GEMMELL v HM ADVOCATE

No 31
20 December 2011
[2011] HCJAC 129

Lord Justice-Clerk (Gill),
Lord Osborne, Lord Eassie,
Lady Paton and Lord Wheatley

James Kelly Gemmell, Appellant—*Ogg (Solicitor-advocate)*
Paul Robertson, Appellant—*Brown*
David Alexander Gibson, Appellant—*Paterson (Solicitor-advocate), Goodfellow (Solicitor-advocate)*
Peter Stephen McCourt, Appellant—*Brown*
Euan McWilliam Ross, Appellant—*Shead, CM Mitchell*
David John Forsyth Hart, Appellant—*CM Mitchell*
Charlene Elisabeth Ogilvie, Respondent—*Keenan (Solicitor-advocate)*
Her Majesty's Advocate, Respondent and Appellant—*Ferguson QC, A-D*

Justiciary – Sentence – Discounting in respect of guilty plea – Appropriate approach to sentence discounting – Whether discounting applies to the public protection element in a sentence – Whether discounting applies to imposition of a period of disqualification or penalty points – Criminal Procedure (Scotland) Act 1995 (cap 46), sec 196

Section 196(1) of the Criminal Procedure (Scotland) Act 1995 (cap 46) provides that, in determining what sentence to pass on, or disposal or order to make in relation to, an offender who has pled guilty to an offence, a court shall take into account the stage in proceedings at which intention to plead guilty was indicated and the circumstances in which the indication was given. In passing sentence on such an offender, the court shall state whether having taken account of those matters the sentence imposed is different from that which the court would otherwise have imposed and, if not, the reasons why it is not. Section 196(2) provides that where the court is passing sentence on an offender under sec 205B(2) of the Act and the offender has pled guilty to the offence for which he is being sentenced the court may after taking into account the matters mentioned in subsec (1) pass a sentence of less than seven years' imprisonment or detention, but any such term of imprisonment or period of detention shall not be less than five years, two hundred and nineteen days.

The appellants appealed against sentence raising the issues of: the general question of the proper approach to sentence discounting and whether it applies to the public protection element in a sentence; whether discounting can apply to the imposition of a period of disqualification or of penalty points. The Crown cross-appealed in relation to the final appellant on the ground that, by reason of the discount allowed, the sentence was unduly lenient.

Held that: (1) the sentence discounting process involved three stages, first, deciding what the sentence would be if no discount arose; secondly, deciding whether there should be a discount; and thirdly, if so, deciding what the amount of it should be (per Lord Justice-Clerk (Gill), para 27); (2) discounting was a matter of discretion for the sentencer and only in exceptional circumstances would the appeal court interfere (per Lord Justice-Clerk (Gill), paras 29, 81); (3) the factors relevant to discounting are: saving in jury costs, time and inconvenience; sparing complainers and other witnesses from giving evidence (per Lord Justice-Clerk (Gill), paras 44, 45); (4) the factors of the strength of the Crown case, previous convictions and public protection, assistance to the authorities, remorse, and uncooperative behavior were irrelevant to discounting (per Lord Justice-Clerk (Gill), paras 48–52); (5) in particular, considerations of public protection, although relevant to the headline figure, should not be taken into account when assessing the discount (per Lord Justice-Clerk (Gill), para 57, Lord Eassie, para 141, Lord Wheatley, para 167; *dissenting* on that issue, Lord Osborne, para 119, Lady Paton, paras 151 *et seq*); (6) any discount should be applied to the whole sentence, without attempting to identify and exclude elements relating to public protection; (7) neither the extension period of extended sentences nor minimum sentences qualified for discounting except

in relation to the latter as expressly provided for by statute (per Lord Justice-Clerk (Gill), paras 66, 68); (8) discounting applied to disqualification from driving and penalty points subject to the statutory minimum sentencing requirements thereanent (*Stewart v Griffiths overruled*, per Lord Justice-Clerk (Gill), paras 69–72); and appeals *allowed* (Lord Osborne *dissenting* on appeal 6, para 135; Lady Paton *dissenting* on appeals 1, 2 and 3, paras 158–160); and cross-appeal by the Crown *refused*.

