidence to support that identification evidence, he should withdraw the case from the jury at the end of the prosecution case; but that where the strength of the prosecution evidence depended on the determination of a witness's reliability, and on one possible view of the facts there was evidence upon which a jury could properly convict, the judge should not stop the trial even if he regarded the prosecution evidence as uncreditworthy but should leave the case to the jury; that since the trial judge had rationally considered the prosecution's case on identification to be too weak to sustain a conviction she should have withdrawn the case from the jury with a direction to acquit the defendant; and that, therefore, a miscarriage of justice had occurred and the conviction would be quashed (post, pp. 125B - C, 126E - F, 127G - 128A, 129D - F, l30A). *Reg. v. Turnbull* [1977] Q.B. 224, C.A. and *Reid (Junior) v. The Queen*

[1990] 1 A.C. 363, P.C. applied. *Reg. v. Galbraith* [1981] 1 W.L.R. 1039, C.A. considered"

10. The short report in the Criminal Law Review in respect of *Shippey* reads as follows:

"High Court sitting at Sheffield, Turner J.; May 23 to 25, 1988.

The defendant Shippey was charged alone with rape and all three defendants were charged jointly with a further rape on a different day of the same girl. The prosecution case rested entirely upon the evidence of the complainant and there was effectively little or no corroboration. After the close of the prosecution case submissions of no case to answer were made by all defence counsel on the basis of *Galbraith (supra)* namely that the evidence was so inherently weak and inconsistent that no jury properly directed could properly convict. The prosecution opposed the application arguing that although there were weaknesses and inconsistencies in the evidence nevertheless there was evidence, which evidence must be taken at its highest in accordance with *Galbraith* and once that was done, it could not be said that a jury properly directed could not properly convict; there being evidence it was a matter for the jury under limb 2(b) of *Galbraith* to assess its strength or weaknesses and accordingly the case should go to the jury. The prosecution referred his Lordship to the cases of *R.* v. *Beckwith* 81 C.L.R. 646 and *Haw Tua Tua* v. *Public Prosecutor* [1981] 3 All E.R. 14 at p. 19 and the article: submission of no case to answer—some recent developments, 82 C.L.R. 558.

Decision : His Lordship considered the case of *Galbraith* in great detail emphasising that it had to be understood that that case was resolving the division of opinion which had arisen between the cases of *Barker* and *Mansfield* (cited therein) and resolving it in favour of *Barker.* The instant case was clearly not a case under limb 1 of the *Galbraith* formulation and His Lordship therefore moved directly to limb 2. It was conceded by the defence that there was undoubtedly some evidence which went to support "on a minimum basis" the proposition that the crimes allegedly committed by the defendants had been so committed by them. However, taking the prosecution case at its highest did not mean picking out the plums and leaving the duff behind. His Lordship found that he must assess the evidence and if the witnesses' evidence was self-contradictory and out of reason and all commonsense then such evidence is tenuous and suffering from inherent weakness. He did not interpret the judgment in either *Galbraith* or *Barker* as intending to say that if there are parts of the evidence which go to support the charge then no matter what the state of the rest of the evidence that is enough to leave the matter to the jury. Such a view would leave part of the ratio of *Gaibraith* tautologous. He found that he had to make an assessment of the evidence as a whole. It was not simply a matter of the credibility of individual witnesses or simply a matter of evidential inconsistencies between witnesses, although those matters may play a subordinate role. He found that there were within the complainant's own evidence inconsistencies of such a substantial kind that he would have to point out to the jury their effect and to indicate to the jury how difficult and dangerous it would be to act upon the plums and not the duff.
His Lordship then went on to identify parts of the complainant's own evidence which he found to be totally at variance with other parts which were supportative of the prosecution case. He labelled those parts variously as being "frankly

incredible" as having "really significant inherent inconsistencies" and as being "strikingly and wholly inconsistent with the allegation of rape," *(e.g.* her voluntary return to the defendant Shippey after he had allegedly earlier informed her that he wanted sexual intercourse with her, that he would not leave until he had had the same and after he had earlier allegedly threatened her with violence if he did not get the same). His Lordship found that he could only accept the prosecution submission that the case must be left to the jury when taken at its highest if he were to ignore the inconsistencies which he had earlier outlined (as described above). He could not ignore those inconsistencies and bearing them in mind he found that a jury properly directed could not properly convict.
Accordingly the submissions were allowed and formal verdicts of not guilty directed".

11. I have also considered further authorities in respect of a judge's power to stop a case and to direct a verdict of not guilty. Those authorities include *Heston-Francois* (1984) 78 Cr App R 209, *Falconer-Atlee* (1973) 58 Cr App R 348 and *R v Brown* 1998 Crim LR 196.

12. In *Heston-Francois* (1984) 78 Cr App R 209 the English Court of Appeal referred to there being no doubt that the court had an inherent jurisdiction to stop a prosecution.

13. In *Falconer-Atlee* (1973) 58 Cr App R 348 Roskill L J in the English Court of Appeal at page 357 stated:

"… the learned judge, having ruled that there was evidence to go to the jury, went on almost to invite the jury to stop the case. This Court has repeatedly said in recent years that this practice should not be followed. If a judge thinks that the case is tenuous, then, even though there is some evidence against the accused person, the judge, if he thinks it would be unsafe or unsatisfactory to allow the case to go to the jury even with a proper direction, should take upon himself the responsibility of stopping it there and then. If the judge is not prepared to stop the case on his own responsibility it is wrong for him to try and cast the responsibility of stopping it on the jury. In this case the jury declined to take the hint the judge offered".

14. The following is an extract from the short report of *R v Brown* [1998] Crim LR 196 (a decision of the English Court of Appeal Criminal Division):

"It seemed to the Court that throughout the trial the judge has a responsibility not to allow a jury to consider evidence on which they could not safely convict …if, at the conclusion of the evidence, the trial judge is of the opinion that no reasonable jury properly directed could safely convict, he should raise the matter for discussion with counsel even if no submission of no case to answer is made. If having heard submissions he is of the same opinion, he should withdraw the case from the jury"."

803. A submission of no case can be made at the close of the case for the prosecution (sometimes exceptionally at end of defence case). The submission is made in the absence of the jury (unless possibly the defence ask that jury remain in which case judge should hear

submissions from the defence in the absence of jury as to why the normal procedure should not be followed). If a submission of no case is rejected, there should be no comment to the jury. If the court rejects some counts but not others the judge can comment to the jury briefly as long as he says nothing to the jury which might be construed as indicating a belief that any remaining counts are well-founded.

804. The following are relevant extracts from *Archbold* :

> "4-294 In *R v Galbraith*, 73 Cr.App.R.124,C.A, the earlier authorities were reviewed and guidance given as to the proper approach:
> "(1) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty – the judge will stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury". (*per* Lord Lane C.J. at p. 127).
> The Lord Chief Justice then observed that borderline cases could be left to the discretion of the judge. For an example of the approach of the Court of Appeal to the exercise of this discretion, see *R v Lesley* [1996] 1 Cr. App.R. 39, C.A.
> 4-295 In *R.v. Shippey* [1988] Crim L.R. 767, Crown Court, Turner J. held that the requirement to take the prosecution evidence at its highest did not mean "picking out all the plums and leaving the duff behind". The judge should assess the evidence and if the evidence of the witness upon whom the prosecution case depended was self-contradictory and out of reason and all common sense then such evidence was tenuous and suffered from inherent weakness. His Lordship did not interpret *Galbraith* as meaning that if there are parts of the evidence which go to support the charge then that is enough to leave the matter to the jury, no matter what the state of the rest of the evidence is. It was, he said, necessary to make an assessment of the evidence as a whole and it was not simply a matter of the credibility of individual witnesses or of evidential inconsistencies between witnesses, although those matters may play a subordinate role. In *Brooks v DPP* [1994] 1 A.C. 568 at 581, PC, it was said (in the context of committal proceedings) that questions of credibility, except in the clearest of cases, do not normally result in a finding that there is no prima facie case."

805. When the prosecution evidence has been concluded it is open to counsel for the defence to invite the Deemster to direct the jury as a matter of law that they should acquit the Defendant either because (1) the prosecution have failed to produce any evidence to establish some essential ingredient of the offence or (2) the evidence produced is so

weak or so discredited by cross examination that no reasonable jury could convict.

806. The Deemster should take care not to usurp the function of the jury. The Appeal Division in *Warren* (judgment 1st February 2010) stressed that the proper determination of a submission of no case in a jury trial involves the striking of a balance between a usurpation by the judge of the jury's functions and the danger of an unjust conviction. If issues of credibility arise these are issues within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty then the judge should allow the matter to be tried by the jury.

807. In *DPP v Varlack* (Privy Council judgment delivered 1st December 2008) the following is stated:

> "14. Submissions of no case were made to the trial judge at the end of the prosecution evidence on behalf of each defendant and their counsel applied to the judge to have the case against their clients withdrawn from the jury. The judge gave a reserved judgment in writing, in which she acceded to the application in respect of the murder charge against Pemberton but rejected all the other defence submissions. At the outset she set out the governing principle in determining applications of no case, based on *R v Galbraith* [1981] 1 WLR 1039 and *Labrador v R* (BVI Criminal Appeal No 10 of 2001). The essential statement of the law for present purposes is a sentence from the judgment of Lord Lane CJ in *Galbraith* at page 1042:
>
> "Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury".
>
> This has long been regarded as a canonical statement of the law, and was so accepted by both parties to the appeal before the Board."

808. See *R v P* [2008] 2 Cr App R 6 in respect of a submission of no case to answer in the context of a prosecution which is dependent on circumstantial evidence. In such a case the judge ought to look at the evidence in the round and ask whether there was a case on which a jury properly directed could convict.

809. In *R v N Ltd and C Ltd* [2008] EWCA Crim 1223 it was confirmed that an English Crown Court judge had no jurisdiction at common law to rule that there was no case to answer before the conclusion of the

prosecution case. See also *Baines* (judgment 24th November 2008 at paragraphs 117 and 119).

810. The Privy Council in *DPP v Varlack* (judgment delivered 1st December 2008) stated:

> "21. The basic rule in deciding on a submission of no case at the end of the evidence adduced by the prosecution is that the judge should not withdraw the case if a reasonable jury properly directed could on that evidence find the charge in question proved beyond reasonable doubt. The canonical statement of the law, as quoted above is to be found in the judgment of Lord Lane CJ in *R v Galbraith* [1981] 1 WLR 1039, 1042. That decision concerned the weight which could properly be attached to testimony relied upon by the Crown as implicating the defendant, but the underlying principle, that the assessment of the strength of the evidence should be left to the jury rather than being undertaken by the judge, is equally applicable in cases such as the present, concerned with the drawing of inferences.
>
> 22. The principle was summarised in such a case in the judgment of King CJ in the Supreme Court of South Australia in *Questions of Law Reserved on Acquittal (No 2 of 1993)* (1993) 61 SASR 1, 5 in a passage which their Lordships regard as an accurate statement of the law:
>
> "It follows from the principles as formulated in *Bilick* (supra) in connection with circumstantial cases, that it is not the function of the judge in considering a submission of no case to choose between inferences which are reasonably open to the jury. He must decide upon the basis that the jury will draw such of the inferences which are reasonably open, as are most favourable to the prosecution. It is not his concern that any verdict of guilty might be set aside by the Court of Criminal Appeal as unsafe. Neither is it any part of his function to decide whether any possible hypotheses consistent with innocence arc (sic) reasonably open on the evidence … He is concerned only with whether a reasonable mind *could* reach a conclusion of guilty beyond reasonable doubt and therefore exclude any competing hypothesis as not reasonably open on the evidence…
>
> I would re-state the principles, in summary form, as follows. If there is direct evidence which is capable of proving the charge, there is a case to answer no matter how weak or tenuous the judge might consider such evidence to be. If the case depends upon circumstantial evidence, and that evidence, if accepted, is *capable* of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus is *capable* of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to answer. There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or to put it another way, could not exclude all hypotheses consistent with innocence, as not reasonably open on the evidence."

A similar statement appears in a recent judgment of the English Court of Appeal, Criminal Division in *R v Jabber* [2006] EWCA Crim 2694, where Moses LJ said at paragraph 21:

"The correct approach is to ask whether a reasonable jury, properly directed, would be entitled to draw an adverse inference. To draw an adverse inference from a combination of factual circumstances necessarily does involve the rejection of all realistic possibilities consistent with innocence. But that is not the same as saying that anyone considering those circumstances would be bound to reach the same conclusion. That is not an appropriate test for a judge to apply on the submission of no case. The correct test is the conventional test of what a reasonable jury would be entitled to conclude."

Cf *R v Van Bokkum* (unreported) 7 March 2000 (EWCA Crim, 199900333/Z3), para 32; *R v Edwards* [2004] EWCA Crim 2102, paras 83-5; Blackstone's *Criminal Practice,* 2008 ed, para D15.62.

23. The judge held that the evidence was such that a reasonable jury might convict. The Court of Appeal held, on the other hand, that because it was in their view as likely that the respondent was a party only to a purpose which did not involve contemplation of the killing of Todman, there was "no basis but speculation on which to ascribe to Varlack participation in one as opposed to the other" (para 31). They did not apply the test of determining what inferences a reasonable jury properly directed might draw, as distinct from those which they themselves thought could or could not be drawn.

24. Their Lordships consider that the Court of Appeal were in error in this respect. The trial judge correctly approached the submission of no case by reference to the test whether a reasonable jury properly directed might on one view of the evidence convict. When one applies this principle, it follows that the fact that another view, consistent with innocence, could possibly be held does not mean that the case should be withdrawn from the jury. The judge was in their Lordships' opinion justified in concluding that a reasonable jury might on one view of the evidence find the case proved beyond reasonable doubt and convict the respondent…"

811. The Privy Council in *Eiley v The Queen* [2009] UKPC 39 dealt with a case in which the prosecution withdrew a charge of murder against an individual (Mr Vasquez) who had entered into an agreement with the Director of Public Prosecutions under which he was promised immunity from prosecution if he gave truthful evidence at the trial. Lord Phillips stated:

"50. None of the defence counsel applied to have the trial stopped at the end of the prosecution case under the principle in *R v Gaibraith* [1981] 1 WLR 1039. Had such an application been made the Board considers that it would have had merit. It would, however, have been an unusual and extreme step for the judge to have ruled that there was no case upon which the jury could safely convict in the absence of any submission to this effect from any defendant. The critical question is whether having regard to the nature of the evidence given by Mr Vasquez, the

circumstances in which it was given and the terms in which the judge summed up the evidence to the jury, the appellants' convictions are safe. The Board has concluded that they are not. For these reasons their Lordships will humbly advise Her Majesty that the three appeals should be allowed and the convictions of the appellants quashed."

Stay on grounds of abuse of process

812. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Devo* (judgment delivered 29th October 2008) stated:

"43. We are satisfied that as a matter of law the power to stay a prosecution arises only where firstly, the prosecution have so manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take advantage of a technicality and that such would be inconsistent with the due administration of justice or, secondly, on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by unjustifiable behaviour on the part of the prosecution which deprives him of a fair trial : see the authorities already referred to above.

44. This is an approach which existed before the advent of the Human Rights legislation and is consistent with the obligations imposed by Article 6 of the Human Rights Act 2001. Such was expressly confirmed by the House of Lords in *R v Looseley* where the House did not discern any appreciable difference between the requirements of Article 6 or the Strasbourg jurisprudence thereon and English law as it had developed in recent years.

45. But some important matters must be noted .

46. Firstly, because prima facie it is the duty of a court to try a person who is charged before it with an offence which the court has power to try, the jurisdiction to grant a stay must be exercised carefully and sparingly and only for very compelling reasons. A stay should not be imposed as a disciplinary measure : *R v Horseferry Road Magistrates` Court, ex parte Bennett* [1994] 1 AC 42, at 74, where the English police, having decided not to use the extradition process, colluded with the South African police to have the appellant arrested in South Africa and forcibly returned the UK against his will.

47. Secondly, the fairness of a trial is not one-sided : *R v Derby Crown Court ex p Brooks* and *Attorney General`s Reference (No 1 of 1990)* [1992] 95 Cr App R 296, at 302.

48. Thirdly, the trial process itself is equipped to deal with the bulk of complaints which found applications for a stay and an argument solely based on the assertion that inadequate disclosure prevents a fair trial will not pass the high threshold because the very fact that the fault in disclosure has been revealed will *usually* mean that it can be appropriately remedied by judicial control of the proceedings : *R v Togher, Doran and Parsons*."

813. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Lawrence* 2003-05 MLR N27 (judgment delivered 28th

July 2004) confirmed the court's jurisdiction in respect of stays. That case involved substantial delays in respect of historic sex offences. Having reviewed the authorities the Appeal Division usefully summarised the position at paragraph 16 of the judgment as follows:

> "Having regard to all such authorities, we have no doubt a stay of proceedings on the ground of delay or any other reason should only be ordered in an exceptional case where a defendant establishes, on a balance of probabilities, that the delay has caused him to suffer serious prejudice, such that no fair trial is possible. In reaching his conclusion, on the facts of a particular case, a Deemster is required to consider the extent to which any possible unfairness to a defendant can be dealt with during the trial process, for example, by ruling evidence inadmissible. Each case will need to be determined on its own facts and there may be some cases, such as *R v Dutton* [1994] Crim. LR 910, where the prejudice is such that an order to stay proceedings is justifiable. Furthermore it may be the case that in exceptional situations, although it is debatable whether *B* can properly be so regarded, this court will quash a conviction where it concludes that the conviction is unsafe because the appellant was put in an impossible position to defend himself. But these cases will be exceptional."

814. Bingham L J, as he then was, in *R v Liverpool Stipendiary Magistrates ex p. Ellison* [1990] RTR 220, 227 stated that:

> "If any criminal court at any time has cause to suspect that a prosecutor may be manipulating or using the procedures of the court in order to oppress or unfairly to prejudice a defendant before the court, I have no doubt that it is the duty of the court to inquire into the situation and ensure that its procedure is not being so abused. Usually no doubt such inquiry will be prompted by a complaint on the part of the defendant. But the duty of the court in my view exists even in the absence of a complaint."

815. Circumstances have to be exceptional to justify a stay. The jurisdiction to decline to allow criminal proceedings to continue should be used sparingly. There are safeguards to a defendant in the trial process itself. These principles shout loudly from the pages and pages of the law reports reporting judgments in respect of applications for stays.

816. *Tully* 2003-05 MLR N1 concerned difficulties in the prosecution providing material to the defence who wished to use such material to cross-examine prosecution witnesses on character. The prosecution had made reasonable attempts to obtain certain medical records and a fair trial could take place even though certain records appeared to be missing. A stay was not granted in the particular circumstances of that case.

817. *Beckford* [1996] 1 Cr App R 94 contains a useful summary of the two main established categories:
(1) cases where the court concludes that the defendant cannot receive a fair trial and
(2) cases where it concludes that it would be unfair for the defendant to be tried
(for example where the prosecution have been guilty of such serious misbehaviour that they should not be allowed to benefit from it to the defendant's detriment).

818. In *R v Momodou and Limani* (2005) 2 Cr App R 6 at 99-110 Judge L J indicated that a judge can stay proceedings even if the prosecution were blameless and the difficulties were created by third parties.

819. In *Bell* 2005-06 MLR 327 at pages 347-348 I stated:

> "57. Mr Bell has yet to plead to the charges and presently enjoys the presumption of innocence. It is not for me to determine the innocence or guilt of the Defendant. If he pleads not guilty and is acquitted after a trial he will be innocent. If he pleads guilty or is found guilty after a trial he will be guilty. Those issues are yet to be determined. Mrs Jones is right to submit that this court should be concerned to maintain the integrity of the criminal justice system. This court is indeed concerned with the maintenance of the integrity of the criminal justice system. As regards the position generally, I remind myself that the criminal justice system does not involve a game where otherwise guilty defendants should be permitted to rely upon technical irregularities to, in colloquial terms, "get away with it". In more judicial terms I would refer to the comments of Lord Justice Auld in the case of *R v Gleeson* (the Court of Appeal Criminal Division Times Law Reports 30th October 2003) where Lord Justice Auld is credited with the comments "a criminal trial is not a game. Its object is to ensure that the guilty are convicted and the innocent acquitted". Those comments also reflect the comments of Lord Scarman in the *Sang* case (1979) 69 Cr. App R. 282 at page 307 where Lord Scarman indicated that the test of unfairness is not that of a game. A defendant should not be permitted to take unfair advantage of a technicality or procedural irregularity to escape trial any more than the prosecution should be permitted to take advantage of a technicality as the authorities on abuse of process make plain. If Mr Bell is innocent he should be acquitted. If he is guilty he should be convicted and dealt with accordingly. Justice must be done in respect of Mr Bell and in respect of the community in which he lives. The Court of Appeal also made it clear in the case of *Vincent Munnery* (1992) 94 Cr. App. R. 164 that in a criminal prosecution it was justice that mattered both to the public as represented by the prosecution as well as to the defence.
> 58. I am not for one moment suggesting that the police should feel free to breach mandatory statutory or common law requirements and cause unlawful detentions or commit unlawful arrests. Nor am I suggesting that the unlawful interference with the liberty of the individual should be regarded as a mere technicality or a minor procedural matter. I am however suggesting that defendants against whom there is a prime facie case to answer should not be permitted to walk away from the consequences of their potentially serious criminal conduct by endeavouring to

rely upon procedural irregularities committed by the police in good faith by inadvertence or neglect (rather than in bad faith or otherwise in circumstances where an abuse of process argument would be successful). In cases where the prosecution have acted in bad faith or otherwise abused the process then the court does have ample power to stop a prosecution. I entirely accept that the court can order a stay of proceedings in the absence of bad faith. This court in a proper case will not hesitate to intervene if the police or the prosecution authorities have seriously abused their powers. There is however no evidence of a serious abuse in the circumstances of the case presently before me which would justify an order being made in effect stopping these proceedings."

820. In *Colvin* (judgment delivered 19th June 2002, unreported) certain evidence was not produced but a stay was not granted.

821. *R v Gray* 1990-92 MLR 74 was the high water mark in respect of stays in Manx law. The stay in that case was granted on grounds of illness of one of the accused and on the grounds of significant delays in commencing proceedings.

822. In respect of the judge's power to stop a case and direct a verdict of not guilty see *Heston - Francois* (1984) 78 Cr App R 209 and *Falconer-Atlee* (1973) 58 Cr App R 348. In *R v Brown* 1998 Crim LR 196 it was held that a judge's concern in respect of conviction by the jury was immaterial. A judge has the power to withdraw the case from jury. In *R v N Ltd* [2008] EWCA 1223 Crim 1223 it was held that a judge had no jurisdiction to entertain a submission of no case to answer or direct that a not guilty verdict should be entered before the conclusion of the Crown's evidence. In *R v N Ltd* it was also indicated that it may sometimes be appropriate and convenient for the parties to ask the judge to rule, either before any evidence is called or before the conclusion of the Crown's evidence, whether on agreed, admitted or assumed facts that the offence charged is made out as a matter of law, but any direction to the jury to return a verdict of not guilty should wait until the end of Crown's case. It is open to the judge in a proper case to suggest to the parties that he be invited to make such a ruling.

823. In *R v Baines* (Court of General Gaol Delivery judgment delivered on the 24th November 2008) I held that the court did not have jurisdiction prior to trial to dismiss the charges against the defendants on the basis of insufficiency of evidence. A submission of no case to answer would have to wait until the close of prosecution case. The court did not have jurisdiction to hear such a submission prior to trial or prior to the close of the prosecution case.

824. See *R (FB) v DPP* [2009] EWHC 106 in respect of decisions by prosecutors that evidence is not reliable and cannot be put before the

jury with the result that no evidence is offered and not guilty verdicts directed.

825. In *R v Grant* (2005) 2 Cr App R 28 at 409 the issue of abuse of process was raised in the context of covert recordings of matters covered by legal professional privilege. See also *McE v Prison Service of Northern Ireland* [2009] UKHL 15.

826. Whilst on the topic of legal professional privilege see *Wishart* [2005] EWCA Crim 1337, *Loizou* [2006] EWCA Crim 1719, *Matthews* [2006] EWCA Crim 2759 and *Hall-Chung* [2007] EWCA Crim 3429. Basic principles in respect of waiver of legal privilege and silence during police interviews on legal advice were laid down in *Condron* [1997] 1 Cr App R 185 and *Bowden* [1999] 2 Cr App R 197. See also *Beckles* [1005] 1 Cr App R 23 and Lord Woolf's reference to "a notorious minefield" (paragraph 6) and the "singularly delicate" (paragraph 43) position where a defendant relies on legal advice as a reason for not answering questions in interview. Legal professional privilege is a fundamental privilege on which the administration of justice as a whole rests. A suspect must be free to consult his legal advisers without fear of his communications being revealed (*R v Derby Magistrates Court ex parte B* [1996] 1 AC 487). A suspect does not waive privilege where he or his lawyer states in interview that he will not answer questions on the basis of legal advice. If a suspect goes further and explains the basis on which he has been so advised, or if his lawyer acting as his authorised representative gives such an explanation, a waiver of legal professional privilege may be involved. Where a defendant gives evidence at trial that he declined to answer questions on legal advice that does not in itself waive privilege. Where a defendant or his lawyer gives evidence about the content of that advice privilege may well be waived. Some suggest that adducing evidence of legal advice at the police station should do no more than waive privilege for that stage of the proceedings. Where a defendant calls a lawyer to give evidence about an account which he has given to his lawyer at the police station in order to rebut an allegation of recent fabrication this does not automatically involve any waiver of privilege.

827. In *Collister* 2003-05 MLR 150 there was no stay despite serious concerns in relation to the prosecution. At paragraph 111 of the judgment I stated that:

> "The prosecution should have had sufficient resources to prosecute this case properly, efficiently, fairly and within a reasonable time."

828. In respect of publicity and applications for stays see *Teare* 1993-95 MLR 212, *Rosemary West* 1996 2 Cr App R and *Flanagan* (Appeal Division judgment 29th July 2004). In *Flanagan* the Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) stated:

> "15. We are satisfied that the real issue here, where the publicity was far less significant than that in *Teare*, was whether on the balance of probabilities any such publicity had caused such prejudice to the Appellant to the extent that no fair trial was possible, making allowances for the fact that in a compact jurisdiction information about a defendant is easily disseminated and acquired.. In a compact jurisdiction such as this it is sometimes inevitable that jurors will know some background to a case : such is sometimes inevitable even in much larger jurisdictions when crimes and prosecutions have generated enormous pre-trial publicity. In such cases fairness to a defendant is achieved by the Deemster giving a firm direction to the jury that they must only decide the case on the basis of the evidence before them and nothing else and it has to be assumed that the jury has followed that direction.
>
> 16. On the facts of this case we are satisfied that the learned Acting Deemster adopted the correct approach. Given that the newspaper report did not identify the Appellant and that any sensible reader would have assumed that the mitigation advanced by Miss Shillito was only her version of events, it would have been foolish to expressly draw the jury's attention to the report. In our judgment it was sufficient for the learned Acting Deemster to direct the jury that they must only decide the case on the evidence adduced before them and, since such a direction would correct any possible injustice to the Appellant and enable him to have a fair trial, no adjournment of the trial was necessary or desirable."

829. See also *Watterson* 1978-80 MLR 105 where the Appeal Division dealt with issues concerning media coverage of a case and a fair trial. The Appeal Division stressed that if an issue in respect of the same was to be raised it should be raised before the trial commenced and not merely on appeal.

830. In *Fulcher and Shaw* Crim 1997/45 (judgment delivered 30th July 2001) Deemster Cain granted a stay in somewhat exceptional circumstances. See *R v R* [2010] EWCA Crim 924 in respect of a stay of proceedings on the grounds of abuse of process where the prosecution were willing to give the defendant's legal advisers access to certain indecent images, the subject matter of the charges against the defendant, but were unwilling for the defendant to be shown the images.

831. There is an obligation on the prosecution to disclose any material in their possession which may assist the defence. Failure to provide essential disclosure may offend the defendant's right to a fair trial. It is rare for a judge to grant a stay for abuse of process and normally the trial process is expected to deal with allegations of unfairness. See

R v O [2007] EWCA Crim 3483 in respect of non-disclosure by the prosecution and the consequences. In that case where the defence had been pressing for disclosure and the prosecution had delayed for over a year, had breached a court order and only produced over 8000 pages of documentation on, virtually, the first day of the trial Teare J stayed the indictment against the defendant as an abuse and the Court of Appeal did not interfere with the decision. The Court of Appeal would only interfere if no reasonable judge could have reached the conclusion the trial judge had reached.

832. Acting Deemster Montgomerie in *R v Cubberley* (judgment 20th November 2007) ordered a stay of the proceedings. The Acting Deemster considered the position in respect of the non-availability of material, in that case a diary. The Acting Deemster referred to the duty of the prosecution in relation to securing material which may be relevant to the investigation.

833. In *Morris v DPP* [2008] EWHC 2788 (Admin) it was held that in certain cases there was no automatic requirement on the prosecution to retain CCTV and audio evidence where potentially it recorded the giving of statutory warnings under the Road Traffic Act 1998. Prior to the trial the defence had not indicated that they considered the CCTV to be relevant material. There was other evidence supporting the fact that the warning had been given. The Crown Court declined to stay the proceedings. The conviction imposed at trial was upheld.

834. Acting Deemster Montgomerie in *R v Myers* (judgment 28th November 2008) refused to order a stay of proceedings in the circumstances of that case which involved the failure of the prosecution in respect of disclosure. The Acting Deemster at paragraph [28] of his judgment stated: "There is a strong public interest in criminal charges being decided on their merits." At paragraph [29] the Acting Deemster added: "it is not the role of this Court to stay the proceedings by way of punishment of the prosecution." The Acting Deemster was unimpressed with defence submissions that an element of surprise would be removed by the retrial and the defence would lose the impact of the body language of a prosecution witness.

835. See also Acting Deemster Montgomerie's judgment in *Myers* delivered on the 26th March 2009, unreported, where another application that the proceedings be stayed was dismissed. The Acting Deemster did not consider that the defendant had suffered serious prejudice to the extent that a fair trial could not take place.

836. In *R v Horseferry Road Magistrates Ex p Bennett* [1994] 1 AC 42 it was held that the court had the power to prevent the abuse of executive powers which threaten the rule of law. See *R (Corner House Research and others) v Director of the Serious Fraud Office* [2008] UKHL 60, *Panday v Senior Superintendent Wellington Virgil* (Privy Council Judgment delivered 9th April 2008), *R v Mullen* [2004] 2 Cr App R 29, *R v Latif* [1996] 1 WLR 104 and *R v Looseley* [2001] 1 WLR 2060.

837. In *R v Redmond* [2006] EWCA Crim 1744; [2009] 1 Cr App R 25 the defendant was charged with conspiracy to evade the prohibition on the importation of a class B drug. The case against him relied on the evidence of two undercover police officers who gave evidence of conversations they had had with the defendant while he was in Spain and Ireland. Most of those conversations were tape recorded covertly and the recordings and transcripts produced in evidence. The defendant argued that the covert recordings were illegal under the law of the relevant jurisdiction and that the officers had knowingly broken the rules. He applied for the proceedings to be stayed as an abuse of process. The judge heard evidence from the officers as to their state of mind and expert evidence as to the content of Spanish law. He held that the evidence had not been unlawfully obtained and refused the application. The defendant was convicted. He applied for leave to appeal. The English Court of Appeal held, refusing the application, that irrespective of whether the judge had fallen into error in concluding that the evidence had been lawfully obtained, his conclusion that he could properly permit the prosecution to proceed was one that was within his discretion unless the conduct of the police officers had involved riding roughshod over the Spanish and Irish rules. Moreover, even if evidence probative of guilt had been obtained unlawfully, such evidence was not automatically rendered inadmissible and nor was it automatically the case that it would be unfair for that evidence to be considered by a jury. The crucial issue was whether the prosecuting authorities had knowingly abused their executive powers, and that issue turned on the judge's assessment of the credibility of the officers. The witnesses were seen and heard by the judge who was in a good position to evaluate their honesty and credibility; and he was entitled to conclude on the evidence before him that the police had not acted in bad faith. Accordingly, the English Court of Appeal held that there were no grounds for arguing that the judge's conclusion was erroneous in law.

838. In *DPP v Cooper* 172 JP 195 (judgment delivered 3rd March 2008) evidence was rendered incapable of independent testing by the

defence and the English Administrative Court (Silber J) held that in the particular circumstances of that case the absence of the evidence was an impediment to the defence in undermining the prosecution's case, but the justices would have been able to make allowance for that and if the trial had been before a jury the judge would have explained the position and directed them to bear certain factors in mind when considering the guilt of the defendant which would have compensated him adequately for the lack of the evidence. It was held that it was wrong to stay the proceedings in such circumstances.

839. See also the authorities referred to in *Christian* (Court of General Gaol Delivery judgment delivered 5th December 2007) in respect of the powers of Deemsters to prevent a case proceeding on the grounds of abuse of process.

840. In *Arrigo and Vella against Malta* Application No 6569104 the European Court of Human Rights sitting on 10th May 2005 stressed that politicians and officials should take great care in commenting on pending criminal proceedings as such comments may prejudice a fair trial. On page 7 of the decision as to the admissibility of the application it is stated:

> " …respect for the presumption of innocence requires that the authorities use all the necessary discretion and circumspection (see *Allenet de Ribemont,* judgment quoted above, *ibidem)*. Article 6 § 2 will be violated if a statement of a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved so according to law. It suffices, even in the absence of any formal finding, that there is some reasoning to suggest that the official regards the accused as guilty. In this respect, the Court has emphasised the importance of the choice of words by public officials in their statements to the press before a person has been tried and found guilty of an offence *(Daktaras v. Lithuania,* no. 42095/98, § § 41 and 44, ECHR 2000-X, and *Butkevicius v. Lithuania,* judgment quoted above, §§ 49-50)."

841. See *R v Edwards* [2009] HCA 20 in respect of Australian law on the topic of permanent stays of criminal trials. The Australian High Court confirmed that in exercising the discretion to grant a permanent stay of proceedings, a court should consider whether, in all the circumstances, the continuation of the proceedings would involve unacceptable injustice or unfairness, or whether continuation would be so unfairly and unjustifiably oppressive as to constitute an abuse of process. The Court noted that it is not uncommon for trials to proceed despite the unavailability of relevant evidence and held that the loss of evidence did not prejudice the pilots. It concluded that no feature of the delay or loss of evidence justified the extreme step of permanently staying the proceedings. The Court set aside the order of the Supreme

Court of Tasmania and dismissed the pilots' application for a permanent stay.

842. Judge Denyer QC in his useful book on *Case Management in the Crown Court* at chapter 10 deals with abuse of process applications as follows:

"10.1 This is not the place to recite all the case law that has now accumulated around the rules relating to abuse of process. For our purposes, it is sufficient to identify the two strands which have developed, namely cases where it is said that the defendant cannot have a fair trial and those in which it is said that it would be unfair to try the defendant [*Beckford* [1996] Crim App R 94 at 100]

10.2 As to delay and the inability to have a fair trial, the law was summarised thus by Rose L J in *S* [2006] EWCA Crim 756 [at paragraph 21]

"In the light of the authorities, the correct approach for a judge to whom an application for a stay for abuse of process on the ground of delay is made, is to bear in mind the following principles—

(i) Even where delay is unjustifiable, a permanent stay should be the exception rather than the rule.

(ii) Where there is no fault on the part of the complainant or the prosecution, it will be very rare for a stay to be granted.

(iii) No stay should be granted in the absence of serious prejudice to the defence so that no fair trial can be held.

(iv) When assessing possible serious prejudice, the judge should bear in mind his or her power to regulate the admissibility of evidence and that the trial process itself should ensure that all relevant factual issues arising from delay will be placed before the jury for their consideration in accordance with appropriate directions from the judge.

(v) If having considered all these factors, a judge's assessment is that a fair trial will be possible, a stay should not be granted."

As to cases where evidence has been lost or destroyed, the following passage from the judgment of Mantell L J in *Medway* [unreported] is relevant:

"We recognise that in cases where evidence has been tampered with, lost or destroyed, it may well be that a defendant will be disadvantaged. It does not necessarily follow that in such a case the defendant cannot have a fair trial or that it would be unfair for him to be tried. We would think that there would need to be something wholly exceptional about the circumstances of the cases to justify a stay on the ground that evidence has been lost or destroyed. One such circumstance might be if the interference with the evidence was malicious."

10.3 In respect of situations where it is said that it is not fair to try the defendant (a problem which often arises when entrapment is alleged by the defence) the

following passage from the speech of Lord Steyn in *Latif* [1996] 1 WLR 104 suffices to illustrate the point. He said [at page 112]:

"In this case the issue is whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system. The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed ... The speeches in *Bennett* conclusively establish that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place."

…In *Smolinski* [2004] EWCA Crim 1270 Lord Woolf said [at paragraphs 8 and 9]

"The making of applications to have cases stayed where there has been delay on the basis of abuse of process has become prevalent ... The court questions whether it is helpful to make applications in relation to abuse of process before any evidence has been given by the complainants in a case of this nature. Clearly, having regard to the period of time which has elapsed, the court expects that careful consideration has been given by the prosecution as to whether it is right to bring the prosecution at all. If having considered the evidence to be called, and the witnesses having been interviewed on behalf of the prosecution, a decision is reached that the case should proceed, then in the normal way we would suggest that it is better not to make an application based on abuse of process. Unless the case is exceptional, the application will be unsuccessful ... If an application is to be made to a judge, the best time for doing so is after any evidence has been called. This means that on the one hand the court has had an opportunity of seeing the witnesses and, on the other hand, the complainants have had to go through the ordeal of giving evidence. However, despite the latter point ... it seems to us that on the whole it is preferable for the evidence to be called and for a judge then to make his decision as to whether the trial should proceed or whether the evidence is such that it would not be safe for a jury to convict."

Quite how this differs from a judge dealing in the ordinary way with a submission of no case at the close of the prosecution, is not immediately obvious. In particular, it is not clear whether the judge is simply to apply the conventional Galbraith test or whether some enhanced power is envisaged. It is hard to see how, if it is proper applying conventional Galbraith principles for a judge to decide that the case should continue, he should then be able to decide on abuse grounds that the case should be stayed. It is not a logical division: it might involve a judge in making a fairly naked usurpation of the function of the jury.

10.5 Not only is there an inconsistency between the Practice Direction [Part IV.36 of the Consolidated Criminal Practice Direction which states that applications for a stay on the grounds of abuse must be made prior to the trial] and the *Smolinski* approach, there are other procedural rules which are predicated on the basis that an application will be made before or at the start of the trial. For example, section 6A(1)(d) of the Criminal Procedure and Investigations Act 1996, dealing with the contents of a defence statement, requires that any point to be taken about abuse of

process should be indicated in that statement. If in truth we are simply dealing with an 'enhanced' Galbraith submission which, by definition, can only be made after the prosecution case has closed, it is hard to see how a defendant could spell that out in advance of the trial in his defence statement."

843. On the Island advocates are encouraged to make applications at an early stage and in advance of the trial where appropriate. This, in the main, is to assist in the smooth running of the trial and to ensure that any disputed issues are dealt with at an early stage of the proceedings. Where applications have to wait until trial (such as a submission of no case to answer after the close of the prosecution case) then such applications are, of necessity, dealt with during the course of the trial.

844. In *R v Gore* [2009] EWCA Crim 1424 the English Court of Appeal held that the issue of a fixed penalty notice asserting one offence did not protect the recipient from further proceedings if and when it became apparent that a more serious offence had in fact been committed in the course of the same incident. The Lord Chief Justice of England and Wales stated:

"16. There is a great deal of force in the judgment of the Divisional Court in *Guest v Director of Public Prosecutions* [2009] EWHC 594, where the Director of Public Prosecutions was directed to reconsider a decision that a potential defendant should be prosecuted for assault occasioning actual bodily harm, when he had been given an inappropriate conditional caution for the offence. The court rejected the argument that if the decision not to prosecute and the conditional caution were quashed, any subsequent prosecution would fail on abuse of process grounds. As Goldring L J explained, "criminal litigation is not a game... it does not seem to me that, … a further prosecution would necessarily amount to an affront to public justice... indeed, many might think that what so far has happened deserves that description." Naturally, and indeed we emphasise, decisions in this type of case involve the application of well understood principles to fact specific situations. There was here no improper escalation of charge, nor any departure from any reasonable expectation that either appellant would not be prosecuted, if any more serious consequences of their conduct, and evidence justifying prosecution for an offence of violence came to light after the issue of the notice. The reality is that on the night in question the defendants must have been thanking their lucky stars that they got away with the serious violence they had perpetrated. It was not an abuse of process for justice to catch up with them."

