

PUBLISHED FOR CONSULTATION ONLY



Sentencing Guidelines Council

**National Allocation
Guidelines 2006**

Draft Guidelines

NATIONAL ALLOCATION GUIDELINES 2006

FOREWORD

The Sentencing Guidelines Council was created in 2004 in order to frame guidelines to assist courts as they deal with criminal cases across the whole of England and Wales.

The Council receives advice from the Sentencing Advisory Panel which consults widely before tendering that advice. The Council then produces a draft guideline on which it seeks the views of a limited group as provided by the Criminal Justice Act 2003. The Panel's advice to the Council in relation to allocation guidelines is being published simultaneously.

This draft guideline covers the legislative and other factors that should influence the decision whether an either-way offence is retained for trial in a magistrates' court or sent to the Crown Court to be dealt with (the allocation decision). It is within the remit of the Sentencing Guidelines Council to produce guidelines to support that decision and it is important that new guidelines be ready for use when legislative provisions changing the allocation procedure are brought into force in autumn 2006.

The new allocation procedure has the added dimension of a sentence indication being given by a magistrates' court once it has decided that a case could be retained. This option is only available after the main part of the allocation decision has been made, but it is a key feature of the new procedures and guidance to courts is critical if consistency of approach is to be achieved. In *R. v. Goodyear*,¹ the Court of Appeal (Criminal Division) considered sentence indications in reference to proceedings in the Crown Court and established a procedure for that Court. Although the procedure and approach of the Crown Court are very different from that in a magistrates' court, most of the principles identified in *Goodyear* can be applied to the statutory sentence indication procedure that follows an allocation decision.

The Panel's advice (and discussion paper that formed the basis of consultation seminars) contains further background details. All documents can be found at www.sentencing-guidelines.gov.uk or can be obtained from the Council's Secretariat at 85 Buckingham Gate, London SW1E 6PD.

When the consultation period is concluded (**the closing date for responses is 10 April 2006**), the Council will consider any responses received and then issue definitive guidelines to which every court must have regard in accordance with section 172 of the 2003 Act.



Chairman of the Council
February 2006

¹ [2006] 1 Cr. App. R.(S) 6

NATIONAL ALLOCATION GUIDELINES 2006

CONTENTS

1. Statement of Purpose	3
2. Statutory Considerations	3
3. Procedure and Principles	4-7
Principles for consideration:	
❖ Adequacy of sentencing powers to be based on an assumption that the prosecution version of the facts is correct	4-5
❖ Charges and range of conduct to be considered	5-6
❖ The need for a separate tribunal to determine fact	6
❖ Presumption in favour of summary trial	6
❖ Linked cases	6-7
❖ Any representations by the prosecution or defence	7
4. Indication of Sentence	7-9
A. The Statutory Procedure	7-8
B. Reduction in sentence for a guilty plea	8-9
Annex 1	10-11

NATIONAL ALLOCATION GUIDELINES 2006

1. STATEMENT OF PURPOSE

1.1 In accordance with section 19 of the Magistrates' Courts Act 1980,² where a defendant has not indicated an intention to plead guilty, a magistrates' court must decide whether an offence triable either-way should be sent to the Crown Court for trial.

1.2 **The objectives of the allocation procedure are:**

- ❖ to ensure (subject to exceptions³) that the court that determines guilt also imposes sentence
- ❖ where the determination is that trial on indictment is appropriate, the case reaches the Crown Court as soon as possible.

1.3 **The purpose of these guidelines is to provide guidance to those making that decision, applying the legislative criteria in the context of the sentencing framework as provided by the Criminal Justice Act 2003.**

1.4 These guidelines apply:

- ❖ to offenders aged 18 and over and
- ❖ in those cases where a youth is charged together with an adult and the plea before venue procedure applies.

2. STATUTORY CONSIDERATIONS

2.1 When deciding whether an offence is more suitable for summary trial or trial on indictment, section 19 of the Magistrates' Courts Act 1980 (as amended) requires that:

- ❖ before making a decision the court will be informed of the accused's previous convictions (if any) and shall consider any representations from the prosecution and defence as to whether summary trial or trial on indictment would be more suitable.
- ❖ in making a decision under this section, the court shall consider whether the sentence which a magistrates' court would have power to impose for the offence would be adequate
- ❖ the court shall have regard to any allocation guidelines (or revised allocation guidelines) issued as definitive guidelines under section 170 of the Criminal Justice Act 2003.

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² as amended by the Criminal Justice Act 2003, s.41 and sched.3

³ such as for offenders who may qualify for a sentence for public protection where the power to commit for sentence after conviction remains.