Du Plooy v HM Advocate 2005 1 JC 1 *distinguished* and *Horribine v Thomson* 2008 JC 306 (*dissenting* Lord Osborne, para 123) and *Stewart v Griffiths* 2005 SCCR 291 *overruled*.

JAMES KELLY GEMMELL appealed against sentence and his appeal was conjoined with six other appeals which raised questions of principle on sentence discounting.

Cases referred to:
Adair v Munn 1940 JC 69; 1940 SN 62; 1940 SLT 414
Advocate (HM) v Alexander [2005] HCJAC 77; 2005 SCCR 537
Advocate (HM) v Bell 1995 SLT 350; 1995 SCCR 244
Advocate (HM) v Forrest 1998 SCCR 153; 1998 GWD 8-378
Advocate (HM) v Graham [2010] HCJAC 50; 2011 JC 1; 2010 SLT 715; 2010 SCCR 641; 2010 SCL 789
Advocate (HM) v Thomson and anr [2006] HCJAC 32; 2006 SCCR 265; 2006 GWD 11-205
Attorney-General's Reference (No 7 of 1989) (Re) sub nom R v Thornton (1990–91) 12 Cr App R (S) 1; [1990] Crim LR 436
Balgowan v HM Advocate [2011] HCJAC 2; 2012 JC 5; 2011 SLT 285; 2011 SCCR 143; 2011 SCL 418
Brown v HM Advocate [2010] HCJAC 24; 2010 JC 148; 2010 SLT 964; 2010 SCCR 393; 2010 SCL 899
Cameron v R [2002] HCA 6; (2002) 209 CLR 339; 187 ALR 65; 76 ALJR 382
Charlotte v Fraser Sh Ct, 21 January 2010, unreported
Coogans v MacDonald 1954 JC 98; 1954 SLT 279
Coyle v HM Advocate [2007] HCJAC 52; 2008 JC 107; 2007 SCCR 479; 2008 SCL 131
Docherty v McGlennan 1998 GWD 4-176
Du Plooy v HM Advocate 2005 1 JC 1; 2003 SLT 1237; 2003 SCCR 640
Horribine v Thomson [2008] HCJAC 21; 2008 JC 306; 2008 SLT 503; 2008 SCCR 377; 2008 SCL 724
Jackson v HM Advocate [2008] HCJAC 37; 2008 JC 443; 2008 SLT 709; 2008 SCCR 733; 2008 SCL 958
Jordan v HM Advocate [2008] HCJAC 24; 2008 JC 345; 2008 SLT 489; 2008 SCCR 618; 2008 SCL 729
Kane v HM Advocate 2003 SCCR 749; 2004 GWD 8-179
Khaliq v HM Advocate 1984 SCCR 212
Leonard v Houston [2007] HCJAC 46; 2008 JC 92; 2007 SCCR 354; 2007 SCL 100
McGowan v HM Advocate [2005] HCJAC 67; 2005 1 JC 327; 2005 SCCR 497
McKinlay and anr v HM Advocate High Court of Justiciary, 4 December 2009, unreported
Malige v France (1999) 28 EHRR 578; [1998] HRCD 897
Markarian v R [2005] HCA 25; (2006) 228 CLR 357; (2005) 215 ALR 213; 79 ALJR 1048
Neilson v PF, Elgin 20 May 2009, unreported
Petch v HM Advocate [2011] HCJAC 20; 2011 JC 210; 2011 SLT 391; 2011 SCCR 199; 2011 SCL 372
RB v HM Advocate 2004 SCCR 443; 2004 GWD 21-453
R v Barney [2007] EWCA Crim 3181; [2008] 2 Cr App R (S) 37
R v Delucca; R v Murray; R v Stubbings [2010] EWCA Crim 710; [2011] 1 WLR 1148; [2010] 4 All ER 290; [2011] 1 Cr App R (S) 7
R v Harper [1968] 2 QB 108; [1968] 2 WLR 626; 52 Cr App R 21; [1967] Crim LR 714; 112 SJ 189
R v LM 2008 SCC 31; [2008] 2 SCR 163
R v M [1996] 1 SCR 500
R v Martin [2006] EWCA Crim 1035; [2007] 1 Cr App R (S) 3
R v Millberry; R v Lackenby; R v Morgan [2002] EWCA Crim 2891; [2003] 1 WLR 546; [2003] 2 All ER 939; [2003] 1 Cr App R 25; [2003] 2 Cr App R (S) 31; [2003] Crim LR 207