Case for the prosecution

845. Counsel for the prosecution should fairly and robustly present the case for the prosecution.

846. Prosecutors are to regard themselves as ministers of justice and should not over zealously struggle for a conviction. Rule 19(9) of the Advocates Practice Rules 2001 provides that when prosecuting a

criminal case every advocate must ensure that although every material point is made which supports the prosecution, the evidence must be presented dispassionately and with scrupulous fairness.

847. The High Court of Australia in *Libke v The Queen* [2007] HCA 30 (20th June 2007) dealt with issues concerning the duties of prosecutors. The following are extracts from the judgments in that case (footnotes omitted):

> "33. The appellant argued in this Court that a miscarriage of justice occurred by reason of the prosecutor's cross-examination of him, and commentary during it.
>
> 34. The principles governing the conduct of a prosecutor are well settled. They were restated by Deane J in *Whitehorn v The Queen*:
>
> "Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one. The consequence of a failure to observe the standards of fairness to be expected of the Crown may be insignificant in the context of an overall trial. Where that is so, departure from those standards, however regrettable, will not warrant the interference of an appellate court with a conviction. On occasion however, the consequences of such a failure may so affect or permeate a trial as to warrant the conclusion that the accused has actually been denied his fundamental right to a fair trial. As a general proposition, that will, of itself, mean that there has been a serious miscarriage of justice with the consequence that any conviction of the accused should be quashed and, where appropriate, a new trial ordered."
>
> In the same case, Dawson J said this:
>
> "No doubt all of these observations are merely aspects of the general obligation which is imposed upon a Crown Prosecutor to act fairly in the discharge of the function which he performs in a criminal trial. That function is ultimately to assist in the attainment of justice between the Crown and the accused. In this respect the Crown Prosecutor may have added responsibilities in comparison with other counsel but it does not mean that his is a detached or disinterested role in the trial process."
>
> 35. The role of prosecuting counsel is not to be passive. He or she may be robust, and be expected and required to conduct the prosecution conscientiously and firmly. Because a criminal trial is an adversarial proceeding, there is at least the same expectation of defence counsel. The obligation of counsel extends to the making of timely objections to impermissible or unacceptable questions and conduct. But it is also the duty of the trial judge to make appropriate interventions if questions of

those kinds, capable of jeopardizing a fair trial, are asked. The duty of the trial judge is the highest duty of all. It is a transcendent duty to ensure a fair trial…

37. In this case we are unable to conclude that the appellant did have a fair trial. Whether a cross-examination and commentary during it were excessive will usually be a question of degree. It would not be appropriate to require a standard of perfection or to impose undue weight on the occasional accidental slips and mistakes that can occur in the heat of a trial. Further, it is true that the appellant's credit was in issue and a rigorous cross-examination was therefore to be expected. However, it was seriously objectionable for a counsel to say, during an address to the jury, that he or she "did not buy" something said by a party in evidence, or that "we've heard about that one". It is not acceptable for counsel to make that comment, that is, to express a personal opinion about a party's, or indeed any witness', evidence during cross-examination as the prosecutor did here. It was equally inappropriate for counsel to comment after the appellant had made a responsive answer "whenever you're prepared to finish it". In the same category are these comments: "That doesn't tell us much, does it?"; "I'm just trying to analyse your version of it" and, "hopeless" in commentary upon an answer. These are but a few examples of the inappropriateness of the cross-examination. Here, the sarcastic and repeated commentary as a whole went too far. The appellant's counsel's failure generally to object, regrettable as that may have been, provided no antidote to the infection of the trial that the prosecutor's questions and comments caused. The circumstances called for the trial judge to intervene …

71. A criminal trial in Australia is an accusatorial and adversarial process. In that process, prosecuting counsel has a role that is bounded by long-established duties and responsibilities. Those duties and responsibilities are summarised when it is said that "[t]he duty of prosecuting counsel is not to obtain a conviction at all costs but to act as a minister of justice". In the Supreme Court of Canada, Rand J described the role of the prosecutor as being:

"not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed *with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings*." (emphasis added)

A central, even the central, element in that role is "ensuring that the Crown case is presented *with fairness to the accused* " .

72. The prosecution case is to be presented in the context of an adversarial process in which each side "is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what

questions whether in chief or in cross-examination shall be asked". But again, there are boundaries to that process. The choices that have been described are to be made "subject to the rules of evidence, fairness and admissibility". As Dawson J said in *Whitehorn v The Queen*:

"A trial does not involve the pursuit of truth by any means. The adversary system is the means adopted and *the judge's role in that system is to hold the balance between the contending parties* without himself taking part in their disputations." (emphasis added)

It is not for the judge to attempt to remedy the deficiencies of a party's case. As was pointed out in *Whitehorn*, and earlier in *Richardson v The Queen*, the judge will frequently lack the knowledge and the information that would be necessary to making a decision about whether and how any deficiency would be remedied. But it is for the judge to "hold the balance between the contending parties". It is for the judge to ensure that the trial is conducted fairly."

848. In *McKinnon v Government of the United States of America* [2008] UKHL 59 the House of Lords considered abuse arguments in the context of extradition proceedings and plea bargaining. The following are extracts from the opinion of Lord Brown:

"The appellant's argument

28. The appellant's main argument focuses on the wide disparity between on the one hand the predicted likely outcome if the appellant cooperated with the US authorities - a sentence of 3-4 years of which 6- 12 months would be served in a low security prison in the US after which there were good prospects of repatriation with the expectation of release after serving only half the sentence - and on the other hand the threatened likely outcome if the appellant refused to cooperate - a sentence of 8-10 years or more in a US high security prison with remission of only 15%. Such a disparity, it is submitted, is disproportionate and subjected the appellant to impermissible pressure to surrender his legal rights, particularly his right to contest extradition. Pressure of this kind, it is submitted, indeed plea bargaining generally, runs flatly counter to the principle of English law recently clarified in the judgment of the five-judge Court of Appeal delivered by Lord Woolf C J in *R v Goodyear* [2005] 1 WLR 2532: essentially that a judge may respond to a defendant's request that he be told the maximum sentence that would be imposed on a plea of guilty but is not to volunteer such information unasked nor to indicate what sentence might be passed on the defendant's conviction by the jury. As the Court stated at para 54:

"With some defendants at any rate, the very process of comparing the two alternatives would create pressure to tender a guilty plea."

29. Where, as here, the respondent government is seeking the assistance of the English courts to extradite an accused, it must, submits the appellant comply with the legal principles of this jurisdiction. True it is that he has in fact resisted the pressure improperly put upon him but that, he submits, is no answer to the

contention that it constituted an abuse of process: it was calculated to interfere with the extradition proceedings …

…

34. Before answering these questions, however, it is as well to recognise that the difference between the American system and our own is not perhaps so stark as the appellant's argument suggests. In this country too there is a clearly recognised discount for a plea of guilty: a basic discount of one-third for saving the cost of the trial, more if a guilty plea introduces other mitigating factors, and more still (usually one half to two thirds but exceptionally three-quarters or even beyond that) in the particular circumstances provided for by sections 71-75 of the Serious Organised Crime and Police Act 2005 - see *R v P; R v Blackburn* [2007] EWCA çrim 2290. No less importantly, it is accepted practice in this country for the parties to hold off-the-record discussions whereby the prosecutor will accept pleas of guilty to lesser charges (or on a lesser factual basis) in return for a defendant's timely guilty plea. Indeed the entire premise of the principle established in *Goodyear* [2005] 1 WLR 2532 is that the parties will have reached an agreed basis of plea in private before the judge is approached. What, it must be appreciated, *Goodyear* forbids are *judicial,* not prosecutorial, indications of sentence. Indeed, *Goodyear* goes further than would be permitted in the United States by allowing the judge in certain circumstances to indicate what sentence he would pass.

35. Your Lordships will also appreciate that in April 2008 the Attorney General issued a consultation paper regarding the possible introduction here of a formal court-sanctioned plea negotiation framework for fraud cases: "The Introduction of a Plea negotiation Framework for Fraud Cases in England and Wales: a consultation". The framework would enable the prosecutor to agree (without binding the court) that a specific sentence or sentencing range is appropriate. The paper summarises the current system, recognising the legitimacy of the informal plea negotiations that currently take place, unregulated though these are. In the Federal Courts of the United States, by contrast, the practice of plea bargaining is regulated and the courts have a duty to discuss the consequences of a guilty plea with the accused in open court and to ensure that it has been entered voluntarily and with a full understanding of those consequences. The contents of any plea agreement must be disclosed in open court and the trial judge has the power to accept or reject it.

…

37. The Divisional Court expressed their "cultural reservations" about the general American style of plea-bargaining (para 60) and in particular "a degree of distaste" as to the prosecutor's approach towards providing or withdrawing support for repatriation (para 54). These comments seem to me somewhat fastidious. Our law is replete with statements of the highest authority counselling not merely a broad and liberal construction of extradition laws (to serve the transnational interest in bringing to justice those accused of serious cross-border crimes - see, for example, *In re Ismail* [1999] 1 AC 320, 326-327), but also the need in the conduct of extradition proceedings to accommodate legal and cultural differences between the legal systems of the many foreign friendly states with whom the UK has entered into reciprocal extradition arrangements.

38. Turning, with these considerations in mind, to the questions raised by *Cobb* and central to the determination of the present appeal, I for my part would unhesitatingly answer all of them in the negative. As the Divisional Court itself pointed out (at para 34), the gravity of the offences alleged against the appellant should not be understated: the equivalent domestic offences include an offence under section 12 of the Aviation and Maritime Security Act 1990 for which the maximum sentence is life imprisonment. True, the disparity between the consequences predicted by the US authorities dependent upon whether the appellant cooperated or not was very marked. It seems to me, however, no more appropriate to describe the predicted consequences of non-cooperation as a "threat" than to characterise the predicted consequences of cooperation as a "promise" (or, indeed, a "bribe"). In one sense all discounts for pleas of guilty could be said to subject the defendant to pressure, and the greater the discount the greater the pressure. But the discount would have to be very substantially more generous than anything promised here (as to the way the case would be put and the likely outcome) before it constituted unlawful pressure such as to vitiate the process. So too would the predicted consequences of non-cooperation need to go significantly beyond what could properly be regarded as the defendant's just desserts on conviction for that to constitute unlawful pressure.

…

40. The high watermark of the appellant's case here consists of Mr Lawson's recollection that, unless the appellant consented to extradition (as opposed merely to pleading guilty if extradited), the prosecuting authorities would oppose his repatriation. That, however, even were it to be regarded as an unlawful threat, has now been expressly repudiated by Mr Wiechering, again in marked contrast to the position in *Cobb.*

41. In my judgment it would only be in a wholly extreme case like *Cobb* itself that the court should properly regard any encouragement to accused persons to surrender for trial and plead guilty, in particular if made by a prosecutor during a regulated process of plea bargaining, as so unconscionable as to constitute an abuse of process justifying the requested state's refusal to extradite the accused. It is difficult, indeed, to think of anything other than the threat of unlawful action which could fairly be said so to imperil the integrity of the extradition process as to require the accused, notwithstanding his having resisted the undue pressure, to be discharged irrespective of the strength of the case against him.

42. In my judgment this is far from being such a case and accordingly I would dismiss the appeal."

Case for the defence

849. Defence counsel should also present the defence case fairly and avoid any unnecessary surprises. Defence counsel should not engage in any unnecessary or inappropriate attacks on prosecution witnesses or third parties.

850. It would appear that defence counsel can make an opening speech but this is very rare in practice. If a defence opening speech is made it would normally be before calling evidence if the defendant and other witnesses as to the facts are to be called. Counsel would need to be very confident as to what his client and witnesses were going to say. The defence may however have a right to an opening speech in certain circumstances (See *Hill* (1911) 7 Cr App R 1). An opening speech appears to have been made by defence counsel in *Hollyoak v R* 1990-92 MLR 329. In that case the Appeal Division did not adversely comment on the fact that a defence opening speech had been made but did comment adversely on the contents of such speech and the difficulties that had been caused in that trial due to the defence presenting an opening speech.

851. Counsel is, of course, under a duty to avoid wasting time by repetition or prolixity and he must not be made the instrument of unnecessary attacks on the witnesses or other third parties. It is however the duty of counsel for the defence to use every proper line of questioning and argument to secure the acquittal of his client.

Addresses to jury

852. At the conclusion of the evidence counsel are entitled to address the jury. The prosecution are heard first and the defence would normally have the last word before the Deemster's summing up. Defence counsel have a broad discretion to say anything he considers desirable on the whole case, but he should not allege as fact matters of which no evidence has been given. He should not 'conjure up explanations out of the air' but is entitled to make points based on the evidence before the jury.

853. Counsel should raise with the Deemster any necessary points of law prior to closing speeches being delivered. The trial Deemster would usually discuss in open court with counsel, in the absence of the jury, the main areas to be covered in the summing up and invite submissions as to any special directions that counsel feel are appropriate. Counsel should make any necessary applications and draw to the Deemster's attention any directions they say are appropriate.

854. In closing speeches counsel should avoid references to "my belief" or "my opinion" (e.g. in my opinion this is the weakest prosecution case in history; it is my belief that < > is lying). The beliefs and opinions of counsel are irrelevant. Counsel deal in submissions based on the

evidence. Counsel do not deal with their personal beliefs or personal opinions.

855. The following is stated in Glanville Williams *Learning the Law* 13th Edition at page 199:

> "The most common breach of etiquette committed by the enthusiastic beginner when arguing a moot case is the expression of a personal opinion on the merits of the case being presented. Counsel may "submit" and "suggest" strongly, and may state propositions of law and fact, but should not express a personal "belief" or "opinion". You should also avoid the expression "I think", however natural it may seem to employ it. It is regarded as being disrespectful to the Bench to say: "My Lords, in my opinion the law is so-and-so", still more to say: "My Lords, in my opinion this man is innocent". As an advocate you are paid to present your client's case, not to offer a sincere opinion on how you would decide if you were the judge. It is only by maintaining this rule that the advocate can be kept free from any possible charge of hypocrisy."

856. Counsel should ensure that any points made have a foundation in the evidence. Counsel should not make references to any likely custodial sentences if the defendant is convicted or the likely length of sentence. These matters are irrelevant to the jury's consideration of the case. Sentencing is of no concern of the jury. In *AG for South Australia v Brown* [1960] AC 432 at page 454 it is indicated that if counsel refer to sentencing consequences "it is incumbent upon the judge to instruct the jury that such matters are not their concern and are completely irrelevant to any issue they have to determine." See however the Appeal Division's judgment in *Sayle* (judgment 24th May 2006) to the effect that the trial Deemster has a discretion whether to direct a jury to disregard such comments. Similar principles apply to any other improper comments made by prosecution or defence.

857. Counsel should not appeal to emotions or subjective feelings. Counsel should not engage in speculation. Counsel are not permitted to give evidence. Counsel should not allude to alleged facts or other matters which have not been the subject of evidence (See *Shimmin* (1882) 15 Cox CC 122). Counsel should not give evidence or make submissions that are not based on evidence (e.g. there are infrequent fires in bedsit land, or in the 1980's there were few jobs around; or it is difficult to get access to Lord Street) unless these issues have been dealt with in the evidence. In *R v Cowan* [1996] 1 Cr App R 1 9G Taylor LCJ stated: "We wish to make it clear that the rule against advocates giving evidence dressed up as a submission applies in this context [failure to mention fact when interviewed, on legal advice]. It cannot be proper for a defence advocate to give the jury reasons for his client's silence at trial in the absence of evidence to support such reasons."

858. Counsel should not say to the jury that you have to be "absolutely certain of guilt. If there is even the remotest possibility that my client may be not guilty or even a hint of doubt however unreasonable you must acquit." That, of course, is not the proper test.

859. The defence may advance hypotheses which go beyond the client's version of events, always provided that other evidence has been called which supports such hypotheses (*Bateson* (1991) Times 10 April 1991).

860. *Mantoor Ramdhanie v The State* (Privy Council judgment 15th December 2005) refers to the standards to be expected of the prosecutor's closing speech (paragraph 18 onwards). The duty of Crown counsel is to be impartial and excludes any notion of winning or losing. Counsel should not use inflammatory and vindictive language. Counsel should not express a personal opinion that the accused is guilty or that the Crown investigators and experts are satisfied as to his guilt. Counsel should not cast aspersions or make improper imputations as to the integrity of the opposing counsel unless in the most extreme circumstances and then only in the absence of the jury. Emotional pleas for sympathy are inappropriate. The duty of prosecuting counsel is not to obtain a conviction at all costs but to act as a minister of justice.

861. In *R v Bryant* [2005] EWCA Crim 2079 the court referred to the objective and dispassionate way prosecution counsel should exercise the "fundamental obligation of counsel for the Crown to act as a minister of justice."

862. Reference should never be made to matters which may be prejudicial to a defendant but which are not before the jury.

863. If there is to be a challenge to a witness (for example taking issue with the independence of an expert witness) that should not, in the normal course of events, be covered in closing speeches unless the point was expressly put to the witness whilst giving evidence and the witness given an opportunity to comment upon it.

Alternative verdicts

864. The Appeal Division (Judge of Appeal Tattersall and Acting Deemster King) in *Brown* (judgment 29th January 2007) considered *R v Coutts* [2006] UKHL 1 and summarised the main applicable principles in respect of alternative verdicts as follows:

"30. We draw the following principles from these passages:

(1) the basic rule is that on a trial on information the trial Judge should leave to the jury any obvious alternative which there is evidence to support. To which we would add the rider: "so long as that alternative is open to the jury as a matter of law under the material statutory provisions". These will usually be those set out in s.22(2) of the Criminal Jurisdiction Act 1993;

(2) there must however be evidence upon which to support such alternative;

(3) further, the alternative must be obvious in the sense that it should suggest itself to the mind of any ordinary knowledgeable and alert criminal Judge. Alternatives identified only because of diligent research by ingenious Counsel after trial, are excluded;

(4) the duty of the Judge is to act in accordance with these principles, irrespective of the wishes of trial Counsel;

(5) however that duty is always tempered by the overriding duty not to infringe a defendant's right to a fair trial. There may be circumstances where that overriding duty will dictate that the alternative should not be left to the jury where, for example, it were shown that decisions were made at trial which would not have been made had the possibility of such a verdict been envisaged. Normally however, the requirement of fairness will be satisfied if the proposed direction on an alternative verdict is indicated to Counsel at some stage before their closing speeches."

865. In *R v Coutts* [2006] UKHL 39 Lord Bingham at paragraph 1 stated:

"The appellant, Mr Coutts, was convicted of murder on an indictment charging him with that crime alone. Evidence was adduced at the trial which would have enabled a rational jury, if they accepted it, to convict him of manslaughter. But the trial judge, with the support of the prosecution and the consent of the defence, did not leave an alternative count of manslaughter to the jury. He directed the jury that they should convict of murder if satisfied that the appellant had committed that offence and, if not so satisfied, acquit. On his appeal to the Court of Appeal (Criminal Division) the appellant contended that a manslaughter verdict should have been left to the jury for their consideration, irrespective of the parties' wishes, since there was evidence to support it. The Court of Appeal rejected that contention, and by leave of the House the appellant now challenges its decision. The narrow question raised by the appeal is whether, on the facts of this case, the trial judge should have left an alternative verdict of manslaughter to the jury. The broader question, of more general public importance, concerns the duty and discretion of trial judges to leave alternative verdicts of lesser-included offences to the jury where there is evidence which a rational jury could accept to support such a verdict but neither prosecution nor defence seek it."

866. Lord Bingham added:

"23. The public interest in the administration of justice is, in my opinion, best served if in any trial on indictment the trial judge leaves to the jury, subject to any

appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to support. I would not extend the rule to summary proceedings since, for all their potential importance to individuals, they do not engage the public interest to the same degree. I would also confine the rule to alternative verdicts obviously raised by the evidence: by that I refer to alternatives which should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge, excluding alternatives which ingenious counsel may identify through diligent research after the trial. Application of this rule may in some cases benefit the defendant, protecting him against an excessive conviction. In other cases it may benefit the public, by providing for the conviction of a lawbreaker who deserves punishment. A defendant may, quite reasonably from his point of view, choose to roll the dice. But the interests of society should not depend on such a contingency.

24. It is of course fundamental that the duty to leave lesser verdicts to the jury should not be exercised so as to infringe a defendant's right to a fair trial. This might be so if it were shown that decisions were made at trial which would not have been made had the possibility of such a verdict been envisaged. But no such infringement has ordinarily been found where there is evidence of provocation not relied on by the defence, nor will it ordinarily be unfair to leave an alternative where a defendant who, resisting conviction of a more serious offence, succeeds in throwing doubt on an ingredient of that offence and is as a result convicted of a lesser offence lacking that ingredient. There may be unfairness if the jury first learn of the alternative from the judge's summing-up, when counsel have not had the opportunity to address it in their closing speeches. But that risk is met if the proposed direction is indicated to counsel at some stage before they make their closing speeches. They can continue to discount the alternative in their closing speeches, but they can address the jury with knowledge of what the judge will direct. Had this course been followed in the present case there would have been no unfairness to the appellant, and while taking a contrary view the Court of Appeal did not identify the unfairness which it held would arise. It is not unfair to deprive a defendant, timeously alerted to the possibility, of what may be an adventitious acquittal.

25. The Court of Appeal rightly recognised the high sense of public duty which juries customarily bring to their task. I would not wish to belittle that in any way. But one does not belittle it to decline (as the High Court of Australia has done) to attribute to juries an adherence to principle and an obliviousness to consequences which is scarcely attainable.

26. Nor, with respect, is it an objection that the jury's task would have been more complicated had a manslaughter direction been given. Compared with many directions given to juries, a manslaughter direction in this case would not have been complicated. But even if it would, that cannot be relied on as a reason for not leaving to the jury a verdict which they should on the facts have considered. If juries are to continue to command the respect of the public, they must be trusted to understand the issues raised even by a case of some complexity. For reasons already given, the wishes of counsel cannot override the judge's duty.

27. I am of opinion that the judge should have left a manslaughter verdict to the jury. His failure to do so, although fully understandable in the circumstances, was a material irregularity. While the murder count against the appellant was clearly a strong one, no appellate court can be sure that a jury, fully directed, would not have convicted of manslaughter. For these reasons, and those given by my noble and learned friends Lord Hutton, Lord Rodger of Earlsferry and Lord Mance, with which I agree, I would accordingly allow the appeal. I would remit

the matter to the Court of Appeal and invite that court to quash the conviction. It may also deal with any application for a retrial which may be made, the appellant remaining in custody meanwhile."

867. Lord Hutton stated:

"62. In conclusion I refer briefly to one further matter. The authorities make it clear that an alternative verdict should only be left if it is one to which "a jury could reasonably come" (per Lord Clyde in *Von Starck* at page 1275: see also Mustill LJ in *Fairbanks* page 1205, "unless the alternatives really arise on the issues as presented at the trial"). There- fore I am in full agreement with the test proposed by Lord Bingham in paragraph 23 of his speech that the alternative or alternatives "should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge, excluding alternatives which ingenious counsel may identify through diligent research after the trial". I also agree that the rule discussed by Lord Bingham should not be extended to summary proceedings."

868. See the Appeal Division's helpful and comprehensive judgment in *Brown* (judgment delivered 26th January 2007) applying these principles.

869. *Coutts* and *Brown* need to be read in the light of *R v Foster* [2007] EWCA Crim 2869. The following are extracts from headnote to *R v Foster* [2008] 2 All ER 597:

"In July 2006 the House of Lords gave guidance relating to alternative verdicts in *R v Coutts* [2006] 4 All ER 353. The House considered the statutory rules in s 6 of the Criminal Law Act 1967 which provided (sub-s (2)) that on an indictment for murder a person found not guilty of murder 'may be found guilty—(a) of manslaughter, or of causing grievous bodily harm with intent to do so; or (b) of any offence of which he may be found guilty under an enactment specifically so providing, or under section 4(2) of this Act [assisting offenders]; or (c) of an attempt to commit murder, or of an attempt to commit any other offence of which he might be found guilty; but may not be found guilty of any offence not included above'; and (sub-s (3)) that where, on a person's trial on indictment for any offence, except treason or murder, the jury found him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amounted to or included an allegation of another offence falling within the jurisdiction of the court of trial 'the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence'. Three appeals were heard together because they raised questions about the ambit and application of the decision in *R v Coutts*. F was convicted of attempted murder. His conviction was referred to the Court of Appeal because the trial judge had failed to leave to the jury the possibility of conviction of an alternative offence, assault occasioning actual bodily harm, or attempt to do so, or attempt to do grievous bodily harm with intent. N was also convicted of attempted murder after a trial in which no alternative verdict had been left to the jury. K was convicted of counts of burglary and attempted burglary; no alternative verdicts of theft or handling stolen goods had been left to

the jury. In a fourth case the defendant applied for leave to appeal against conviction on different grounds. The first three defendants submitted that when at trial a defendant admitted in evidence any lesser criminal offence to the offence charged in the indictment the judge had always to direct the jury in a way that enabled them to acquit of the more serious offence and convict of the offence admitted by the defendant. They considered that *R v Coutts* demonstrated a principle of law that in a trial on indictment any obvious and viable alternative verdict should ordinarily be left to the jury where there was evidence to support it, irrespective of the wishes of the parties and even where the alternative verdict would be inconsistent with the prosecution case. The Court of Appeal considered (i) whether it was possible to identify when, as a matter of law a judge's failure to leave an alternative verdict to the jury was erroneous; (ii) (in relation to *K's* case) whether the principles in *R v Coutts* extended beyond the ambit of s 6 of the 1967 Act; and (iii) the impact of an erroneous failure by a judge to leave an alternative lesser verdict to the jury on the safety of the conviction in the individual case.

Held — (1) Any requirement to leave an alternative verdict to the jury did not engage an absolute question of law. The situation which arose in the instant cases would not always create an obligation on the trial judge to leave an alternative lesser verdict whenever the defence to the more serious charge on the indictment involved an admission of a lesser offence. In addition to any specific issues of fairness there was a proportionality consideration. A judge would not be in error if he decided that a lesser alternative verdict should not be left to the jury if that verdict could properly be described in its legal or factual context as trivial or insubstantial or where any possible compromise verdict would not reflect the real issues in the case. He should reconsider any decision he might have reached about alternative verdicts in the light of any question the jury saw fit to ask about them. However, when the defence to a specific charge amounted to the admission or assertion of a lesser offence, the primary obligation of the judge was to ensure that the defence was left to the jury. If it were not, the summing up would be seriously defective and the conviction would almost inevitably be unsafe. The judgment whether a lesser alternative verdict should be left to the jury involved an examination of all the evidence and the issues of law and fact to which it had given rise. Within that case-specific framework the judge had to examine whether the absence of a direction about a lesser alternative verdict would oblige the jury to make an unrealistic choice between the serious charge and complete acquittal which would unfairly disadvantage the defendant …; R *v Coutts* [2006] 4 All ER 353 explained.

(2) The principles derived from *R v Coutts* did not extend beyond the ambit of the statutory framework in the 1967 Act …

(3) An erroneous failure by a trial judge to leave an alternative lesser verdict to the jury did not change the statutory test relating to the safety, or otherwise, of convictions returned by the jury. Ultimately the single issue for the Court of Appeal was whether the conviction was unsafe. In the instant cases there was no reason to doubt the safety of the convictions. The appeals would therefore be dismissed."

870. The following is the report of *Foster* at [2008] Crim LR 463:

"R. v Foster Court of Appeal (Criminal Division): Sir Igor Judge P., Latham L.J., Grigson, Andrew Smith and Pitchford JJ.: November 30, 2007; [2007] EWCA Crim 2869.

In separate but conjoined appeals against conviction the Court of Appeal considered the application and ambit of the decision of the House of Lords in *Coutts* [2006] UKHL 39; [2007] 1 Cr. App. R. 6; [2006] Crim. L.R. 1065 concerning the general duty and discretion of a trial judge to leave to the jury the possibility of returning an alternative verdict convicting the defendant of an offence which had arisen on the evidence instead of an offence alleged in the indictment. In particular, the court considered: (1) when, as a matter of law, a trial judge's decision not to leave an alternative verdict would be erroneous; (2) whether the principle identified in *Coutts* extended beyond the ambit of s.6 of the Criminal Law Act 1967, so that an alternative could be returned in respect of an offence other than a lesser alternative included within the offence charged in the indictment; and (3) the approach to appeals against conviction where it was submitted that there had been an erroneous failure by a trial judge to leave an alternative lesser verdict to the jury.

On behalf of the appellants, it was submitted that when a defendant admitted in evidence any lesser criminal offence to the offence charged in the indictment, the trial judge must always direct the jury in a way which enabled them to acquit of the more serious offence and to convict of the offence admitted by the defendant. It was further submitted that *Coutts* demonstrated a principle of law that in a trial on indictment any "obvious and viable alternative verdict" should ordinarily be left to the jury where there was evidence to support it, irrespective of the wishes of the parties, and even when the alternative verdict would be inconsistent with the prosecution case. This principle, it was submitted, was not confined to cases to which s.6(2) and (3) of the Criminal Law Act 1967 might apply, and an indictment which failed to include an obvious and viable alternative offence, as disclosed on the evidence at trial, would therefore be defective for the purposes of s.5 of the Indictments Act 1915. As to the approach to appeals, it was submitted that where a trial judge had erroneously failed to leave a lesser alternative verdict obviously raised by the evidence, the conviction should be quashed as a serious miscarriage of justice.

Held, (1) nothing in *Coutts* suggested expressly, or by necessary implication, that there was an obligation on a trial judge to leave a lesser alternative verdict whenever the defence to the charge on the indictment involved an admission of the lesser offence. The danger highlighted by some of the speeches in *Coutts,* underlining the duty of the trial judge to leave alternative verdicts to the jury, was the risk that faced with the stark choice between convicting a defendant whose behaviour was on any view utterly deplorable, and acquitting him altogether, the jury may unconsciously but wrongly allow their decision to be influenced by considerations extraneous to the evidence and convict of the more serious charges rather than acquit altogether. But *Coutts* did not suggest that such a risk was always present. In addition to any specific issues of fairness, there was a proportionality consideration, such that a trial judge would not be in error if he decided that a lesser alternative verdict should not be left to the jury because that verdict could properly be described in its legal and factual context as trivial, or insubstantial, or where any possible compromise verdict would not reflect the real issues in the case. The trial judge must reconsider any decision he may have reached about alternative verdicts in the light of any question which the jury might see fit to ask; but when the defence to a specific charge amounts to the admission or assertion of a lesser offence, the primary obligation of the trial judge is to ensure that the defence is left to the jury. If it is not, on elementary

principles, the summing-up will be seriously defective and the conviction would almost inevitably be unsafe.

(2) There was no basis for concluding that the principles in *Coutts* extended beyond the ambit of the statutory framework in the 1967 Act. It was undesirable that a trial judge at the end of the evidence should be obliged to consider whether the indictment should be amended to include all offences on which a jury properly directed might convict, and where on the evidence possible further offences appeared, which were not lesser included alternatives, to order an amendment of the indictment to include them. To do so would overlook the true purpose of an indictment, which was to specify the charges upon which the prosecution, not the court, was seeking a conviction or convictions. It would be likely to obscure the issues between the prosecution and the defence; it would complicate the task of the jury, which until that moment would have been considering the evidence in the light of the charges actually included in the indictment; it would complicate the summing-up; and it would also open up the possibility of additional counts being based on the evidence and at the behest of a co-defendant, and in theory at least, but subject to the unfairness principle, permit an amendment to allege a more serious charge.
(3) The judgment whether a lesser alternative verdict should be left to the jury involved an examination of all the evidence, disputed and undisputed, and the issues of law and fact to which it had given rise. Within that case-specific framework the trial judge should examine whether the absence of a direction about a lesser alternative verdict or verdicts would oblige the jury to make an unrealistic choice between the serious charge and complete acquittal which would unfairly disadvantage the defendant. In this context the trial judge enjoyed "the feel of the case" which an appellate court lacked. On appeal the issue was not whether a direction in relation to a lesser alternative verdict was omitted, and whether its omission was erroneous, but whether the safety of the conviction was undermined. Ultimately, therefore, the single issue for the Court of Appeal was whether the conviction was safe.

Commentary. *Failure to leave an alternative verdict.*

In *Coutts* Lord Bingham stated:

"The objective must be that defendants are neither over-convicted nor under-convicted, nor acquitted when they have committed a lesser offence of the type charged. The human instrument relied on to achieve this objective in cases of serious crime is of course the jury. But to achieve it in some cases the jury must be alerted to the options open to it." As stated in the commentary to *Coutts* ([2006] Crim. L.R. 1065 at 1067) it is clear that the duty to leave the alternative offences to the jury lies with the judge, irrespective of the wishes of the trial advocates This is confirmed by the Court of Appeal in *Foster* (at [51]). The requirement is to leave any viable alternative offence, i.e. one for which there is evidence which has been adduced, if it is an "obvious" alternative - obvious in the sense that it "would suggest itself to the mind of the ordinary knowledgeable and alert criminal judge". But, as recognised in the instant case, it:

"[D]oes not necessarily follow from the defendant's admission of a lesser or different crime to the crime charged in the indictment that the jury must be given

an opportunity to return a verdict on the basis of the admitted criminal conduct." (at [591).

There will be occasions when a defendant will admit to some criminal activity on what might be seen as incontrovertible evidence but deny the more serious charge. In some such cases the alternative verdict may be somewhat remote from the real issue in the case and as such the defendant may be under-convicted. On the other hand there may be situations which work to the detriment of the defendant, as recognised in *Coutts,* where the jury may convict, having allowed their determinations to be influenced by issues extraneous to the evidence, when faced with a stark choice between convicting on serious charges a defendant who has acted deplorably rather than acquit altogether. Such risks are not always present, however, and as such it should not be a firm rule that every alternative verdict should be left to the jury. The court recognised that the whole administration of justice in the Crown Court depends upon the conscientiousness of the jury and their ability to follow appropriate directions from the judge. As such, whether or not a lesser alternative offence should be left to the jury must be a judgment left to the trial judge who has a "feel for the case" (at [611]). It is the judge who is best placed to consider whether the absence of a direction about a lesser alternative verdict would disadvantage the defendant, and similarly he or she is best placed to consider fairness to the prosecution and the wider interests of society. Lord Bingham's objective of avoiding over and under-conviction must allow for a determination by the trial judge based upon the evidence and issues raised rather an absolute question of law. The exercise of the discretion must of course not prejudice the defendant and this has been supported by the European Court of Human Rights in *Pelissier* v *France* (2000) 30 E.H.R.R. 715.

Extending the ambit of the statutory framework. In the absence of any clear indication by the House of Lords the suggestion that the principles in *Coutts* extended beyond the statutory framework was rejected. A bill of indictment is defined in *Archbold* as "a written or printed accusation of crime made at the suit of the Crown against one or more persons" (para. 1-1). For the judge to consider at the end of the evidence whether the indictment should be amended to include all offences on which a jury might convict would change the nature of the indictment to one which stated the charges identified by the court rather than the prosecution. As this had not been envisaged explicitly by the House of Lords, there was no reason for the Court of Appeal to develop the law in this way.

Safety. The impact of any erroneous failure by the trial judge to leave an alternative lesser verdict to the jury would be governed in the usual way by reference to the statutory test relating to the safety of conviction. The approach in *Maxwell* (1990) 91 Cr. App. R. 61 suggested that the appellate court should interfere only where satisfied that the jury may have convicted out of a reluctance to see the defendant getting clean away. This case was described in *Coutts* as "not an easy authority" (at [19]), and the present court determined that the approach taken in *Maxwell* is no longer good law, stating: "Lord Ackner's test is no longer applicable. Effectively, it has been extinguished" (at [51])."

871. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Volante* (judgment delivered on the 5th September 2008) stated:

"44. Mr Quinn submitted that the Acting Deemster erred in failing to direct the jury that if they were satisfied that the Appellant had assaulted a girl but were not satisfied that such occurred in circumstances of indecency they could return a verdict of guilty of common assault. This submission was never made to the Acting Deemster.

45. Mr Unsworth submitted that such submission was divorced from the factual content of the allegations made by the girls. They had alleged that the Appellant touched or kissed them or interfered with their clothing in circumstances from which the jury could infer indecency. It was never the Appellant`s case that he had inflicted common assaults on these girls and he never offered to, or did, plead guilty to common assaults on such girls. When those representing the Appellant were given the opportunity to discuss the Acting Deemster`s proposed legal directions, this point was never raised.

46. In such circumstances and on the particular facts of this case we are satisfied that there was no obligation on the Acting Deemster to direct the jury as to an alternative offence of common assault. That was not the way in which his case was being put and there was no submission by either prosecution or defence that the jury should be so directed. We agree with Mr Unsworth that the issues for the jury were essentially two-fold : firstly, did the incident as described by the girl happen ? and secondly, did such incident constitute an indecent assault? We have no doubt that, in the absence of the Appellant conducting his case with such an alternative in mind, it would have been an unnecessary complication of an already factually complex case for the Acting Deemster to have invited the jury to consider an alternative offence of common assault.

47. For the sake of completeness we add that even had the Acting Deemster been asked by those representing the Appellant to direct the jury as to an alternative verdict of common assault, she would not have been required to do so if she concluded, as she was entitled to do on the way the prosecution and defence presented their cases, that a verdict of guilty to common assault could properly be described in its legal and factual context as trivial, or insubstantial, or would not reflect the real issues in the case : see *R v Foster* [2008] 1 WLR 1615."

872. See also section 22 of the Criminal Jurisdiction Act 1993 which provides as follows:

"22 Alternative verdicts

(1) On an information for murder, a person found not guilty of murder may be found guilty of –

(a) an offence under section 20 (manslaughter) or section 33 (grievous bodily harm) of the Criminal Code 1872;

(b) an offence under section 2(1) (abetting suicide) of the Criminal Law Act 1981;

(c) any offence of which he may be found guilty under subsection (4), or under any other enactment specifically so providing;

(d) any offence under sections 23 to 27 (attempted murder) of the Criminal Code 1872, or an attempt to commit any other offence of which he might be found guilty,

but may not be found guilty of any offence not included above.

(2) Where, on the trial of a person on information for any offence except treason or murder –

(a) the jury finds him not guilty of the offence specifically charged in the information, but

(b) the allegations in the information amount to or include (expressly or by implication) an allegation of another offence,

the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an information specifically charging that other offence.

For the purposes of this subsection an allegation of an offence shall be taken as including an allegation of attempting to commit that offence.

(3) Without prejudice to subsection (2), where on the trial of a person on information for an offence under section 1 (rape) or section 7) (incest) of the Sexual Offences Act 1992 –

(a) the jury are not satisfied that he is guilty of the offence charged or of an attempt to commit it, but

(b) the jury are satisfied that he is guilty –

(i) where charged with an offence under section 1, of an offence under section 2 (procurement by threats or lies) or section 3 (administering drugs to obtain sexual act) of that Act, or

(ii) where charged with an offence under section 7, of an offence under section 4 (intercourse with young person) of that Act,

they may find him guilty of the latter offence.

(4) If on the trial of a person on information for an arrestable offence the jury are satisfied that the offence charged (or some other offence of which the defendant might on that charge be found guilty) was committed, but find the defendant not guilty of it, they may find him guilty of any offence under section 7(1) of the Criminal Law Act 1981 (act to impede apprehension or prosecution of offender) of which they are satisfied that he is guilty in relation to the offence charged (or that other offence).

(5) On the trial of a person on information of attempting to commit an offence, he may be convicted of the offence charged even though he is shown to be guilty of the completed offence, but he is not afterwards liable to be prosecuted for the completed offence.