3. PROCEDURE AND PRINCIPLES

3.1 The court should invite representations from the prosecution and the defence as to the most appropriate venue for trial of the case. The existence of previous convictions recorded against an offender should be brought to the attention of the court at this time.

- ❖ **The primary test is the adequacy of the sentencing powers of the court.**
- ❖ **A court will start with a general presumption towards trial in a magistrates' court.**
- ❖ **The features set out in the following guidelines will need to be considered in order to determine whether the sentencing powers of a magistrates' court are sufficient to deal with the case justly.**
- ❖ **In deciding whether the powers of a magistrates' court would be adequate, a court is required to have regard to the approach to the assessment of seriousness set out in the Council Guideline *Overarching Principles: Seriousness*.⁴**

Principles for consideration

3.2 The principles set out below are relevant considerations in relation to the decision of the court as to whether an offence or offences would merit a custodial sentence of 12 months or more. The increased sentencing powers of a magistrates' court mean that more cases can now be dealt with at this level. Accordingly, it is expected that a magistrates' court will retain cases of greater seriousness than has historically been the case.

3.3 Adequacy of sentencing powers to be based on an assumption that the prosecution version of the facts is correct

The issue for the court is the extent of its sentencing powers for the offence(s) charged following conviction based on the prosecution case at its highest.

3.3.1 Given that the allocation decision is only required where a guilty plea indication is not given, the court should allocate either-way cases according to the seriousness of the alleged offence, looking at the case at its worst from the point of view of the defendant. The reduction for a guilty plea principle should not influence the court in making an allocation decision.

3.3.2 The assessment of seriousness will be based upon representations from the prosecution and defence on the nature and circumstances of the offence. These will include factors that aggravate (legislative, general or offence

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⁴ published December 2004 – www.sentencing-guidelines.gov.uk

specific aggravating factors) or mitigate the seriousness of the offence, but will not extend to matters of personal mitigation.

3.3.3 The court will have regard to definitive guidelines issued by the Sentencing Guidelines Council relating both to principles of sentencing and to specific offences, and to relevant judgments of the Court of Appeal (Criminal Division).⁵

3.3.4 In order to properly assess the seriousness of the offending conduct, courts should make efforts to consider together as many outstanding cases as possible where an allocation decision is yet to be made, unless this would result in significant delay or injustice to the prosecution or defence. Where appropriate, consideration may need to be given to transferring a case to another magistrates' court for this purpose,⁶ after consultation with that other court.

3.3.5 In assessing the seriousness of the current offence(s), the court must consider the existence and relevance of any previous convictions, taking into consideration the nature of the offence(s) to which the conviction(s) relate(s), the relevance of them to the current offence, and the time that has elapsed since the conviction(s).

3.3.6 Where a defendant has already been convicted of other matters but not yet sentenced, those convictions will be relevant to the assessment of seriousness of the offence(s) currently before the court.

3.3.7 The existence of a suspended sentence order will be relevant to the allocation decision as it will be a recorded conviction. The question of whether the defendant is liable to have the order implemented will be considered following conviction and so is not relevant to the allocation decision.

3.3.8 Where an offence is a specified offence, the issue of whether the offender should be made subject to a sentence for public protection under sections 224-236 of the Criminal Justice Act 2003 will be considered following conviction.

3.4 Charges and range of conduct to be considered

3.4.1 The prosecuting authority should ensure that the charge(s) in a particular case present the court with sufficient information to know the extent of the criminality of the defendant. Where, for example, a defendant is alleged to have acted criminally over a long period, the charges need to be constructed with care as a court is not entitled to make assumptions about the extent of criminality where offences are neither admitted nor proved.

3.4.2 The possibility that, after conviction, an offender may ask for other

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⁵ See the 'Guideline Judgments – Case Compendium' which provides additional information about some offences.

⁶ In accordance with the Magistrates' Courts Act 1980, s.27A (as inserted by the Courts Act 2003, s.46)

matters to be taken into consideration will not be relevant to the seriousness of the offence before the court when considering allocation. A court could refuse to take additional offences into account when sentencing if they would render the powers of the court inadequate to deal with the case in an appropriate way.

3.5 *The need for a separate tribunal to determine fact*

3.5.1 The procedures in a magistrates' court are generally likely to be adequate for all cases where sentencing is within the powers of that court. Accordingly, it will rarely be appropriate for a magistrates' court to decline summary trial for an offence within its sentencing range for reasons unconnected with the adequacy of sentence.