R v Tasker [2003] VSCA 190; (2003) 7 VR 128
R v Thomson; R v Houlton [2000] NSWCCA 309; (2000) 29 NSWLR 383
Rennie v Frame [2005] HCJAC 83; 2006 JC 60; 2005 SCCR 608
Ross v McGowan [2009] HCJAC 82; 2010 SCL 106; 2009 GWD 38-653
Spence v HM Advocate [2007] HCJAC 64; 2008 JC 174; 2007 SLT 1218; 2007 SCCR 592; 2008 SCL 256
Stewart v Griffiths 2005 SCCR 291
Strawhorn v McLeod 1987 SCCR 413
Sweeney v HM Advocate 1990 GWD 25-1385
Tennie v Munro 1999 SCCR 70; 1999 GWD 4-201
Tudhope v Eadie 1984 JC 6; 1984 SLT 178; 1983 SCCR 464
Weir v HM Advocate [2006] HCJAC 25; 2006 SLT 353; 2006 SCCR 206
Will v HM Advocate [2010] HCJAC 113; 2010 GWD 37-764

Textbooks etc referred to:
Archbold, JF, *Criminal Pleading, Evidence and Practice* (Sweet and Maxwell, London, 2011), paras 5.78 *et seq*
Ashworth, A, and Redmayne, M, *The Criminal Process* (4th ed, Oxford University Press, Oxford, 2010), pp 312–314
Ashworth, A, *Sentencing and Criminal Justice* (5th ed, Cambridge University Press, Cambridge, 2010), pp 172, 173
Brown, G, ''*Culpable Homicide: Effect of rejected plea on sentence discount – rationale for the sentence discount*'' (2011) 110 (4) *Criminal Law Bulletin* 5, pp 5, 6
Clarke, A, Moran-Ellis, J, and Sleney, J, *Attitudes to Date Rape and Relationship Rape: A Qualitative Study* (Sentencing Advisory Panel, London, 2002), pp 34, 55, 56
Darbyshire, P, ''*The Mischief of Plea Bargaining and Sentencing Rewards*'' [2000] *Criminal Law Review* 895, p 901
Emmins, CJ, *Sentencing* (4th Wasik ed, Blackstone, London, 2001), pp 66, 67
Henham, RJ, ''*Bargain Justice or Justice Denied? Sentence Discounts and the Criminal Process*'' (1999) 62 (4) *Modern Law Review* 515, p 537
Parole Board for Scotland, *Annual Report 2008–09* (SG/2009/263) (TSO, Edinburgh, 2009), pp 13, 14 (Online: http://www.scottishparoleboard.gov.uk/pdf/Parole%20Board%202008.pdf (8 August 2012))
Parole Board for Scotland, *Annual Report 2009–10* (SG/2010/250) (Parole Board for Scotland, Edinburgh, 2010), p 14 (Online: http://www.scottishparoleboard.gov.uk/pdf/Parole%20Board%202009.pdf (8 August 2012))
Renton, RW, and Brown, HH, *Criminal Procedure according to the Law of Scotland* (6th Gordon ed, W Green, Edinburgh, 1996), vol 1, paras 22.26, fn 3; 23.13 *et seq*
Sanders, A, Young, R and Burton, M, *Criminal Justice* (4th ed, Oxford University Press, Oxford, 2010), pp 494, 495
Scottish Government, *CP(S)A section 306 — Costs and Equalities and the Scottish Criminal Justice System 2005/06* (B57260) (Scottish Government, Edinburgh, 2008), pp 5, 6 (Online: http://www.scotland.gov.uk/Resource/Doc/237550/0065253.pdf (8 August 2012))
Scottish Government, *Criminal Proceedings in Scotland, 2010–11* (Scottish Government, Edinburgh, 2011), pp 12, 13, 28 (Online: http://www.scotland.gov.uk/Resource/0038/00389834.pdf (8 August 2012))
Scottish Legal Aid Board, *Annual Report 2009–2010* (SG/2010/145) (Scottish Legal Aid Board, Edinburgh, 2010), pp 6–8 (Online: http://www.slab.org.uk/common/documents/annual_report_2009_2010/AnnualReview2009-2010Dec2010FINAL.pdf (8 August 2012))
Scottish Office Home and Health Department, *Firm and Fair: Improving the delivery of justice in Scotland* (Cm 2600, 1994), para 21
Sentencing Guidelines Council, *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (revised ed, Sentencing Guidelines Secretariat, London, 2007), paras 2.2, 2.4, 2.6, 4.2, 5.2–5.5, 6.1–6.5, 7.1–7.3 (Online: http://sentencingcouncil.judiciary.gov.uk/docs/Reduction_in_Sentence_for_a_Guilty_Plea_-Revised_2007.pdf (7 August 2012))
Thomas, DA, *Principles of Sentencing: The sentencing policy of the Court of Appeal Criminal Division* (2nd ed, Heinemann, London, 1979), p 50