(6) Subsection (5) is without prejudice to the power of the Attorney General, at any time before a verdict, to enter a *nolle prosequi,* or to the power of the court to discharge the jury, with a view to the preferment of an information for the completed offence.
(7) Subsections (1) to (4) apply to an information containing more than one count as if each were a separate information.
(8) Nothing in this section prejudices section 9 (attempt to commit offence is an offence) of the Criminal Law Act 1981.
(9) In this section 'arrestable offence' has the meaning given by section 4(1) of the Criminal Law Act 1981".

[See s6(3) CJA 1967 Act of Parliament]

873. If the alternative count is in the information consider Specimen Direction 4 of the Judicial Studies Board which reads as follows:

"4. Alternative Offences

Counts 1 and 2 are alternative counts. You cannot find the defendant guilty on both. [First consider count 1, which is the more serious charge involving (set out ingredients briefly). If you find the defendant guilty on that count, do not consider count 2 at all. If you are not sure that the defendant is guilty on count 1, then consider count 2 [which involves, etc]."

874. In respect of road traffic cases see Part IV of Schedule 6 to the Road Traffic Act 1985 especially paragraphs 1(1), 1(2) and 1A, and 3.

875. In *Brown* the Appeal Division (Judge of Appeal Tattersall and Acting Deemster King) in a judgment delivered on the 29th January 2007 at paragraph 24 stated:

"For it to be open to the jury to return an alternative verdict not only must the test in section 22(2) (b) be satisfied, but the alternative offence must be capable of being tried by information. A purely summary offence will not qualify."

876. Section 3 of the Criminal Code (Informations) Act 1920 provides that charges for any offences, whether felonies or misdemeanours, may be joined in the same information if those charges are founded on the same facts, or form or are part of a series of offences of the same or a similar character. The words "felonies or misdemeanours" were given judicial attention in *R v Collister* 2003-05 MLR 150 (Court of General Gaol Delivery Deemster Doyle) and *R v Gibney and Jack Robinson Trawlers* (Court of General Gaol Delivery Acting Deemster Moran judgment 18th May 2005). See also the earlier judgment of Acting Deemster Moran in *R v Gibney and Jack Robinson Trawlers* (Court of General Gaol Delivery 12th April 2005). Acting Deemster Moran concluded as follows:

"For all of those reasons, I am satisfied that the so called offence of corporate manslaughter does not exist in the Isle of Man and that it was not open to the prosecution to charge the second defendant with Manslaughter under section 20 of the Criminal Code of 1872 in this case."

877. In *R v McEvilly* [2008] EWCA Crim 1162; [2008] Crim LR 968 it was held that where there are two charges in the alternative on the indictment arising from the same facts, and with one more serious than the other, the judge should not take a verdict on the less serious count until finality had been reached on the more serious charge. Such finality might take the form of a not guilty verdict, or a decision to discharge the jury on that count because there was no realistic prospect of agreement on a verdict. If a verdict was prematurely returned on an alternative count before the jury had given their verdict on the more serious count, the judge should decline to accept the verdict on the alternative count.

Counsel's duty to assist Deemster in respect of summing up

878. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Duffy* (judgment delivered 26th October 2004) summarised the position succinctly in one line:

"15 … It is the duty of all advocates to give proper assistance to the court."

879. In *Kelly* (judgment 8th November 2001) the Appeal Division (Judge of Appeal Tattersall and Deemster Cain) stated:

"16 … we are compelled to observe that at the conclusion of the evidence and before the commencement of speeches Deemster Kerruish indicated what directions he proposed to make and invited comment from the advocates thereon. Neither advocate made any observation and in particular neither advocate indicated that the learned Deemster should give the directions which both now concede that he should have given. In our judgment a prosecuting advocate is under a positive duty to draw to a Deemster's attention any failure to give an adequate and proper direction on the law - see *R v Lang-Hall* ["Times" 24th March 1989] and such was emphasised in *R v Roberts* [1992] Crim LR 375 and R *v Donoghue* [1988] 86 Cr App R 267 - and a Deemster is entitled to rely to an extent on that assistance being available to him - see *R v McVey* [1988] Crim LR 127. The extent of the duty on a defence advocate may be somewhat less - see *R v Cocks* [1976] 63 Cr App R 79 and *R v Edwards* [1983] 77 Cr App R 5 - although in *Edwards* the court considered it to be inconceivable that defence counsel, acting in a client' s best interests, could have failed to draw a serious omission in the summing-up to the attention of the judge."

880. In *Scambler* (judgment 12th January 2004) the Appeal Division (Judge of Appeal Tattersall and Deemster Doyle) at paragraph 8 stated:

"… it is the duty of those representing an appellant to clearly identify what matters are relied upon by the appellant as supporting his contention that his appeal against conviction should be allowed. This is particularly important in a case such as this where the court is supplied with a complete transcript of the trial. Furthermore it is incumbent on those representing an appellant to cite, and produce copies of, all authorities relied upon and to identify what propositions of law are to be relied upon from such authorities. It is insufficient merely to refer to large sections of Archbold, helpful though Archbold may be to set the scene for such submissions."

881. In *Scambler* the Appeal Division added:

"17. However it important that we should record that at the conclusion of his summing up the Acting Deemster asked both advocates whether there were any further directions he should give the jury and both confirmed that there were none. They too erred. We hope that all advocates will note what we said at paragraph 16 of our judgment in *Kelly* as to the duties on all advocates to assist a Deemster. Although we do not repeat such dicta in this judgment, advocates must fulfil their responsibilities."

882. At the appropriate stage of the trial and usually before the closing speeches of counsel the trial Deemster will indicate to counsel the main areas and directions the trial Deemster intends to cover in the summing up. The trial Deemster will invite submissions and counsel should not hesitate to offer assistance. It is counsel's duty to be in a position to assist the Deemster in respect of areas to be covered in the summing up. Counsel should assist the Deemster in respect of the areas counsel say should be dealt with in the summing up. For guidance under the laws of England and Wales see the helpful website of the Judicial Studies Board (*www.jsboard.co.uk*).

883. Simon Brown L J, giving the judgment of the English Court of Appeal in *R v Nelson* [1997] Crim L R 234, stressed that every defendant has the right to have his defence, whatever it may be, faithfully and accurately placed before the jury. A defendant is not however entitled to have his defence rehearsed blandly and uncritically in the summing up. No defendant has the right to demand that the judge should conceal from the jury such difficulties and deficiences as are apparent in his case. Of course, the judge must remain impartial. But if common sense and reason demonstrates that a given defence is riddled with implausiblities, inconsisticiences and illogicalities there is no reason for the judge to withhold from the jury the benefit of his own powers of logic and analysis. Why should pointing out those matters be thought to smack of partiality? To play a case straight down the middle requires only that a judge gives full and fair weight to the evidence and arguments of each side. The judge is not required to top up the case for one side so as to correct any

substantial imbalance. He has no duty to cloud the merits either by obscuring the strengths of one side or the weakness of the other. Impartiality means no more or less than the judge shall fairly state and analyse the case for both sides. Justice moreover requires that he assists the jury to reach a logicial and reasoned conclusion on the evidence. The judge should anaylise the competing cases and give the jury the benefit of that reasoned analysis. The judge in his summing up must, of course, make it abundantly plain that the all important conclusion on the facts is for the jury alone.

884. In *Devo* (judgment delivered on the 29th October 2008) the Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) commented in respect of the way the case had been presented before the Court of General Gaol Delivery. The following are extracts from the Appeal Division's comprehensive judgment:-

"168. We cannot leave this case without observing that the Acting Deemster, a very experienced Judge in both this jurisdiction and elsewhere, was not best served by the case as presented to her. She was faced with an almost impossible task. There were too many counts on the Information and a large number of defendants. Non-disclosure was a continuing serious problem which permeated throughout the whole trial and necessitated the recalling of witnesses, numerous applications and much delay. It is unfortunate that in such circumstances she erred."

"65 … the task faced by the Acting Deemster was not an easy one. Whilst a concise summing-up is to be commended, this was not a case where the Acting Deemster could avoid a lengthy summing-up if she was to give the assistance to the jury which it was entitled to expect from her. Although we do not criticise the advocates who, during breaks in the summing-up, drew the Acting Deemster's attention to what they perceived to be errors in such summing-up, and we note that many of such alleged errors were not pursued before this court, it must have been very distracting for the Acting Deemster, as also it must have been to be presented without any forewarning with written directions on the law which had been agreed by all the advocates. Whilst the agreement of directions by advocates can sometimes be a very useful approach, such an approach ought always to be one adopted in conjunction with the Deemster.

66. We recognise that ultimately this court has to take the summing-up as a whole and to ask themselves in the words of Lord Sumner in *Ibrahim v R* [1914] AC 599, at 615, whether there was :

'Something which ... deprives the accused of the substance of a fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in the future.'

67. But equally any appellate court must not lose touch with reality : see *R v Stoddart* 2 Cr App R 217 where Lord Alverstone CJ, at 245, made some general observations where a misdirection is alleged :

‘Probably no summing up, and certainly none that attempts to deal with the incidents as to which the evidence has extended over a period of twenty days, would fail to be open to some objection. ... Every summing-up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively. This Court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed, or whether other topics which might have been dealt with on other occasions should be introduced. This Court sits here to administer justice and to deal with valid objections to matters which may have led to a miscarriage of justice.’ ”

“76. In our judgment if a Deemster decides to introduce an issue into his summing-up which has not been actively canvassed in the course of the trial, he should at least give ample warning of his intention to do so to advocates in the absence of the jury and before the advocates` speeches so that there can be discussion as to correctness of the approach proposed to be adopted by the Deemster and an opportunity given to advocates to deal with that issue in their speeches : see *R v Cristini (Luigi)* [1987] Crim LR 504 and *R v Winn-Pope* [1996] CLR 521 where the judge’s comments went to the root of a defendant’s claim to be an honest shopper by labelling him as a ‘con man’ - a notion which the prosecution had been careful not to introduce.

77. The Acting Deemster did not adopt such approach. Moreover, as was recognised by her, the issue of possible inconsistency raised by the Acting Deemster went to the heart of Mr Devo’s defence.

78. In our judgment on the facts of this case it was impermissible for the Acting Deemster to introduce this new issue for the first time in her summing-up because firstly, the defence had no opportunity before the jury to deal with it either evidentially or by argument; secondly, it undermined a central feature of the defence, namely that there were different regulatory regimes for licences and that Mr Devo would not knowingly act unlawfully ; and thirdly, it could, and in our judgment probably would, raise concerns in the minds of the jury as to Mr Devo`s overall credibility.”

“108. Whilst we accept that it was inappropriate for the Acting Deemster to use the words `make you sure so that you think it is more likely than not`, this was a brief mistake which the Acting Deemster immediately corrected.

109. Whilst Mr Hackett recognised that this was not a major point he submitted that it formed part of the adverse factual matrix. We entirely disagree. A Deemster is not to be impugned where he makes a mistake and corrects it in circumstances where there can be no prejudice to a defendant. Here we are satisfied that the jury were properly directed as to the standard of proof in respect of Mr Devo, that in reality there was no misdirection and that there was no prejudice to Mr Devo.”

“122. The Acting Deemster declined to adopt such framework [a framework for directions submitted by counsel]. It may be that she believed, as we believe, that such were unnecessarily complicated and would serve to confuse rather than

assist the jury and certainly it is settled procedure that judges should avoid any elaboration or paraphrase of what is meant by intent : see *Archbold* 17-35(a). :

`When a judge is directing a jury upon the mental element necessary in a crime of specific intent (such as murder), he should avoid any elaboration or paraphrase of what is meant by intent, and leave it to the jury`s good sense to decide whether the accused acted with the necessary intent.`"

"125. On balance we concluded that whilst in all the circumstances it would have been preferable for the Acting Deemster to direct the jury in the expanded terms of the advocates` agreed direction, it was a fuller and more accurate direction than that which she gave albeit that it would have probably been more confusing to the jury, we do not think that by using a shorter more intelligible form of words the Acting Deemster misdirected the jury."

"142. Mr Lawson-Rogers submitted that the Acting Deemster failed to sum up the evidence and the defence case in a coherent and fair manner so as to enable the jury to appreciate the issues which they had to decide.

143 It was agreed that in her summing-up which lasted about 1½ days the Acting Deemster referred to the evidence in the precise order in which it was given, did not summarise the material parts of the evidence but recited it extenso, even when the jury had transcripts of such evidence and did not attempt to identify what evidence related to each count.

144. In *R v Lawrence* [1982] AC 510, at 519, Lord Hailsham LC described the duty of a judge when summing-up thus :

`The purpose of a direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case. The search for universally applicable definitions is often productive of more obscurity than light. A direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge`s note book. A direction to a jury should be custom-built to make the jury understand their task in relation to a particular case. Of course it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts.`

145. Moreover it is important for a Deemster to marshal the evidence and arrange it issue by issue : see *R v Amado-Taylor* [2000] 2 Cr App R 189 where, at 192, Henry LJ stated :

`…generally speaking, the longer a trial lasts, the greater will be a jury`s need for assistance from the judge relating to the evidence. Many jurors do not have the experience, ability or opportunity of a judge to note significant evidence and to cross reference evidence from different sources which relates to the same issue. Accordingly, in a trial lasting several days or more, it is generally of assistance to the jury if the judge summarises those factual issues which are not disputed, and, where there is a significant dispute as to material facts, identifies succinctly those

pieces of evidence which are in conflict. By so doing, the judge can focus the jury`s attention on those factual issues which they must resolve. It is never appropriate, however, for a summing-up to be a mere rehearsal of the evidence.`

146. Similarly in *Berry v R* [1992] 2 AC 364, at 383, Lord Lowry stated :

`The jury are entitled at any stage to the judge`s help on the facts as well as on the law. To withhold that assistance constitutes an irregularity which may be material depending on the circumstances, since, if the jury return a guilty verdict, one cannot tell whether some misconception or irrelevance has played a part.`

147. Although we recognise that a Deemster has some discretion as to how he thinks it is best to sum up a case, he is probably in the best position to make such judgment, we have no doubt that much of evidence and the transcripts could have been summarised by the Acting Deemster and that when summarising the evidence she could have greatly assisted the jury by identifying to which count such evidence might be relevant.

148. Ultimately we had to consider whether this summing up was unfair and gave rise of a risk of a miscarriage of justice. With some hesitation we have concluded that such risk existed for the following reasons.

149. Firstly, this trial began with 8 Defendants and 60 counts. There were problems with late and non-disclosure. Witnesses had to be recalled. Defendants were discharged after successful applications that they had no case to answer. The Information was eventually reduced to 4 counts facing two defendants but counts 1 and 2, which related solely to Mr Devo, related to a completely different kind of offence and a different regulatory regime than counts 3 and 4, which related to both Mr Devo and Mr Riedel. During the trial, which lasted for over 7 weeks, the jury did not sit for 9 days, during which the Acting Deemster was required to address various applications and give both sides time to consider new documentation. In such circumstances the jury were entitled to expect and greatly needed assistance from the Acting Deemster to identify the issues which they had to address and the available evidence which had been adduced on such issues.

150. Secondly, we do not believe that the structure of the Acting Deemster's summing up gave such assistance. In this case it was, we think, mandatory for the Acting Deemster to make it clear what evidence related to which count and, in relation to counts 3 and 4, to which defendant.

151. In not adopting such a structured summing up we have concluded that there was a significant risk that the jury may have not identified the relevant issues and evidence or at least may have been confused on such matters, making the convictions of Mr Riedel on counts 3 and 4 unsafe."

885. In *Volante* (judgment delivered on the 5th September 2008) the Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) stated:

"66. Whilst we readily accept that it is the duty of a Deemster when summing up to identify the defence, although how this is required to be done will depend on all the circumstances of the case, we do not think that a Deemster is required to

identify every part of cross examination which a defendant believes might assist his case. To conclude otherwise would place an impossible burden on the Deemster and would encourage prolixity rather than brevity. What is required is that the Deemster should undertake a fair review of the essential features of the evidence and strike a fair balance between the prosecution case and the defence case.

67. We have carefully reviewed the entirety of the summing up and are satisfied that not only was the defence case properly identified but that there was a fair review of the totality of the evidence which had been adduced to the jury. We thus reject this submission.

68. Although we do not make any criticism of Mr Quinn`s detailed submissions in support of his contention that the convictions were generally unsafe and unsatisfactory, we have to say that in our judgment his analytical approach in dissecting the summing up did not acknowledge the reality of the overall impact of the summing up on the jury which we are satisfied was fair to the Appellant."

886. In *Volante* the Appeal Division also stated:

"21. Such submission is made notwithstanding that prior to her summing up the Acting Deemster had provided both prosecution and defence with her draft submissions as to the law [which in due course were incorporated in her summing up] and the defence had raised no issue as to the appropriateness of such directions. Whilst we accept that the failure of an advocate to adversely comment on draft directions when given the opportunity to do so is not fatal to an appeal based on an alleged misdirection, the absence of any comment is likely to affect the assessment of the significance of the alleged deficiency : see *R v Gammans & Jarman* [1999] 2 *Archbold News* 1…

31. The Acting Deemster continued thus :

`The second element is that of indecency. An assault by itself is not enough to found a conviction, the assault must have occurred in circumstances of indecency. Another way of expressing the same test is whether what occurred was so offensive to contemporary standards of modesty and privacy as to be indecent. You as the jury have to decide whether right minded persons would consider the conduct indecent or not. Some assaults, if you are sure that they occurred, may give rise you think to an irresistible inference that the Defendant intended to assault the girl in a manner which right minded persons would clearly think was indecent. On the other hand there may be assaults which you are sure occurred where the circumstances are such that they are only capable of constituting an indecent assault. In those circumstances you must be satisfied that the Defendant intended to act indecently. You look at the following factors and any other factors which you agree [and] regard as relevant : the relationship between the Defendant and the girl ; how did the Defendant embark on this conduct and why was he so behaving ; what did the Defendant say, if anything ; what were the surrounding circumstances ; who was present ; what was the girl`s reaction to the behaviour ; was she upset or not by the behaviour ; what has the Defendant told you about these incidents in interview and in the course of his evidence.`

32. Mr Quinn, in our judgment correctly, did not criticise such directions.

33. The Acting Deemster continued thus :

`But the issue of consent needs to be dealt with. All of these girls were under the age of 16 at the time, so they were unable in law to consent to such behaviour. Therefore, if the Defendant believed that they consented or that they did not mind such behaviour that is no defence.`

34. Mr Quinn again did not criticise such directions which were founded upon section 13(2) of the Sexual Offences Act 1992. We agree that such direction was an impeccable one.

35. The Acting Deemster continued thus :

`But also it is not necessary for the Prosecution to prove that the Defendant had an indecent motive when he performed any assault that you find proved. It is what the Defendant did which is important, although you take into account any evidence as to his motive in deciding whether right minded persons would consider the conduct indecent or not. You must decide what right minded persons would think of this conduct and decide whether you think it is indecent. It is not what the Defendant thought of such conduct.`

36. This is the crucial passage relied upon by Mr Quinn. He submitted that in these directions the Acting Deemster erred in law and, having correctly directed the jury [as set out in paragraph 31 above] as to the requisite intent on the part of the Appellant in respect of the offences alleged against him, the Acting Deemster was here giving an inconsistent and contrary direction as to intent which was wrong in law. If Mr Quinn`s analysis is correct it is surprising that no immediate objection was made to the Acting Deemster and whilst recognising that it is not easy for an advocate to interrupt a summing up in the presence of the jury, we bear in mind that there were a number of opportunities during breaks in the summing up when such objection could conveniently have been made to the Acting Deemster in the absence of the jury.

37. We have given this submission careful consideration but are satisfied that it lacks any merit…

60. Secondly, Mr Quinn submitted that in her summing up the Acting Deemster erred in law in referring to inadmissible hearsay evidence. There were few examples of this. They largely related to the girls saying during their dvd interviews that other girls had seen things. No objection had been taken by the defence to such evidence, no doubt because it was part of the Appellant`s case that the girls had discussed matters and were in effect conspiring together to present a false case against him. Mr Quinn thus contended that there should have been warnings by the Acting Deemster to disregard hearsay evidence, notwithstanding that he conceded that when summarising the evidence in relation to count 6 the Acting Deemster had expressly directed the jury to disregard those parts of the evidence which were hearsay and that the only purpose of some of such evidence was to explain how matters came to be reported.

61. We regard such submission as misconceived. The hearsay evidence had been introduced into the trial without any objection by the defence. More importantly, before she began to refer to the evidence the Acting Deemster gave the jury an express direction as to the effect of hearsay evidence. She said this :

`Hearsay Evidence. During the course of the trial you heard me explain about hearsay evidence. There are some exceptions but as a general rule you must only rely upon direct evidence, that is where a witness says I was there and I saw and I heard that. Girl A describing what another girl B told her is not evidence you should rely on to establish the truth of what the girl B said. However, if girl B tells you herself then it is direct evidence and it is evidence that you can rely on providing you are satisfied it is accurate and truthful.`

62. In our judgment no legitimate criticism can be made of such direction and, having given such a direction at the outset of her summing up we are satisfied that there was no obligation on the Acting Deemster to repeat such direction each time she referred to a piece of hearsay evidence."

887. The Privy Council in *Trimmingham v The Queen* (judgment delivered 22nd June 2009) stated:

"12 There are few cases in which the judge's summing up could not be criticised in some respects and submissions advanced that the content or wording could have been improved upon. The present case is no exception. It is possible in various places to say that the judge should have spelled matters out more fully or in a different fashion, but what an appellate tribunal must do is to look at the thrust of the directions and consider if they have adequately put the several issues before the jury and given them a proper explanation of their task in relation to those which they have to decide. In particular, the Board must determine whether, if there has been any defect, there has been any miscarriage of justice which requires their intervention. Their Lordships are fully satisfied that the trial judge's careful summing up stated the law adequately and put the issues properly and fairly before the jury. They consider that any deficiencies to which exception might be taken were minor and that they fall well short of a miscarriage of justice which should cause them to set aside the verdict."

888. In *Trimmingham* the Privy Council also dealt with the law in respect of accomplice evidence and lies as follows:

"10. Mr Fitzgerald QC for the appellant submitted that these directions were defective, in that the judge did not spell out why it was dangerous to convict on an accomplice's evidence and failed to make it sufficiently clear that the evidence relied on by way of corroboration only went so far as to contradict the appellant's alibi and fell short of pointing to him as the one who killed the deceased, rather than Ding. It has to be borne in mind, however, that at the time of trial the appellant was advancing an alibi and was not making the case upon which he subsequently relied, that although both he and Ding were present at the scene it was Ding who carried out the killing, contrary to the appellant's wishes. In negativing his alibi, the Crown evidence tended to show that he was making a false case. The judge in such a situation had to make it sufficiently clear to the jury that advancing a false alibi or lying in other respects did not of itself suffice

to establish guilt of the crime and that they had to consider possible reasons why the appellant might have done so other than trying to cover up guilt. The issues of corroboration and a *Lucas* direction are in this respect interdependent."

889. The Privy Council in *Trimmingham* also stated the following in respect of death sentences imposed by Carribean courts:

"20. Judges in the Caribbean courts have in the past few years set out the approach which a sentencing judge should follow in a case where the imposition of the death sentence is discretionary. This approach received the approval of the Board in *Pipersburgh v The Queen* [2008] UKPC 11, and should be regarded as established law.

21. It can be expressed in two basic principles. The first has been expressed in several different formulations, but they all carry the same message, that the death penalty should be imposed only in cases which on the facts of the offence are the most extreme and exceptional, "the worst of the worst" or "the rarest of the rare". In considering whether a particular case falls into that category, the judge should of course compare it with other murder cases and not with ordinary civilised behaviour. The second principle is that there must be no reasonable prospect of reform of the offender and that the object of punishment could not be achieved by any means other than the ultimate sentence of death. The character of the offender and any other relevant circumstances are to be taken into account in so far as they may operate in his favour by way of mitigation and are not to weigh in the scales against him. Before it imposes a sentence of death the court must be properly satisfied that these two criteria have been fulfilled.

22. Mr Fitzgerald readily accepted that the appellant's crime was a brutal and disgusting murder, involving the cold-blooded killing of an elderly man in the course of a robbery. He contended, however, that it fell short of being in the category of the rarest of the rare. He submitted that the killing did not appear to have been planned or premeditated and although the manner of the killing was gruesome and violent, there was no torture of the deceased, nor prolonged trauma or humiliation of him prior to death.

23. Their Lordships accept the correctness of this contention. It was undeniably a bad case, even a very bad case, of murder committed for gain. But in their judgment it falls short of being among the worst of the worst, such as to call for the ultimate penalty of capital punishment. The appellant behaved in a revolting fashion, but this case is not comparable with the worst cases of sadistic killings. Their Lordships would also point out that the object of keeping the appellant out of society entirely, which the judge considered necessary, can be achieved without executing him.

24. This conclusion makes it unnecessary for the Board to consider the factors relating to the character and personality of the appellant, to which the content of the medical reports, if admitted, would be material. Nor do they propose to express an opinion on the other grounds of appeal against sentence advanced on behalf of the appellant, save that they feel obliged to draw to the attention of prosecutors once again the principles set out in paragraphs 10 and 11 of the judgment of the Board in *Randall v The Queen* [2002] UKPC 19, [2002] 1 WLR

2237 regarding the standard of conduct to be expected of them as ministers of justice."

890. See also *Sayle* (Appeal Division judgment 24th May 2006) in respect of the discretion of the trial Deemster where an advocate wrongly refers to sentencing matters in a closing address to the jury. In *Chambers* (Appeal Division judgment 12th August 2010) helpful guidance in respect of issues to be covered in summing up a case under the Misuse of Drugs Act 1976 including a paraphernalia direction was provided.

891. See *Ronald John v The State of Trinidad and Tobago* (Privy Council judgment delivered 16th March 2009) in respect of directions to the jury where an accomplice who benefits from immunity from prosecution has given evidence.

892. The English Court of Appeal in *R v Harvey* [2009] EWCA Crim 469 dealt with the directions a trial judge should give in respect of self-defence. The following are extracts from the judgment of Moses L J:

"1. This is an appeal which demonstrates the importance of fashioning directions to a jury to the issues of the case. The grounds of appeal are focussed on the directions which the judge gave in relation to self-defence …

13. Although distinct grounds were advanced, their merits can only be judged by consideration of the summing up as a whole. The sense of the directions must be judged by the thrust of the summing up as a whole and not by analysis of isolated extracts. Did the judge adequately explain that the burden remained on the prosecution throughout to disprove self-defence? Did he make sufficiently clear the essential elements of the law as to self-defence as applicable to the factual issues of the case ?…

23. We acknowledge that a confused and confusing direction is an oxymoron. If a judge is unclear he cannot be said to be directing the jury at all. We also recognise that it is the prime function of a judge's directions to a jury to spare the jury from the law and not to inflict it upon them. No disquisition on the 19th century statutory provisions was necessary. Nor was it necessary to give general directions on the law of self-defence without reference to the factual issues in the case …

30. The argument advanced in the third ground demonstrates the erroneous belief that in every case of self-defence all the elements are always relevant and must be mechanically recited to the jury. In any event in the passage we have cited at §10 the judge did make it clear that the defence was based upon the circumstances as the defendant honestly believed them to be.

31. As the Privy Council said in *Shaw* (§20) the rudiments of self-defence must be stated in clear and simple terms. The Privy Council was doing no more than repeating what has been said so many times before:

"The directions must be tailored to the factual dispute."

The directions in law needed do no more than to guide the jury as to what the essential factual dispute was and the conclusions to be drawn from the different findings open to them on the evidence."

893. The Privy Council in *Jackson v The Queen* (judgment delivered 7th July 2009) provided some guidance in respect of the law on joint enterprise and concluded that the trial judge had failed to give any coherent directions on joint enterprise. The guidance was as follows:

"11. It was, of course, common ground before the Board that, for a conviction of murder, the Crown has to prove that the person who struck the fatal blow did so with the intention to kill or to cause serious injury. Both parties also accepted that, for present purposes, the most up-to-date guidance on the law of joint enterprise was to be found in the speech of Lord Brown of Eaton-under-Heywood in *R v Rahman* [2009] 1 AC 129, 165, para 68:

"If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture unless (i) A suddenly produces and uses a weapon of which B knows nothing and which is more lethal than any weapon which B contemplates that A or any other participant may be carrying and (ii) for that reason A's act is to be regarded as fundamentally different from anything foreseen by B." "

894. See also *R v Yemoh* [2009] EWCA Crim 930 in respect of the law concerning joint enterprise.

895. In *Williams* 2003-05 MLR N8 the Appeal Division (Judge of Appeal Tattersall and Deemster Doyle) dealt with the offence of counselling and procuring and held that there needed to be an intention to encourage and actual deliberate encouragement of the offence committed. Mere presence at the scene of the crime was insufficient in itself.

896. The following are extracts from the Appeal Division's judgment in *Williams* 2003-05 MLR N 8, delivered on the 20th August 2003:

"The alleged misdirection on `encouragement`

34. This ground of appeal gives rise to two separate complaints, albeit that there is some overlap between them. Firstly, that the Acting Deemster misdirected the jury when referring to the factual issue as to whether the Appellant encouraged Mr Renshaw to assault Mr Griffin. Secondly, whether the Appellant should have been prosecuted for an offence of aiding and abetting Mr Renshaw in the commission of the assault. Both complaints can conveniently be considered together.

35. Miss Hannan submits that encouragement is insufficient to justify a conviction of inflicting grievous bodily harm although she concedes that it is sufficient to justify a conviction for aiding and abetting. Mr Carle disagrees.

36. Throughout the trial the case was conducted by the prosecution on two alternative bases : either the Appellant physically took part in the assault or she encouraged it to take place. Such is apparent from the prosecution opening :

`[The Appellant] denied any involvement whatsoever in the assault herself. Again, members of the jury, it will be up to you, having heard all the evidence, to decide whether or not this is indeed the case or whether by encouragement and or by taking part herself, she too is guilty of the involvement of the offence of grievous bodily harm.`

37. Before she addressed the jury, Miss Hannan expressed her concern to the Acting Deemster that in their closing address the prosecution had submitted to the jury that the Appellant could be convicted of the offence of inflicting grievous bodily harm if they were satisfied that she had encouraged the offence and that in the event of a conviction the Acting Deemster would not know on what factual basis - physical involvement or mere encouragement - the jury had convicted. Accordingly she contended that there should be a count of aiding and abetting.

38. The Acting Deemster rejected such submission on the basis that, whatever difficulties might result in sentencing, as a matter of law the Appellant could be convicted of the offence of inflicting grievous bodily harm if she either physically participated in the assault on Mr Griffin or if she encouraged Mr Renshaw to so assault Mr Griffin.

39**.** As a matter of law we are satisfied that the Acting Deemster was right.

40. To establish criminal liability on the ground of encouragement, it must be proved that a defendant intended to encourage and wilfully encouraged the crime committed. This is a question of fact for a jury. Mere continued voluntary presence at the scene of the commission of a crime, even when non-accidental, does not necessarily amount to such encouragement. On the facts here there was ample evidence from which the jury could legitimately conclude that the Appellant had encouraged Mr Renshaw to continue to assault Mr Griffin. We do not accept that it was necessary that there be an alternative count of aiding and abetting. Whether this had been an aiding and abetting case or one of joint enterprise, in our judgment the case was legitimately put to the jury on the basis of encouragement.

41. However we do accept that had there been a count of aiding and abetting, the jury could have been directed that if they were to be satisfied only that the Appellant encouraged Mr Renshaw and were not satisfied that she physically participated in the assault, they should convict only of the count of aiding and abetting. Had that course been followed the jury`s findings would have been capable of easy interpretation. Because there was no such count, and we stress that in law there need be no such count, it was difficult to know on what basis the jury had convicted the Appellant. It may be noted that in sentencing this Appellant, the Acting Deemster assumed that the conviction was on the basis of encouragement alone, namely the construction most favourable to the Appellant."

897. In *Hollyoak v R* 1990-92 MLR 329 at 337 Judge of Appeal Hytner stated:

> "When the learned Deemster summed the case up to the jury he made no reference to various inconsistencies on these peripheral matters. On the whole, and particularly when the defendants have not given evidence, it is as well for the judge to remind the jury, not in detail, but of the fact that in cross-examination the witness was not wholly consistent."

898. In *Shimmin v Oake* 1993-95 MLR N 3 it was held by the Appeal Division (Judge of Appeal Hytner and Acting Deemster Tattersall as he then was) that when a person has been found in possession of cannabis wrapped in a manner typical of that used by suppliers, it was wrong to infer from that evidence alone that the person is a supplier, since it might equally be inferred that the drug had recently been received from the supplier.

899. In respect of *Lovelock/Kelly* directions regarding extravagant living or drug paraphernalia found in the possession of those charged with offences under the Misuse of Drugs Act 1976 see *Kelly* (judgment 8th November 2001 Appeal Division), *Flanagan* (judgment 29th July 2004 Appeal Division), *Scambler* (judgment 12th January 2004 Appeal Division), *Lovelock* [1977] Crim LR 821 and *Grant* [1996] 1 Cr App R 73.

900. See also the Judicial Studies Board's Specimen Direction 36 Drugs – Money found in possession of Defendant/Evidence of Extravagant lifestyle:

> "The prosecution has called evidence that D [eg was found to be in possession of £...] (and/or to the effect that he) [was living to a standard which they suggest was much higher than that which might be expected of a man of his means].
>
> That evidence, if you accept it, does not by itself prove anything against D. However, if you are sure that:
>
> (a) D's explanation for the [money][standard of living] is untrue; (adding, in a supply or intent to supply case)
>
> (b) the [money][standard of living] can only be explained by continuing dealing in drugs as opposed to drug dealing in the past,
>
> you may if you think fit take that evidence into account when deciding whether D [was in possession of drugs][intended to supply drugs to another person][supplied drugs to another person] as alleged in the indictment.

Notes

1. See R v Gordon 2 Cr App R 61, R v Diane Morris 2 Cr App R 69, R v Grant [1996] 1 Cr App R 73 and R v Malik, unreported (98/02540/43). Re 'lifestyle', see R v Scott [1996] Crim LR 652.
2. In R v Guney [1998] 2 Crim App R 242, the Court of Appeal held that it is for the trial judge to determine whether cash and lifestyle may be relevant and admissible to any issue in the case. The court decided that in limited circumstances this kind of evidence might be relevant to the issue of possession only. The admissibility of such evidence depends on the particular circumstances of the case, and the issues raised (for example, the defendant was not 'knowingly' in possession). Such evidence is more likely to be relevant where the issue is possession with intent to supply. See also R v Griffiths [1998] Crim LR 567, CA.
3. A similar direction should be given where the issue is intent to supply and documents such as notes and jottings are admitted in evidence. See R v Lovelock [1997] 2 Crim LR 821 and R v Chubb, unreported (97/03840/X5).

Archbold (2003) 26-71 page 2272.
Blackstone (2003) F1.9 page 1957."

901. As regards notebooks and money it is incumbent on a trial judge to give a scrupulously fair direction to the jury that before the jury can use evidence of documents or other drug paraphernalia as evidence of an intent to supply they must be satisfied that it was not only demonstrative of past dealing but also capable of going to intention to supply in the future.

902. Is the finding of money in the possession of the defendant at his home or perhaps more cogently in the possession of the appellant when away from his home and in conjunction with a substantial quantity of drugs relevant to the issue of intent to supply? It is a matter for the jury to decide whether the presence of money, in all the circumstances, is indicative of an ongoing trading in the drugs, so that the presence of the drugs at the time of the arrest is capable of being construed as possession with intent to supply.

903. It is necessary for the judge to indicate that any explanation for the money which has been put forward by way of an innocent explanation by the accused would have to be rejected by the jury before they could regard the finding of the money as relevant to the offence. Again the jury should be directed that if there was any possibility of the money being in the accused's possession for reasons other than drug dealing, then the evidence would not be probative. If, on the other hand, the jury were to come to the conclusion that the presence of the money indicated not merely past dealing, but an ongoing

dealing in drugs, then finding the money, together with the drugs in question, would be a matter which the jury could take into account in considering whether the necessary intent had been proved.

904. See also *Dickson* (Appeal Division judgment 6th January 2003). If the alleged tick list is a part of a book it is desirable perhaps that the whole book should be before the jury if that is the wish of the defendant. In *Dickson* it was argued by the defence that Mr Duggan, a prosecution expert, should not have been allowed to go as far as he did in saying that the document was a tick list. The Appeal Division at paragraph 5 stated:

> "First we observe that there was no challenge made as to why he should not give expert evidence and from the beginning of his evidence it is quite obvious that he is very well qualified.
> Thus, looking at the evidence as a whole we find that in the end result he only goes as far as saying that this might be a tick list."

905. In *Dickson* the Appeal Division also dealt with a submission that the trial Deemster failed to direct the jury about the significance of and the use which they could make of the books, the clingfilm, and what in general is termed paraphernalia. The Appeal Division applied *Kelly*.

906. In *Pate v R* 1981-83 MLR 130 the Appeal Division (Judge of Appeal Hytner and Deemster Luft) held that the trial judge (Deemster Corrin) had not acted improperly in giving a written note to the jury setting out the essentials of his direction on provocation since counsel had seen the note and not objected either to the note being given or its terms. The Appeal Division indicated that such a practice could be helpful, particularly after a long summing up, but its value should be weighed against the attendant dangers and it should never be adopted unless counsel had an opportunity to object.

907. The Privy Council in *Eiley v The Queen* [2009] UKPC 39 dealt with issues in respect of a summing up where a prosecution witness had been charged with murder and then done a deal with the DPP and was giving evidence against the defendant.

Duties of advocates

908. In *Parton* (judgment delivered 30th July 2009) I endeavoured to set out some of the duties of prosecution and defence counsel. I stated the following:

"49. Rule 19(1) of the Advocates Practice Rules 2001 provides that advocates have an overriding duty to the court to ensure, in the public interest, that the proper and efficient administration of justice is achieved; they must assist the court in justice and must not deceive or knowingly or recklessly mislead the court.

50. Rule 19 (6) of the Advocates Practice Rules 2001 provides that an advocate must comply with any order of the court which the court can properly make, requiring the advocate or his firm to take or refrain from taking some particular course of action; equally an advocate is bound to honour an undertaking given to any court or tribunal.

51. Rule 21 of the of the Advocates Practice Rules 2001 provides as follows:

"Application of Bar Council and the Law Society Codes

21. Unless there is a conflict with these Rules or with an Isle of Man statute or decision of the Courts of the Isle of Man in the construction or interpretation of these practice rules, reference shall be made to the provisions contained in the Guide to the Professional Conduct of Solicitors of England and Wales and the Code of Conduct of the Bar of England and Wales and such provisions will be applicable and shall be followed unless they arise out of some statutory obligation or duty imposed upon Solicitors or Barristers in England and Wales which does not apply to advocates."

52. Section 3 of the Code of Conduct of the Bar of England and Wales relates to written standards for the conduct of professional work. Section 3 paragraph 10 refers to the responsibilities of prosecuting counsel. Paragraph 10.4(a) provides that prosecuting counsel should settle an indictment promptly and within due time and should bear in mind the desirability of not overloading an indictment with either too many defendants or too many counts, in order to present the prosecution case as simply and as concisely as possible. Paragraph 10.4(e) provides that prosecuting counsel should eliminate all unnecessary material in the case so as to ensure an efficient and fair trial and in particular should consider the need for particular witnesses and exhibits and draft appropriate admissions for service on the defence. Paragraph 10.8 concerns the duties of prosecuting counsel in relation to sentence. Paragraph 10.8(e) provides that prosecuting counsel:

"(e) should draw the attention of the defence to any assertion of material fact made in mitigation which the prosecution believes to be untrue: if the defence persist in that assertion, prosecuting counsel should invite the Court to consider requiring the issue to be determined by the calling of evidence in accordance with the decision of the Court of Appeal in R v Newton (1983) 77 Crim App R 13".