3.5.2 However, there may be a few rare and exceptional cases (for example where unusually complex disclosure issues regarding public interest immunity or sensitivity are to be decided) where it will be especially important to have the separation between Judge and jury that is possible in the Crown Court.

3.6 *Presumption in favour of summary trial*

3.6.1 As many cases as possible should be dealt with in a magistrates' court. However, since there is no *general* power to commit for sentence after a determination for summary trial, where any uncertainty remains in relation to the adequacy of the sentencing powers available it should be resolved in favour of the case being dealt with in the Crown Court.

3.6.2 The court is entitled to expect the Justices' Clerk (or assistant to the Justices' Clerk) present in court, and the prosecution and defence advocates, to bring relevant guidelines and authorities to the attention of the court.

3.7 *Linked cases*

3.7.1 As a general rule, it is preferable for all issues to be dealt with in a single trial.

3.7.2 Where several defendants are contesting charges that are linked, the presumption is that a single trial will be in the interests of justice for the purpose of considering allocation.

3.7.3 Where one or more of the defendants is a youth, any presumption in favour of sending the youth to the Crown Court to be tried jointly with an adult who is being sent must be balanced with the general presumption that young offenders should be dealt with in a youth court. In determining which is the appropriate court, examples of factors that should be considered when deciding whether to separate the youth and adult defendants include:

- ❖ the young age of the offender, particularly where the age gap between the adult and youth offender is substantial

- ❖ the immaturity and intellect of the youth
- ❖ the relative culpability of the youth compared with the adult and whether or not the role played by the youth was minor
- ❖ lack of previous convictions on the part of the youth compared with the adult offender
- ❖ whether the trial of the adult and youth can be severed without inconvenience to witnesses or injustice to the case as a whole

3.8 Any representations by the prosecution or defence

3.8.1 The assessment of offence seriousness for the purposes of the allocation decision is based on the prosecution case at its highest (see 3.1 above). Defence representations should normally be directed to identifying inaccuracies in the factual outline of the case, assessing the adequacy of the court's sentencing powers and determining the relevance of an offender's previous convictions.⁷

4. INDICATION OF SENTENCE

A. The Statutory Procedure

The relevant statutory provisions are reproduced at Annex 1.

4.1 If it is clear whether or not a custodial sentence is likely, it will normally be helpful for a court to give the indication requested unless there is a good reason for not doing so.

4.2 The key elements of the approach to giving a sentence indication are:

(i) A court should assess the type of sentence realistically possible in the light of the facts as presented by the prosecution, with the additional element of a guilty plea tendered at this stage in the proceedings, and subject to defence representations as to the accuracy of the factual outline of the case. Wherever possible, the key elements of the basis upon which the indication is given should be recorded in writing.

(ii) A court should proceed with caution where an offender is unrepresented. The offender should be advised of the availability of independent legal advice. The Justices' Clerk (or assistant to the Justices' Clerk) present in court has a duty to assist the unrepresented

⁷ CJA2003, s.143(2)

party,⁸ and this will include drawing to the attention of an unrepresented defendant that there is an entitlement to request an indication of sentence.

(iii) A court should not give an indication of sentence where there are alternative charges unless the prosecution has indicated that an agreement as to acceptable pleas has been established following discussions with the defence, and there is an appropriate factual basis upon which an indication could be given.

(iv) The prosecution must ensure that the court is fully informed of the facts of the case and any relevant background.

(v) The court is entitled to expect that the Justices' Clerk (or assistant to the Justices' Clerk) present in court, and the prosecution and defence advocates, will ensure that the court considers any relevant guidelines or other authorities affecting sentence.

(vi) The information presented to the court will not include personal mitigation except in so far as it has influenced the facts of the case presented to the court or it is actively agreed by the prosecution advocate.

(vii) Any indication given must be recorded in writing and entered onto the court register.

B. Reduction in sentence for a guilty plea

4.14 In order to set the maximum type of sentence in cases where the offence is close to the threshold for a custodial sentence, a magistrates' court would have to consider whether the maximum reduction in sentence for a guilty plea would potentially be available where a guilty plea is forthcoming only after a sentence indication has been given.

4.15 The Guideline, *Reduction in Sentence for a Guilty Plea*, at paragraph 4.3 states:

“(i) The maximum reduction will be given only where the offender indicated willingness to admit guilt at the **first reasonable opportunity**. When this occurs will vary from case to case.

(ii) Where the admission of guilt comes later than the first reasonable opportunity, the reduction for guilty plea will be less than one third.”