Following sundry procedure, the appeals came before the High Court of Justiciary, comprising the Lord Justice-Clerk (Gill), Lord Osborne, Lord Eassie, Lady Paton and Lord Wheatley, for a hearing.

At advising, on 20 December 2011—

LORD JUSTICE-CLERK (GILL)—

I INTRODUCTION

The appeals

[1] We have held a conjoined hearing in seven appeals against sentence. They raise important questions of principle on sentence discounting.

[2] Appeals 1 to 4 raise the general question of the proper approach to sentence discounting; and the specific issue whether discounting applies to the public protection element in a sentence.

[3] Appeals 5 to 7 are road traffic cases. They raise the question whether discounting can apply to the imposition of a period of disqualification or of penalty points.

[4] In appeal 7 the Crown has appealed against the sentence on the ground that, by reason of the discount allowed, the sentence was unduly lenient.

II DEVELOPMENT OF SENTENCE DISCOUNTING

Strawhorn v McLeod

[5] In *Strawhorn v McLeod* this court held that while rewarding pleas of guilty with a reduction in sentence might be administratively convenient, it was an objectionable practice that should not be followed. It was a form of plea bargaining that offended against the presumption of innocence and disabled the sentencer from exercising his discretion fully and freely in a particular case. In that case a reduction of the sentence on account of an early plea was seen as an aspect of mitigation.

Criminal Procedure (Scotland) Act 1995, sec 196, as enacted

[6] The principle of sentence discounting was first recognised in legislation in sec 33 of the Criminal Justice (Scotland) Act 1995 (cap 20), which was re-enacted in the consolidating Criminal Procedure (Scotland) Act 1995 (cap 46) ('the 1995 Act'). Section 196 of the 1995 Act, as enacted, provided as follows:

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

This permissive provision removed the restriction placed on sentencers by *Strawhorn v McLeod* (*cf* Renton and Brown, *Criminal Procedure*, para 22.26, fn 3; *RB v HM Advocate*, para 21; *cf* Scottish Office Home and Health Department, *Firm and Fair: Improving the delivery of justice in Scotland*).