53. Paragraph 11 refers to the responsibilities of defence counsel and provides as follows:

"11 Responsibilities of Defence Counsel

11.1 When defending a client on a criminal charge, a barrister must endeavour to protect his client from conviction except by a competent tribunal and upon legally admissible evidence sufficient to support a conviction for the offence charged.
11.2 A barrister acting for the defence:

(a) should satisfy himself, if he is briefed to represent more than one defendant, that no conflict of interest is likely to arise;
(b) should arrange a conference and if necessary a series of conferences with his professional and lay clients;
(c) should consider whether any enquiries or further enquiries are necessary and, if so, should advise in writing as soon as possible;
(d) should consider whether any witnesses for the defence are required and, if so, which;
(e) should consider whether a Notice of Alibi is required and, if so, should draft an appropriate notice;
(f) should consider whether it would be appropriate to call expert evidence for the defence and, if so, have regard to the rules of the Crown Court in relation to notifying the prosecution of the contents of the evidence to be given;
(g) should ensure that he has sufficient instructions for the purpose of deciding which prosecution witnesses should be cross-examined, and should then ensure that no other witnesses remain fully bound at the request of the defendant and request his professional client to inform the Crown Prosecution Service of those who can be conditionally bound;
(h) should consider whether any admissions can be made with a view to saving time and expense at trial, with the aim of admitting as much evidence as can properly be admitted in accordance with the barrister's duty to his client;
(i) should consider what admissions can properly be requested from the prosecution;
(j) should decide what exhibits, if any, which have not been or cannot be copied he wishes to examine, and should ensure that appropriate arrangements are made to examine them as promptly as possible so that there is no undue delay in the trial.
(k) should as to anything which he is instructed to submit in mitigation which casts aspersions on the conduct or character of a victim or witness in the case, notify the prosecution in advance so as to give prosecuting Counsel sufficient opportunity to consider his position under paragraph 10.8(e).
11.3 A barrister acting for a defendant should advise his lay client generally about his plea. In doing so he may, if necessary, express his advice in strong terms. He must, however, make it clear that the client has complete freedom of choice and that the responsibility for the plea is the client's.
11.4 A barrister acting for a defendant should advise his client as to whether or not to give evidence in his own defence but the decision must be taken by the client himself.
11.5
11.5.1 Where a defendant tells his counsel that he did not commit the offence with which he is charged but nevertheless insists on pleading guilty to it for reasons of his own, counsel should:
(a) advise the defendant that, if he is not guilty, he should plead not guilty but that the decision is one for the defendant; counsel must continue to represent him but only after he has advised what the consequences will be and that what can be submitted in mitigation can only be on the basis that the client is guilty.
(b) explore with the defendant why he wishes to plead guilty to a charge which he says he did not commit and whether any steps could be taken which would enable him to enter a plea of not guilty in accordance with his profession of innocence.
11.5.2 If the client maintains his wish to plead guilty, he should be further advised:

(a) what the consequences will be, in particular in gaining or adding to a criminal record and that it is unlikely that a conviction based on such a plea would be overturned on appeal;
(b) that what can be submitted on his behalf in mitigation can only be on the basis that he is guilty and will otherwise be strictly limited so that, for instance, counsel will not be able to assert that the defendant has shown remorse through his guilty plea.
11.5.3 If, following all of the above advice, the defendant persists in his decision to plead guilty
(a) counsel may continue to represent him if he is satisfied that it is proper to do so;
(b) before a plea of guilty is entered counsel or a representative of his professional client who is present should record in writing the reasons for the plea;
(c) the defendant should be invited to endorse a declaration that he has given unequivocal instructions of his own free will that he intends to plead guilty even though he maintains that he did not commit the offence(s) and that he understands the advice given by counsel and in particular the restrictions placed on counsel in mitigating and the consequences to himself; the defendant should also be advised that he is under no obligation to sign; and
(d) if no such declaration is signed, counsel should make a contemporaneous note of his advice."

54. Paragraph 12 refers to confessions of guilt:

"12 Confessions of Guilt

12.1 In considering the duty of counsel retained to defend a person charged with an offence who confesses to his counsel that he did commit the offence charged, it is essential to bear the following points clearly in mind:
(a) that every punishable crime is a breach of common or statute law committed by a person of sound mind and understanding;
(b) that the issue in a criminal trial is always whether the defendant is guilty of the offence charged, never whether he is innocent;
(c) that the burden of proof rests on the prosecution.
12.2 It follows that the mere fact that a person charged with a crime has confessed to his counsel that he did commit the offence charged is no bar to that barrister appearing or continuing to appear in his defence, nor indeed does such a confession release the barrister from his imperative duty to do all that he honourably can for his client.
12.3 Such a confession, however, imposes very strict limitations on the conduct of the defence. A barrister must not assert as true that which he knows to be false. He must not connive at, much less attempt to substantiate, a fraud.
12.4 While, therefore, it would be right to take any objections to the competency of the Court, to the form of the indictment, to the admissibility of any evidence or to the evidence admitted, it would be wrong to suggest that some other person had committed the offence charged, or to call any evidence which the barrister must know to be false having regard to the confession, such, for instance, as evidence in support of an alibi. In other words, a barrister must not (whether by calling the defendant or otherwise) set up an affirmative case inconsistent with the confession made to him.
12.5 A more difficult question is within what limits may counsel attack the evidence for the prosecution either by cross-examination or in his speech to the

tribunal charged with the decision of the facts. No clearer rule can be laid down than this, that he is entitled to test the evidence given by each individual witness and to argue that the evidence taken as a whole is insufficient to amount to proof that the defendant is guilty of the offence charged. Further than this he ought not to go.

12.6 The foregoing is based on the assumption that the defendant has made a clear confession that he did commit the offence charged, and does not profess to deal with the very difficult questions which may present themselves to a barrister when a series of inconsistent statements are made to him by the defendant before or during the proceedings; nor does it deal with the questions which may arise where statements are made by the defendant which point almost irresistibly to the conclusion that the defendant is guilty but do not amount to a clear confession. Statements of this kind may inhibit the defence, but questions arising on them can only be answered after careful consideration of the actual circumstances of the particular case".

55. Paragraph 13.1 provides as follows:

"13.1 Both prosecuting and defence counsel:

(a) should ensure that the listing officer receives in good time their best estimate of the likely length of the trial (including whether or not there is to be a plea of guilty) and should ensure that the listing officer is given early notice of any change of such estimate or possible adjournment;

(b) should take all reasonable and practicable steps to ensure that the case is properly prepared and ready for trial by the time that it is first listed;

(c) should ensure that arrangements have been made in adequate time for witnesses to attend Court as and when required and should plan, so far as possible, for sufficient witnesses to be available to occupy the full Court day;

(d) should, if a witness (for example a doctor) can only attend Court at a certain time during the trial without great inconvenience to himself, try to arrange for that witness to be accommodated by raising the matter with the trial Judge and with his opponent;

(e) should take all necessary steps to comply with the Practice Direction (Crime: Tape Recording of Police Interviews) [1989] 1 WLR 631."

909. Timely preparation is important for advocates and for judges. Know the law, know the rules of evidence, know the procedure and know the case. Be prepared. Anticipate the issues that may be raised. Consider the admissibility of the evidence. Consider fairness to the prosecution and fairness to the defence. The court endeavours to fairly balance all the various interests. Be conscious of the strain and stress that the criminal justice system places on all of those who come into contact with it. Use your common sense and retain a sense of perspective. Good professional work whether for the prosecution or the defence can be hugely satisfying and rewarding. We all make mistakes from time to time. The important thing is to learn from them , to move on and to reduce the risk of the same mistakes happening again in the future.

910. When raising an issue advocates should assist the court by explaining clearly what the issue or application is, exactly what order or direction they are requesting and bringing to the court's attention the relevant statutory provisions and caselaw. Advocates should not endeavour to spring surprises at the last minute on their opposite number or on the court. Surprises run the risk of causing adjournments or other injustices. Reduce surprises and you reduce the risk of injustice and the risk of judicial criticism. Moreover you reduce the risk of not acting in the best interests of your client.

911. The Chief Justice of Hong Kong, Andrew Kwok-Nang Li, on the 12th May 2007 at the ceremony for admission of senior counsel stated:

> "It must be strongly emphasised that the advocate plays a pivotal role in our courts. The administration of justice depends to a large extent on the confidence which judges at all levels of court could repose in the competence and integrity of the advocates appearing before them. Whilst fearless in advancing their client's cause, advocates must discharge in full their duties to the court. Judges expect and have a right to expect that submissions made by advocates relating to law and the evidence are well considered and are justified by the authorities and the evidence. The conduct of counsel, particularly Senior Counsel, should leave no room for any doubt that their duties to the court have been fully discharged."

912. Advocates should advise clients and not simply act on instructions as the client's mouth piece. Counsel should not make hopeless points or applications or ask improper questions or raise inappropriate issues simply because the client has instructed them to do so. District Judge Peter Glover (SJ 20.07.07 at page 938) stated:

> "A good advocate at any level will not slavishly follow his instructions."

913. In *Hobson* [1998] 1 Cr App R 32 at 35 it was stated:

> "Because a client wishes a particular question to be asked, point to be made or witness to be called it does not follow that the question must be asked, the point made or the witness called."

914. Counsel do not act as a mere mouthpiece for the client. Advocates are professionals and officers of the court. They are there to advise the client and on some occasions that advice must be firm and robust. In *R v Ulcay and Toygun* [2007] EWCA Crim 2379 the English Court of Appeal made the following important points:

> "27. The correct meaning of the phrase "acting on instructions", as it applies to the professional responsibility of the advocate in any criminal court, is sometimes misunderstood, even by counsel. Neither the client, nor if the advocate is a barrister, his instructing solicitor, is entitled to direct counsel how the case should

be conducted. The advocate is not a tinkling echo, or mouthpiece, spouting whatever his client "instructs" him to say. In the forensic process the client's "instructions" encompass whatever the client facing a criminal charge asserts to be the truth about the facts which bring him or her before the court. Those instructions represent the client's case, and that is the case which the advocate should advance. In practical terms, that will often mean that prosecution witnesses will be cross-examined on the basis that they are lying or mistaken, or have misunderstand or misinterpreted something said or done by the defendant; however there is almost always some evidence advanced by the prosecution which, on the basis of the client's instructions, is not in truth in issue at all, either directly, or indirectly. Some decisions, of course, must be made not by the advocate, but by the defendant personally, for example, and pre-eminently, the plea itself, and in the course of the trial, the decision whether or not to give evidence. The advocate must give his best professional advice, leaving the ultimate decision to the client. It is however always improper for the advocate to seek to challenge evidence which is accepted to be true on the basis of the *facts* agreed or described by the client, merely because the lay-client, or the professional client, wishes him to do so. He may not accept nor act on such instructions."

915. See also *McVey* (Court of General Gaol Delivery judgment 30th October 2009). In a civil context see the judgment in *Pilling v Department of Local Government and the Environment* 1996-98 MLR 293. The Appeal Division (Judge of Appeal Hytner and Acting Deemster Sauvain) at page 311 stated:

" … it is nevertheless essential that advocates do not permit their own judgment to be clouded or eroded by client pressure… Of course, advocates must be fearless in pursuit of the client's case. The fact that a judge is not immediately receptive to an argument does not necessarily mean that it lacks merit, and if an advocate believes it to be arguable he or she is not only entitled, but has a duty to the client to pursue it with vigour. Where, however, the advocate knows that the point lacks merit, it is an abuse of the process of the court to pursue it simply to please the client and alleviate pressures emanating from him or her."

916. The Appeal Division (Judge of Appeal Hytner) in *Clucas v Clucas* 1981-83 MLR 5 at pages 15-16 stated:

"… advocates should always stand up to judges and it is their duty to do so… This is the strength of having an independent Bar or an independent advocate; the liberty of the subject depends upon a strong and independent-minded advocate, when it is his duty to do so, standing up to a judge, and embarrassment should not prevent him from so doing."

917. The following are informative extracts from *The Kalisher Lecture 2009 Developments in Crown Court Advocacy* (6th October 2009) delivered by Lord Chief Justice Judge:

"An observation I make based on the number of times when the advocate in my court wishes to take instructions on a matter which in my view is entirely within

the advocate's professional judgment, and based also on anecdote - I wonder whether there is in some advocates a misunderstanding of what is meant by taking the client's instructions. The client's instructions are what he tells you the facts are, and on which you therefore present his defence. The client cannot instruct the advocate how to advance or conduct his case. The advocate is not the client's mouthpiece. When he allows himself to become the mere mouthpiece of those who are instructing him, whether for the prosecution or the defence, he is no longer acting as a professional advocate …

There is a fundamental premise to which the entirety of Michael Kalisher's life was dedicated: the administration of justice in the Crown Court depends on the quality of the advocacy deployed on each side. The jury will do its conscientious best. The judge will make the decisions and give the directions believed by him to be appropriate. But the analysis of each sides's case, and all the evidence, and its importance to the case, so as to enable both judge and jury to exercise their own responsibilities, depends on high quality advocacy. And we are not discussing some disembodied theory. This is the day to day stuff of reailty. It is in the public interest that the guilty should be convicted: it is in the public interest, as well as the interest of the innocent defendant, that he should be acquitted. For a truly innocent defendant, to be convicted is a disaster. These disasters happen even in the best run trials with the best quality advocacy. Poor quality advocacy by either side simply increases the prospects of the guilty being acquitted, or the innocent being convicted. In the process of adversarial trial before a jury it really is as stark and simple as that."

918. In *Hobson* [1998] 1 Cr App R 32 at 35 it was indicated that simply because a client wishes a particular question to be asked or a particular witness to be called it does not follow that the question must be asked or the witness called.

919. In *R v Glover, Glover and Priestnal* (Court of General Gaol Delivery judgment delivered 25th August 2006) I referred to the duties of advocates as follows:

"66. In *R v C* 2003-05 MLR N16 I endeavoured in general terms to outline the duties of advocates to the court. *MTM* (*Tax Consultants*) *Limited v Jones and Morris* (CLA 2001/103 judgment 16th February 2006) at paragraphs 88-101 outlined the duties of advocates in respect of the discovery process. Advocates, in civil and criminal matters, have an overriding duty to the court. Rule 19(1) of the Advocates' Practice Rules 2001 provides that:

"Advocates have an overriding duty to the Court to ensure, in the public interest, that the proper and efficient administration of justice is achieved; they must assist the Court in justice and must not deceive or knowingly or recklessly mislead the Court".

67. Advocates have a duty not to waste time and money and to bring a case to hearing as quickly as possible (in the civil context see *Brennan v Brighton BC* The Times 24th July 1996, and *Blyth Valley BC v Henderson* (1996) PIQR 64). English solicitors have been held to have a duty to give reasonable estimates of

the length of hearings and may be held responsible for costs where adjournments are caused by non-compliance with that duty (*Ibbs v Holloway Bros pty Ltd* [1952] 1 All ER 220). Advocates should take reasonable and timely steps to ensure that adjournments are not unnecessarily brought about.

68. Moreover counsel should not assume that the amount of time available for a trial is indefinite. When trial dates are set counsel should ensure that the availability of all concerned in the case has been carefully checked. Commitments in other cases will be considered but it should not be assumed that simply because counsel or witnesses may want to take holidays or be off island on courses or conferences that such commitments can be accommodated. Court commitments must take priority if cases are to proceed without undue delay. I should also add that I can see no reason why defendants should not be expected to enter pleas at their first appearance at the Court of General Gaol Delivery. Prior to the matter being listed at the Court of General Gaol Delivery the defendant since arrest and committal would have had ample time to consider his position. The norm therefore should be to expect pleas at the first appearance in the Court of General Gaol Delivery. Let all defendants and defence counsel be aware of that. There are far too many unnecessary applications for adjournments. Moreover late guilty pleas may not attract as significant a sentencing discount as early guilty pleas. If a defendant is guilty the sooner a guilty plea is entered the better for all concerned.

69. It is well established that as part of his responsibility for the management of a trial a Deemster is expected to control the timetable and is entitled to direct that the trial ought to be concluded by a specific date. If need be limitations have to be placed on the time witnesses are to spend in the witness box. Counsel should concentrate on the main issues. Evidence not in real dispute should be agreed and sensible concessions made on both sides. No one should assume that trials will be permitted to take as long or use up as much time as either or both sides might wish, or think, or assert they need. Time is not unlimited. The entitlement to a fair trial is not inconsistent with proper judicial control of time. Time is often wasted by unnecessary applications for adjournments. This case is an unfortunate example of that."…

"120. The vacation of trial dates is a serious step to take. It wastes a great deal of court time and resources and it is a great inconvenience to the court, to the prosecution, to the defence, to the witnesses, to the jury and to other court users. It wastes time, valuable resources and costs. It delays justice. It has an impact on other cases awaiting trial. It impedes an efficient use of valuable judicial time. It should be avoided. The risk of vacation of trial dates can be significantly reduced if all counsel focus on the issues in the case at an early stage and ensure that early preparation in connection with the case is undertaken and not left until the last moment and that the availability of important witnesses is not overlooked.

121. Advocates should not treat court orders including case management directions as simply pieces of papers which can be ignored or compliance with them delayed to suit their convenience. Orders and directions in respect of contested trials or sentencing hearings should be strictly complied with. Serious consequences can follow if they are not. The efficient and fair administration of justice depends on advocates and the parties complying strictly with court orders. Everyone concerned with the trial process, the prosecution, the defence and all advocates involved in a case should ensure that court orders including case

management directions are strictly complied with on a timely basis and that the case is ready for hearing and proceeds accordingly. Late preparation and late applications are to be discouraged. They involve delay. They waste time and costs and they cause inconvenience. There are few reasonable excuses for late preparation. It is not reasonable to say I did not comply with the court order because I was too busy or I was only a few days late or other matters took priority. Compliance with court orders should take priority. If advocates are too busy and cannot devote sufficient time to existing matters then they should arrange for additional resources and support or refuse to take on new instructions. Preparation for a hearing should commence at an early date rather than at a late date. Proper time and attention should be given to every case. Leaving preparation until a couple of days or a couple of weeks before trial invites disaster together with judicial criticism and adverse costs orders or other penalties."

920. See *R v C* 2003-05 MLR N16 and the full judgment in respect of duties of advocates generally. See also English Law Society guidance entitled *Withdrawing from a criminal case*.

921. Rule 21 of the Advocates Practice Rules 2001 unless there is a conflict with the Rules or an Isle of Man statute or decision of the Courts of the Isle of Man in the construction or interpretation of the practice rules reference shall be made to the provisions contained in the Guide to the Professional Conduct of Solicitors of England and Wales and the Code of Conduct of the Bar of England and Wales and such provisions will be applicable and shall be followed unless they arise out of some statutory obligation or duty imposed upon solicitors or barristers in England and Wales which does not apply to advocates.

922. See also *English Bar Code of Conduct* :

"Conduct in Court

708 A barrister when conducting proceedings in Court:

(a) is personally responsible for the conduct and presentation of his case and must exercise personal judgment upon the substance and purpose of statements made and questions asked;
(b) must not unless invited to do so by the Court or when appearing before a tribunal where it is his duty to do so assert a personal opinion of the facts or the law;
(c) must ensure that the Court is informed of all relevant decisions and legislative provisions of which he is aware whether the effect is favourable or unfavourable towards the contention for which he argues;
(d) must bring any procedural irregularity to the attention of the Court during the hearing and not reserve such matter to be raised on appeal;
(e) must not adduce evidence obtained otherwise than from or through the client or devise facts which will assist in advancing the lay client's case;
(f) must not make a submissions which he does not consider to be properly arguable;

(g) must not make a submission which he does not consider to be properly arguable;
(h) must not make statements or ask questions which are merely scandalous or intended or calculated only to vilify insult or annoy either a witness or some other person;
(i) must if possible avoid the naming in open Court of third parties whose character would thereby be impugned;
(j) must not by assertion in a speech impugn a witness whom he has had an opportunity to cross-examine unless in cross-examination he has given the witness an opportunity to answer the allegation;
(k) must not suggest that a victim, witness or other person is guilty of crime, fraud or misconduct or make any defamatory aspersion on the conduct of any other person or attribute to another person the crime or conduct of which his lay client is accused unless such allegations go to a matter in issue (including the credibility of the witness) which is material to the lay client's case and appear to him to be supported by reasonable grounds."

923. Lord Steyn in *The Role of the Bar, the Judge and the Jury* PL 1999, SPR, 51-63 at page 57 stated:

"Skilled advocates

The administration of justice is crucially dependent on competent and well prepared advocates. Sir Owen Dixon memorably summarized the duty of counsel. He said :
To be a good lawyer is difficult. To master the law is impossible. But I should have thought that the first rule of conduct for counsel, the first and paramount ethical rule, was to do his best to acquire such a knowledge of the law that he really knows what he is doing when he stands between his client and the court …
That duty counsel owes to his client and to the court. In a criminal case a trial judge is entitled to well prepared submissions from both counsel for the prosecution and defence. In some quarters of the Bar it is apparently still thought acceptable for defence counsel to adopt the strategy of saying "let us leave it to the judge, if he errs we have a ground of appeal". In my view that is unacceptable conduct. For my part there is a general duty not only on counsel for the prosecution but also on defence counsel to raise any pertinent issues of substantive law or procedure with the trial judge in the absence of the jury so that, if possible, justice in accordance with law can be done at the trial. The only exception I would make is the rare case where counsel for the defence reasonably feels that the judge has by his unfair conduct of the trial and summing up made such an intervention unrealistic. In any event, the general moral is: do not expect sympathy at appellate level about clear errors in a summing up which could have been corrected at a trial."

924. Counsel should ensure at all times that they respect the rule of law and do not fall foul of the law. Lord Carswell at paragraph 28 *DP v Hurnam* (Privy Council judgment delivered 25th April 2007), a case involving a barrister practising in Mauritius conspiring to do an unlawful act, stated:

"… it is vital that the standards of probity of practitioners in the criminal courts should be maintained."

925. Lawyers must be capable of being trusted to the ends of the earth (*Bolton v Law Society* [1994] 1 WLR 512 at 518-519).

926. Advocates when arguing points of law should ensure that the relevant law is referred to and not just rely on extracts from textbooks. In *Scambler* (Appeal Division judgment delivered on the 12th January 2004) the Appeal Division (Judge of Appeal Tattersall and Deemster Doyle) in the context of an appeal against conviction stated:

"7. Further, as to the power to set aside a conviction on the ground that the conviction was unsafe or unsatisfactory, Mrs Jones, who appeared on behalf of the Appellant at the trial and before this court, reminded us of dicta of Widgery L J when giving the judgment of the English Court of Criminal Appeal in *R v Cooper* [1969] 1 QB 267, at 271, when he stated:

'That means that in cases of this kind the Court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such: it is a reaction which can be produced by the general feel of the case as the Court experiences it'

8. Whilst in our judgment such dicta are uncontroversial, we cannot overstress that, such dicta notwithstanding, it is the duty of those representing an appellant to clearly identify what matters are relied upon by the appellant as supporting his contention that his appeal against conviction should be allowed. This is particularly important in a case such as this where the court is supplied with a complete transcript of the trial. Furthermore it is incumbent on those representing an appellant to cite, and produce copies of, all authorities relied upon and to identify what propositions of law are to be relied upon from such authorities. It is insufficient merely to refer to large sections of Archbold, helpful though Archbold may be to set the scene for such submissions."

927. In respect of the citation of authorities generally see the *Practice Note* at [2001] 2 All ER 510. See also *R v Erskine and Williams* [2009] EWCA Crim 1425 reported by the Times on the 22nd July 2009 under the headline *Excessive citation of decisions in criminal appeals must cease.*

928. As to the width of the decision of the prosecution authorities to prosecute and the duty not to succumb to improper pressure to discontinue a prosecution see *R v Director of the Serious Fraud Office and BAE Systems PLC* [2008] EWHC 714 (Admin). The House of Lords subsequently allowed an appeal against the decision of the

Queen's Bench Divisional Court. Their opinions are reported at [2008] UKHL 60. Lord Bingham stated:

"1. The issue in this appeal is whether a decision made by the appellant, the Director of the Serious Fraud Office, on 14 December 2006, to discontinue a criminal investigation was unlawful…

The main issue

30. It is common ground in these proceedings that the Director is a public official appointed by the Crown but independent of it. He is entrusted by Parliament with discretionary powers to investigate suspected offences which reasonably appear to him to involve serious or complex fraud and to prosecute in such cases. These are powers given to him by Parliament as head of an independent, professional service who is subject only to the superintendence of the Attorney General. There is an obvious analogy with the position of the Director of Public Prosecutions. It is accepted that the decisions of the Director are not immune from review by the courts, but authority makes plain that only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator…

31. The reasons why the courts are very slow to interfere are well understood. They are, first, that the powers in question are entrusted to the officers identified, and to no one else. No other authority may exercise these powers or make the judgments on which such exercise must depend. Secondly, the courts have recognised (as it was described in the cited passage *of Matalulu)*

"the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits"

Thirdly, the powers are conferred in very broad and unprescriptive terms.

32. Of course, and this again is uncontroversial, the discretions conferred on the Director are not unfettered. He must seek to exercise his powers so as to promote the statutory purpose for which he is given them. He must direct himself correctly in law. He must act lawfully. He must do his best to exercise an objective judgment on the relevant material available to him. He must exercise his powers in good faith, uninfluenced by any ulterior motive, predilection or prejudice. In the present case, the claimants have not sought to impugn the Director's good faith and honesty in any way.

33. The first duty of the Director is, in appropriate cases, to investigate and prosecute…

36. The Divisional Court was right to hold that a person subject to the jurisdiction of the court who sought to impede an SFO investigation would be at risk of prosecution for attempting to pervert the course of justice, and also right to hold that the Saudis were not subject to the court's jurisdiction. But there is little assistance to be gained in resolving the present problem from the authority which the Divisional Court cited …

38. The Divisional Court held (para 68) that "No revolutionary principle needs to

be created ... we can deploy well-settled principles of public law". But in para 99 of its judgment the court did lay down a principle which, if not revolutionary, was novel and unsupported by authority:
"The principle we have identified is that submission to a threat is lawful only when it is demonstrated to a court that there was no alternative course open to the decision-maker …

41. The Director was confronted by an ugly and obviously unwelcome threat. He had to decide what, if anything, he should do. He did not surrender his discretionary power of decision to any third party, although he did consult the most expert source available to him in the person of the Ambassador and he did, as he was entitled if not bound to do, consult the Attorney General who, however, properly left the decision to him. The issue in these proceedings is not whether his decision was right or wrong, nor whether the Divisional Court or the House agrees with it, but whether it was a decision which the Director was lawfully entitled to make. Such an approach involves no affront to the rule of law, to which the principles of judicial review give effect (see *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, para 73, per Lord Hoffmann).

42. In the opinion of the House the Director's decision was one he was lawfully entitled to make. It may indeed be doubted whether a responsible decision-maker could, on the facts before the Director, have decided otherwise."

929. Lady Hale stated:

"52. I confess that I would have liked to be able to uphold the decision (if not every aspect of the reasoning) of the Divisional Court. It is extremely distasteful that an independent public official should feel himself obliged to give way to threats of any sort. The Director clearly felt the same for he resisted the extreme pressure under which he was put for as long as he could. The great British public may still believe that it was the risk to British commercial interests which caused him to give way, but the evidence is quite clear that this was not so. He only gave way when he was convinced that the threat of withdrawal of Saudi security co-operation was real and that the consequences would be an equally real risk to "British lives on British streets". The only question is whether it was lawful for him to take this into account.

53. Put like that, it is difficult to reach any other conclusion than that it was indeed lawful for him to take this into account. But it is not quite as simple as that. It is common ground that it would not have been lawful for him to take account of threats of harm to himself, threats of the "we know where you live" variety. That sort of threat would have been an irrelevant consideration. So what makes this sort of threat different? Why should the Director be obliged to ignore threats to his own personal safety (and presumably that of his family) but entitled to take into account threats to the safety of others? The answer must lie in a distinction between the personal and the public interest. The "public interest" is often invoked but not susceptible of precise definition. But it must mean something of importance to the public as a whole rather than just to a private individual. The withdrawal of Saudi security cooperation would indeed have consequences of importance for the public as a whole. I am more impressed by the real threat to "British lives on British streets" than I am by unspecified

references to national security or the national interest. "National security" in the sense of a threat to the safety of the nation as a nation state was not in issue here. Public safety was.

54. I also agree that the Director was entitled to rely upon the judgment of others as to the existence of such a risk. There are many other factors in a prosecutor's exercise of discretion upon which he may have to rely on the advice of others. Medical evidence of the effect of a prosecution upon a potential accused is an obvious example. Of course, he is entitled, even obliged, to probe that evidence or advice, to require to be convinced of its accuracy or weight. But in the end there are some things upon which others are more expert than he could ever be. In the end there are also some things which he cannot do. He is not in a position to try to dissuade the Saudis from carrying out their threat. Eventually, he has to rely on the assurances of others that despite their best endeavours the threats are real and the risks are real.

55. I am therefore driven to the conclusion that he was entitled to take these things into account. I do not however accept that this was the only decision he could have made. He had to weigh the seriousness of the risk, in every sense, against the other public interest considerations. These include the importance of upholding the rule of law and the principle that no-one, including powerful British companies who do business for powerful foreign countries, is above the law. It is perhaps worth remembering that it was BAE Systems, or people in BAE Systems, who were the target of the investigation and of any eventual prosecution and not anyone in Saudi Arabia. The Director carried on with the investigation despite their earnest attempts to dissuade him. He clearly had the countervailing factors very much in mind throughout, as did the Attorney General. A lesser person might have taken the easy way out and agreed with the Attorney General that it would be difficult on the evidence to prove every element of the offence. But he did not.

56. As to whether the safety of British lives on British streets is a prohibited consideration under article 5 of the OECD Convention, we do not need to express a view. Professor Susan Rose-Ackerman and Benjamim Billa of Yale Law School make a powerful case that there is no implicit exception for "national security" under the OECD Convention ("Treaties and National Security Exceptions", Yale Law School, 2007). But the Director has made it clear that he would have reached the same conclusion in any event and as a matter of domestic law he was entitled to do so.

57. For these reasons, although I would wish that the world were a better place where honest and conscientious public servants were not put in impossible situations such as this, I agree that his decision was lawful and this appeal must be allowed."

930. In *Huggins* (Privy Council judgment delivered 9th June 2008) comments were made in respect of the duties of prosecution counsel as follows:

"18. After the defence counsel had addressed the jury, prosecuting counsel Mr Rajbansie (who in accordance with the practice in Trinidad and Tobago had the

last word) closed the prosecution case to the jury in regrettably vigorous and hyperbolic terms. At the close of his address defence counsel presented a number of complaints about its content. These were repeated and amplified by counsel for the appellants before the Board, and may be summarised under several heads:

• attacking the character of the defendants;
• making disparaging and belittling remarks about witnesses and counsel;
• accusing one counsel of being party to concocting his client's case and coaching him in his evidence;
• misrepresenting the defence case and parts of the evidence in material respects;
• personally vouching for the correctness of the prosecution case and telling the jury of the importance of convicting the defendants.

…

27. It was not in dispute in the argument presented to the Board that the function of prosecuting counsel is to act as a minister of justice, concerned with the fairness of the trial as well as presentation of his case, and that he should not act merely as an advocate striving to secure a result for a client. He should bear in mind in doing so the dignity, seriousness and justness of judicial proceedings: *Boucher v The Queen* (1954) 111 Can CC 263, 270, per Rand J. The underlying reason is to ensure that the defendant is fairly tried, which constitutes an overriding requirement: *Randall v The Queen* [2002] UKPC 19, [2002] 1 WLR 2237, 2241, para 10, per Lord Bingham of Cornhill.

28. The proper approach of an appellate court to complaints of conduct conducing to unfairness of the trial is well exemplified by *Randall v The Queen* ...

29. Some assistance may be obtained from a brief consideration of examples of other cases where the Board has allowed appeals on this ground. In *Mohamed v The State* [1999] 1 WLR 552, prosecuting counsel had made a closing speech when he was not entitled to do so, had repeatedly urged the jury to convict and had informed them of his view that the defendant was plainly guilty. He made emotional appeals for sympathy for the deceased and his family and filled his speech with inflammatory passages. The Board regarded the speech as "wholly improper" (page 564, per Lord Steyn). Counsel had failed to show proper detachment and the judge made only "perfunctory" attempts to restrain him. The Board came to the conclusion, reversing the Court of Appeal of Trinidad and Tobago, that they could not be satisfied that the jury would inevitably have found the appellant guilty if the misconduct had not occurred, and so they could not apply the proviso and uphold the conviction…

32. As appears from the judgments in the cases just cited, their Lordships strongly deplore behaviour of this nature by prosecuting counsel. They should observe proper standards of decorum and courtesy in their conduct of the case, their treatment of the witnesses and the presentation of their addresses to the jury, as should all counsel in a trial. They should take care not to misrepresent the evidence given on either side or the case being made on behalf of the defence. They are of course entitled to make out as effectively as they can the prosecution case against the defendant, that he is guilty of the crime charged, for that is their proper function in an adversarial system. They have to be careful, however, not to allow vigour in presentation of the prosecution case to trespass into the area of

unfairness by indulging in the type of behaviour exemplified by the cases which their Lordships have cited. Regrettably prosecuting counsel in the present case overstepped the mark on a number of occasions, and it would have been preferable if the judge had pulled him up earlier and made it clear that such behaviour was unacceptable. The issue is whether his departure from propriety was of such a nature as to deprive the appellants of a fair trial.

33. Following the complaints from defence counsel, the judge wisely took the opportunity to correct the misstatements of prosecuting counsel about a number of matters, in particular concerning the case being made by the defendants. She also warned the jury to disregard his remarks about the importance of a conviction. This was done in a separate segment of the trial, so that it had maximum impact and it could not become submerged in the content of a long and detailed summing-up. The Court of Appeal took the view, rightly in their Lordships' opinion, that the corrective statement by the judge removed a good deal of the potential unfairness.

34. The Court of Appeal were prepared to accept the tone and content of Mr Rajbansie's remarks to which their Lordships have earlier referred. They described him as "somewhat high spirited in his address" and overplaying the dramatics, but considered that the judge had taken adequate steps to correct any major errors. Their Lordships feel more doubtful about the impact of counsel's more extreme comments, which the judge did not specifically mention in her corrective directions, though she did warn them to decide the case only on the evidence and to set aside their emotions in coming to a decision. They are influenced by the fact that the Court of Appeal, with their knowledge of local conditions and culture, were of opinion that those remarks would not in influence a jury in Trinidad to an extent which would make a trial unfair. Applying the standard in *Randall v The Queen,* their Lordships have concluded that counsel's departure from good practice, although very reprehensible, falls short of being so gross, persistent or prejudicial as to require them to condemn the trial as unfair. The convictions accordingly should not be regarded as unsafe on this ground."

931. In *Chief Constable v Matthews* (judgment 12th November 2009) Deputy High Bailiff Montgomerie dealt with an application for costs and the relevance of the Code for Crown Prosecutors. The judgment contains useful references to the duties of the prosecution in criminal cases.

932. In *Eiley v The Queen* [2009] UKPC 39 (a case where the defendant was convicted of murder in San Pedro a small fishing town on an island off the coast of Belize) the Privy Council referred to the difficulties which could arise if prosecution counsel lacked experience. Lord Phillips stated:

"35. Prosecuting counsel left to a deputy the task of making the closing address of the prosecution to the jury. As he told the jury, he had only completed his law studies a year before. His enthusiasm was in inverse proportion to his experience. Unhappily, much of his address was inappropriate, calling on occasion for

intervention from the bench. It cannot have afforded the jury the assistance that they could reasonably expect from the prosecution."

933. See *Burzala v HM Advocate* [2007] HCJAC 67 in respect of the duties of counsel in the conduct of the case for the defence.

934. See also *Smith* (Privy Council judgment delivered 23rd June 2008) at paragraph 19 prosecuting counsel "owe a duty to behave as ministers of justice rather than partisans seeking to achieve a conviction by any means possible." See also *Libke v The Queen* [2007] HCA 30 (20th June 2007 High Court of Australia).

935. Phillips LCJ and Latham L J in the *Court of Appeal Criminal Division Review of the Legal Year* 2007/2008 at paragraph 10.3:

> "Counsel are reminded that they should only settle (and indeed persist with) grounds [of appeal] which they consider reasonable, have some real prospect of success and are prepared to argue them before the Court. Grounds should not be settled that cannot be supported merely because of a client's instruction to do so, as not only does this create a false hope for applicants but also burdens the Court with unnecessary work."

Difficult cases for counsel

936. The courts and informed members of the community appreciate that counsel in criminal cases are frequently faced with difficult issues and that much stress and tension is generated in court proceedings. It is no exaggeration to state that without counsel of integrity and competence the administration of justice on this Island would suffer. We should all appreciate the work done by counsel especially in the difficult cases of which there are many. Counsel frequently have to undertake difficult cases involving difficult issues and difficult clients. It is however important that in such cases counsel should ensure that they comply with their professional duties and assist the court. It is equally important that the courts and community recognise the difficulties which counsel face when dealing with certain cases.

937. The English Lord Chief Justice in *Fraser Marr* Court of Appeal June 13th 1989 (1990) 90 Cr App R 154 at page 156 stated:

> "No one could doubt that if the allegations made by the prosecution were true, this was a singularly unattractive crime, earning the offender no thought of sympathy.
>
> Likewise the nature of the defence was, to say the very least, most unimpressive.
>
> It is however an inherent principle of our system of trial that however distasteful the offence, however repulsive the defendant, however laughable his defence, he

is nevertheless entitled to have his case fairly presented to the jury both by counsel and by the judge. Indeed it is probably true to say that it is just in those cases where the cards seem to be stacked most heavily against the defendant that the judge should be most scrupulous to ensure that nothing untoward takes place which might exacerbate the defendant's difficulties."

938. Sedley J in *R v Secretary of State for the Home Department ex parte Moon* 1995 Admin Law Report 477 at 485 stated:

"… it is precisely the unpopular applicant for whom the safeguards of due process are most relevant in a society which acknowledges the rule of law."

939. Kirby J in a powerful dissent in *Carr v The State of Western Australia* [2007] HCA 47 (23 October 2007) stated (footnotes omitted):

"101. If a person who has committed a serious crime makes admissions consistent with his involvement in that crime, and those admissions are accurately recorded, why should the law be concerned to reconsider his conviction? Above all, why should it contemplate an order acquitting such a person of a crime when his guilt is seemingly established reliably, by his own words?

102. The answer to these questions lies in features that are central to the criminal trial process observed in Australia. Specifically, it derives from the requirements established by the Parliament of Western Australia for the conduct of trials of serious offences in that State, where the conviction of an accused person rests on evidence of that person's admissions to police. As is often said, the rule of law is relatively easy to accord to popular people who are, or may be, innocent of a crime. It is tested when its principle is invoked by a prisoner who claims to have been convicted on inadmissible evidence which, it is said, should not have been placed before the jury. In such a case, upholding the law, and the procedures that the law mandates, may be more important for the interests of the community than obtaining, or affirming, the conviction of a person such as the appellant.

103. There is a second feature of the Australian criminal justice system that should be mentioned. Trials of serious crimes, such as the present, are accusatorial in character. Valid legislation apart, it is usually essential to the proper conduct of a criminal trial that the prosecution prove the guilt of the accused and do so by admissible evidence. Ordinarily (as here) the accused does not need to prove his or her innocence.

104. This second feature of the criminal justice system is not always understood. Yet it is deeply embedded in the procedures of criminal justice in Australia, inherited from England. It may even be implied in the assumption about fair trial in the federal Constitution. It serves as a check on the powers of the state and as an important defence for individual liberty. It is a reason why countries that observe the accusatorial system

tend to have a higher quality of liberty than countries that observe different traditions.

105. Sometimes it falls to this Court to defend these basic features of the legal system, invoked by unattractive parties, including prisoners who appear to be, and may indeed be, guilty of the offence charged. In such cases, the observance of legality is even more important than keeping an individual such as the appellant behind bars. To the extent that this Court upholds the rule of law, it offers the protection of the law that is precious for everyone in the Commonwealth …

168. It is an undeniably uncongenial outcome to discharge a prisoner, evidence of whose guilt is seemingly established by his own words. Such an order is not made with enthusiasm. I can understand the tendency of human minds to resist such an outcome. However, the order is not made only for the appellant but as an assurance of the adherence of our institutions to the rule of law; to steadfast observance of the requirements of the accusatorial system of criminal justice hitherto followed in Australia; and to the neutral judicial application of the requirements laid down by Parliament in s 570D of the Code.