In considering further when the “first reasonable opportunity” occurs, Annex 2 of the Guideline emphasises the purpose of giving the reduction which is in

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⁸ in accordance with paragraph V.55.9 of the Practice Direction (criminal: consolidated) www.hmcourts-service.gov.uk/cms/pds.htm

recognition of “the benefits that come from a guilty plea both for those directly involved in the case in question but also in enabling Courts more quickly to deal with other outstanding cases”.

4.16 There may only be a relatively short time gap between the opportunity to give an indication prior to allocation and the opportunity after an indication of sentence. However, the court will have had to consider allocation and determine summary trial and will then have to consider its response to the request for an indication of sentence. In those circumstances, it would appear that delay had taken place that could have been avoided and this will influence the extent of the reduction.

Where a guilty plea is indicated after the court has given an indication of the likely sentence, the appropriate reduction in sentence for the guilty plea should be a maximum of one quarter.

**Sections 20 and 20A Magistrates' Courts Act 1980
(as substituted by the Criminal Justice Act 2003, schedule 3, para. 6)**

20 Procedure where summary trial appears more suitable

- (1) If the court decides under section 19 above that the offence appears to it more suitable for summary trial, the following provisions of this section shall apply (unless they are excluded by section 23 below).
- (2) The court shall explain to the accused in ordinary language-
 - (a) that it appears to the court more suitable for him to be tried summarily for the offence;
 - (b) that he can either consent to be so tried or, if he wishes, be tried on indictment; and
 - (c) in the case of a specified offence (within the meaning of section 224 of the Criminal Justice Act 2003), that if he is tried summarily and is convicted by the court, he may be committed for sentence to the Crown Court under section 3A of the Powers of Criminal Courts (Sentencing) Act 2000 if the committing court is of such opinion as is mentioned in subsection (2) of that section.
- (3) The accused may then request an indication ("an indication of sentence") of whether a custodial sentence or non-custodial sentence would be more likely to be imposed if he were to be tried summarily for the offence and to plead guilty.
- (4) If the accused requests an indication of sentence, the court may, but need not, give such an indication.
- (5) If the accused requests and the court gives an indication of sentence, the court shall ask the accused whether he wishes, on the basis of the indication, to reconsider the indication of plea which was given, or is taken to have been given, under section 17A or 17B above.
- (6) If the accused indicates that he wishes to reconsider the indication under section 17A or 17B above, the court shall ask the accused whether (if the offence were to proceed to trial) he would plead guilty or not guilty.
- (7) If the accused indicates that he would plead guilty the court shall proceed as if-
 - (a) the proceedings constituted from that time the summary trial of the information; and
 - (b) section 9(1) above were complied with and he pleaded guilty under it.
- (8) Subsection (9) below applies where-
 - (a) the court does not give an indication of sentence (whether because the accused does not request one or because the court does not agree to give one);
 - (b) the accused either-

- (i) does not indicate, in accordance with subsection (5) above, that he wishes; or
- (ii) indicates, in accordance with subsection (5) above, that he does not wish, to reconsider the indication of plea under section 17A or 17B above; or
- (c) the accused does not indicate, in accordance with subsection (6) above, that he would plead guilty.

(9) The court shall ask the accused whether he consents to be tried summarily or wishes to be tried on indictment and-

- (a) if he consents to be tried summarily, shall proceed to the summary trial of the information; and
- (b) if he does not so consent, shall proceed in relation to the offence in accordance with section 51(1) of the Crime and Disorder Act 1998.

20A Procedure where summary trial appears more suitable: supplementary

(1) Where the case is dealt with in accordance with section 20(7) above, no court (whether a magistrates' court or not) may impose a custodial sentence for the offence unless such a sentence was indicated in the indication of sentence referred to in section 20 above.

(2) Subsection (1) above is subject to sections 3A(4), 4(8) and 5(3) of the Powers of Criminal Courts (Sentencing) Act 2000.

(3) Except as provided in subsection (1) above-

- (a) an indication of sentence shall not be binding on any court (whether a magistrates' court or not); and
- (b) no sentence may be challenged or be the subject of appeal in any court on the ground that it is not consistent with an indication of sentence.

(4) Subject to section 20(7) above, the following shall not for any purpose be taken to constitute the taking of a plea-

- (a) asking the accused under section 20 above whether (if the offence were to proceed to trial) he would plead guilty or not guilty; or
- (b) an indication by the accused under that section of how he would plead.

(5) Where the court gives an indication of sentence under section 20 above, it shall cause each such indication to be entered in the register.

(6) In this section and in section 20 above, references to a custodial sentence are to a custodial sentence within the meaning of section 76 of the Powers of Criminal Courts (Sentencing) Act 2000, and references to a non-custodial sentence shall be construed accordingly."