Crime and Punishment (Scotland) Act 1997 (cap 48)

[7] Section 2(2) of this Act added the present subsec (2) to sec 196 of the 1995 Act. It provided that in cases under sec 205B(2) of the 1995 Act, the court had a restricted power to allow a discount on the minimum sentences that sec 205B(2) laid down for those convicted for a third time of certain drug trafficking offences.

Du Plooy v HM Advocate

[8] In *Du Plooy v HM Advocate* this court interpreted sec 196, as then amended, and resolved some of the uncertainties in its practical operation. It gave guidance for sentencers 'as to the basis of, and scope for, an allowance in the sentencing of an accused in respect of the fact that he has pled guilty, and the form which such an allowance might take' (para 1). The court held that sec 196(1) enabled the sentencer to make allowance, according to the circumstances of the case, for the fact that the tendering of a plea of guilty was likely to save public money and court time, and in general to avoid inconvenience to witnesses; or, in certain types of cases, to avoid the additional distress that could be caused by their having to be precognosced or to give evidence. Adopting the language of Spigelman CJ in a decision of the Court of Appeal of New South Wales (*R v Thomson; R v Houlton*) and Kirby J in the High Court of Australia (*Cameron v R*), the court said that these specific considerations gave 'utilitarian value' to the plea (para 16).

[9] The court held that sec 196(1) also enabled the sentencer to make allowance for the accused's acceptance of guilt (para 16), the allowance, if any, being a matter of discretion (paras 7, 26). The court then dealt with the important question of remorse. It first acknowledged that although an accused might have a number of reasons for pleading guilty which had little, if anything, to do with genuine remorse there were cases in which the accused would have shown what was claimed to be true contrition. As examples of conduct that a sentencer might be asked to take into account, the court referred to cases where the accused had taken practical steps to assist the authorities, had gone voluntarily to the police to confess his guilt, had provided information pointing to the guilt of others or had confessed and pled guilty to spare the complainer the ordeal of giving evidence. The court observed that such matters were regularly taken into account by sentencers and might be significant in reducing the sentence; but that it was preferable that they should be taken into account in arriving at the discount, rather than be treated as aspects of general mitigation (para 23).

[10] The court considered that where an allowance was appropriate on any of these grounds, the sentencer should apply a distinct discount and specify the amount of it (para 25). The discount should not normally exceed a third of the sentence that would otherwise have been imposed (para 26). Where the plea of guilty might be said to have been practically inevitable, the view that the plea had less value to the criminal justice system could not be pressed too far because, *inter alia*, the utilitarian benefits of the early plea remained real, whatever might have been the strength of the Crown case (para 21).

[11] The court also held that discounting should not apply at all to the public protection element in the sentence (para 19). This is what the court said:

> 'Earlier in this opinion we indicated that the ''utilitarian value'' of the plea of guilty and the implications of the accused's acceptance of his guilt should be taken into consideration in determining the appropriate punishment of the

> accused. Thus they should be considered along with matters relevant to punishment, such as the seriousness of the offence and the accused's previous convictions. However, the sentence may also contain an element which is designed to protect the public against the accused's reoffending. In our view the ''utilitarian value'' of the plea of guilty and the accused's acceptance of his guilt should not be allowed to detract from the need to protect the public. Accordingly where a sentencer imposes an extended sentence under sec 210A of the 1995 Act, ie where the sentencer takes the view that the period for which the offender would be subject to a licence ''would not be adequate for the purpose of protecting the public from serious harm from the offender'', no allowance in respect of a plea of guilty should be made in determining the length of the extension period. Likewise, where the sentencer imposes a determinate sentence which contains an element which is designed to protect the public from the accused's reoffending, the sentence should not, to that extent, be subject to any allowance in respect of the plea of guilty. Comparison may be made with the fixing of a punishment part of a life sentence under sec 2(2) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (cap 9), as amended, which provides for the taking into account of the matters mentioned in paras (a) and (b) of sec 196(1).'