169. Section 570D is a strict and unusual provision. It was enacted to deal with a large and endemic problem. We do the law no service by failing to observe the requirements that appear in the provisions of s 570D of the Code because the appellant, who claims their benefit, becomes their uncongenial beneficiary.

170. This was not a case where a suspect, suddenly apprehended by police, blurted out incriminating evidence. In such a case different considerations would arise. Instead, this was a case of a suspect in police custody who was properly cautioned, formally interviewed and who then insisted on his right to silence and to consult a lawyer before answering questions. Knowing of that insistence, police proceeded to override his rights and privileges. He was a smart alec for whom it is hard to feel much sympathy. But the police were public officials bound to comply with the law. We should uphold the appellant's rights because doing so is an obligation that is precious for everyone. It is cases like this that test this Court. It is no real test to afford the protection of the law to the clearly innocent, the powerful and the acclaimed.

171. The "right to silence" may indeed sometimes evoke "strong but unfocused feelings". It is, without doubt, a "shorthand description" of different rules that apply in the criminal law. But it has not been, at least until now, meaningless and impotent in Australian law. In default of clear and valid legislation authorising a contrary course, this Court should uphold the right to silence in a case such as the present for it is important to the individual's true choice to remain silent in the face of the authority and to the proper control of the conduct of the agents of the state."

940. Section 570D of the Code provided in subsection (2) that, on the trial of an accused person for a serious offence, evidence of any admission

by the accused person should not be admissible unless either the evidence took a certain form (a videotape recording of the admission) or the prosecution proved that there was a reasonable excuse for there not being such a video tape recording or there were exceptional circumstances which, in the interests of justice, justified the admission of the evidence.

941. Lord Steyn in *Roberts v Parole Board* [2005] UKHL 45 stated:

> "Even the most wicked of men are entitled to justice at the hands of the State."

942. Justice Frankfurter in *US v Rabinowitz* 339 US 56 (1950) at page 69 stated:

> "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people."

943. As the English Court of Appeal stated in *R v Cordingley* [2007] EWCA Crim 2174 every defendant was entitled to be tried fairly, courteously and with due regard for the presumption of innocence. Robust case management and the sensible use of court time was to be endorsed but exchanges between judges and counsel should not be rude or discourteous. The overriding objective is for criminal cases to be dealt with justly. Delays however must be avoided wherever possible.

944. In *R v Ibrahim* [2008] EWCA 880 the President of the Queen's Bench Division at paragraph 7 stated:

> "It is axiomatic that every defendant, even a defendant alleged to be involved in direct and dangerous violence on the citizens and institutions of this country, is entitled to a fair trial at which his guilt must be proved. This trial was marked with conspicuous fairness, and commanding judicial control by Mr Justice Fulford. The defendants were represented at public expense by leading counsel of distinction and experience, with absolute clarity about their professional responsibilities both to their clients, and to the court. The jury's difficulty in agreeing verdicts in relation to Asiedu and Yahya demonstrates that they approached the issues with the open-minded fairness and lack of prejudice which is one of the customary characteristics of the jury system. Now that the applicants have been convicted after a fair trial before an impartial tribunal, we are entitled to record, after a lengthy examination of the evidence, that their defences to the charge of conspiracy to murder were ludicrous."

945. The Privy Council in *Michel v The Queen* [2009] UKPC 40 referred to *R v Nelson* [1997] Crim LR 234 and sressed that every defendant has the right to have his defence, whatever it may be, faithfully and accurately placed before the jury.

946. See in a different context the words of Wall L J in *F (a child)* [2008] EWCA civ 439 at paragraph 79: "The first point about which the social workers and the agency's lawyers in the instant case need to be reminded is that when dealing with parents, however inadequate and abusive, they are dealing with human beings who have both feelings and rights."

947. Lord Hope in *RB (Algeria) v Secretary of State for the Home Department*) [2009] UKHL 10 stated:

> "209. Most people in Britain, I suspect, would be astonished at the amount of care, time and trouble that has been devoted to the question whether it will be safe for the aliens to be returned to their own countries. In each case the Secretary of State has issued a certificate under section 33 of the Anti-terrorism, Crime and Immigration Act 2001 that the aliens' removal from the United Kingdom would be conducive to the public good. The measured language of the statute scarcely matches the harm that they would wish to inflict upon our way of life, if they were at liberty to do so. Why hesitate, people may ask. Surely the sooner they are got rid of the better. On their own heads be it if their extremist views expose them to the risk of ill-treatment when they get home.
> 210. That however is not the way the rule of law works. The lesson of history is that depriving people of its protection because of their beliefs or behaviour, however obnoxious, leads to the disintegration of society. A democracy cannot survive in such an atmosphere, as events in Europe in the 1930s so powerfully demonstrated. It was to eradicate this evil that the European Convention on Human Rights, following the example of the Universal Declaration of Human Rights by the General Assembly of the United Nations on 10 December 1948, was prepared for the Governments of European countries to enter into. The most important word in this document appears in article 1, and it is repeated time and time again in the following articles. It is the word "everyone". The rights and fundamental freedoms that the Convention guarantees are not just for some people. They are for everyone. No one, however dangerous, however disgusting, however despicable, is excluded. Those who have no respect for the rule of law - even those who would seek to destroy it - are in the same position as everyone else.
> 211. The paradox that this system produces is that, from time to time, much time and effort has to be given to the protection of those who may seem to be the least deserving. Indeed it is just because their cases are so unattractive that the law must be especially vigilant to ensure that the standards to which everyone is entitled are adhered to. The rights that the aliens invoke in this case were designed to enshrine values that are essential components of any modern democratic society: the right not to be tortured or subjected to inhuman or degrading treatment, the right to liberty and the right to a fair trial. There is no room for discrimination here. Their protection must be given to everyone. It would be so easy, if it were otherwise, for minority groups of all kinds to be persecuted by the majority. We must not allow this to happen. Feelings of the kind that the aliens' beliefs and conduct give rise to must be resisted for however long it takes to ensure that they have this protection."

948. Kirby J in *R v Tang* [2008] HCA 39 at paragraph 69 stated:

> "As is often observed, the protection of the law becomes specifically important when it is claimed by the unpopular and the despised accused of grave wrong-doing (cf *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116 at 124 per Latham CJ)."

949. Michael Kirby in *Honouring Pro Bono Lawyering* (2nd April 2009) at page 9 states:

> "The law knows no finer hour than when it defends the rights of the marginalised and the unpopular."

950. Despite the challenges that counsel practising in the criminal arena face it is important that standards are maintained and enhanced. In addition to the community appreciating that prosecution and defence counsel have difficult roles to play counsel should also appreciate that to a large extent the administration of justice on this Island depends on their integrity and competence.

951. I turn now to consider the issue of costs in criminal proceedings. In many cases defendants will benefit from legal aid. In others they will be privately funded. Issues of costs may arise from time to time in criminal proceedings.

Costs

Costs orders against public funds

952. In respect of costs orders against public funds see *R v Collister* (judgment 16th April 2004). In *Collister* I referred to the Criminal Justice (Defence Costs) Rules 2000 and stated that the court may make a costs order for the payment of defence costs when it is satisfied that it is appropriate in the circumstances of any particular proceedings. Regard should be had to the criteria specified in rule 3(3) and in particular the court should consider the manner in which the prosecution and the defence have conducted their respective cases including conduct which unnecessarily extended proceedings or resulted in unnecessary expense, the personal conduct of the defendant before and during the proceedings, the complexity of the case, the number of offences of which the defendant is accused and if accused of more than one offence and acquiited of one or more the fact that he is convicted of others.

953. Under the 2000 Rules it is the Chief Registrar who determines the amount recoverable by way of defence costs. The fact that a defendant is insured in respect of costs does not prevent costs being incurred by the defendant (*Collister* applying *R v Miller* [1983] 3 All ER 186). It is immaterial that the defendant is legally aided (*R v Arron* [1973] 2 All ER 1221). Under rule 5(4) when determining defence costs there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the Chief Registrar may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved against the applicant. See also *Vanselow* (judgment 15th September 2010).

954. In *Collister* (judgment 16th April 2004) I stated the following:

> "37. Should the costs be awarded against the Treasury? Under section 50(1A) costs are in effect awarded out of public funds. The order is for payment by the Treasury out of money provided by Tynwald.
>
> 38. The court has a wide discretion in respect of applications for costs. That discretion must of course be exercised judicially taking into account all relevant factors and disregarding any irrelevant factors.
>
> 39. Where proceedings have been discontinued a Defendant is prime facie entitled to an award of costs in his favour if the court is of the view that such an award is appropriate in the circumstances of the case.

40. This is not a case where the prosecution could reasonably argue that the Defendant's conduct has brought suspicion on himself and the Defendant has misled the prosecution into thinking the case is stronger than it was (see for example the case of *South West Surrey Magistrates Court ex parte James* [2009] Criminal Law Review 690). If anyone has been misled in this case it is the Defendant. If any criticism is to be made in this case it is against the prosecution rather than the Defendant.

41. Even where the prosecution have acted properly in bringing the case, the authorities show that, costs should not always be denied (see for example the case of *Birmingham Juvenile Court ex parte H* (1992) 156 JP 445).

42. I note the position in England and in particular the Practice Direction (Crime: Costs) (1991) 93 Cr.App.R 89. I also note section 16(2)(b) of the Prosecution of Offences Act 1985 and I note the provisions of the Criminal Justice (Defence Costs) Rules 2000 and Rule 3(1) and Rule 3(3) (e). The court shall take into account under rule 3(3)(e) if the accused is accused of more than one offence and acquitted of one or more, the fact that he is convicted of others.

Blackstone at page 1751 comments that in such a case

"no doubt the court's decision will in practice depend on whether the accused was acquitted on the major part of the indictment or only on subsidiary counts".

43. In the case before me I note that the prosecution have withdrawn count 1 the manslaughter count - that was the major part of the information and the prosecution are not proceeding with that count.

44. In exercising my discretion I have had careful regard to the provisions of the statute and the provisions of the Criminal Justice (Defence Costs) Rules 2000.

45. I am satisfied that it is appropriate in the circumstances of these proceedings to make an order under section 50(1A) of the Criminal Jurisdiction Act 1993 for the payment of defence costs namely expenses incurred by the Defendant David James Collister in carrying on his defence.

46. If the amount of costs cannot be agreed between the prosecution and the defence then presumably the defence will make a claim for the determination of the Defendant's costs by the Chief Registrar pursuant to the Criminal Justice (Defence Costs) Rules 2000. I do not believe that I have enough information in my possession to specify the amount of defence costs pursuant to Rule 8 and in any event I do not have the agreement of the Defendant in this respect. There will therefore need, in the absence of an agreement between the prosecution and the defence, to be a determination by the Chief Registrar pursuant to the Criminal Justice (Defence Costs) Rules 2000."

955. See generally section 50 of the Criminal Jurisdiction Act 1993 and the Criminal Justice (Defence Costs) Rules 2000. Consider the developing European jurisprudence including *Yassar Hussain v UK* (No 8866/06) ECHR 7th March 2006. See also *R (Spiteri) v Basildon*

Crown Court [2009] EWHC 665 (Admin) and *Dowler v Merseyrail* [2009] EWHC 558 (Admin).

956. Section 50 of the Criminal Jurisdiction Act 1993 provides as follows:

> "50 Award of trial costs out of public funds
> (1) A court may, in relation to any proceedings on information, order the payment by the Treasury out of money provided by Tynwald of such sums as appear to the court reasonably sufficient-
> (a) to compensate the prosecutor for the expenses properly incurred in the prosecution, or
> (b) to compensate any person properly attending to give evidence for the prosecution or the defence or both, or called to give evidence at the instance of the court, for the expense, trouble or loss of time properly incurred or incidental to his attendance and giving of evidence.
> (1A) Where a person is tried in any proceedings on information and acquitted on any count in the information, the court may, to such extent and subject to such conditions or limitations as may be contained in rules of court, order the payment by the Treasury out of money provided by Tynwald of such sums as appear to the court reasonably sufficient to compensate the defendant for the expenses properly incurred by him in carrying on the defence.
> (1B) Provision may be made by rules of court to specify circumstances in which an order may or may not be made under subsection (1A).
> (2) Where an appellant is acquitted on a retrial, the costs of the defence which may be ordered to be paid by the Treasury under this section include-
> (a) any costs which could have been ordered to be so paid under that section by the court by which he was originally tried, if he had been acquitted at the original trial, and
> (b) the costs of the appeal.
> (3) Unless the court otherwise orders, no expenses shall be allowed to a witness, whether for the prosecution or the defence, under this section if his evidence is as to character only."

Costs orders against advocates

957. In *Glover, Glover & Priestnal* (judgment 25th August 2006) I stated:

> "3. For an order for costs to be made against an advocate personally the court must be satisfied that the advocate has been guilty of a serious dereliction of duty or negligence at a sufficiently high level. A simple mistake, or oversight or mere error of judgment or inadvertence may not of itself be sufficiently serious to justify an order for costs against an advocate personally. Serious incompetence is capable of amounting to serious dereliction of duty. Breaches of court orders and other serious breaches of duty to the court may justify costs orders being made against advocates personally. It is trite but every case will, of course, depend on its own facts and circumstances. The court has a wide discretion in relation to costs. That discretion however must be exercised judicially.
>
> 4. When considering making a costs order against an advocate personally the court should give that advocate a full and fair opportunity of responding to the

allegations made against him. The application should specify fully and fairly the grounds on which it is submitted an adverse costs order should be made. The court may wish to consider the following questions –

(1) is there sufficient evidence and information before the court to determine the application fairly?

(2) have the grounds of the application been stated clearly and with proper particularity?

(3) has the advocate had sufficient opportunity of responding to the application?

(4) has the advocate been guilty of a serious dereliction of his duty to the court or made a serious mistake in circumstances where significant blame attaches to the advocate or has the advocate simply committed an inadvertent mistake or oversight or made an understandable error of judgment?

(5) in cases where a serious dereliction of duty or a serious mistake has been proved have costs been wasted as a result and are they quantifiable?

(6) is it otherwise fair and appropriate for a costs order to be made against the advocate personally?

5. There is a clear need for anyone applying for a wasted costs order or for any court intending to exercise such jurisdiction to formulate carefully and concisely the complaint and the grounds on which such an order may be made. The grounds must be clear and particular. The advocate alleged to be at fault must have sufficient notice of the specific complaint against him and a proper opportunity to respond to it. It is a useful discipline to treat such applications as a court would treat a contempt petition. It would usually be inappropriate to propose that the advocate might forego fees on a voluntary basis. The jurisdiction to make costs orders against advocates personally must be exercised with great caution and the court must always be sensitive to the fact that these applications are never easy for the advocates involved. If however such orders are appropriate the court should not hesitate to make them…"

958. See also section 7 of the Administration of Justice Act 2008 which substitutes section 53 (3) of the High Court Act 1991 in respect of wasted costs in proceedings in the High Court. It should be remembered that the Court of General Gaol Delivery is not a division of the High Court. The Criminal Jurisdiction Act 1993 deals with the existence of the Court of General Gaol Delivery.

959. In *R v Ulcay* [2007] EWCA Crim 2379; [2008] 1 All ER 547 it was held that wasted costs orders would not be imposed in circumstances where counsel was placed in an awkward situation and simply tried to do his best e.g. taking on a case at extremely short notice.

Costs orders against defendants

960. Section 48 of the Criminal Jurisdiction Act 1993 provides that the court before which a person is convicted on information may, if it thinks fit, order the offender to pay the whole or any part of the costs incurred in or in relation to the prosecution and conviction. See also *R*

v Northallerton Magistrates Court ex parte Dove (1999) 163 JP 657 Bingham LCJ as applied in *BPS Advertising Ltd v London Borough of Barnet* [2006] EWHC 3335 (Admin) and outlining general principles to the following effect:

(1) An order to pay costs to the prosecutor shall never exceed the sum which having regard to the defendant's means and any other financial order imposed upon him, the defendant is able to pay and which it is reasonable to order the defendant to pay;
(2) Such an order should never exceed the sum which the prosecutor has actually and reasonably incurred;
(3) The purpose of such an order is to compensate the prosecutor and not to punish the defendant. Where the defendant has by his conduct put the prosecutor to avoidable expense he may, subject to his means, be ordered to pay some or all of that sum to the prosecutor. But he is not to be punished for exercising his right to defend himself;
(4) The costs ordered to be paid should not in the ordinary way be grossly disproportionate to the fine. The court should ordinarily begin by deciding on the appropriate fine to reflect the criminality of the defendant's offence, always bearing in mind his means and his ability to pay and then consider what if any costs he should be ordered to pay to the prosecutor.

961. See also *Attorney General for Gibraltar v Shimidzu (Berllaque intervening)* [2005] 1 WLR 3335 (Privy Council). *R v Balshaw* [2009] EWCA Crim 470, [2009] 2 Cr App R 6 dealt with the position in England and Wales in respect of costs being paid by the accused to the prosecutor and the circumstances when it is just and reasonable to make such orders.

962. We now move beyond Court of General Gaol Delivery matters and into Appeal Division matters.

Appeals and references

General

963. In *McCluskey* 2003-05 MLR N 22 (judgment 8th April 2004) the Appeal Division (Judge of Appeal Tattersall and Acting Deemster King) outlined the jurisdiction of the Appeal Division in criminal matters. Judge of Appeal Tattersall stressed that the Appeal Division owed its jurisdiction to statute and that it was crucial to consider the relevant statutory framework contained in the Criminal Jurisdiction Act 1993. In that case the appellant endeavoured to reopen an appeal which had been dismissed by the Appeal Division (Judge of Appeal Hytner and Deemster Corrin) on the 17th April 1996. Judge of Appeal Tattersall at paragraph 33 stated:

> "… in our judgment there is only one proper statutory interpretation of the Criminal Jurisdiction Act 1993. When, in any given case an appeal has been heard and determined on its merits, then in the absence of any reference under section 39, that is the end of the matter as far as any appeal to this court is concerned."

964. See now section 19B (1) of the High Court Act 1991 (inserted by section 4(1) of the Administration of Justice Act 2008) which provides that subject to rules of court, where the High Court has finally determined an appeal, it may reopen its determination. Appeal includes an application for leave to appeal.

965. When an appeal is lodged the matter will normally be listed for directions. Standard directions would set out a time table for the filing and serving of a duly paginated record of proceedings together with skeleton arguments and authorities and a list of issues for determination by the court. See generally Part 14 of the Rules of the High Court of Justice 2009 in respect of appeals.

966. Judge of Appeal Glidewell delivering the judgment of the Appeal Division in *Craine v R* 1978-80 MLR 233 stated:

> "It is something that is not perhaps as generally appreciated as it might be, and certainly the court must make the obvious point, that it is not for this court to consider again the rightness of the jury's verdict. The jury are the judges of fact. This court's function is to consider whether, in any respect, the judge who conducted the trial went wrong in law or in his directions to the jury. Provided that he did not, it is not open to this court to reconsider whether, on the facts, the jury came to a right decision."

967. The following are extracts from the judgment of the Appeal Division in *Hafner* (judgment delivered 31st August 2007):

"*Jurisdiction based on statute*

23. Let me now turn to the jurisdiction of this court to entertain appeals.

24. This court (differently constituted) in *McCluskey v R* 2003-05 MLR N 22 (judgment 8th April 2004) dealing with a second appeal in respect of a conviction after a trial in the Court of General Gaol Delivery stated at paragraph 9 of its judgment:

"This court owes its jurisdiction to statute. Hence it is crucial to set out the statutory framework".

25. The court then set out the material provisions of the Criminal Jurisdiction Act 1993 in particular section 30(1) which provides that a person convicted on information may appeal to the Appeal Division against his conviction. The Appeal Division held that it had no jurisdiction to determine a second appeal by the Appellant.

26. In *Stubbs v Gonzales* (reasons upon a petition for special leave to appeal delivered on the 25th May 2005) the Privy Council briefly touched upon jurisdiction in relation to appeals in the Bahamas which was said (at paragraph 3 of the reasons delivered by Lord Hoffmann) to be "entirely statutory".

27. In *R v Jeffries* [1969] 1 QB 120 Widgery LJ at page 124 referred to the powers of the Court of Criminal Appeal in England as deriving from statute. Widgery LJ stated:

"… the powers of this court are derived from, and confined to, those given to it by the Criminal Appeal Act of 1907".

28. The decision in *Jeffries* was approved by the House of Lords in *R v Kearley* [1994] 2 AC 414.

29. Dealing with an appeal in a criminal context in the Isle of Man in *Harding and Sands v R* 1993-95 MLR 161 this court (Deemster Corrin and Hytner J.A.) stated at page 166:

"This court is a creature of statute; it has no powers save those granted it by Tynwald".

30. In *Jones v R* 1999-01 MLR 369 this court (Deemster Cain and Tattersall J.A) at pages 376 and 377 stated:

"Mrs Kelly submitted, by reference to s. 18(3)(c) of the High Court Act 1991, s. 1(1) of the Criminal Appeal Act 1969, s.10(4) of the Criminal Code Amendment Act 1921 and s. 9(3) of the Judicature Act 1883, that this court has an inherent power to take into account circumstances which have occurred since a sentence was imposed. We reject this submission. We reaffirm the view expressed by this court in *Harding v. R* (3) (1993-95 MLR at 166) that "this court is a creature of statute; it has no powers save those granted to it by Tynwald" and (*ibid*., at 165) that "Manx courts cannot legislate, nor should they flout the clear intention of the Manx legislature". We are satisfied that, in exercising its appellate criminal

jurisdiction on appeals against sentence, this court's powers derive solely from s.33(4) of the Criminal Jurisdiction Act 1993".

31. I would add for the sake of completeness that, although its jurisdiction is based on statute, the Appeal Division does, of course, have inherent jurisdiction to deal with procedural matters in the same way that the Privy Council does. See for example *TheBelize Alliance of Conservation Non-Governmental Organizations v The Department of the Environmentand the Belize Electricity Company Limited* (Judgment delivered 13th August 2003 Privy Council Appeal No 47 of 2003), *Jones* (judgment of Appeal Division delivered on the 28th January 2000) and *Kailaysur v State of Mauritius* [2004] 1 WLR 2316.

32. In *Taylor on Appeals* at paragraph 10-032 it is stated:

"Whilst the Court of Appeal is essentially a creature of statute with no inherent jurisdiction, it has the ability, like any other court of record, in certain areas to control its own procedure".

33. The ability to adjourn in appropriate cases is given as an obvious example (See *Smith (Wallace Duncan) (No 2*) [1999] 2 Cr App R 444)."

968. Under section 31(1) of the Criminal Jurisdiction Act 1993 it is provided that a person convicted on information who desires to appeal to the Appeal Division shall lodge in the General Registry notice in writing of appeal stating the grounds of appeal and signed by him or his advocate. Section 31(2) of the Criminal Jurisdiction Act 1993 provides that a notice under subsection (1) shall be lodged (a) in the case of an appeal against conviction (except where paragraph (b) applies), within 28 days beginning with the date of conviction; (b) in the case of an appeal against sentence, or an appeal against conviction made at the same time as an appeal against sentence passed on the conviction, within 28 days beginning with the date of the sentence. The appellant shall also within that period serve a copy of the notice on the Attorney General. The Appeal Division may extend the time within which a notice of appeal may be given.

Appeals against conviction

969. Section 30(1) of the Criminal Jurisdiction Act 1993 provides that a person convicted on information may appeal to the Appeal Division against his conviction. See also section 30 (5), (5A), (6) and (7) of the Criminal Jurisdiction Act 1993. Section 31 of the Criminal Jurisdiction Act 1993 sets out the appeal procedure.

970. Section 33(1) of the Criminal Jurisdiction Act 1993 provides that subject to subsection (2) the Appeal Division on an appeal against conviction shall allow the appeal if it thinks –

(a) that the conviction of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory, or

(b) that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or

(c) that there was a material irregularity in the course of the trial,

and in any other case it shall dismiss the appeal.

971. Under section 33(3) of the Criminal Jurisdiction Act 1993 the Appeal Division if it allows an appeal against conviction shall quash the conviction and either:

(a) direct a verdict of acquittal to be entered, or

(b) if it appears to the Division that the interests of justice so require order the appellant to be retried and direct the Attorney General to prefer a fresh information for the purpose.

972. The Privy Council in *Trimmington v The Queen* (judgment delivered 22nd June 2009) stressed at paragraph 12 of the judgment that there are few cases in which a judge's summing up could not be criticised and improved upon : "but what an appellate tribunal must do is to look at the thrust of the directions and consider if they have adequately put the several issues before the jury and given them a proper explanation of their task in relation those which they have to decide. In particular, the Board must determine whether, if there has been any defect, there has been a miscarriage of justice which requires their intervention."

973. Commenting on *Michel v The Queen* [2009] UKPC Lord Neuberger in the 2009 Denning Lecture *Rights Responsibilities : Civil Duty and the Rule of Law* (Inner Temple 23rd November 2009) at paragraph 14 stated:

"Judicial exuberance happens sometimes : judges are human beings, and a rehearing because the trial was unfair is, while regrettable, nothing very remarkable. However, the striking thing was that the Privy Council thought that the defendant had been rightly convicted; indeed, they found it difficult to see how any result other than a guilty verdict could have eventuated. Nonetheless, the right to a fair trial was considered so fundamental that the point could come, as it sadly did in that case, that the unfairness alone was enough to undermine the conviction. In other words, as that case neatly demonstrates, it is more than a merely protective rule : it is a substantive, free-standing right."

Substantial miscarriage of justice and fresh evidence

974. Lord Bingham delivering the judgment of the Privy Council in *Bain* (Privy Council judgment delivered on the 10th May 2007) stated:

> "103. A substantial miscarriage of justice will actually occur if fresh, admissible and apparently credible evidence is admitted which the jury convicting a defendant had no opportunity to consider but which might have led it, acting reasonably, to reach a different verdict if it had had the opportunity to consider it. Such a miscarriage involves no reflection on the trial judge, and in the present case David's counsel expressly disavowed any criticism of Williamson J. It is, however, the duty of the criminal appellate courts to seek to identify and rectify convictions which may be unjust. That result will occur where a defendant is convicted and further post-trial evidence raises a reasonable doubt whether he would or should have been convicted had that evidence been before the jury.
>
> 104. In the opinion of the Board the fresh evidence adduced in relation to the nine points summarised above, taken together, compels the conclusion that a substantial miscarriage of justice has actually occurred in this case. It is the effect of all the fresh evidence taken together, not the evidence on any single point, which compels that conclusion. But it is necessary to identify the source of the Board's concern in relation to each point."

And at paragraph 119:

> "… In closing, the Board wishes to emphasise, as it hopes is clear, that its decision imports no view whatever on the proper outcome of a retrial. Where issues have not been fully and fairly considered by a trial jury, determination of guilt is not the task of appellate courts. The Board has concluded that, in the very unusual circumstances of this case, a substantial miscarriage of justice has actually occurred. Therefore the proviso to Section 385(1) cannot be applied, and the appeal must under the subsection be allowed. At any retrial it will be decided whether the appellant is guilty or not, and nothing in this judgment should influence the verdict in any way."

975. Lord Bingham at paragraph 115 added that "the issue of guilt is one for a properly informed and directed jury, not for an appellate court."

976. See the judgment of the Privy Council in *Barlow* (judgment delivered 8th July 2009) in respect of the phrase "miscarriage of justice."

977. *R v Hill* [2008] EWCA Crim 76 confirmed that it was of central importance to the law that a person charged should advance whatever material was available to him at trial. The Court of Appeal would not ordinarily exercise its powers to admit fresh evidence so as to permit a defendant to change his account after trial in order to run a different defence on appeal, in the absence of the witnesses and the jury.

978. In *Teare v R* 1993-95 MLR 154 the Appeal Division (Judge of Appeal Hytner and Deemster Corrin) held that the new evidence in that case was admissible for its credibility to be determined at a retrial since it was not, and could not reasonably have been, available to the defence at the trial, either because it had not emerged or because it had not been disclosed by the prosecution. The Appeal Division also stressed that it was important for the police to realise, however innocent their motive, that they were under a duty not to suppress or manufacture evidence. To do so could result either in an innocent defendant being convicted or in a guilty defendant, against who a sound case had been built up, being acquitted because the evidence had been tampered with. Both potential results were unacceptable.

979. Consider also *Kelvin Dial* (Privy Council judgment delivered 14th February 2005) and *Dosoruth v Maurituis* [2005] Crim LR 475 Privy Council. Lord Bingham in *Bain* (Privy Council judgment delivered on the 10th May 2007) stated:

> "34. The third Court of Appeal applied well-settled principles in its approach to fresh evidence. Thus it referred to the threshold conditions of sufficient freshness and sufficient credibility, while acknowledging that the overriding requirement is to promote the interests of justice. The court admitted all the fresh evidence submitted, and no complaint is made of its ruling on this point."

980. See also further comments in the judgment in respect of the position once the fresh evidence has been received. Is the fresh evidence credible and material to the miscarriage of justice issue? See the English, New Zealand and Australian authorities referred to in *Bain*.

981. In respect of the admission on appeal of evidence that was not adduced at trial see *R v Eskine and Williams* [2009] EWCA Crim 1425 which deals with the position under the law in England and Wales. The question for decision in that case was simple : exercising the jurisdiction provided by section 23 of the Criminal Appeal Act 1968 (Act of Parliament), as amended by the Criminal Appeal Act 1995, was it necessary or expedient in the interests of justice to receive evidence which was not adduced at trial? The following are extracts from the judgment of Lord Chief Justice:

> "6. Under s.23 (4), the Court may if they think it necessary or expedient in the interests of justice, order the examination of any witness whose attendance might be required under subsection (1)(b) above to be conducted, in a manner provided by rules of court, before any judge or officer of the Court or other person appointed by the Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court.

7. The powers under this sub-section were used in *Stafford & Luvaglio (No. 2)* (1972) 57 Cr. App. R. 203 and in *Saunders* (1973) 58 Cr. App. R. 248, but have rarely been used since then. In the present appeals, although it was clear that there were differences in the opinions of the experts, none of the differences turned on issues of credit. It was desirable to hear these two appeals together, but very difficult to find a time when all the experts and counsel were available. It was therefore proposed that the evidence of the expert psychiatrists be heard in each case by one of the judges who was to hear the appeal on separate days at a time that was convenient to those in each case. The evidence in relation to Williams was heard before Thomas L J on 16 March 2009 and in relation to Erskine on 21 April 2009…

39. The jurisdiction to admit fresh evidence is governed by statute. Section 23 of the Criminal Appeal Act 1968 as amended by the Criminal Appeal Act 1995 provides:

"(1) For the purposes of an appeal under this Part of this Act the Court of Appeal may, if they think it necessary or expedient in the interests of justice –
…
(c) receive any evidence which was not adduced in the proceedings from which the appeal lies
(2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to –
(a) whether the evidence appears to the court to be capable of belief;
(b) whether it appeals to the court that the evidence may afford any ground for allowing the appeal
(c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is subject to the appeal;
(d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings."

Virtually by definition, the decision whether to admit fresh evidence is case and fact specific. The discretion to receive fresh evidence is a wide one focussing on the interests of justice. The considerations listed in sub-section (2)(a) – (d) are neither exhaustive nor conclusive, but they require specific attention. The fact that the issue to which the fresh evidence relates was not raised at trial does not automatically preclude its reception. However it is well understood that, save exceptionally, if the defendant is allowed to advance on appeal a defence and/or evidence which could and should have been but were not put before the jury, our trial process would be subverted. Therefore if they were not deployed when they were available to be deployed, or the issues could have been but were not raised at trial, it is clear from the statutory structure, as explained in the authorities, that unless a reasonable and persuasive explanation for one or other of these omissions is offered, it is highly unlikely that the "interests of justice" test will be satisfied.

The cases included in the bundles of authorities

40. As we have seen the statutory framework is uncomplicated. The question for decision identified in paragraph 1 of this judgment is stark. In this section of the judgment we shall illustrate the way in which a series of decisions of the court addressing this stark question in individual cases appear to have developed a

jurisprudential momentum of their own. It is a process which has become commonplace in many different areas of the criminal law.

41. The first authority provided was *R v Kooken* (1982) 74 Cr App R 30. This court considered and quoted the essential reasoning in *Dodd* June 10 1971 (unreported) and *Melville* (1976) 62 Cr App R 100. The court doubted whether the trial judge had any discretion to call evidence to support a possible defence of diminished responsibility which the defendant herself did not wish to advance. The suggestion that, pursuant to section 23 (1) of the Criminal Appeal Act 1968, it was "necessary or expedient in the interests of justice" for the medical evidence supporting diminished responsibility to be called as fresh evidence when, notwithstanding that the applicant was not "mentally sound" she did not wish any such argument to be advanced was rejected. Although she was not mentally sound and her power to reach the right decision in her own interests was diminished, she was not unfit to plead. Her objection to the admission of the evidence was "invincible". The application was dismissed. The observation that whether convicted of murder or manslaughter on the grounds of diminished responsibility, the applicant would continue to be detained in Broadmoor, was incidental to the refusal of the application for permission to appeal, and would not have led to its refusal if it would otherwise been appropriate to grant it.

42. In *R v Campbell (No1)* (1987) 84 Cr App R 255 it was again emphasised that diminished responsibility is an optional defence, to be advanced, if he so wishes, by the defendant. The principle now encapsulated in *R v Coutts* [2007] 1 Cr App R 6, [2006] UKHL 39, that any available defence should be left to the jury for its consideration, had no application to diminished responsibility. Some 10 years later *Campbell* was again before the Court of Appeal, when, as we shall see, it took a different turn.

43. *R v Straw* [1995] 1 All ER 187 was decided in June 1987. So, although reported in 1995, it is chronologically the next authority requiring consideration. It was common ground between the psychiatric experts that at the time when the applicant killed her husband, her responsibility was materially diminished. The prosecution were prepared to accept a plea of guilty to manslaughter on this ground. The applicant refused to tender such a plea and gave express instructions that she would plead not guilty. After conviction she wished diminished responsibility to be reconsidered. Her application to introduce fresh evidence was dismissed. The court referred to the decisions in *Dodd, Kooken* and *Melville.* The applicant was "sufficiently capable" of tendering her plea and fully advised as to her position. "Although she may not have been a normal person, she was capable in law of making the decision". In reality this decision added nothing to the principle identified in *Kooken*, and its absence from any formal law report for the next 8 years did not represent a significant gap in the relevant jurisprudence.

44. In *R v Ahluwalia* [1993] 96 Cr App R 133 diminished responsibility was not raised at trial. The principle that "ordinarily, of course, any available defence should be advanced at trial," and that if medical evidence to support such a plea was available, it should be adduced at trial, was emphasised. Defendants were not permitted to run a defence at trial in the belief that after conviction, the court would allow a different defence to be raised. However evidence which would have supported diminished responsibility and was available at trial was "overlooked" and not "further pursued" at trial. The appellant herself "was not

consulted" and she did not, in any real sense, decide that the defence should not be advanced. This judgment underlined the scepticism with which evidence to support diminished responsibility based on "wholly retrospective medical evidence" would be approached. However the evidence was admitted because the decision not to advance the defence was not made by the appellant.

45. In *R v Arnold* (1996) 31 B.M.L.R. 24, following the appellant's conviction of two murders in 1987, the court addressed evidence of diminished responsibility. The court considered and quoted extracts from the judgments in *Dodd, Melville, Ahluwalia, and Richardson* (9 May 1991, unreported) and referred to the decisions in *Kooken* and *Campbell (No 1)*, and decided that evidence which would have supported diminished responsibility should not be admitted. Psychiatric evidence was available at trial which would have supported the defence. Fresh psychiatric evidence confirmed the availability of the defence. All this, was, however, was subject to the defendant establishing a proper factual basis for the defence. Without that evidence from the appellant, who at trial denied any involvement in the killing, the fresh evidence should not be admitted. The court took the opportunity to doubt the correctness of observations in *Dodd,* repeated in *Melville,* that to be admitted on appeal the evidence that the appellant was subject to diminished responsibility should be "really overwhelming". However it was emphasised that "Whether the trial be civil or criminal, parties must be required as a matter of the administration of justice to present their case at the trial and not be permitted, one case having failed, to run a different and inconsistent case in the appellate court based on different evidence…However, very exceptionally, these considerations can be treated as not conclusive".

46. We must now return to *R v Campbell* [1997] 1 Cr App R 199. Noting that at the time of the trial there was clear evidence that the appellant suffered from an abnormality of mind at the time of the killing, and on the basis that medical science in the intervening period had advanced, the court admitted further psychiatric evidence. A defence of diminished responsibility, if advanced at trial on the basis of the evidence then before the Court of Appeal, might well have succeeded. The evidence was admitted, and the conviction quashed. The court addressed the principle "repeatedly underlined" that in criminal trials the defendants must "advance a full defence before the jury and call any necessary evidence at that stage. It is not permissible to advance one defence before the jury and, when that has failed, to devise a new defence, perhaps many years later, and then seek to raise that defence on appeal". The court was influenced by the fact that the absence of a defence of diminished responsibility at trial was not what was described as "a matter of tactical decision" but one of "practical necessity" because there was no expert evidence to support the defence. Save to record the earlier conclusion in *Campbell (No 1),* no reference was made to earlier authorities or previous decisions. The application was to be judged exclusively by reference to what the interests of justice required "in all the circumstances". This judgment demonstrates that justice can be done without the need for any learned parade of jurisprudence.

47. In *R v Borthwick* [1998] Crim LR 274 on appeal there was clear and undisputed evidence, unknown at trial which demonstrated diminished responsibility. Prior to the trial the appellant had been examined by a psychiatrist, but he refused to allow a more detailed examination to be undertaken and pleaded not guilty on the basis that he denied responsibility for the killing. He was

convicted. Shortly afterwards he admitted that he was responsible for the homicide. The court was concerned that B's state of mind may have reduced his ability to give rational instructions about his defence. Repeating *Melville* and *Campbell (No 2)* the court held that there was "overwhelming" or "clear evidence" that the defence of diminished responsibility would have succeeded at trial, and that the reason why the defence had not been advanced was itself consequent on the mental illness of the defendant. In other words, as the telling commentary in the Criminal Law Review by Dr David Ormerod put it "…D's mental illness may have affected his judgment to the extent that it could not be said that he was exercising an option not to run the defence at trial…".

48. In *R v Gilfillan*, 7 December 1998 (unreported), the defendant did not advance diminished responsibility at trial. He gave no instructions which would have supported the defence and, because he made no relevant disclosure to the medical experts, there was no medical evidence which would have supported the defence. Accordingly it was not "fully explored" before the trial. After the appellant's conviction, new facts emerged which supported diminished responsibility. The explanation for the failure to advance the defence at trial was "to be found in the very mental condition" of the defendant himself. He was "fearful of the possible consequences of a finding that he was mentally ill, and, more importantly, did not consider that he was". The true state of his mental condition was concealed from his professional advisers as well as his parents. The Crown did not oppose the admission of the evidence.

49. In *R v Weekes* [1999] 2 Cr App R 520 the defendant refused to follow advice that it would be in his best interests to plead guilty to manslaughter on the basis of diminished responsibility. There was powerful evidence to support it. Instead he suggested that he had acted in self-defence and under provocation. These defences were rejected by the jury. He appealed against conviction, seeking leave to adduce the medical evidence which was available at trial together with further psychiatric evidence that his ability to make a sensible judgment whether to advance diminished responsibility would have been adversely affected by his mental illness. Accordingly his decision not to advance diminished responsibility could not be treated as a "reasoned decision". The case was particularly stark because the prosecution would have accepted a plea to manslaughter on the basis of diminished responsibility, and so indicated to the appellant's counsel. As it happened this was Mr Nigel Rumfitt QC, counsel for Williams in the present case. The appeal was heard on 8th February 1999, shortly before Williams' conviction in this case. On that occasion counsel had plainly given detailed and meticulous advice on the issue to *Weekes*. We have no doubt that the same robust, clear thinking approach was adopted by Mr Rumfitt when he was acting for Williams.

50. In the judgment *Dodd* and *Melville* were re-examined. Attention was drawn to *Straw* [1995] 1 All ER 187 and *Steven (Jones)* [1997] 1 Cr App R 86 as well as *Borthwick. Shah* 30 April 1998, (unreported) was analysed in some detail. The passages quoted from the judgment in *Shah* referred to *Ahluwalia*, and the passages cited from *Straw* referred to *Kooken*. In *Weekes* the essential fact was the "plain and undisputed" evidence at trial that the defendant's decision not to allow diminished responsibility "to be canvassed" was significantly affected by his mental illness. The court would have been much less impressed with the argument if the evidence in support of diminished responsibility only emerged after the

trial. However the court's unequivocal conclusion was that "in the last analysis as appears from all these decisions each case turned on its own facts".