This principle was restated in *McGowan v HM Advocate* (para 16).

Criminal Procedure (Scotland) (Amendment) Act 2004 (asp 5)

[12] Section 20 of this Act further amended sec 196 of the 1995 Act by making the operation of the section mandatory (sec 196(1)) and by requiring the sentencer to specify whether he had allowed a discount and, if he had not, to say so and give his reasons (sec 196(1A)).

Practice Note (No 1 of 2008), Recording of Sentencing Discount

[13] The Practice Note requires every sentencing court to record the sentence imposed upon an accused, to specify any discount applied and to specify the greater sentence that would have been imposed but for the plea of guilty.

Current wording of sec 196

[14] With the amendments to which I have referred, the current wording of sec 196 of the 1995 Act is as follows:

> '(1) In determining what sentence to pass on, or what other disposal or order to make in relation to, an offender who has pled guilty to an offence, a court shall take into account–
>
> (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
> (b) the circumstances in which that indication was given.
>
> (1A) In passing sentence on an offender referred to in subsection (1) above, the court shall–
>
> (a) state whether, having taken account of the matters mentioned in paragraphs (a) and (b) of that subsection, the sentence imposed in respect of the offence is different from that which the court would otherwise have imposed; and
> (b) if it is not, state reasons why it is not.
>
> (2) Where the court is passing sentence on an offender under section 205B(2) of this Act and that offender has pled guilty to the offence for which he is being

> so sentenced, the court may, after taking into account the matters mentioned in paragraphs (a) and (b) of subsection (1) above, pass a sentence of less than seven years' imprisonment or, as the case may be, detention but any such sentence shall not be of a term of imprisonment or period of detention of less than five years, two hundred and nineteen days.'

Section 196, like its English equivalent (*infra*), says nothing about the scale of discounts but implies that the discount should be greater the earlier the plea is tendered (*cf* Ashworth, *Sentencing and Criminal Justice*, p 172; Archbold, *Criminal Pleading, Evidence and Practice*, paras 5.78 *et seq*).

III CASE LAW SINCE *DU PLOOY*

Levels of discount

[15] In *Spence v HM Advocate* the court gave general guidance on the levels of discount. It considered that any discount should be on a sliding scale ranging from one third, or in exceptional circumstances possibly more, to nil. These were said to be broad figures for guidance only, the amount of any discount being dependent on the circumstances (para 15). However, the court identified the first critical period in solemn procedure as being that between the accused's appearance on petition and the service of the indictment. During that period it was open to the accused to give notice under sec 76 of the 1995 Act of his intention to plead guilty. The court said that:

> 'If a clear indication of an intention to plead guilty is given during that period (and is adhered to) we would expect that a discount of the order of one-third might be afforded.'

Assessing the public protection element — methodology

Determinate sentences

[16] In *Weir v HM Advocate* the appellant tendered an early plea to a contravention of sec 2 of the Road Traffic Act 1988 (cap 52) committed while he was being pursued by the police. He had a recent conviction for the same offence. The sentencing judge sentenced him to two years' imprisonment, the statutory maximum. He declined to allow any discount for the plea of guilty because of the seriousness of the offence and because of the need to protect the public. In his view, only the maximum custodial sentence would provide adequate protection for the public. This court observed that there might be cases where protection of the public was so overwhelming a consideration that in practical terms it excluded all other factors (para 13); but it did not accept that that was such a case. If there was, or should have been, a punitive element in the sentence, even if it was relatively small, the court had to take that element into account. The court concluded that the sentencing judge should have done so (para 14). The court allowed a discount, but without explaining how it arrived at it.

[17] *Jackson v HM Advocate* was a decision of two judges. The appellant tendered an early plea to the culpable homicide of a child caused by his reckless driving of a defective vehicle. He was sentenced to 13 years' imprisonment. The sentencing judge took as his starting point a period of 16 years. He attributed seven years of that period to the element of public protection. To the remaining nine years he applied a discount of one-third (para 2).