51. *R v Criminal Cases Review Commission ex parte Pearson* [2000] 1_Cr App R 141, involved an application for judicial review of a decision by the Criminal Cases Review Commission not to refer the applicant's conviction for murder to this court. The Commission decided that the evidence of diminished responsibility on which the applicant was seeking to rely would not be admitted in evidence under section 23 of the Criminal Appeal Act 1968, as amended by the Criminal Appeal Act 1995. Lord Bingham CJ noted that the Commission and the court were referred to a number of earlier decisions. These included *Dodd* and *Melville*, which were set out in detail in his judgment. He referred to *Straw*, and *Richardson*, again quoting passages from the judgments. He addressed the reasoning in *Ahluwalia*, *Binning* (unreported April 12 1995) and *Arnold*, again in detail, and concluded that the unreported decision in *Arnold* contained the "fullest and clearest judicial consideration" of the court's approach to the issues which arise here. The judgment then examined *Steven Jones* and *Campbell,* in the context both of the 1987 and 1997 decisions, and then *Borthwick, Hobson* and *Shah* and finally *Weekes.*

52. This examination of the previous decisions could not have been more comprehensive. Lord Bingham suggested that the cases identified a number of features which would be likely "to weigh more or less heavily against the reception of fresh evidence". These included "a deliberate decision by a defendant whose decision-making faculties are unimpaired not to advance before the trial jury a defence known to be available; evidence of mental abnormality or substantial impairment given years after the offence and contradicted by evidence available at the time of the offence; expert evidence based on factual premises which are unsubstantiated, unreliable or false, or which is for any other reason unpersuasive". In the ultimate analysis the jurisdiction under section 23 of the 1968 Act provides the means by which justice can be done in the individual case. The end result, and the principle to be extracted from it, is that the statutory discretion could not be constrained by "inflexible mechanistic rules".

53. Next in the bundles of authorities is *R v Martin* [2002] 1 Cr App R_27. There was no medical evidence at trial to support diminished responsibility. Indeed the evidence on the issue was said to be "negative". After conviction two new experts were instructed on behalf of the appellant. This was credible evidence, not available at trial, and the court decided that the evidence should be admitted. The conviction was quashed. Although the case was and to some extent remains notorious, the court did not decide any issue of legal principle in relation to diminished responsibility. The case can only have been reported for reasons unconnected with this defence.

54. *R v Gilbert* [2003] EWCA 2385 arose from another much earlier murder conviction in 1994. The court was invited by the Criminal Cases Review Commission, to consider fresh evidence relating to diminished responsibility. The court referred to *Dodd, Melville, Steven Jones, Gilfillan, Straw, Ahluwalia,* both *Campbell* decisions*, Borthwick, Shah* and *Weekes.* After these references to the earlier decisions, the conclusion was that when diminished responsibility was not raised at the trial, it would only be in an "exceptional case that the court will hold that a reasonable explanation for the failure to adduce the evidence in the

proceedings has been demonstrated". However, even in the absence of some reasonable explanation for this failure, the court was still obliged to consider whether it was "necessary or expedient" to receive the evidence in the interests of justice. The court admitted the evidence. At the hearing of the appeal in the following year, the conviction was upheld. – see [2004] EWCA 2413. Neither decision was reported. We are unsurprised: no issues of principle were raised.

55. *R v Hendy* [2006] 2 Cr App R 33 was decided in April 2006. In 1993 the appellant was convicted of murder. The essential issue examined in the judgment was the impact of *R v Dietschmann* [2003] 2 Cr App R 4 in the context of self induced intoxication. The conviction was quashed on the grounds of misdirection. The court also addressed the ground of appeal based on fresh medical evidence "obtained retrospectively". The court considered the review of the authorities carried out in *Gilbert*, and decided that notwithstanding the reluctance of the court to admit evidence to support a defence which was not raised at trial, and the necessary scepticism with which to approach fresh evidence of diminished responsibility where the issue was canvassed at trial, the evidence should be admitted. This plainly was a factual decision based on the court's judgment of the interests of justice.

56. *R v Neaven* [2006] EWCA Crim 955, [2007] 2 All ER 891, [2006] Crim LR 909 was decided in May 2006. In 2001, the appellant was convicted of murder. Unknown to himself or his legal advisers, at the time of the offence his responsibility for his actions was diminished. Fresh evidence substantiated that contention. The Crown's position was that the decision not to advance diminished responsibility, but to rely on self-defence, was a tactical decision. The appellant was offered the opportunity of a medical assessment and declined. This was said to be a form of "shut-eye knowledge" of what the assessment would or might reveal. It was not however contended that the appellant or his legal advisers knew or ought to have known of the schizophrenia from which he was suffering.

57. The court examined the "relevant jurisprudence". Extracts from *Dodd, Kooken, Straw, Ahluwalia, Borthwick, Shah* and *Weekes* were set out in the judgment. The court then summarised the "guidance" to be derived from the authorities.

"(1) That the obligation on a defendant to advance his whole case at trial and the scepticism directed towards tactical decision remains fundamental. (2) That it therefore takes an exceptional case to allow it to be in the interests of justice to admit and give effect to fresh evidence, not relied on at trial, designed to promote a new defence of diminished responsibility. However, subject to this (3) each case turns on its own facts. (4) Therefore where the evidence of mental illness and substantial impairment is common ground or otherwise clear and undisputed, it may be in the interests of justice (in the absence of opposition from the appellant himself – (see Kooken) to admit it. (5) This is especially so if the potential advice of tactical decision is met by undisputed evidence that such decisions were affected by the defendant's illness itself. (6) The emergence only after conviction of evidence of mental illness and of the potential of a defence of diminished responsibility is of little weight, unless perhaps there is unanimity as to the conditions necessary for such a defence at the time of the offence. From this connection it may be observed that only in the special case of Kooken was clear

and undisputed fresh evidence on appeal of a good defence of diminished responsibility to the killing not acted upon in this court."

58. The court then addressed two further factors which were said not to have arisen in the earlier cases cited to the court. "The first is that, although the evidence of diminished responsibility is common ground, it was unknown at the time of the trial. The second is that, although there is evidence both that his mental illness and his ignorance of his illness affected the appellant's decision making at trial, that evidence is not undisputed". "In principle, knowledge of a defendant's mental illness and its effect on him for the purposes of his defence should make it very difficult to introduce such evidence for the first time on appeal …even so, where the illness also affects the ability to give rational instructions, the interests of justice may still require a different result". The appeal was allowed because it could not be said that the appellant or his legal advisers had "made a tactical decision with knowledge or insight which should be considered to bind him". In short the ultimate decision was a factual decision based on all the subtleties and nuances of the individual case. The case did indeed turn on its own facts.

59. In *Latus* [2006] EWCA Crim 3187 the applicant for leave to appeal was convicted of murder. Diminished responsibility was not advanced at trial. Later evidence suggested that at the time of the offence he was suffering from diminished responsibility. The court considered *Borthwick, Ahluwalia, Straw* and the guidance in *Neaven.* The application was refused. No reasonable explanation was given for the failure to introduce the evidence at trial. The decision not to do so was a deliberate tactical decision made by an appellant who "hoped to get away" with his crime, and denied involvement in. The decision was not caused by the illness but by a tactical decision not to allow the defence of diminished responsibility to be investigated. No point of principle was involved.

60. In *Diamond* [2008] EWCA Crim 923 [2008] MHLR 124 the appellant was convicted of murder in 1999. There was an extensive pre-trial psychiatric history. However before trial he refused to undergo a medical assessment into the possibility that he was suffering from mental illness as well as personality disorder. Instead he advanced a defence that he had not committed the murder, and he sought to provide an innocent explanation for the powerful evidence linking him to the crime. By the time the case was referred to the Criminal Cases Review Commission, he admitted his responsibility for the homicide. There was said to be strong evidence that at the time of the killing his responsibility for his actions was substantially impaired by abnormality of mind and that when he was giving instructions to his legal advisers for the purposes of the trial his mental capacity was significantly impaired by mental illness at the time

61. The court examined the relevant guidance. After repeating the fundamental principle "that a defendant must advance all aspects of his case at trial and the court will not admit fresh evidence to enable a defendant to run a different case if that case could have been run first time round", a proposition sustained by reference to *Ahluwalia* and *Shah*, the judgment then examined a "series of cases" which were said to provide guidance about the principles which should govern the exercise of the court's discretion to admit evidence under section 23 of the 1968 Act where diminished responsibility was not advanced at trial. These were "very helpfully and clearly stated in *R v Neaven*". The court then

referred to a number of specific features relevant to the case of *Diamond* itself, which were derived from *Straw, Kooken, Shah, Borthwick, Gilfillan, Hadan* [2003] EWCA Civ 284 *and Ashton* [2006] EWCA Crim 1267*,* as well as *Weekes and Ahluwalia, Sharp* [2003] EWCA Crim 3870, *Shickle* [2005] EWCA Crim 181 and *Latus* . Reference was also made to Lord Bingham's observation in *R v Criminal Cases Review Commission* that "the more unpromising the context from which the appellant seeks to adduce fresh evidence, the more compelling the evidence would have to be (all things being equal) before the Court of Appeal would receive it". In the end, the emphasis was that "each case will depend upon its own facts".

62. The court concluded that the appellant's decision not to advance diminished responsibility was a tactical decision made at trial which was not materially connected with the appellant's mental condition at the time. Accordingly there was no reasonable explanation for the failure to adduce the evidence which would have supported diminished responsibility. The appeal was dismissed…

Conclusion - Erskine

95. This is a straightforward case. It is overwhelmingly clear that at the time when the appellant appeared at trial, there was unequivocal contemporaneous evidence that his mental responsibility for his actions at the time of the killing was substantially impaired. In addition, there was contemporaneous evidence which suggested that as a result of reduced mental acuity, not amounting to unfitness to plead, but part and parcel of his illness, the decision not to advance the defence was irremediably flawed. There was nothing his legal advisers could do about it, and in reality nothing he could do about it himself. The interests of justice require us to admit the fresh evidence. We have examined it with care. We are satisfied that the convictions for murder were unsafe. We shall substitute convictions of manslaughter on the grounds of diminished responsibility.

Sentence - Erskine

96. Mr Edward Fitzgerald QC suggested that following a conviction for manslaughter on the grounds of diminished responsibility the principle or convention had been established that a sentence of imprisonment for life should not be imposed, but that the appropriate course would be to make a hospital order under section 37 of the Mental Health Act to which a restriction on release under section 41 should be attached. We disagree. To begin with, it is not unknown for a successful defence of diminished responsibility to be advanced by an individual whose mental state at the date of sentence was not so subject and who represented and continues to represent a considerable danger to public safety. In other words, no medical disposal would be available and, simultaneously, the danger to public safety was undiminished. In any event, however, even if medical evidence were available to support a hospital order, a sentence of life imprisonment may nevertheless be appropriate. In making these decisions the court will no doubt be influenced not only by the considerations of long-term public safety, but also the nature of the homicide or homicides, and the circumstances in which they were committed, and the extent to which the defendant's mental responsibility for his actions was diminished. In some of these cases a significant element of responsibility remains, an aspect which was recently addressed in *R v Woods*

[2009] EWCA Crim 651. We need not address the point further because in the present case we are in effect reflecting on the appropriate sentence for manslaughter on grounds of diminished responsibility over 20 years after conviction, and 20 years or so after the appellant was removed from prison into a maximum security hospital where he has remained ever since. We cannot ignore these realities. The medical evidence is clear. For present purposes we remind ourselves of Dr Chesterman's conclusion that "…it would not be appropriate to consider releasing him into the community for the foreseeable future given that the risk of further similar re-offending cannot be regarded as insignificant". It is Dr Horne's view that if a hospital order were now to replace the order of life imprisonment, it should be subjected to appropriate statutory restrictions on any possible release under section 41.

97. Subject to the oral evidence required for these purposes, we shall make a hospital order, and in the interests of public safety, we shall attach a restriction for an indefinite period under section 41.

Conclusion - Williams

98. This is a very different appeal to Erskine. The issue of a possible defence of diminished responsibility was closely examined before the appellant chose to plead guilty to murder. The plea was a deliberate and properly informed decision. Although the issue was carefully examined, nothing was revealed at the time to suggest that the defence was available. The appellant was seeking to gain some advantage from his plea. The material which has emerged since the trial is unconvincing, particularly in relation to any potential mental impairment which might have led to the decision to plead guilty to murder. The interests of justice require that the conviction returned on the basis of the appellant's own guilty plea should be upheld. This appeal is dismissed."

Lurking doubt

982. Lord Rodger in *Dookran v The State* (Privy Council judgment 7th March 2007) stated:

"28...Although reference to lurking doubt has been criticised from time to time as an unwarranted gloss on the language of the statute regulating appeal proceedings in England and Wales, it is really just one way in which an appeal court addresses the fundamental question: Is the conviction safe? In the vast majority of cases the answer to that question will be found simply by considering whether the rules of procedure and the rules of law, including the rules on the admissibility of evidence, have been applied properly. Very exceptionally, however, even where the rules have been properly applied, on the basis of the "general feel of the case as the Court experiences it", there may remain a lurking doubt in the minds of the appellate judges which makes them wonder whether justice has been done: *R v Cooper* [1969] 1 QB 267, 271, per Widgery LJ. See Archbold, *Criminal Pleading Evidence and Practice* (2006), paras 7-47 – 7-49. In reality, Mr Jennings was submitting that this was an exceptional case of that kind.
29. As Widgery LJ indicates, any impression of this kind is something which the judges in an appeal court will tend to form for themselves on the basis of an

overall view of the specific features of the particular proceedings. As such, it is unique to those proceedings and will not be replicated in other cases."

983. At paragraph 36 Lord Rodger indicated that their Lordships:-

"cannot avoid a residual feeling of unease about whether justice has been done in Malharri's case and so about the safety of her conviction." [appeal allowed and conviction quashed]

984. Is the alleged incompetence of counsel a ground of appeal? It is easy for unsuccessful defendants to blame counsel for their plight. It will only be in rare cases that the incompetence of counsel will form the sole ground of a successful appeal.

985. One of the main issues will be whether the incompetence of counsel has prevented the defendant from having a fair trial. See Appeal Division judgment in *McCluskey* 2003-05 MLR N 22 (judgment delivered on the 18th April 2004) *Bally Sheng Balson* (Privy Council judgment 2nd February 2005), *Flanagan* (Appeal Division judgment 29th July 2004), *Bhola* (Privy Council judgment 8th March 2006) and *Nudd v R* [2006] HCA 9 (9th March 2006). In *Bally Sheng Balson* (Privy Council judgment 2nd February 2005) the following test was referred to at paragraph 36 – the question is whether the conduct of counsel has become so extreme as to result in a denial of due process to his client. Examples are given in *Boodram v The State* [2002] UKPC 20, [2002] 1 Cr App R 12. Lord Justice General Hope in *Anderson v HM Advocate* 1996 JC 29 at 44 stated:

"The question depended not upon a qualitative assessment of the degree of incompetence by counsel or the nature of his conduct but upon the effect of the failure on the accused's right to a fair trial. It can only be said to have resulted in a miscarriage of justice if it has deprived the accused of his right to a fair trial. That can only be said to have occurred where the conduct was such that the accused's defence was not presented to the court. This may be because the accused was deprived of the opportunity to present his defence, or because his counsel or solicitor acted contrary to his instructions as to the defence which he wished to put or because of other conduct which had the effect that, because his defence was not presented to the court, a fair trial was denied to him."

986. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Flanagan* (judgment 29th July 2004) made reference to *Doherty & McGregor v R* [1997] 2 Cr App R 218 at 220. These authorities now need to be read in light of *Boodram* and the subsequent authorities on the point. In *Doherty* it was stated that unless in the particular circumstances it can be demonstrated that in the light of the information available to him at the time no reasonably competent counsel would sensibly have adopted the course taken by

him at the time when he took it grounds of appeal on the basis of criticism of counsel should not be advanced. The Appeal Division in *Flanagan* stated that this was rightly a high test and added at paragraph 39:

"Without such a test it is easy to ignore the difficulties faced by an advocate under the immediate pressure of the trial process and to be seduced by the easily made submission that the case could have been conducted in a different way to the defendant's benefit. We agree that the cases where it will be appropriate to quash a conviction on the basis of criticisms of a defence advocate's conduct must inevitably be very rare."

987. In respect of appeals and allegations of defective legal representation see *Woodside v HM Advocate* [2009] HCJAC 19 and an article by Shiels *Professional Conduct and the Solicitor Advocate* 2009 Crim LR 794.

988. The Appeal Division (Deemster Kerruish and Deemster Doyle) in *Hall* (judgment 16th March 2007) considered the facts of that case and some of the relevant law as follows:

"[10] The Appellant maintained that immediately prior to his appearance before the High Bailiff on 5th December 2006, the advocate had indicated that if the Appellant pleaded guilty he would seek to have the disqualification limited to a couple of months with a reasonable fine. The Appellant further maintained that reliant upon such alleged indication, he contacted his then employer with whom he was employed as a driver, and received confirmation that such disqualification would not cause his employment to be terminated. According to the Appellant, the indications allegedly given by the advocate, and the response he received from his employer, led him to decide to plead guilty to the charge.

[11] We record that since the Appellant appeared in person before us, we did not have benefit of assistance from the advocate. However, if such alleged advice was given then it flies in the face of the courts' sentencing powers relevant to an offence under section 2 of the Act. Pursuant to Schedules 6 and 3 of the Act, following a guilty plea or conviction for an offence under section 2, disqualification for a period of not less than twelve months is obligatory unless there are special reasons. A 'special reason' is one, which is special to the facts of the particular case, in other words, a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, yet directly connected with the commission of the offence, and one which the court ought properly to take into consideration when imposing punishment see Williams v Culverhouse (SOGD judgment 27th July 2004), and Whittall v Kirby [1947] KB 194. There were no special reasons raised by the advocate in his mitigation. Further, under Schedule 3, upon such a conviction, the court is obligated to require that the disqualification continues until the offender passes his test.

[12] The courts have made it clear that there are only very restricted circumstances in which a court will interfere with a conviction or sentence on the grounds of the alleged conduct, or competence of Counsel. In Flanagan - v - The

Attorney General on behalf of the Queen (SOGD) judgment 29th July 2004, this Court stated at paragraphs 38 and 39:-

"38. … Unless in the particular circumstances it can be demonstrated that in the light of the information available to him at the time no reasonably competent counsel would sensibly have adopted the course taken by him at the time when he took it, these grounds of appeal should not be advanced.

39. Such is a high test and rightly so. Without such a test it is easy to ignore the difficulties faced by an advocate under the immediate pressure of the trial process and to be seduced by the easily made submission that the case could have been conducted in a different way to the defendant's benefit. We agree that the cases where it will be appropriate to quash a conviction on the basis of criticisms of a defence advocate's conduct must inevitably be very rare."

[13] This particular issue was considered more recently in Bally Sheng Balson –v- The State [PC Appeal No. 26 of 2004]. We refer to the judgment of that court delivered by Lord Hope of Craighead and in particular those parts at paragraph 36 and part of paragraph 37 which read:-

"36. Their Lordships have had in mind the formulation of the test to be applied where counsel's conduct is called into question which was formulated by de la Bastide CJ in the Court of Appeal in Boodram v The State [2002] UKPC 20; [2002] 1 Cr App R 12 and which was endorsed by the Board in that case: para 39. The question, as the Chief Justice put it, is whether the conduct of counsel has become so extreme as to result in a denial of due process to his client. Among the examples he gave was the case where counsel conducted the defence without taking his client's instructions. His formulation of the test is consistent with the approach which has been taken in several other jurisdictions. The comparative jurisprudence on this issue was examined in depth by the High Court of Justiciary in Scotland in Anderson v HM Advocate, 1996 JC 29. Among the cases referred in that judgment were R v Clinton [1993] 1 WLR 1181, R v McLoughin [1985] 1 NZLR 106, R v Birks (1990) 19 NSWLR 677, Sankar v The State [1995] 1 WLR 194 and Mills v The Queen [1995] 1 WLR 511. The Lord Justice General (Hope), delivering the opinion of the court, said at p 43 that the question depended not upon a qualitative assessment of the degree of incompetence by counsel or the nature of his conduct but upon the effect of the failure on the accused's right to a fair trial. At p 44 he said of such conduct:

'It can only be said to have resulted in a miscarriage of justice if it has deprived the accused of his right to a fair trial. That can only be said to have occurred where the conduct was such that the accused's defence was not presented to the court. This may be because the accused was deprived of the opportunity to present his defence, or because his counsel or solicitor acted contrary to his instructions as to the defence which he wished to be put or because of other conduct which had the effect that, because his defence was not presented to the court, a fair trial was denied to him.'

37. …There is no question in this case of the appellant having been deprived of

the opportunity to present his defence or of his being deprived of a fair trial." "

989. Consider *Muirhead* (Privy Council judgment delivered 28th July 2008) allowing the appeal and criticising counsel's failure to assist in respect of the defendant's allegations against counsel.

990. Lord Carswell delivered the judgment of the Privy Council in *Bernard* on the 10th May 2007 and the following are extracts:

> "23. A defendant in a criminal trial is entitled to a fair trial at common law, and the constitutional right to due process of law and the protection of the law under section 4 of the Constitution of Trinidad and Tobago will, if infringed, also entitle a citizen to a remedy: cf *Boodram v The State* [2001] UKPC 20; [2002] 1 Cr App R 103. In a case like that under appeal, the danger which may arise from inadequate representation is that in the absence of effective conduct of the defence, the conviction may be unsafe and there may be a miscarriage of justice.
> 24. Their Lordships do not consider that it could ever be justifiable to appoint counsel of three months' standing to defend a client on his own in a capital murder trial. Even when one cannot readily point to specific matters with which he failed to deal effectively, it cannot be supposed that he has the maturity of judgment and experience of tactics, handling of evidence and presentation to be able to make correctly the myriad of necessary decisions in the course of a major trial , many of which require instant and sure reaction for which experience alone fits an advocate…
> 27. … It does not inevitably follow that a conviction will be set aside on the ground of unfairness if there have been some errors in the conduct of the trial. It is a matter of degree, but factors which may affect one's conclusion are the seriousness of the defects, bearing in mind the gravity of the charges faced by the defendant, and on the other hand the weight of the prosecution case against him. Lord Bingham of Cornhill expressed the principle in *Randall v The Queen* [2002] UKPC 19, [2002] 1 WLR 2237, 2251, para 28:
>
> "While reference has been made above to some of the rules which should be observed in a well-conducted trial to safeguard the fairness of the proceedings, it is not every departure from good practice which renders a trial unfair. Inevitably, in the course of a long trial, things are done or said which should not be done or said. Most occurrences of that kind do not undermine the integrity of the trial, particularly if they are isolated and particularly if, where appropriate, they are the subject of a clear judicial direction. It would emasculate the trial process, and undermine public confidence in the administration of criminal justice, if a standard of perfection were imposed that was incapable of attainment in practice. But the right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial." "
>
> [conviction set aside and bearing in mind the lapse of time since the killing of Mr Saroop in February 1990 the Privy Council did not regard it as appropriate that there should be a retrial]

991. In *Burzala v HM Advocate* [2007] HCJAC 67 the Scottish High Court of Justiciary held that an appeal based on defective representation could only succeed where there had been a miscarriage of justice, which could only have occurred if the conduct of the defence deprived the appellant of his right to a fair trial. That in turn could only be said to have occurred if the appellant's defence was not presented in court, but the manner in which a defence was conducted was a matter for the professional judgment of counsel and criticism of strategic or tactical decisions as to how the defence should be presented was not sufficient to support an appeal on the ground of defective representation if those decisions were reasonably and responsibly made by counsel in accordance with his or her professional judgment.

992. The Supreme Court of the United States in *Strickland v Washington* 466 US 668 (1984) dealt with issues in respect of allegations of ineffective assistance of counsel. The benchmark for judging any claims of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. The same principle applies to a capital sentencing proceeding in the United States of America. The proper standard for judging attorney performance is that of reasonably effective assistance, considering all the circumstances. When a convicted defendant complains of the ineffectiveness of counsel's assistance the defendant must show that counsel's representation fell below an objective standard of reasonableness. Judicial scrutiny of counsel's performance must be highly deferential and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. With regard to the showing of prejudice the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing on ineffectiveness claims must consider the totality of the evidence before the judge or jury. See also *Wiggins v Smith* 539 US 510 (2002) and *Rompilla v Beard* 545 US 374 (2005). Kelly Green in *There's less in this than meets the eye: Why Wiggins doesn't fix Strickland and what the court should do instead* 29 Vt.L.Rev 647

provides some interesting comments in respect of the position in the United States of America.

993. Where one of the grounds of appeal is an allegation that counsel at the trial deliberately disobeyed his instructions it is important that those acting for the appellant take some steps to ascertain from counsel concerned what he has to say about the matter. In *Roberto Malasi* [2008] EWCA 2505 Thomas L J stated:

> "14 We shall proceed to determine the case on the basis that those instructions were given and were not followed by his counsel. However, it is very important that we make the following observation because we wish it to be acted upon by those responsible for the proper conduct of the affairs of the Bar of England and Wales.
>
> 15 It is invariably the course that where criticism is made of counsel, particularly eminent and experienced leading counsel, and particularly criticism of the gravity made in this case, namely that counsel did not follow the instructions of someone on trial for murder, that before an appeal is brought on that basis, and certainly before it is renewed before this court, that some steps are taken to ascertain from counsel concerned what he has to say about that matter. The reasons are obvious.
>
> 16 Unfortunately, in this case, when new solicitors and counsel, whom we shall not name in public, were instructed, although they wrote numerous letters to this court complaining about the refusal of the registrar to grant more legal aid, it appears from what we have been told today, but we know not whether it is correct or not, no one took the elementary step of asking leading counsel what had happened. It is always difficult for this court when dealing with cases of this kind to trespass into areas of professional privilege, but it is normally the case that where criticism is made privilege is always waived and the most careful steps are taken. This is not a case where it is alleged that what was done by counsel was merely not in accordance with is proper standards, it is case where it is alleged that he deliberately disobeyed the instructions of his client. That is a very grave allegation to make against such a distinguished counsel and on which to pursue an application for appeal. We do not think, for our part, that it is proper for such an application to be pursued or made without those elementary steps being taken. We did not want to delay the further conduct of this appeal, because, as we have said and as we shall further explain in a moment, we have proceeded on the basis that counsel deliberately disobeyed the instructions, but it is a matter of concern to us and the professional standing of those involved, not counsel here today, as to how this matter has come to this court in this way when such a grave allegation is made against a member of the Bar and no steps have been taken to see what he has to say about it.
>
> 17 We proceed, as we have said, to consider the matter on the basis that counsel deliberately disobeyed his client's instructions on a charge of murder on a matter so central to the trial of the case, namely whether the jury that was to try him should be discharged."

994. On appeal defence counsel cannot blow hot and cold (*Lucas* [1991] Crim LR 844, and *R v Smith* [2005] UKHL 12). The defendant should present his case at trial and not keep any cards up his sleeve to play for the first time at appeal (*R v Neaven* [2007] 2 All ER 891). In *Watterson* 1978-80 MLR 105 the Appeal Division (Judge of Appeal Glidewell and Deemster Eason) held that if were to be argued that a fair trial was not possible because of media coverage the point might properly to be raised before the trial commenced and not merely on appeal. Criminal defence lawyers should not hold cards up sleeves and the court should bear in mind the advantage of the court at first instance seeing the witnesses (*AG v Steinhoff* Privy Council judgment delivered on the 19th July 2005).

995. In *Pitman v The State* (Privy Council judgment 3rd March 2008) the following was stated at paragraph 24:

> "It is the duty of the court in a criminal appeal to take account of all the grounds which could reasonably be advanced on behalf of an appellant, whether or not they have been sufficiently argued."

996. In respect of appeals against conviction on guilty pleas see paragraph 2-195 of *Archbold* to the effect that if a plea of guilty is tendered in a summary court was an unequivocal plea (i.e. a plea which could not be described as a "guilty but…" plea) then once the sentence has been passed by the summary court and the conviction is accordingly complete it is too late for any court to entertain an application for a change of plea.

997. In *Hall* (Appeal Division judgment 16th March 2007) the appellant before the Court of Summary Jurisdiction had pleaded guilty to a charge of dangerous driving and endeavoured to appeal against conviction and sentence. The Appeal Division (Deemster Kerruish and Deemster Doyle) stated:

> "[14] We refer to section 103(1) Summary Jurisdiction Act 1989, which provides:
> "103 Right of appeal against conviction or sentence
> (1) A person convicted by a court of summary jurisdiction may appeal to the High Court –
> (a) if he pleaded guilty, against his sentence;
> (b) if he did not, against the conviction or sentence or both."
> At first sight, such provision prevents the Appellant seeking to appeal his conviction.
>
> [15] The equivalent statutory provision in England and Wales to section 103 is section 108(1) Magistrates Courts Act 1980, the origin of which was section 36 Criminal Justice Act 1948. Such latter provision was the subject of consideration

in R -v- West Kent Quarter Sessions Appeal Committee ex parte Files 2 All ER (1951) 727 and again by Lord Goddard CJ in his judgment in R -v- Durham Quarter Sessions ex parte Virgo 1 All ER (1952) 465. In that case Lord Goddard CJ reviewed his earlier judgment in West Kent. In particular we refer to that part of Lord Goddard's judgment in Durham at 469d which part reads:-

"I think the concluding words of my judgment go too far. Where the question in the case is whether or not the plea which was put in by the prisoner at the hearing before the justices amounted to a plea of Guilty or Not Guilty, that is a matter which the court can entertain. It would be putting it too high against an unrepresented prisoner who, when first charged, had said that he pleaded Guilty but, before being sentenced, had made to the court a statement which showed that he meant to deny that he had acted feloniously or criminally, to say: 'You said you were Guilty, and, therefore, there is an end of it'. It must not be taken that the concluding words of my judgment in the West Kent case preclude courts of quarter sessions from considering whether the plea which was made before the court of summary jurisdiction, taking all that the prisoner said together, was a plea of Guilty or Not Guilty."

Lord Goddard then continued at 469h:-

"Quarter sessions came to the conclusion that the plea of Guilty was wrongly recorded, not because the defendant did not understand or did not intend to plead otherwise than he did, but because, taking the whole of his plea together, they were satisfied that in law it amounted to a plea of Not Guilty. I think they were right in entertaining the appeal to that extent and that, as the defendant had never been tried on a plea of Not Guilty, they were entitled to treat the conviction as a nullity as the court did in R -v- Ingleson. ([1915] 1 KB 512)."

[16] The authorities make it clear that if a plea of "guilty" tendered in a court of summary jurisdiction was an unequivocal plea that is a plea which could not be described as a "guilty but …" plea, then once sentence has been passed by that court and the conviction is accordingly complete, it is too late for an appellate court to entertain an application for a change of plea, see S (an Infant) -v- Manchester City Recorder (1971) AC 481 HL. Also, a plea is not equivocal because it is based upon incorrect or corrupted evidence, see R -v- Bolton J ex parte Scally (1991) 1 QB 537DC, where relief was available on judicial review. We refer to Archbold Criminal Pleading Evidence and Practice (2007) paragraphs 2-195 to 197. This Court is entitled to enquire into the question whether the plea entered before the summary court was equivocal. However, unless there is something which prima facie raises the issue of an equivocal plea having been tendered before the court of summary jurisdiction, this Court ought not to make inquiry. The issue of equivocality is confined to what went on before the court of summary jurisdiction. If the evidence reveals that nothing occurred there to render the plea equivocal that is the end of the matter and this Court will proceed to hear the appeal against sentence, if pursued. In a case of an appellant producing some prima facie and credible evidence tending to show that the plea before the court of summary jurisdiction was equivocal, this Court may seek assistance from a transcript of the proceedings in the court below, or, if it is considered more conducive to justice, from such court as to what happened before that court and only after considering such assistance should this Court decide the issue. In P. Foster (Haulage) Limited -v- Roberts, 67 Cr.App.R. 305, DC it was said that the

Crown Court should ask itself three questions, (a) was the plea itself equivocal?, (b) if not, did anything occur during the proceedings which should have led the justices to consider whether they should exercise their discretion to invite or permit a change of plea?, (c) if so, had it been shown that by not inviting a change of plea the justices had exercised their discretion wrongly? As to the second issue, such court stated that if the defendant is legally represented, it will be rare that it can be said that it ought to have been apparent to the justices that they should consider exercising their discretion to invite a change of plea. If, however, the mitigation, other than general assertion in mitigation, is inconsistent with the legal ingredients of the offence, or with the plea, then the court of summary jurisdiction should not shy from doing so.

[17] The transcript records two exchanges between the Appellant, and the High Bailiff. We refer to the first such exchange:

"HIGH BAILIFF: Mr Lee David Hall it's alleged that on the 3rd of June this year on the Snaefell Mountain Road at Kate's Cottage you drove a motorcycle dangerously. What do you say to that? Guilty or not guilty?
MR HALL: Not guilty to speeding No Sir.
HIGH BAILIFF: You're not charged with speeding, you're charged with dangerous driving.
MR. HALL: Guilty Sir.
HIGH BAILIFF: Okay thank you, sit down."
After the imposition of the sentence, the following exchange is recorded:-
"Mr. Hall: Can I just say that I've been coming for the last ten years and I've never, ever had a black mark on my record over here in anything.
High Bailiff: Yes.
Mr. Hall: I mean, I don't even drink when I'm over here on purpose. I mean I am very careful, it was just I come down the hill, saw the straight, saw the 60 zone, I looked in my mirrors first and then braked. If I wouldn't have looked in my mirrors ..
High Bailiff: I appreciate what you're …
Mr. Hall: I would not have been getting caught speeding. I am a safe rider."
Later Mr. Hall states:-
"Mr. Hall: That's why I've come today and I've pleaded guilty. Because I know, yes I know I've been speeding. I was 26 foot inside. If I wouldn't have looked in my mirrors I would have stopped."
Such exchanges might be taken to indicate some doubt, or confusion in the Appellant's mind.

[18] We also refer to section 2(A) of the Act which provides:-

“2A Meaning of dangerous driving
(1) For the purposes of sections 1 and 2 a person is to be regarded as driving dangerously if (and, subject to subsection (2), only if) -
(a) the way he drives falls far below what would be expected of a competent and careful driver, and
(b) it would be obvious to a competent and careful driver that driving in that way would be dangerous.
(2) A person is also to be regarded as driving dangerously for the purposes of sections 1 and 2 if it would be obvious to a competent and careful driver that driving the vehicle in its current state would be dangerous.

(3) In subsections (1) and (2) 'dangerous' refers to danger either of injury to any person or of serious damage to property; and in determining for the purposes of those subsections what would be expected of, or obvious to, a competent and careful driver in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to circumstances shown to have been within the knowledge of the accused.
(4) In determining for the purposes of subsection (2) the state of a vehicle, regard may be had to anything attached to or carried on or in it and to the manner in which it is attached or carried.

We record that there was no concern raised by the prosecution as to the state of the Appellant's motorcycle. It is also important to keep in mind the high threshold set by section 2A, see R –v- Conteh (2004) RTR 1, CA.

[19] The summary of facts and the transcript demonstrate that the prosecution before the High Bailiff relied solely upon speed. Indeed such was readily accepted by Miss Braidwood. Speed alone cannot found an offence of dangerous driving. The question of speed must be placed within the context of all the circumstances of the alleged offence, see Archbold 2007 at paragraph 32-17. In this particular case, placing the Appellant's speed within the context of all the circumstances was very material, but not raised by defence. We are content that the Appellant's appreciation was that speed alone was sufficient to found the offence. Also, whilst in this appeal we had not benefit of assistance from the advocate, a reading of the transcript without such assistance could lead to the conclusion that it was considered by him that the court had a general discretion as to the minimum period of disqualification it could impose. In all the circumstances, we concluded that the Appellant's plea of "guilty" was an equivocal plea, and, in what we viewed to be a rare and exceptional case, determined to allow the appeal against conviction. Accordingly, we quashed the conviction and sentences imposed, and remitted the matter to the High Bailiff's court."

998. In respect of appeals and assertions of inconsistent verdicts see *R v Volante* (Appeal Division judgment 5th September 2008).

The proviso and retrials

999. Section 33(2) of the Criminal Jurisdiction Act 1993 provides that the Appeal Division, even though it thinks that the point raised in the appeal might be decided in favour of the appellant, may dismiss the appeal if it considers that no miscarriage of justice has actually occurred. This provision is frequently referred to as the proviso.

1000. In *Watterson v R* 1978-80 MLR 105 Judge of Appeal Glidewell delivering the judgment of the Appeal Division came to the conclusion that part of Deemster Luft's summing up contained a misdirection and at page 112 added:

"That means that the court has had to consider whether it should apply the proviso. The test, as the court sees it, is whether it can say that it is satisfied, using

the usual criminal standard of proof that a jury properly directed in this respect but directed exactly as it was directed in every other respect would have convicted. The court's view is that there was a very strong case for the prosecution here and that it is very likely that a jury would have convicted but it can not say that it is satisfied that a jury would so have convicted."

1001. See *Stafford v The State* [1999] 1 WLR 2026, 2029-2030 Lord Hope and *Dookran v The State* (Privy Council judgment 7th March 2007) in respect of the proviso and retrials. Lord Rodger commented at paragraphs 12 and 14 to the effect that if the appeal court decides that some of the evidence was inadmissible it will uphold the conviction only if the appeal court is satisfied that without that evidence a reasonable jury would inevitably have convicted. See also the judgment of the Privy Council in *Barlow* (judgment delivered on the 8th July 2009) in respect of the application of the proviso. The Privy Council referred to *Matenga* [2009] NZSC 18 and stated that there could be no question of applying the proviso if what went wrong at the trial made the trial unfair. The fairness of the trial has to be judged in the light of the proceedings as a whole. In *Barlow* the Privy Council held that the introduction of certain inadmissible evidence was not such a departure from the essential requirements of the law that it went to the root of the proceedings. The Privy Council went on to consider whether the potentially adverse effect of the introduction of some inadmissible evidence on the result of the trial may actually, that is in reality, have occurred. In doing so the Privy Council considered whether in light of all the admissible evidence, notwithstanding the miscarriage of admitting the unsustainable part of some of the expert evidence, the guilty verdict was inevitable in the sense of being the only reasonably possible verdict of that evidence (see paragraph 59 of the Privy Council's judgment). The Privy Council for this purpose took into account the relevant evidence as a whole both tending to incriminate the defendant and that in his favour.

1002. See *Flanagan* (Appeal Division judgment 29th July 2004) at paragraphs 43-45 and section 33(2) of the Criminal Jurisdiction Act 1993. Consider whether any miscarriage of justice has actually occurred. Was the evidence against the defendant overwhelming? Were convictions inevitable even without the inadmissible evidence or error? See High Court of Australia judgments in *Libke v R* [2007] HCA 30 regarding the application of the proviso.

1003. In *R v Newbery* (judgment 30th September 2004) the Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) accepted the trial judge's assessment that the defendant had been convicted on "quite overwhelming evidence." The Appeal Division felt that there was

formidable evidence against the appellant. The Appeal Division had "absolutely no doubt that his convictions are safe and satisfactory and that there was no miscarriage of justice."

1004. In *Pipersburgh v The Queen* (Privy Council judgment 21st February 2008) reference was made to the issue of the proviso in the circumstances of that case at paragraph 30 of the judgment. Identification evidence was in issue in that case. Crucial evidence by way of dock identifications was given by Crown witnesses. Evidence of the appellants' disappearance and flight to Mexico soon after the murders was striking indeed. But it was legally significant only when taken along with the evidence on which the Crown relied to show that the appellants had been on the scene and involved in the murders. Since the judge failed to direct the jury properly on the approach which they should adopt when considering the key identification evidence, and in particular, failed to tell them that they required to approach it with great care, the Board could not affirm that, even if properly directed, the jury would inevitably have reached the same verdicts. The convictions were regarded as unsafe. The Privy Council's advice was that the appeals should be allowed and the matter remitted to the Court of Appeal with a direction to that court to quash the convictions and to consider whether a retrial should be ordered, the appellants remaining in custody meanwhile.