[18] The court was satisfied that the starting figure of 16 years was not excessive. Having referred to *Weir v HM Advocate*, it said:

> '[9] ... [W]e are not persuaded that [the sentencing judge's] approach to the issue of discount is correct or even appropriate. We recognise that *Du Plooy v HM Advocate* does suggest that discount should not be applied to parts of a sentence of imprisonment which are designed to protect the public. However beyond that the case gives little assistance on that point.
>
> [10] At the end of the day we are obliged as a sentencing court to recognise that there is an element of public protection in this sentence of 16 years. Reviewing the appeal in *Weir v HM Advocate* as one way to deal with the matters, however, we consider in this case that the appropriate method to be employed is to apply discount to the whole figure of 16 years but not at one-third, but rather at 25 per cent to reflect the element of public protection in that rather broad way.'

The court substituted a sentence of 12 years. The same approach was adopted by a court of two judges in *Brown v HM Advocate* (para 11).

[19] In *Coyle v HM Advocate* the appellant tendered an early plea to two charges one of which was a charge of driving while disqualified. The sheriff, having regard to the appellant's record of nine directly analogous convictions and to the straightforward nature of the offence, took as his starting point on this charge the statutory maximum disqualification of 12 months and discounted it by one month for the early plea. It was submitted that the sheriff had erred in taking account of the appellant's record twice, in assessing the starting figure and in restricting the discount. A court of two judges held that that methodology was appropriate.

[20] In *Horribine v Thomson* the appellant pled guilty on summary complaint to a charge of driving while disqualified. The sheriff sentenced him to six months' imprisonment, the statutory maximum. He allowed no discount, on the view that the appellant should have been prosecuted on indictment and that the only protection that could be given to the public was by removing him from the temptation of driving for the maximum period. A court of three judges accepted the reasoning in *Coyle v HM Advocate* (para 8) and substituted a sentence of five months and two weeks' imprisonment. It held that although the sentence was based to some extent on the need to protect the public, there were also punitive and deterrent elements in it. It concluded that the appellant's record for analogous offences was a ground for modifying the amount of the discount that might otherwise have been appropriate (para 7). It followed *Weir v HM Advocate* in making its own assessment of the discount, again without specifying how it arrived at it.

Extended sentences

[21] In *Jordan v HM Advocate* the court observed that where an extended sentence was appropriate, the length of the custodial term would be determined primarily by the requirements of retribution and deterrence, while the length of the extension period would be determined by the requirements of public protection (para 19). It held that where an extended sentence was imposed, the length of the extension period should be determined only after the discounted custodial term had been fixed; and, subject to any statutory maximum, should take account of the whole period for which the public required to be protected from the offender, both while he was in custody and while he was on licence (para 21).

Strength of the Crown case

[22] In *Brown v HM Advocate* the appellant pled guilty by sec 76 procedure and was given a discount of one-third. On appeal, it was held that although the plea avoided the need for the Crown to proceed to full precognition, it was abundantly clear that there was no conceivable defence and that there had never been any suggestion that there was. In these circumstances a court of two judges substituted a discount of one-fifth (paras 10, 12).

[23] In *HM Advocate v Graham* in similar circumstances (paras 56–58) the court restricted the discount to one-tenth (*cf HM Advocate v Alexander*).

IV Law in England and Wales

History of sentence discounting

[24] There is a long-established practice in England and Wales of allowing a discount on the sentence on a plea of guilty (Thomas, *Principles of Sentencing*, p 50; *R v Harper*). Until 1994 a plea of guilty seems to have been viewed by the English courts as an aspect of mitigation (Emmins, *Sentencing*, pp 66, 67; *cf Attorney-General's Reference (No 7 of 1989)*, Lord Lane CJ, p 6). The principle of sentence discounting was made formal by sec 48 of the Criminal Justice and Public Order Act 1994 (cap 33). Sections 144 and 174(2)(d) of the Criminal Justice Act 2003 (cap 44) currently apply. Their provisions are similar to those of sec 196 of the 1995 Act.