1005. See *Devo* (Appeal Division judgment delivered on the 29th October 2008) in respect of the proviso. At paragraph 166 the Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) stated that they "did not consider that no miscarriage of justice had actually occurred and thus we were not entitled to, and did not, apply the proviso." At paragraph 167 the Appeal Division referred to the long and complicated trial, large number of counts eventually reduced to 4, late disclosure by the prosecution, substantial time elapsing since the events in question, risk of custody and concluded:

"In all those circumstances we could not conclude that the interests of justice required that there should be a re-trial."

1006. See also *Weiss v The Queen* (2005) 224 CLR 300 and *Nudd v The Queen* (2006) 80 ALJR 614 (judgments of the High Court of Australia) in respect of appeals and the application of the proviso.

Appeals in respect of admissibility of evidence decisions

1007. In *DPP v Chand* [2007] EWHC 90 (Admin) January 17, 2007 it was stated that:

> "The approach to consideration in the Court of Appeal of a Crown Court judge's decision, as set out in *Hanson, Gilmore and Plckston, The Times,* March 24, 2005 ("if a judge has directed himself or herself correctly, this Court will be very slow to interfere with a ruling as to admissibility … it will not interfere unless the judge's judgment as to the capacity of prior events to establish propensity is plainly wrong, or discretion has been exercised unreasonably in the *Wednesbury* sense") applied equally to consideration of an appeal in the Administrative Court against a decision by a district judge (magistrates' court)."

Reluctance to interfere with case management decisions

1008. The authorities indicate that the Appeal Division should be slow to interfere with case management decisions made by a trial Deemster. See for example *C* [2007] EWCA Crim 2532 (in respect of a refusal by the trial judge to adjourn a trial to enable the prosecutor to arrange for the attendance of the complainant, whose evidence was vital to the prosecution case but who had made clear her refusal to attend). It was emphasized by the English Court of Appeal that trial judges are best placed to make case management decisions and severe restrictions are placed on the English Court of Appeal's powers to interfere.

Appeals by defence against sentence

1009. Under section 33(4) of the Criminal Jurisdiction Act 1993 on an appeal against sentence the Appeal Division (a) if it thinks that a different sentence should have been passed, shall quash the sentence passed at the trial and pass such other sentence authorised in law by the verdict (whether more or less severe) in substitution for it as the Appeal Division thinks ought to have been passed, and (b) in any other case shall dismiss the appeal. Under subsection (5) it is provided that the Appeal Division shall not increase a sentence by reason of or in consideration of any evidence which was not given at the trial.

1010. Section 34 of the Criminal Jurisdiction Act 1993 concerns the substitution of verdict or sentence. Section 37 concerns supplemental powers of the Appeal Division.

1011. In *Jones v R* 1999-01 MLR 369 the Appeal Division (Judge of Appeal Tattersall and Deemster Cain) held that it could consider circumstances unknown to the sentencer existing at the time of sentence but not events subsequent to sentence. In *O'Callaghan v*

Teare 1981-83 MLR 103 the Appeal Division (Judge of Appeal Hytner and Deemster Luft) held that it would be inappropriate to grant leave to withdraw the appeal as it raised serious constitutional questions regarding the legality of the sentence imposed and there was a need to re-examine the sentence in the light of the appellant's desire that it now be executed.

1012. The Appeal Division (Deemster Kneale and Deemster Moore) in *Perry v Clague* 1961-71 MLR 162 held that as a general rule the appeal court would not alter a sentence unless it was so excessive or so inadequate that it appeared there had been a failure to apply the right principles.

1013. The Appeal Division also has the power to increase a sentence when considering a defence appeal against sentence. The power to increase a sentence should be exercised with great caution.

1014. The Privy Council in *Earl Williams* (judgment delivered 15th March 2005) dealt with the position where the appellate court was considering increasing the sentence. In *Boyce v Killip* 1961-71 MLR 349 the Appeal Division (Judge of Appeal Bingham and Deemster Moore) indicated that the increase of a sentence on a defence appeal against sentence was improper unless the appellant had been warned that an increase was possible. The appellant needs to be warned of possible increase in sentence on appeal and given an opportunity to be heard and to consider whether to proceed with his appeal against sentence. The appellant in such circumstances should be given an opportunity to ask for leave to withdraw his appeal against sentence. This was a necessary part of a fair hearing. In *O'Callaghan v Teare* 1981-83 MLR 103 the Appeal Division (Judge of Appeal Hytner and Deemster Luft) indicated that the Appeal Division would normally exercise its discretion to allow an appellant, who discovered that a heavier penalty could be imposed on appeal, to withdraw his appeal against sentence without giving the required notice.

1015. The Privy Council in *Oliver* (judgment delivered 26th February 2007 in the Bahamas) stated:

> "16. …The principles which have now been established can be summarised in the following propositions:
>
> (a) The power to increase a sentence must be sparingly exercised and then only in cases where the sentence imposed by the trial court was manifestly inadequate; in all cases the reasons for exercising this drastic power must be explained:

Kailaysur v The State of Mauritius [2004] UKPC 23; [2004] 1 WLR 2316, para 9, per Lord Steyn.

(b) An appellate court which is considering an increase in sentence should invariably give an applicant for leave to appeal or his counsel an indication to that effect and an opportunity to address the court on this increase or to ask for leave to withdraw the application: *Williams v The State* [2005] UKPC 11, [2005] 1 WLR 1948, para 10; *Skeete v The State* [2003] UKPC 82, para 44.

In *Skeete v The State* the appellant had appealed only against conviction and had not brought any appeal against sentence, while in *Williams v The State* the matter before the court was an application for leave to appeal, as distinct from a full appeal. In *Williams* their Lordships distinguished on the latter ground the decision of the Divisional Court in *R v Manchester Crown Court, ex parte Welby* (1981) 73 Cr App R 248, in which Lord Lane CJ stated that once the hearing of an appeal against sentence has started, it will be only in exceptional circumstances that leave to abandon it will be granted. The reason is clear, that if the law were otherwise an appellant could attack a sentence and then, if the reaction of the appellate court was unfavourable and he appeared to be at risk of an increase, he could withdraw the appeal with impunity. Their Lordships appreciate the distinction, but consider that the same principles should apply to appeals as to applications for leave to appeal, save that leave to withdraw a full appeal should be given rather more sparingly. They have no doubt that in all cases where the appellate court is considering an increase it should give a clear indication to that effect and give the appellant or his counsel an opportunity to address them on the point, since there are specific considerations relating to a possible increase, as distinct from those relating to the imposition of the original sentence."

1016. In respect of a defendant appealing on the grounds that a co-defendant received a more lenient sentence see Lord Bingham in *O'Brien v Independent Assessor* [2007] UKHL 10. See also the English Court of Appeal decision in *R v Tate* [2006] EWCA Crim 2373 at paragraph 20. The fact that a co-defendant appears to have been extremely fortunate is not a good ground for imposing a sentence on the appellant that would be less than the facts of the case merit.

1017. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Roberts* (judgment 1st June 2007) stated:

"56. A common-sense test for determining whether there is such disparity as would justify the intervention of this court was defined by Lawton LJ in *R v Fawcett* (1983) 5 Cr App R (S) 158 - a case which involved different sentences imposed by different judges - thus:

'Would right-thinking members of the public, with full knowledge of all the relevant facts and circumstances, learning of this sentence consider that something had gone wrong with the administration of justice?'

57. Mrs Jones agreed that this court should apply such test and we do so.

58. Having regard to the facts of this case, in our judgment the answer to that question is 'No'. These sentences were imposed by the same judge at the same time. Although we agree with Mrs Jones that, in the context of serious drug offences, previous good character offers limited mitigation, Deemster Doyle clearly believed that the personal mitigation available to each defendant was different and justified a significant difference in the length of the custodial sentences imposed. We do not disagree. We are satisfied that Deemster Doyle, in the exercise of his discretion, was entitled to conclude that Roberts who had committed serious drug offences on three occasions in about 10 years should receive a significantly longer custodial sentence than Teare who had not previously offended."

1018. The Appeal Division will normally only interfere if the sentence was manifestly excessive or wrong in principle or wrong in law for example if the court no power to impose it. In *Perry v Clague* 1961-71 MLR 162 (an authority frequently cited by the Appeal Division) Deemster Moore sitting in the Appeal Division in October 1965 referred to *R v Ball* (1951) 35 Cr App R 164 and applied the dicta of Hilbery J giving the judgment of the Court of Criminal Appeal in England as follows:

"In the first place, this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence."

1019. To justify interference the Appeal Division need to be persuaded that the sentence was unduly lenient (not just lenient) or was manifestly excessive or that there was a failure to apply the correct principles. The Deemster at first instance has a sentencing discretion and the Appeal Division should exercise appropriate restraint when considering interfering with a sentence. If the sentence is manifestly excessive or wrong in principle or unduly lenient then the Appeal Division should interfere. If it is not the Appeal Division should not interfere with the sentence imposed even if they would have imposed a different sentence.

1020. Kirby J in *Postiglione v R* (1997) 189 CLR 295 at 336-337 stated:

"It is well established that when performing their function sentencing judges must be accorded a wide measure of latitude which will be respected by the appellate courts so long as the sentencing judge has taken into account the relevant considerations of law and fact, the appellate court will not ordinarily intervene. [T]he proper approach is one of vigilance within a context of appellate restraint."

1021. The Appeal Division (Deemster Cain and Deemster Kerruish) in *Edwards* (judgment 26th February 2001) at paragraph 12 stated:

"In general and broad terms this Court's approach to an appeal such as that before us today is that this Court will interfere with the sentence imposed when (a) the sentence is not justified by law, in which case it will interfere not as a matter of discretion but of law; (b) where sentence has been passed on the wrong factual basis; (c) where some matter has been improperly taken into account or there is some fresh matter to be taken into account; or (d) where the sentence was wrong in principle or manifestly excessive. Such categories are not however exhaustive."

1022. The Jersey Court of Appeal in *Harrison v Attorney General* 2004 JLR 111 indicated that the Court of Appeal would interfere with a sentence passed by the Royal Court where:

(a) it was not justified by law;
(b) it was passed on a wrong factual basis;
(c) some matter had been improperly taken into account or some fresh matter needed consideration;
(d) the sentence was wrong in principle or manifestly excessive.

1023. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Westhead* (judgment 23rd May 2006) dealt with an appeal in respect of sentences of custody totalling 10 years imposed for various drug and drug related offences. The judgment is a useful illustration as to the approach of the Appeal Division in respect of appeals against sentence. The following are extracts from the judgment:

"11 … The Appellant was arrested. In interview … In interview he said that he was holding the drugs for someone in return for the cancellation of a debt. Deemster Doyle sentenced on that basis although he observed that the Appellant acted as a minder without compulsion. In this context we remind ourselves what this court said in *Gillies v Attorney General* [16th April 2004]:

"[20] A person who acts as a minder, facilitator, warehouseman, or banker for a drug dealer facilitates the latter in his illegal activity, and assists the latter to reduce the risk of detection and arrest. Absent proper compulsion, which is supported by credible evidence, and the lack of significant mitigation, such as identification of the dealer, the trial court is entitled to view a minder, facilitator, warehouseman, or banker as having committed an offence for which the sentencing starting point ought to be the same as that for a dealer in the appropriate quantity, quality, and type of drug. The sentencing court will then be entitled to take into account, if it accepts that the offender was a minder, facilitator, warehouseman, or banker, all relevant mitigating, and aggravating factors, including, but not limited to, the circumstances, and period[s] of the facilitation, and the offender's previous convictions."

12. The Appellant pleaded guilty to all offences. The offence of possession of cocaine with intent to supply had been committed whilst he was on bail for the offences committed on 1st February 2005. In respect of that offence and that of production, Deemster Doyle expressly said that he was giving the Appellant

'some credit' for his guilty pleas but added that such was in the context that he had little realistic alternative but to plead guilty. In our judgment this was an appropriate approach which reflects what this court said in *Caldwell- Camp v R* [2003-05] MLR 505 when we said this:

"[66] The sentencer will wish to have due regard to a guilty plea and to apply an appropriate discount. It is in the public interest that the expenditure of time and money on a full trial is avoided. Although discount will be given we suggest that where there is no sensible alternative to a guilty plea the discount will be more limited."

13. Mr. Kermode submitted that the learned Deemster failed to give the Appellant sufficient credit for his plea of guilty to the money laundering offence. We remind ourselves that such plea was made in the face of a wealth of prosecution evidence. Further Mr. Kermode accepted that taking all the circumstances into account, the sentence of two years custody, absent the question of totality, was not manifestly excessive and was supported by authority.

14. The Appellant is a man aged 41 years with one conviction in 1990 for the possession of a controlled drug. He had not previously been sentenced to a term of custody. It is said on his behalf that he was co-operative with the police. However in our judgment the Deemster was entitled to observe that these offences were carefully planned and pre-meditated.

15. It is settled law that the court should only interfere with the exercise of a trial court's discretion if the sentence imposed is manifestly wrong or so excessive or inadequate as to appear wrong in principle or if the court erred in principle: see *Perry v Clague* [1961-71] MLR 162, at 166.

16. Mr. Kermode, on behalf of the Appellant, made a number of submissions.

17. Firstly, Mr. Kermode submitted that the sentence of 6 years custody for the offence of possession of cocaine, a Class A drug, with intent to supply, was manifestly excessive. He relied upon the Appellant's good character, that he was a minder, his remorse and a disparity with the sentence imposed for possession with intent to supply on Scott Farthing. Dealing with the latter first, following *Lamb v* R [1999-01] MLR N11, we view that the Deemster correctly identified the offence of possession with intent to supply as secondary to the offence of production of a Class A drug for which offence he sentenced Mr. Farthing to six years custody. Any argument as to disparity is thus in our judgment unfounded. As to the Appellant's good character, whilst it is correct that the Appellant had only one previous conviction very many years ago, it could not be ignored that for two years prior to July 2005, he had been involved in drug trafficking of Class B and latterly Class C drugs from which he had made substantial financial gains. As to the Appellant being a minder, we note that he acted without compulsion and failed to identify his principal so that the dicta which we have already cited in *Gillies* are apposite. As to the Appellant's remorse, it seems to us that this was towards his family and himself as opposed to the offences.

18. More importantly, in the light of this court's judgment in *Caldwell-Camp*, we regard this submission as wholly unrealistic. In *Caldwell-Camp* this court, in setting out guidelines to assist sentencing judges, indicated that it was appropriate

that there should be bands of starting points and that the starting point, assuming a conviction after a trial, for a quantity of Class A drug in powder form of 20 - 50 grams, should be between 7 and 9 years. In this case whilst the Appellant had pleaded guilty, we note that the drugs had been found in the Appellant's home and consider that he had little option but to plead guilty. In our judgment, on the facts of this case, Deemster Doyle was entirely justified in imposing a sentence of 6 years custody.

19. Secondly, Mr. Kermode submitted that either or both of the 2 year custodial sentences imposed for production and money laundering should have been imposed to run concurrently. In fact the consecutive sentences were imposed for the offences of money laundering and the possession of cocaine with intent to supply. As a matter of principle we can see no reason why Deemster Doyle was not fully entitled to impose consecutive sentences for each of these offences. The former related to a substantial period of dealing in drugs which was separate to the offence of production and in our judgment merited a consecutive sentence. The latter related to the Appellant's possession of cocaine with intent to supply whilst he was on bail for the offence of production. As this court said in *Miller v Attorney General* [1st May 2001], when an offender commits a further offence whilst on bail, the sentence imposed should normally be consecutive to the sentence imposed for the offence or offences in respect of which the offender was on bail. Accordingly we reject this submission.

20. Thirdly, Mr. Kermode submitted that looking at the totality of the offences committed by the Appellant, the total sentence of 10 years was manifestly excessive. Whilst we accept that the sentence was long and that a sentencing judgment must always ensure that the totality of consecutive sentences imposed is not excessive [see *Skillen v R* [1972-77] MLR 331 and *Hartley v Cain* [1978-80] MLR 196], it seems to us that such a long sentence was the inevitable consequence of the longer sentences which are likely to result from our decision in *Caldwell-Camp*, the extent of the Appellant's criminality and the fact that he had committed three separate groups of offences, one of which whilst he was on bail. We expressly reject Mr. Kermode's submission that because all the offences involved financial benefit from drug dealing that these offences were of the same character and thereby justified some lesser overall sentence [see *Purcell v Oake* [1990-92] MLR 185].In such circumstances we do not conclude that the overall length of the sentence imposed on the Appellant was too long and we can see no legitimate reason to interfere with the sentences imposed by Deemster Doyle.

21. It follows that this appeal is dismissed."

1024. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Clinton* (judgment 29th October 2009) at paragraph 78 applied the well established principles in relation to defence appeals against sentence and concluded:

"78. Having regard to all such matters, whilst we recognise that the sentence of 15 years custody imposed on this Appellant was a severe sentence, particularly where the only custodial sentence which he had previously served was for 3 months, we are not satisfied that the sentences imposed were manifestly wrong or so excessive as to appear wrong in principle or that the judge erred in principle. In

such circumstances we are not entitled to interfere with the sentencing judge's exercise of discretion."

References on points of law

1025. Section 40(1) of the Criminal Jurisdiction Act 1993 provides that where a person tried on information has been acquitted the Attorney General may, if he desires the opinion of the Appeal Division on a point of law which has arisen in the case, refer the point to that Division, who shall consider the point and give its opinion on it. For the purpose of considering the point the Appeal Division shall hear argument (a) by the Attorney General and (b) if the acquitted person desires to present any argument to it, by an advocate on his behalf or, with leave, by the acquitted person himself. A reference under section 40 does not affect the trial in relation to which the reference is made or any acquittal in that trial.

1026. See the *Attorney General v Hatcher Pharmaceuticals Limited* (Appeal Division judgment delivered 16th April 2008) in which the Attorney General unsuccessfully challenged a ruling of the trial Deemster on an issue of the correct interpretation of section 20 of the Misuse of Drugs Act 1976. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Hatcher* dealt with interesting issues of statutory construction in the context of criminal offences and set out the correct approach to the construction of a penal statute.

1027. The Appeal Division in *Hatcher* concluded as follows:

> "73. Acting Deemster Sullivan adjuded that, on the plain meaning of the words in section 20, a person or company could not assist or induce itself to commit a crime and that it was stretching the normal use of the words in section 20 to conclude otherwise.
> 74. We entirely agree.
> 75. It follows that for the reasons set out above the answer to the question posed by the Attorney General is that an offender cannot commit an offence under section 20 Misuse of Drugs Act 1976 acting alone and that it is a prerequisite for a conviction that the offender must have assisted or induced another party in the commission of an offence outside the Island."

Unduly lenient sentences

1028. The relevant parts of section 41 of the Criminal Jurisdiction Act 1993 provide as follows:

> "(1) If it appears to the Attorney General that -

(a) the sentencing of a person sentenced by a court for any offence has been unduly lenient; or
(b) a court has erred in law as to its powers of sentencing for such an offence,
he may, with leave of the Appeal Division, refer the case to it for review of the sentencing of that person.
(2) On such a reference in relation to any person the Appeal Division may -
(a) quash any sentence passed on him by the court in the same proceedings; and
(b) in place of it pass on him such sentence as it thinks appropriate for the case and as the court had power to pass in dealing with him.
…
(5) For the purpose of this section, any 2 or more sentences are to be treated as passed in the same proceedings if -
(a) they are passed on the same day; or
(b) they are passed on different days but the court in passing any one of them states that it is treating that one together with the other or others as substantially one sentence,
and consecutive terms of custody and terms which are wholly or partly concurrent are to be treated as a single term."

1029. In *R v Coleman Snr*. (judgment delivered on the 29th October 2002) the Appeal Division (Acting Deemster Carter and Acting Deemster Scholes) stated:

"[4] The principles that we have to apply are accepted by both parties as being exactly the same as the United Kingdom. In *Attorney General's reference number 4 of 1989* (1989) 11 Crim. App. R. (S) 517 the Court of Appeal had to consider the correct approach to section 36 which is the equivalent section in the United Kingdom. The then Lord Chief Justice, Lord Lane, said at page 521

"The first thing to be observed is that it is implicit in the section that this Court may only increase sentences which it concludes were *unduly* lenient. It cannot, we are confident, have been the intention of Parliament to subject defendants to the risk of having their sentences increased – with all the anxiety that that naturally gives rise to – merely because in the opinion of this Court the sentence was less than this Court would have imposed. A sentence is unduly lenient we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection regard must of course be had to reported cases, and in particular for the guidance given by this Court from time to time in the so-called guideline cases. However it must always be remembered that sentencing is an art rather than a science; that the trial judge is particularly well placed to assess the weight to be given to various competing considerations, and that leniency is not in itself a vice. That mercy should season justice is a proposition as soundly based in law as it is in literature"."

1030. In *Patterson* 2001-03 MLR N 26 the Appeal Division (Judge of Appeal Tattersall and Deemster Cain) held that a sentence could be considered "unduly lenient" only if it fell outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate, in light of the reported cases,

especially the so-called "guideline cases". Moreover the court should bear in mind that leniency per se was not a vice; sentencing was an art rather than a science; and that the trial judge was particularly well placed to weigh the various competing considerations.

1031. If the Appeal Division increases the sentence it will take into account the principle of double jeopardy. In effect the Appeal Division will bear in mind that the offender has gone through the stress of having to be sentenced twice over. This may be of significant impact in an appeal where the Appeal Division is varying a non-custodial sentence to a custodial sentence.

1032. The Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Volante* (judgment 5th September 2008) stated:

> "86. In our judgment an appropriate sentence for each of these offences would have been one of not less than 18 months custody. Notwithstanding the mitigation put forward by Mr Quinn and the fact that the Appellant had been in custody for 6 weeks we do not believe that it was appropriate to suspend the custodial sentence. We are thus satisfied that it is appropriate that we should quash each of the sentences of 3 months custody suspended for 12 months and substitute therefore longer custodial sentences which must be served forthwith.
>
> 87. However in determining the length of the custodial sentences to be imposed we must have regard to the principles of double jeopardy. The Appellant upon his conviction of the 4 counts surrendered his bail and was remanded in custody for 6 weeks and then sentenced in a manner which allowed his immediate release. Until the Attorney General's application for a review he would have believed that there was no risk of him returning to custody and thereafter he will have suffered anxiety as to whether his sentence might be increased necessitating his return to custody. Whilst we have little sympathy for the Appellant, given that his misfortune is far less than that suffered by the girls, the law requires that we take such matters into account and we do so.
>
> 88. In all these circumstances we impose a sentence of 9 months custody on each of the 4 counts in respect of which the Appellant was convicted, such sentences to be served concurrently, Such sentences require that the Appellant is returned immediately to prison to serve the balance of the sentence not yet served."

1033. In *Freeman* the Appeal Division (Judge of Appeal Tattersall and Deemster Doyle) quashed a sentence of 5 years and substituted for it a sentence of 7 years custody on the basis that the sentence of 5 years was unduly lenient. The Appeal Division in a judgment delivered on the 15th July 2003 stated:

> "23. Those who commit wanton and pre-meditated acts of violence must understand that when convicted they will be punished severely. Further those who

are tempted to commit acts of violence must be deterred from so doing by the sentences which the courts impose.

24. Having considered all the factors in this case, we have concluded that the appropriate sentence after a plea of guilty in this case, was 7 years custody. We have reached that conclusion, having taken into account the principle of double jeopardy, which has reduced the sentence which might otherwise have been appropriate.

25. Accordingly we quash the sentence imposed by the learned Deemster and we substitute for it a sentence of 7 years custody. To that extent this reference by the Attorney General succeeds and the sentence on this Defendant is so varied."

1034. In *Christian* the Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in a judgment delivered on the 28th September 2004 stated:

"[14] Miss Braidwood, on behalf of the Attorney General, seeks to persuade this court that it should review such sentences. The grounds are essentially these: firstly, Deemster Doyle should have imposed a further custodial sentence for the breach of the combination order and, secondly, that the learned Deemster should have imposed consecutive sentences for the offences of possession with intent to supply and handling. It was submitted that a substantially longer sentence would not offend the principle of totality.

[15] The Attorney General can only refer the case to this court with the court's leave. Whilst we readily accept Miss Braidwood's observation that there should be public confidence in the administration of justice including the imposition of not unduly lenient sentences, on the facts of this case we decline to grant leave. We think that no significant points of principle arise in this case for the consideration of the court, we think that this case turns on its own facts, we regard the grounds put forward as inherently weak and doomed to fail and we think that it is inappropriate to grant leave."

1035. In *Attorney General's Reference No 77 of 1999* [2000] 2 Cr App R(S) 250 the English Court of Appeal did not interfere with a probation order imposed on an individual who had been convicted of three counts of indecent assault. The headnote to the report summarises the position as follows:

" … the sentencer was well aware that such offences usually merited immediate imprisonment, especially where there was a breach of trust. The sentencer added that he had decided that that was not appropriate in the present case. He took into account the fact that the defendant had no previous convictions of the same nature, that he had shown remorse and had accepted what he had done. The judge was told there was a real prospect of rehabilitation. He concluded that it was an unusual case in which an unusual course should be taken. In the light of these considerations, the Court was not persuaded that the sentence passed, albeit lenient, was unduly lenient. Sentencing was an art, not a science. There were cases within the residual discretion of the sentencing judge where it was

appropriate to take an exceptional course. This was such a case. The sentence, though lenient, was not unduly lenient."

1036. The Appeal Division (Judge of Appeal Tattersall and Acting Deemster Lockett) in *Roberts* 2001-03 MLR N 28 dealt with a reference by the Attorney General pursuant to section 41(1)(a) of the Criminal Jurisdiction Act 1993. The Deemster at first instance on the 7th May 2002 imposed a sentence of 12 months custody suspended for two years in respect of five offences of theft and five offences of false accounting. The Deemster at first instance was asked to and did take into consideration 71 other offences of theft and false accounting. The defendant was also ordered to pay compensation of £2,225.26. The defendant who was a supervisor employed at a bank stole £13,231.98 from her employers over a period of about three and a half months. The Appeal Division stated:

"[11] We accept that there was considerable mitigation in this case. The Defendant was highly regarded, very highly regarded, by many. She admitted her guilt. We are satisfied that she was and still is genuinely remorseful. She has recently married and has a young baby. She is a woman of good character who had no previous convictions. We are satisfied that it is very unlikely that she will ever re-offend. That said, this was a very significant breach of trust by a person in a position of some responsibility. Not only did the Defendant's dishonesty bear the hallmarks of planning, it continued for a period in excess of three months.

[12] In such circumstances we have come to the conclusion that the proper sentence in this case was inevitably a custodial sentence which took immediate effect, albeit that such was for a relatively short period. We think that such sentence should have been 6 months custody.

[13] The real difficulty which we face is to reflect the question of double jeopardy, especially in this case where a non-custodial sentence was imposed, even though it is less than 2 months since the sentence was imposed. This has much troubled us. Ultimately we have decided that although the proper sentence would have been a sentence of 6 months immediate custody, we do not think it would be just to now impose such sentence.

[14] In all the circumstances of this case we are not prepared to say that this Defendant must now serve an immediate but short term of imprisonment. Accordingly we decline to review this sentence and it will stand as it is."

1037. See also *Attorney General's References* [2005] 1 Cr. App. R(S) 76 at 377. Lord Phillips in *AG's Reference No 8 of 2007* [2007] EWCA Crim 922 at paragraph 16 stated:

" 16. We wish to make one thing clear. The oath taken by a judge to administer justice "without fear or favour, affection of ill-will" extends to imposing what the judge concludes to be the appropriate sentence, without being deterred by the fear of an Attorney's reference. That is not to say that a judge should not pay careful regard to sentencing guidelines, whether laid down by this court or by the Sentencing Guidelines Council. But these are only guidelines. There will be cases where there is good reason to depart significantly from the guidelines. In particular, this may be appropriate where the facts of the offence diminish its

seriousness in comparison to the norm, or where there is particularly powerful personal mitigation. In such circumstances it is quite wrong for the judge to refrain from imposing the sentence that he considers appropriate because of apprehension that this may cause the Attorney General to intervene. We have no doubt that the Attorney General recognises that a departure from the guidelines, even if it is substantial, is not of itself to justify his intervention. The test for intervention is not leniency, but undue leniency. Leniency where the facts justify it is to be commended, not condemned."

1038. See Lord Justice Judge's comments in *Attorney General's Reference No 83 of 2001* (*Stephen David Fidler*) [2002] 1 Cr App R(S) 139 in respect of the imposition of a community rehabilitation order for the offence of robbery:

"On paper this sentence was lenient, but sentencing is not and never can be an exercise on paper; each case, ultimately, is individual… The sentence which he imposed was not, in our judgment, unduly lenient."

1039. Phillips LCJ in the *Court of Criminal Appeal Criminal Division Review of the Legal Year 2007/2008* states:

"A challenge on the ground that a sentence is unduly lenient should be reserved for the very rare case where the judge appears to be significantly out of line."

1040. In *Crosbie* (judgment 23rd September 2009) the Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) declined to grant leave to the Attorney General to refer the case to the Appeal Division for the review of the sentences and stated:

"25. Part of the consideration for the granting of leave is whether there is a pattern of sentencing in the lower courts which may cause public concern or whether there is an overriding public interest which would otherwise require leave to be granted in this case. On the facts of this case neither such consideration applies and accordingly we decline to grant leave to the Attorney General to refer the case to this court for review of the sentencing of the Respondent."

Appeals under the Proceeds of Crime Act 2008

1041. Under section 91 (1) of the Proceeds of Crime Act 2008 if the Court of General Gaol Delivery makes a confiscation order the prosecutor may appeal to the Appeal Division in respect of the order. Under section 91(2) of the Proceeds of Crime Act 2008 if the Court of General Gaol Delivery decides not to make a confiscation order the prosecutor may appeal to the Appeal Division against the decision. Subsections (1) and (2) do not apply to an order or decision made by virtue of sections 79, 80, 87 or 88.

1042. Section 92 of the Proceeds of Crime Act 2008 makes provision for the Appeal Division's powers on appeal. The Appeal Division may confirm, quash or vary the confiscation order.

1043. Section 99(1) of the Proceeds of Crime Act 2008 provides that if on an application for a restraint order the court decides not to make one, the person who applied for the order may appeal to the Appeal Division against the decision.

1044. Section 115(1) of the Proceeds of Crime Act 2008 provides that if on an application for an order under any of sections 103 to 106 the court decides not to make one, the person who applied for the order may appeal to the Appeal Division against the decision.

1045. Section 137(1) of the Proceeds of Crime Act 2008 provide that an appeal to the Appeal Division under Part 2 lies only with the leave of that Court.

No Stay

1046. In criminal matters the fact that an appeal has been lodged is not a reasonable excuse for failing to comply with a community order (*W Midlands Probation Board v Sadler* [2008] EWHC 15). Once a sentence has been passed it is in force and enforceable in the absence of specific provisions to the contrary. An appeal in general does not operate so as to suspend the operation of any sentence or order (*R v May* [2005] EWCA Crim 367).

Appeals in respect of pre-trial rulings

1047. Prior to 1st January 2009 there were no appeals in criminal matters on interlocutory points before the conclusion of the trial. Prior to the 1st January 2009 an appeal by the defence was only after conviction (see section 30 of the Criminal Jurisdiction Act 1993) or after acquittal (by the Attorney General if he desired an opinion of the Appeal Division on a point of law pursuant to section 40(1) of the Criminal Jurisdiction Act 1993). See also *Harding v R* 1993-95 MLR 40. In *Hedworth* [1997] 1 Cr App R 421 at 429 it was stated that it was important that criminal trials get under way as expeditiously as possible and are not bedevilled by appeals in relation to interlocutory matters which are very much the province of the trial judge.

1048. See now however section 29 of the Administration of Justice Act 2008 which inserts section 42A of the Criminal Jurisdiction Act 1993 as follows:

"42A. (1) In this section a ruling is a pre-trial ruling if it relates to a trial on information and the ruling is given—

(a) after the information is issued; but

(b) before the start of the trial.

(2) Where a judge of the High Court has made a pre-trial ruling in respect of any question, an appeal against the ruling shall lie to the Appeal Division but only with the leave of the Appeal Division.

(3) Notwithstanding that leave to appeal has been granted under subsection (2), the jury may be sworn and the trial continued unless the Appeal Division orders otherwise.

(4) On the termination of the hearing of an appeal, the Appeal Division may confirm, reverse or vary the ruling appealed against.

(5) There is no appeal to the Privy Council from a decision of the Appeal Division under subsection (4).

(6) Subsection (5) does not –

(a) prevent an appeal against conviction; or

(b) affect the right of the Attorney General to make a reference under section 40.

(7) For the purposes of this section the start of a trial on information occurs when a jury is sworn to consider the issue of guilt or fitness to plead or, if the court accepts a plea of guilty before a jury is sworn, when that plea is accepted.

(8) This section applies in relation to pre-trial rulings made on or after the day on which this section comes into operation."

[By the Administration of Justice Act 2008 (Appointed Day) Order 2008 section 29 came into operation for all purposes on 1st January 2009]

1049. Pre-trial rulings are rulings which are made after the information is issued but before the start of the trial. For the purposes of the section the start of the trial occurs when a jury is sworn to consider the issue of guilt or fitness to plead or if the court accepts a plea of guilty before a jury is sworn when that plea is accepted. An appeal against a pre-trial ruling only lies to the Appeal Division with the leave of the Appeal Division.

1050. The English Court of Appeal in *C* [2007] EWCA Crim 2532 emphasised that trial judges are best placed to make case management decisions and severe restrictions are placed on the powers of the English Court of Appeal to interfere. See also *DPP v Chand* [2007] EWHC 90 (Admin) where it was accepted that the approach of the Court of Appeal to a Crown Court judge's decision in respect of the admissibility of evidence was: "if a judge has directed himself or herself correctly, this Court will be very slow to interfere with a ruling as to admissibility… it will not interfere unless the judge's judgment … is plainly wrong, or discretion has been exercised unreasonably in the *Wednesbury* sense."

1051. Some further guidance may be obtained from Rose L J in the English Court of Appeal in *Jennings* (1994) 98 Cr Ap R 308 where he stated at page 310:

> "There has, to the knowledge of this Court in recent weeks been a plethora of applications to this Court for leave to appeal against judges' rulings at preparatory hearings. Those applications, by their very nature, have to be dealt with as a matter of urgency …There is, we emphasise, a clear duty on barristers and solicitors, underlined where public funding is involved, to scrutinise with particular care:
>
> (1) whether there is jurisdiction in this Court to entertain an appeal, and
> (2) whether, in an appropriate case, there is any real prospect of successfully arguing that the judge's exercise of discretion was fundamentally flawed.
>
> If it appears to this Court that such anxious scrutiny has not taken place, this Court will not be slow to make appropriate orders with regard to costs."

1052. It should be noted that the wording of section 42A of the Criminal Jurisdiction Act 1993 is not identical to the wording of the various English statutory provisions regarding interlocutory appeals in respect of preparatory hearings. The guidance offered by the English Court of Appeal in respect of appeals on interlocutory matters is however of some assistance pending detailed guidance from the Appeal Division on section 42A of the Criminal Jurisdiction Act 1993. See now *Dobbie* (Appeal Division judgment 13th January 2010).

1053. The comments falling from the lips of English Court of Appeal judges should however not be taken as a discouragement to parties to criminal proceedings in this jurisdiction who have good grounds for appeal in respect of pre-trial rulings. If a party in this jurisdiction has good grounds for appeal in respect of a pre-trial ruling covered by section 42A of the Criminal Jurisdiction Act 1993 that could fundamentally affect the trial then such party should of course make an urgent application for leave to appeal under section 42A of the

Criminal Jurisdiction Act 1993. Whether such leave would be granted is entirely a matter for the Appeal Division. Applications for leave to appeal under section 42A should however, where they are to be pursued, be pursued with urgency. They should not be used as a device to delay the commencement of the trial.

1054. In *R v TR* [2009] EWCA 1035 the English Court of Appeal dealt with a decision by Calvert-Smith J pursuant to section 44 of the Criminal Justice Act 2003 (Act of Parliament). Calvert-Smith J was not sure that the likelihood that jury tampering would take place was so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury. The Lord Chief Justice of England and Wales stated:

> "28. It was further argued that, whatever the outcome of the submission based on the inadequacy of the opportunity for the respondents to address the issues, this court should not interfere with Calvert-Smith J's conclusion in relation to the second condition unless it was unreasonable in the *Wednesbury* sense. We must of course pay close attention to Calvert-Smith J's decision and the reasons for it. The ruling was made in the course of a preparatory hearing. Our jurisdiction is to confirm, reverse or vary the decision. The decision itself does not represent the exercise of a discretion, rather it requires the judge to decide whether the statutory conditions have been established. If his assessment was wrong, the appeal should succeed and an order for trial by judge alone would follow."

1055. The Lord Chief Justice added:-

> "29. This part of the argument led naturally to consideration of the extent of the requirement, if any, that the judge making the order for trial by judge alone under section 44 (rather than section 46) should himself be that judge. In view of the provisions in section 45 this application is decided as part of a preparatory hearing under section 29 of the 1996 Act. We have taken due note of the well known decision in *R v Crown Court at Southwark, ex parte Commissioners of Custom and Excise* [1993] 97 CAR 266 where Lord Justice Watkins observed that the "judge presiding at the preparatory hearing must be the judge who, save in exceptional circumstances, is to conduct the trial". He ruled out administrative convenience as a sufficient reason for changing the judge between the preparatory hearing and the jury trial. The contention on behalf of the respondents was that unless the judge who ordered trial by judge alone was himself the trial judge, there was a real danger that a second judge who did not agree with the order would be nevertheless obliged to conduct a juryless trial.
>
> 30. We have examined the reasoning in *R v Crown Court at Southwark*. Its basis is readily understood. A preparatory hearing is part of the trial. Where a judge is assigned to take the trial who has not conducted the preparatory hearing "it will be necessary for the second judge during the hearing before the jury to consider. . . whether decisions of the first judge at the preparatory hearings relating to questions such as the admissibility of evidence should be reconsidered by him". The purpose of a preparatory hearing is to address and decide as many questions

as possible relevant to the conduct of the trial. That, however, is not the purpose of section 44. In truth, crucial as the judicial decision may be, it is concerned with what for the purposes of *R v Crown Court at Southwark* would be described as an administrative question. Either there will be trial by judge and jury or there will be trial by judge alone. The evidence on this issue will be self-contained and it will very rarely have any bearing on the ultimate verdict. In short, the reasoning behind the decision in *R v Crown Court at Southwark* does not apply to the present situation. We need not address the question whether modern case management requirements may compel fresh consideration of the broad understanding that the same judge must conduct both the preparatory hearing and the trial."

1056. *R v Al-Ali* [2009] 1 Cr App R 21 (an English Court of Appeal case) concerned section 53 of the Criminal Justice Act 2003 where the prosecution sought leave to appeal the trial judge's ruling that there was no case to answer. The English Court of Appeal refused leave to appeal. It was held that in deciding whether to grant leave the court should apply a broader interest of justice test rather than just to ask itself whether the prosecution appeal was arguable or had some prospect of success. It was also important for the court to look ahead to see what the various options were for the court in the event that the appeal succeeded. See also *R v I* [2009] EWCA Crim 1793.

1057. Section 10(2) of the High Court Act 1991 provides that for the avoidance of doubt, it is declared that the High Court does not have jurisdiction to hear and determine petitions of doleance in respect of any matter in, or proceedings of, the Court of General Gaol Delivery. See also *Thompson* 1996-98 MLR N 8 and *Winnell* 1996-98 MLR 32 and 77.

Criminal appeals and leave to appeal out of time

1058. *Archbold* at paragraph 7-182 refers to appeals which are not lodged within the requisite time period and states that substantial grounds must be given for the delay before the court will exercise its power to extend the time allowed for lodging an appeal, and the longer the delay the more onerous such task will be. See *R v Rigby* 17 Cr App R 111, *R v Lesser* 27 Cr App R 69 and *R v Hawkins* [1997] 1 Cr App R 234. The court will take account of matters other than the reason for the delay.

1059. See also *R v Marsh* 25 Cr App R 49. In deciding whether to grant an extension of time, the court will be influenced by the likelihood of a successful appeal if the extension is granted. The court will have regard to the policy behind the time limits for appeals but will also be anxious to ensure that justice is done. It should not be quick to shut

out a meritorious appeal simply because it is out of time by a short period of time.

1060. *R v Jones (No 2)* 56 Cr App R 413 dealt with the position where a defendant absconds, then returns and wishes to appeal. See also *R v Charles* [2001] 2 Cr App R 15.

1061. In exceptional circumstances where it is apparent that there are matters worthy of consideration an extension of time in which to appeal may be granted even where the delay is "inordinate" and unexplained. See *R v King* [2000] Crim LR 835.

1062. *R v Kansal (No 2)* [2001] 3 WLR 751 indicated that it is not the practice of the court to permit convictions to be re-opened on account of developments in the law since the date of conviction.

1063. In *R v Ballinger* [2005] 2 Cr App R 29 it was held that there was nothing incompatible with the European Convention on Human Rights in the imposition of time limits on the institution of appellate proceedings, provided that they were not too short or too rigorously enforced; and an applicant seeking an extension of time for leave to appeal on the ground of violation of the provisions of Article 6 had to show more than that there had been a breach of Article 6; he had also to show that he had suffered a substantial injury or injustice.

1064. In relation to a strict approach to time limits and appeals see *Hampshire Police Authority v Smith* [2009] EWHC 174 (Admin).

Bail pending appeal

1065. There are two decisions of the Appeal Division which are of assistance in respect of applications for bail pending appeals. The first one is *Whipp* 1981-83 MLR 284 and the second one is *Constantinou* 1987-89 MLR 312. Both decisions stress the undesirability of granting bail pending an appeal. The court deplored the situation of a man serving part of a gaol sentence and then coming back into the community pending the appeal and then as a result of a failed appeal being returned to prison. This is not a desirable situation at all. Nor is it desirable for an appellant to be remanded in custody if at the end of the day that appellant's appeal against conviction is successful or an appeal against sentence is successful to the extent that the appellant ends up spending more time in custody than he is eventually sentenced to. Sometimes however for the protection of the public and

the interests of justice the court may be faced with the inevitable risk that a sentence will be served at the time an appeal is heard.

1066. As indicated in *McStein* (CLA 2003/49 judgment delivered 9th April 2003) dealing with bail applications generally, a remand in custody followed by an acquittal or a remand in custody for a period longer than the eventual sentence creates a manifest, sometimes an unavoidable, injustice.

1067. Applications for bail pending appeal create additional difficulties and present the court with a very difficult balancing exercise. The courts in the Isle of Man have indicated their reluctance to grant bail pending appeal and have indicated that the preferred method to deal with such matters is on the basis of an expedited appeal where possible and appropriate.

1068. In *Parker* (Appeal Division judgment delivered 31st October 2003) it was held that the Appeal Division had jurisdiction to grant bail pending an application for leave to appeal to the Privy Council.

1069. In the English case of *Joseph Watton* [1979] 68 Cr App R 293 it was indicated that special circumstances (i.e. where it appears, prima facie, that the appeal is likely to be successful or where there is a risk that the sentence will be served by the time the appeal is heard) need to exist before granting bail pending appeal. Lane LCJ stated: "the true question is – are there exceptional circumstances which would drive the Court to the conclusion that justice can only be done by the granting of bail."

1070. Inevitably the court will also be conscious of the reality of the situation and what it considers are the potential chances of success of the appeal. In considering the chances of success of any appeal the court may be hampered at the early bail hearing stage by the lack of full information in respect of the case as it would be unusual for a full record of proceedings to be before the Appeal Division at the bail hearing stage. At the bail hearing stage the court should not, of course, endeavour to prejudge the merits of the substantive appeal or attempt to come to preliminary views on inadequate information and without benefit of full submissions or the luxury of time to consider the case thoroughly. It would however be to fly in the face of reality, common sense and human nature not to openly recognise that in dealing with an application for bail pending appeal the court may well take into account the apparent merits of the appeal.

Citation of authorities in respect of appeals

1071. Counsel should ensure that the relevant leading authorities are referred to the Appeal Division. These would include authorities decided by the courts in the Isle of Man and indeed in other common law jurisdictions worldwide. It is insufficient simply to rely on extracts from textbooks. The underlying authorities must be referred to (*Scambler* Appeal Division judgment delivered on the 12th January 2004). The relevant legal principles and the leading authorities supporting such principles should be referred to.

1072. There should however be no excessive citation of authorities. This does not yet appear to be a problem we suffer from in this jurisdiction. The English Court of Appeal Criminal Division in *R v Erskine and Williams* [2009] EWCA Crim 1425 referred to the problem which had arisen in England and Wales. The Lord Chief Justice of England and Wales stated:

> "1 These appellants were properly convicted of murder in unconnected trials many years ago. They now argue that their convictions should be quashed and substituted by convictions for manslaughter on the grounds of diminished responsibility. In Erskine there was powerful evidence available at trial which would have supported the defence: in Williams there was none. Neither advanced the defence: indeed Williams pleaded guilty to murder. The question for decision is simple: in relation to each appeal, exercising the jurisdiction provided by section 23 of the Criminal Appeal Act 1968, as amended, do we think it necessary or expedient in the interests of justice to receive evidence which was not adduced at trial?
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> 2. This simple question has involved the preparation of a substantial bundle of authorities and extensive citation and analysis of previous decisions of this court. We imply no criticism of distinguished leading counsel. Their forensic technique has been sanctioned by this court. It has become the modern way of addressing legal principle both on appeal and in the Crown Court itself.
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> 3. Various factors have contributed to the process. These include the stark reality that every single judgment of this court is now available to the advocate, whether it was reserved or unreserved, whether reported or unreported. Understandably, the advocate doing his duty by his client seeks to identify each and every case which even remotely appears to bear on the principle under consideration or which has some passing factual similarity to the one with which he is immediately concerned. The development of legal argument in the criminal justice process is therefore both much more complex and, we venture to suggest, more rebarbative and less focussed than it used to be. Added to these considerations, there has been something of a convention that this court should at least mention authorities referred to by the advocate in oral submissions, and this tends to add yet one more authority to the existing compendium. And so, like Topsy, the process has grown, and lengthened, and continues to grow and lengthen without the slightest discernable improvement in the doing of justice in

the individual case and to the delay and disadvantage of the administration of justice generally. What is abundantly clear is that without a fresh approach to the way in which authorities are used in the course of forensic argument the administration of criminal justice will be suffocated. ..

The citation of authority

63. The practice of lengthy citation of authority has arisen because this court, explaining the reasons for the exercise of its powers under section 23 of the 1968 Act in an individual case, has frequently made reference to its previous decisions, no doubt because it was referred to them. As our review demonstrates, what might be termed "a line of authorities" has developed. This is neither necessary nor desirable. The principles for the exercise of the statutory power are set out in the statute. No further elaboration is necessary. Each case depends upon the application of the powers as set out in the statute in the context of specific facts in the individual case, no more and no less. Examples rarely assist, and some 40 years after its enactment, the essential framework and the over-arching test contained in section 23(1) (after due consideration of the factors identified in section 23(2)), should be well understood without recourse to previous decisions of the court which do no more than evidence the application of those provisions to factual situations.

64. Although each of the cases referred to in this present judgment was included in the bundles of authorities with which we were provided in one or other or both of these appeals, yet, as we have seen, some of them were unreported, and others were reported because they threw light on issues other than diminished responsibility. Time and time again the court has endeavoured to summarise the guidance given by the earlier decisions yet each of these cases has emphasised the fact specific nature of the decision whether to admit evidence under section 23 of the 1968 Act, and somehow or other, notwithstanding the repeated attempts to provide comprehensive guidance, time and time again the court has been invited to and has traversed many, and sometimes all of the previous decisions. This process can no longer be justified.

65. The problem is not new: it is just getting worse.

66. In 1863, WTS Daniel QC, who led the movement which resulted in the founding of the official Law Reports, set out in a letter to the Solicitor General, the problems of expense, prolixity, delay and imperfection in the then system of law reporting that then existed. He continued:

"To these I would add a further evil…. That of reporting cases indiscriminately without reference to their fitness or usefulness as precedents, merely because, having been reported by rivals, the omission of them might prejudice circulation and consequently diminish profit."

Nathaniel Lindley (later Master of the Rolls) in a supporting paper expressing the view of the Chancery Bar suggested that the cases to be reported were:

"1. All cases which introduce, or appear, to introduce a new principle or a new rule.

2. All cases which materially modify an existing principle or rule

3. All cases which settle or materially tend to settle a question upon which the law is doubtful.

4. All cases which for any reason are peculiarly instructive".

He urged that there should be excluded:

"Those cases which are substantially repetitions of what is reported already"

67. These guidelines were those which the official Law Reports published by the Incorporated Council of Law Reporting have endeavoured to follow.

68. In 1939, concern expressed as to the increase in the number of law reports led to the establishment of a Committee under Simonds J which reported to the Lord Chancellor in 1940. Among the topics it considered was the suggestion that too many cases were reported. It referred to the difficulty in deciding what should be reported, but rejected a suggestion that cases which had not been reported in the official reports should not be cited. Professor Goodhart's dissenting report recommended that all judgments should be transcribed, indexed and held centrally.

69. In 1977, Lord Diplock spoke of the "superfluity of citation" and followed up his concerns in *Lambert v Lewis* [1982] AC 225 at 274 where he observed :

"…the respect which under the common law is paid to precedent makes it tempting to the appellate advocate to cite a plethora of authorities which do no more than illustrate the application to particular facts of a well-established principle of law that has been clearly stated …in those cases that are no more than illustrative, however, there are likely to be found judicial statements of principle that do not follow the precise language in which the principle is expressed…, but use some paraphrase of it that the judge thinks is specially apt to explain its application to the facts of a particular case. The citation of a plethora or illustrative authorities, apart from being time and cost-consuming, present the danger of so blinding the court with case law that it has difficulty in seeing the wood of legal principle for the trees of paraphrase".

Lord Roskill made the same point in *Pioneer Shipping v B.T.P. Trioxide* [1982] AC 724 at 751, where he stated:

"I hope I shall not be thought discourteous or unappreciative of the industry involved in the preparation of counsel's arguments if I say that today massive citation of authority in cases where the relevant legal principles have been clearly and authoritatively determined is of little or no assistance, and should be firmly discouraged."

The consequence was lengthened hearings and increased costs "without in any way leading to the avoidance of judicial error".

70. In *Roberts Petroleum Limited v Bernard Kenny Limited (In liquidation)* [1983] 2 AC 192 at 201, and with the enthusiastic support of each member of the

House, Lord Diplock identified the nature of the problem in yet greater detail, and imposed significant limits on the deployment of unreported judgments of the Court of Appeal (Civil Division) before the House of Lords. There was some criticism of this approach. Alternative suggestions, such as allowing a case to be citable only if the court directed that it was citable were made. There was no consensus. Nevertheless in 1996, the Court of Appeal Civil Division laid down a similar rule to that in Roberts Petroleum in its Practice Direction (Court of Appeal: Authorities) [1996] 1 WLR 854.

71. Undoubtedly the problem of excessive citation of authority grew with the ready availability on the internet of most High Court and all Court of Appeal decisions. In *Michaels and another v Taylor Woodrow Development Limited and others* [2001] Ch 493, Laddie J pointed out that

"…the recent growth of computerised databases has made it an even more frequent and extensive occurrence. There are now significantly more judges, more cases and more databases than there were even two decades ago. Until comparatively recently, this was not a substantial problem…now there is no pre-selection. Large numbers of decisions, good and bad, reserved and unreserved, can be accessed…it seems to me that the common law system, which places such reliance on judicial authority, stands the risk of being swamped by a torrent of material…"

72. After consideration of the issue and consultation, a further Practice Direction was issued in relation to all civil courts: Practice Direction (Citation of Authority) [2001] 1 WLR 1001. It did not appear to have solved the problem. Moreover, in any event, it did not apply to criminal courts.

73. Speaking extra judicially at the First Symposium on Law Reporting, Legal Information and Electronic Media in the New Millennium in March 2000, Lord Bingham, then Lord Chief Justice, observed

"The quick, effortless and relatively inexpensive availability of vast new swathes of material hitherto inaccessible, unorganised, unfiltered, unedited, presents a very real risk to the system which may…simply succumb to the weight of the materials presented. "

74. There is no doubting the problem. It is not confined to this particular type of case, but is a feature of all types of appeal against conviction and sentence. Repeating that we imply no criticism of counsel in either case, these appeals illustrate it. The question is whether this judgment will merely be one more plaintive lament against what has become an irreversible process, or whether action should be taken to avoid the impending crisis identified by Lord Bingham. If that is the choice, the answer is self-evident. We must do more than complain. Even if, long term, this issue must be examined again and the various differing views considered, there can be little doubt that firm measures are immediately required, at least in this court, to ensure that appeals can be heard without an excessive citation of or reference to many of its earlier, largely factual decisions.

75. The essential starting point, relevant to any appeal against conviction or sentence, is that, adapting the well known aphorism of Viscount Falkland in 1641: if it is not *necessary* to refer to a previous decision of the court, it is *necessary* not

to refer to it. Similarly, if it is not *necessary* to include a previous decision in the bundle of authorities, it is *necessary* to exclude it. That approach will be rigidly enforced.

76. It follows that when the advocate is considering what authority, if any, to cite for a proposition, only an authority which establishes the principle should be cited. Reference should not be made to authorities which do no more than either (a) illustrate the principle or (b) restate it. Detailed rules are set out in paragraphs II.17 and II.19 of the Consolidated Criminal Practice Direction.

77. II.17 specifies the requirements for skeleton arguments and paragraph II.19 incorporates the detailed provisions relating to the citation of authority in the Court of Appeal (Civil Division). We propose to highlight the most significant features.

Conviction Appeals

78. Advocates must expect to be required to justify the citation of each authority relied on or included in the bundle. The court is most unlikely to be prepared to look at an authority which does no more than illustrate or restate an established proposition.

79. It is good practice for advocates on each side to agree a list of relevant authorities and prepare a joint bundle. If authorities are copied for the use of the court, they must (a) be copied from the principal law report in which the case appears, with headnote: and (b) have marked by sidelining the passage(s) relied on. Authorities should only be copied if they do in fact identify or represent a principle or the development of a principle.

Sentence

80. Advocates must expect to be required to justify the citation of any authority. In particular where a definitive Sentencing Guidelines Council guideline is available there will rarely be any advantage in citing an authority reached before the issue of the guideline, and authorities after its issue which do not refer to it will rarely be of assistance. In any event, where the authority does no more than uphold a sentence imposed at the Crown Court, the advocate must be ready to explain how it can assist the court to decide that a sentence is manifestly excessive or wrong in principle.

81. If authorities are reported in the Criminal Appeal (Sentencing) Reports, that reference should be given. If authorities are copied for the use of the court, they must (a) be copied from the principal law report in which the case appears, with headnote: and (b) have marked by sidelining the passage(s) relied on. Authorities should only be copied if they do in fact identify or represent a principle or the a development of a principle.

Fitness to Plead

82. In the present context notwithstanding the forensic difficulty of raising mutually inconsistent defences which involve denial of involvement in the killing on one hand, and diminished responsibility for the killing on the other, the trial

process demands that the defendant, no doubt after considering legal advice, must decide which defence to advance. In an ideal world, of course, if he were responsible for the killing, he would admit it. But even if he is responsible, he may, and often does, choose to plead not guilty. What he cannot do is to advance such a defence and then, after conviction, seek to appeal in order to advance an alternative defence, such as diminished responsibility. There is one trial, and that trial must address all relevant issues relating to guilt and innocence. Once convicted by the jury, he is guilty of the murder he has denied committing. The defence suggestion that he is not guilty has been rejected, and he has elected not to advance diminished responsibility. If he pleads guilty to murder, he has ignored the opportunity available to him to advance diminished responsibility as a defence. The trial process is concluded.

83. We are therefore dealing with rare occasions when it will be contended that fresh evidence shows that the appellant's responsibility at the time of the killing was indeed sufficiently diminished to fall within the terms of section 2 of the Homicide Act and that there is a persuasive reason why the defence was not advanced at trial. It is inevitable that in these rare cases that consideration by the court of applications to adduce fresh evidence will be distressing for all involved, particularly the family of the deceased, but where there is a persuasive reason it was not adduced at trial, the need to do justice requires this.

84. In this context we must address what appears to be a new but increasing tendency in this class of case for the appellant to advance fresh evidence, not merely to support the defence, but to suggest further, that at the time of the trial, he was either unfit to plead, or virtually so. This is said to provide the necessary explanation for the failure to advance diminished responsibility at trial.

85. The issue of a defendant's fitness to plead is concerned with his mental state not at the moment of the killing, but at the time of the trial. The process is now governed by the Criminal Procedure (Insanity) Act 1964, as amended in 1991 and 2004. However the principles for determining whether he was fit to plead are those of the common law, set out in 1835 in *R v Pritchard* 7 Car and P 304 by Alderson B. These principles were said in *R v Podola* [1960] 1 QB 325 to be "firmly embodied in our law". Ignoring for present purposes problems which may arise where the defendant is "mute of malice" or physically incapable of pleading to the indictment, the question is whether:

"He is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence – to know that he might challenge (the jurors) to whom he may object – and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation, upon this issue, therefore, if you think that there is no certain mode of communicating details of the trial to the prisoner, so that he can clearly understand them, and be able properly to make his defence to the charge; you ought to find that he is not of sane mind."

86. In *Podola* further assistance was given about the meaning of "make a proper defence" and "comprehend" in the context in which Alderson B. was using them. Lord Parker CJ explained:

"As to the word "comprehend", we do not think that this word goes further in meaning than the word "understand". In our judgment the direction…is not intended to cover and does not cover a case where the prisoner can plead to the indictment and has the physical and mental capacity to know that he has the right of challenge and to understand the case as it proceeds."

87. The issue may be raised by either the prosecution or the defence, and, to ensure that a weak prosecution case may be examined and if appropriate dismissed, the court can postpone consideration of the question at any time up to and including the close of the prosecution's case. In 1988 when Erskine was tried, the consequences for a defendant successfully raising the issue were twofold. First it meant that the defendant would be unable to advance a defence of his own, and second, he was to be detained in hospital, indefinitely. In practice this issue is still rarely raised, although the number of cases rose after the statutory amendments made in 1991: see *Continued upturn in unfitness to plead- more disability in relation to the trial under the 1991 Act* [2007] Crim LR 530.

88. It is obviously desirable, and in accordance with principle, not least the operation of the defendant's personal autonomy, that if it is humanly possible, the defendant should tender his own plea and advance such defence as he wishes to advance, and that he should not be shut out from doing so on the grounds of unfitness. Provided the defendant can understand the proceedings, he will be deemed fit to plead. It is clear from the authorities that the test for fitness to plead is very different from the test applied to determine a defendant's mental responsibility for his actions at the time of the killing. The test applies even if the defendant may act against what appears to others to be his own best interest. (*R v Robertson* (1968) 52 Cr App R 690.) and even if he is "highly abnormal" at the time of trial it does not follow that he was incapable of "following a trial or giving evidence or instructing counsel and so on". (*R v Berry* (1970) 66 Cr App R 156). In other words, a defendant is not to be deemed unfit to plead merely because he will not accept what appears to be eminently sensible advice from his legal advisers. It is therefore for him, not his legal advisers or the court, to decide at the time of the trial whether to advance a plea of guilty to manslaughter on the grounds of diminished responsibility.

89. Assuming that the defendant is legally represented (and in cases like these, he will normally be represented by leading and junior counsel, as well as solicitors) his legal representatives are the persons best placed to decide whether to raise the issue of fitness to plead, and indeed to seek medical assistance to resolve the problem. There is a separate and distinct judicial responsibility to oversee the process so that if there is any question of the defendant's fitness to plead, the judge can raise it directly with his legal advisers. Unless there is contemporaneous evidence to suggest that notwithstanding his plea and the apparent satisfaction of his legal advisers and the judge that he was fit to tender it, and participate in the trial, it will be very rare indeed for a later reconstruction, even by distinguished psychiatrists who did not examine the appellant at the time of trial, to persuade the court that notwithstanding the earlier trial process and the safeguards built into it that the appellant was unfit to plead, or close to being unfit or that his decision to deny the offence and not advance diminished responsibility can properly be explained on this basis. The situation is, of course, different if, as in Erskine, serious questions about his fitness to plead were raised in writing or expressly before the judge at the trial.

Diminished Responsibility

90. Subject to these broad considerations, where it is proposed to raise diminished responsibility for the first time on appeal, the court is examining the appellant's mental state at the time of the killing in accordance with section 2 of the Homicide Act 1957. It should normally be necessary to refer the court to no more than the terms of s.23 of the 1968 Act, and the approach suggested in *R v Criminal Cases Review Commission Ex Parte Pearson* [2000] 1 Cr App R 141 at page 164:

"Wisely and correctly, the courts have recognised that the statutory discretion conferred by section 23 cannot be constrained by inflexible, mechanistic rules. But the cases do identify certain features which are likely to weigh more or less heavily against the reception of fresh evidence: for example, a deliberate decision by a defendant whose decision-making faculties are unimpaired not to advance before the trial jury a defence known to be available; evidence of mental abnormality or substantial impairment given years after the offence and contradicted by evidence available at the time of the offence; expert evidence based on factual premises which are unsubstantiated, unreliable or false, or which is for any other reason unpersuasive. But even features such as these need not be conclusive objections in every case. The overriding discretion conferred on the Court enables it to ensure that, in the last resort, defendants are sentenced for the crimes they have committed and not for psychological failings to which they may be subject."

91. If reference to earlier decisions or historical analysis happens to be required, the present judgment, where the vast majority of all the relevant decisions have been collected, will normally suffice. We emphasise that the provisions of s.23 do not require any further judicial exegesis; the court will positively discourage references to previous decisions which exemplify but do not alter the principles identified by Lord Bingham in *Pearson*.

92. The court will normally expect the parties to provide a detailed analysis of the facts to assist it in the application of the statutory test, including an analysis of the following:

i) The psychiatric and/or psychological evidence or other information in relation to the appellant's mental state which was available at the time of trial.

ii) The evidence which has become available since the trial, and an explanation why it was not available at trial.

iii) The circumstances in which the appellant sought to raise on the appeal (a) the evidence available at the time of the trial and (b) evidence that has become available since the trial

iv) The reason why such evidence or information as was available at the time of the trial was not adduced or relied on at trial. This will ordinarily include details of the advice given, the reasons for the appellant's decision at trial and, subject to paragraph …, any relevant evidence of the mental condition in the period leading up to and at the time of the trial and its impact on his decision making capacity.

v) The impact of the fresh evidence on the issues argued at trial and whether and the extent to which it involves a re-arguing of issues considered at trial.

vi) The extent to which the opinions of the experts are agreed and where they are not.

93. These heads of analysis will not all necessarily apply in every case; in some cases additional areas of analysis may be required. However, any such analysis should suffice to assist and inform the court in its task of applying the provisions of s.23 (1) of the 1968 Act."

1073. Hopefully common sense and pragmatism will continue to prevail on this Island and counsel will ensure that the relevant authorities are referred to the court and that there is no excessive citation of authorities.

1074. Much will depend on the circumstances of the case. If the Appeal Division is being asked to depart from previous well established authorities then counsel may have to provide assistance by referring to numerous relevant authorities and tracing the history and prior justification for the well established authorities and whether other common law jurisdictions have followed such authorities or not. However if the appeal is a relatively straightforward appeal against sentence it may be sufficient to refer to the leading guideline case and focus submissions on why it is stated that the sentence imposed was manifestly excessive.

Privy Council and criminal appeals

1075. There have been very few appeals in criminal matters from the Isle of Man to the Judicial Committee of the Privy Council in London. Section 24(1) of the High Court Act 1991 provides that judgments and orders of the Appeal Division may be appealed from to Her Majesty in Council with either (a) the leave of the Appeal Division; or (b) with special leave of Her Majesty.

1076. In *Aldred* 1522-1920 MLR 295 the Judicial Committe of the Privy Council considered a case in which the appellant had been convicted of fraud in the Court of General Gaol Delivery. He petitioned for special leave to appeal submitting that the evidence did not justify the jury's conclusion that he had fraudulent intent. The Board indicated that it did not require submissions from the Crown. The petition was dismissed on the 24th July 1901 and it was held that special leave to appeal would not be granted since no appellate court could set aside the conviction on the ground put forward by the applicant. The jury's verdict was supported by the evidence and it could not be set aside

simply because the appellate court would have come to a different conclusion on the same evidence. Lord Halsbury delivering the opinion of the Board stated:

> "Whether or not their Lordships would have formed the same opinion and found the same verdict, is not the question. If they would not, that it (sic) is not enough to set aside the verdict of the jury which has been arrived at."

1077. See also the interesting Privy Council decision in *Attorney General v Cowley and Kinrade* 1522-1920 MLR 107.

1078. In *Christian v Nowell* 1522-1920 MLR 5 the Privy Council dealt with a petition by George Christian for a remedy in respect of the death of his father William Christian. The Privy Council (including Sir Matthew Hale) dealt with interesting submissions in respect of the Act of Free and General Pardon, Indemnity and Oblivion 1660. The first respondent was the Deputy Governor of the Island at the time. Deemster Edward Christian is recorded as having protested against the illegal proceedings in the Isle of Man and to have withdrawn himself and came to England to "solicit his Majesty and implore his justice." The order of the Privy Council made on the 5th August 1663 poignantly records that:

> "And to the end the guilt of that blood which hath been unjustfly spilt may in some sort be expiated, and his Majesty receive some kind of satisfaction for the untimely loss of a subject, it is ordered that the said Thomas Norris and Hugh Cannell [two judges, by them in that Island called Deemsters] who decreed this violent death, be and remain prisoners in the King's Bench, to be proceeded against in the ordinary course of justice so as to receive condign punishment according to the merit of so heinous a fact …"

1079. In *Nelson v R* 1522-1920 MLR 311 the Privy Council dealt with an appeal in respect of section 218 of the Criminal Code 1872. Mr Nelson faced a charge of having fraudulently appropriated to his own use money of the Dumbell's Banking Company. It was held on the 12th February 1902 that the Deemster had failed to give the jury adequate directions when they requested guidance on the significance of the appellant's solvency which had led to his wrongful conviction. On the facts of the case there was insufficient evidence to convict him of the section 218 charge and the conviction would therefore be set aside.

1080. In *Frankland and Moore v R* 1987-89 MLR 65 the Privy Council dealt with two appeals from the Appeal Division and held that the trial Deemsters had been wrong to direct the juries that they were entitled to ascertain the intent of the accused by reference to an objective test

since the decision in *DPP v Smith* [1961] AC 290, insofar as it laid down an objective test of intent in the crime of murder, did not accurately represent English common law. The Privy Council also held that decisions of the English courts, in particular the House of Lords, although not binding were of persuasive authority in the Isle of Man in the absence of any local case law or statute to the contrary or any particular local condition making them inapplicable. In *Bitel* (Chancery Division judgment delivered 30th November 2007) I referred to the modern Manx law position in relation to precedents from other jurisdictions and stated:

"Precedent

529. Counsel have referred to authorities from various jurisdictions including the Isle of Man, England and Wales, Jersey, Guernsey, the United States of America, Australia, Canada and the British Virgin Islands. In such circumstances it may be of some assistance to set out the Manx law position in relation to precedents from other jurisdictions.

530. If a point of law is covered by local Isle of Man authority especially if that authority is from the Appeal Division or the Privy Council dealing with an appeal from the Isle of Man then it is to that authority which the court should turn in the first instance.

531. If however there is no local binding authority then it is appropriate for counsel and the court to look beyond local frontiers.

532. Lord Ackner sitting in the Judicial Committee of the Privy Council in *Frankland and Moore v R* 1987-89 MLR 65 at page 80 stated:

"Decisions of English courts, particularly decisions of the House of Lords and the Court of Appeal in England, are not binding on Manx courts, but they are of high persuasive authority, as was correctly pointed out by Glidewell, J.A. in giving the judgment of the Staff of Government Division (Criminal Jurisdiction). Such decisions should generally be followed unless either there is some provision to the contrary in a Manx statute or there is some clear decision of a Manx court to the contrary, or, exceptionally, there is some local condition which would give good reason for not following the particular English decision. The persuasive effect of a judgment of the House of Lords, which has largely the same composition as the Judicial Committee of the Privy Council, the final Court of Appeal from a Manx court, is bound to be very high".

533. Manx law has developed significantly since Lord Ackner uttered those words over twenty years ago now.

534. The traditional position in relation to English precedent in Manx law was briefly set out at pages 449-463 of Solly's *Government and Law in the Isle of Man* (1994). At page 463 a relatively young advocate endeavoured to summarise the position as follows:

"In summary, it is clear that English decisions are not strictly binding on Manx courts but that they are of high persuasive value and will frequently be followed in the absence of special circumstances or local precedent to the contrary.

It is to be hoped that Manx common law will develop independently in accordance with the needs, requirements and interests of the inhabitants of the Isle of Man and indeed the international community of which the Island is a part. It is to be hoped that Deemsters will not slavishly follow English decisions, which in certain cases may not be in the best interests of the Island, in areas where it would be more appropriate to develop Manx law in a different way to the way in which English law has developed and is developing".

535. Judge of Appeal Hytner in *Barr and Anglo International Holdings Limited* 1990-92 MLR 398 at page 409 stated:

"Since this court is not in any way bound by decisions of the English courts it should not be assumed that we would follow dicta abandoned by Parliament".

536. In *City and International Securities Limited* 2001-03 MLR 239 Deemster Cain had little difficulty in not following the majority judgments in *Home Office v Harman* [1983] A.C. 280 (House of Lords) which had been challenged before the European Commission of Human Rights.

537. In *Aguilar v Anglican Windows (IOM) Limited* 1987-89 MLR 317 at 325 an advocate endeavoured to persuade Deemster Corrin not to follow the Privy Council decision in *Selvanayagam v University of W Indies* on the grounds that it had been the subject of criticism and that their Lordships had confused remoteness and mitigation. Deemster Corrin at page 325 stated that the decision "is, nevertheless, a decision of the Privy Council and, if not actually binding, is very persuasive authority in this court, and I propose to follow it".

538. Deemster Corrin in *Cusack, Cotter v Scroop Limited* (judgment 16th January 1997) stated at page 9:

"The Isle of Man is an active member of the Commonwealth and whilst historically it has tended to follow English law I feel quite free to look for guidance to other Commonwealth countries as there is no binding or persuasive authority to the contrary in England".

539. The High Court of Australia in *Cook v Cook* (1986) 162 CLR 376 at 390 stated:

"…The history of the country and of the common law makes it inevitable and desirable that the courts of this country will continue to obtain assistance and guidance from the learning and reasoning of United Kingdom courts just as Australian courts benefit from the learning and reasoning of other great common law courts".

540. Thanks in the main to Deemster William Cain and to Dr Alan Milner of Law Reports International the Island has had an excellent system of local law reporting for some many years now. Increasingly it is to our own local judgments that we are turning in dealing with the legal issues of the day.

541. In addition to applying our own local precedents Manx courts will also continue to benefit from the learning and reasoning of judgments of the English courts and "other great common law courts" including the High Court of Australia."

1081. Whilst on the question of precedent consider the judgment of the Appeal Division (Judge of Appeal Tattersall and Deemster Kerruish) in *Clinton* (judgment 29th October 2009) in respect of submissions by the Attorney General that the Appeal Division was, subject to certain exceptions, bound to follow its own decisions pursuant to the principle of stare decisis. The exceptions were : firstly, where the court has to decide which of two conflicting decisions it will follow; secondly, where in the light of a decision of a superior court it is bound to refuse to follow a decision of its own which has not been expressly overruled; and thirdly where the court is satisfied that its decision was given per incuriam. The principle of stare decisis is less strictly applied in criminal cases than in civil cases. In *Clinton* the Appeal Division was invited to consider its decision in *Caldwell-Camp* 2003-05 MLR 505. The Appeal Division in *Clinton* at paragraph 28 of the judgment stated:

"… we are satisfied that this court is entitled to review sentencing guidelines which it has given although, absent a change in the context in which such guidelines were given, the more recent such guidelines were given, the less likely it is that any such review will produce a different result."

1082. The Privy Council have from time to time referred to the way in which they will consider appeals in respect of criminal matters. Lord Carswell in *DPP v Hurnam* (Privy Council judgment delivered 25th April 2007) at paragraph 23 stated:

"The second, and more general, principle is that in criminal appeals brought as of right to the Judicial Committee from Mauritius, the Board will follow the long established practice, originally formulated to govern special leave to appeal in criminal cases, that "some clear departure from the requirements of justice" must be shown to exist. The practice was regarded as the usual rule as far back as 1885: *Riel v The Queen* (1885) 10 App Cas 675, 677, per Lord Halsbury LC, and was reaffirmed in *Ibrahim v The Queen* [1914] AC 599, 614-5, per Lord Sumner. It was adopted and followed by the Board in *Badry v Director of Public Prosecutions* [1983] 2 AC 297 in deciding the first appeal as of right from Mauritius under section 70A of the Courts Act. The Board again accepted the applicability of the rule in *Buxoo v The Queen* [1988] 1 WLR 820."

and at paragraph 28 in respect of appeals against sentences:

"There remains only the matter of sentence. Their Lordships appreciate the force of the contention that it may bear harshly on the respondent to have to serve a prison sentence after such a lapse of time since the commission of the offence.

They are conscious, however, of the content of the practice direction issued by Viscount Dunedin (1932) 48 TLR 300 and accepted as still correct by the Board in the Mauritian appeal of *Badry v Director of Public Prosecutions* [1983] 2 AC 297, 303. That laid down that for the Board to interfere with a criminal sentence there must be something "so irregular or so outrageous as to shake the very basis of justice". Their Lordships do not consider that this test is satisfied in the present case. The charge on which the respondent was convicted was one of great seriousness, for it is vital that the standards of probity of practitioners in the criminal courts should be maintained and falsification of an alibi is a most reprehensible attempt to interfere with the proper administration of criminal justice. The delay since May 2000 has undoubtedly been considerable, but to a large extent it has been occupied by the process of trial and appeals, but it would in their Lordships' view be undesirable if a defendant who has engaged unsuccessfully in a series of appeals could then claim that the passage of time entitled him to relief against a sentence which was correctly imposed by the trial court."

1083. In *Muirhead* (Privy Council judgment delivered 28th July 2008) at paragraph 39 it was stated that "the Privy Council will not act as a court of criminal appeal and will only set aside a conviction if there has been a grave miscarriage of justice." In that case the Privy Council allowed the appeal as they could not be satisfied that the conviction was safe.

1084. Lord Phillips delivered the judgment of the Privy Council in *Eiley v The Queen* [2009] UKPC 39 and criticised the prosecution for failing to appear on the appeal as follows:

"2. The prosecution have not thought fit to appear on this appeal. The Board understands that the reason for this may be simply the cost that representation on the appeal would have involved. This is regrettable. Prosecuting authorities of countries that have preserved the right of an appeal to Her Majesty in Council should recognise the importance that the Board attaches to receiving appropriate assistance where appeals are brought against criminal convictions, especially where these are against convictions for an offence as serious as murder."

1085. In respect of procedural matters see the Judicial Committee (Appellate Jurisdiction) Rules Order 2009 made on the 11th February 2009 and which came into force on the 21st April 2009 except for article 4(2) which came into force on the 1st October 2009.

1086. Rule 11(2) of the Rules provides that an application for permission to appeal must be filed within 56 days from the date of the order or decision of the court below or the date of the court below refusing permission to appeal (if later). Under rule 5(1) the Registrar is given power to extend or shorten any time limit set by the rules or any relevant practice direction (unless to do so would be contrary to any statutory provision).

1087. See the various practice directions and other useful information contained at *www.privycouncil.gov.uk.*See also *Civil Court Practice The Green Book 2009* edited by Lord Neuberger and Louise di Mambo and published in August 2009. The special issue includes the rules and practice directions for the Judicial Committee of the Privy Council with a commentary.

The future

1088. The Island is fortunate to have a society in which the vast majority of people respect the law. We have and sometimes take for granted something that not all countries in the world possess. We have an independent judiciary and an independent legal profession. We have prosecution and defence counsel who respect the rule of law and conduct themselves in accordance with the onerous professional duties placed upon their shoulders. We have passionate people who work hard to help victims of, those charged with and those convicted of criminal offences. Very many people on this Island work hard to protect the public, to safeguard our quality of life and to assist in the rehabilitation of offenders and to help those who are the victims of criminal conduct.

1089. We have a fair criminal justice system. We have the presumption of innocence and we have the concept of a fair trial. A trial that is fair to the defence, fair to the prosecution and fair to the community generally. We have a generous legal aid system. We should not take all these matters for granted. We should appreciate the fortunate position which prevails on this Island but we should not be complacent. Improvements can always be made to any system of justice. We should not be afraid of change. We should embrace it enthusiastically. We should all work together to improve the system of criminal justice on this Island.

1090. Criminal law and procedure does not remain static. The system must continue to be enhanced to ensure that justice continues to be provided to the community, victims and defendants. The paramount considerations must be the protection of the public and the fairness and efficiency of the proceedings to all concerned. We must also remember that the rehabilitation of offenders, where it can be achieved, has an important role to play in the long term protection of the public.

1091. In legal proceedings brevity, simplicity and speed are the friends of justice. Length, complexity and delay are its enemies. Trials must be kept manageable and must take place within a reasonable time. There is no need for matters to be unduly complicated or to take undue time. Counsel and the court should focus on the main issues rather than be distracted by peripheral issues. There needs to be an earlier disclosure of the main issues in a case without unduly prejudicing the position of the defendant. It is in the interests of justice and fairness to all that the focus should be on the main issues of a case and that we all openly

acknowledge that the time and money that can be devoted to any one case is not limitless. If too much time is devoted to one case others suffer. No more than a reasonable amount of time should be allocated to each case. Too many trials are taking up too much time because the parties are not focusing on the main issues. Unnecessary witnesses are being called when they could have been agreed in advance of the trial. Insufficient admissions are being made on matters that should not be in dispute.

1092. Moreover counsel must ensure that case management orders of the court in respect of sentencing hearings and trials are complied with on a timely basis. In the past such orders have not always been complied with on a timely basis and in such circumstances there is a risk that the administration of justice will suffer. All those involved in sentencing hearings and trials must ensure that they are fully prepared well in advance of such hearings and trials. Proceedings need to be fair and efficient. Increased efficiency will not sacrifice fairness whereas inefficiencies can have an adverse impact on the fairness of trials. Fairness is not all one sided. Fairness extends to the defence, to the complainants, to the prosecution, to the witnesses, to the jury, to the media, to other court users and to the community generally.

1093. It is in the best interests of the community and of those guilty of criminal conduct that guilty pleas are entered at the first available opportunity. Too many guilty pleas are left until shortly before the trial. Too many trials are vacated due to late guilty pleas. Defendants and those representing them must take futher steps to ensure that any guilty pleas are entered at the first available opportunity.

1094. There has been a significant increase in the number and complexity of cases coming before the Court of General Gaol Delivery in recent times. It is not anticipated that the number of cases will decrease in the future. In such circumstances the cooperation and assistance of prosecution and defence advocates is absolutely crucial to the fair and efficient administration of justice on this Island. The courts depend on the integrity, competence and efficiency of advocates who, as officers of the court, are duty bound to assist the court in the administration of justice. That assistance includes the need to make more efficient use of the limited time and resources available on the Island.

1095. An independent and well resourced Manx Bar including competent prosecution and defence advocates are vital elements in the pursuit of the enforcement of the rule of law, the protection of the liberty of the subject and the protection of the public. The administration of justice

is crucially dependent on competent and well prepared advocates. With the continuing assistance and cooperation of advocates fairness and efficiency will remain central components in the development of Manx criminal law and procedure in the future.

1096. I finish this book by recording my thanks to prosecution and defence advocates and to all those involved in the criminal justice system on this Island for the valuable assistance the judiciary have received from them to date. The judiciary looks forward to that assistance continuing into the future.

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