Definitive guideline

[25] The current version of the Sentencing Guidelines Council's definitive guideline on sentence discounts (*Reduction in Sentence for a Guilty Plea* (2007)) is based on the following rationale (para 2.2):

> 'A reduction in sentence is appropriate because a guilty plea avoids the need for a trial (thus enabling other cases to be disposed of more expeditiously), shortens the gap between charge and sentence, saves considerable cost, and, in the case of an early plea, saves victims and witnesses from the concern about having to give evidence. The reduction principle derives from the need for the effective administration of justice and not as an aspect of mitigation.'

The definitive guideline recommends that the discount should be on a sliding scale from one-third where the guilty plea is entered at the first reasonable opportunity, to one-quarter where a trial diet has been set and to one-tenth where the plea is tendered at the doors of the court or after the trial has begun (para 4.2). Guidance is given on reduced discounts where the prosecution case is overwhelming (paras 5.2–5.5) and on the application of the guideline in relation to sentences for murder (paras 6.1–6.5) and to other indeterminate sentences (paras 7.1–7.3). It appears that the definitive guideline says nothing on the question whether the public protection element in a sentence can be subject to discounting.

[26] The guideline is described as definitive because it is the culmination of an extensive consultation process (*R v Martin*, para 15). It differs in this respect from the guidance given in *Du Plooy*, which was an extrapolation of general principles from submissions heard in four conjoined appeals.

V CONCLUSIONS

Sentence discounting process

[27] I think that for the purposes of these appeals it is useful to analyse the discounting process in three stages, namely (1) to decide what the sentence would be if no question of a discount arose; (2) to decide whether there should be a discount, and (3) if so, to decide what the amount of it should be.

Headline sentence

[28] In deciding what the sentence would otherwise have been, the court should apply the normal, well-established principles of sentencing, having regard to the circumstances of the offence and factors such as the gravity of the offence, the accused's record, the need to protect the public, and so on.

Discretionary allowance of a discount

[29] The wording of sec 196 of the 1995 Act indicates that the decisions whether to allow a discount and, if so, what discount to allow, remain a matter for the discretion of the sentencer. This has been repeatedly emphasised by this court (*cf Will v HM Advocate*; *RB v HM Advocate*; *HM Advocate v Forrest*; *Docherty v McGlennan*; *Tennie v Munro*; *Charlotte v Fraser*).

[30] At the hearing in these appeals, it was said more than once that by reason of an early plea an accused was 'entitled to' a discount. That is a careless use of language; but it reflects an approach that is prevalent in certain courts of first instance. From the many appeals that we hear in this court, and from a wealth of anecdotal evidence, it is apparent that in some courts discounts of one-third are being allowed for early pleas as a matter of routine.

[31] A superficial reading of the decision in *Du Plooy* may have left sentencers in the lower courts with the impression that discounts are there for the asking. It may be that the observations of this court in *Spence v HM Advocate* have created a climate of expectation among practitioners. So it is opportune to repeat that an accused is not entitled to any particular discount in return for a plea of guilty. The level of discount, if any, is and must always be a matter for the discretion of the sentencer (*Du Plooy*, paras 7, 26).

[32] Nevertheless, the court's discretion is not wholly unfettered. In view of the principles on which discounting is based, and by clear inference from sec 196, there will be cases of early pleas in which a refusal to allow any discount at all would be perverse. Moreover, even in a discretionary matter such as this, it is desirable that the court should exercise its discretion in accordance with some broad general principles. By means of such principles, sentence discounting will not be a haphazard exercise but will instead reflect a common understanding of sentencers and practitioners.

Justification of discounting

[33] The statutory idea of sentence discounting for an early plea is not an aspect of mitigation. It is based on the objective value of an early plea in the administrative and other costs, and the personal inconvenience, that it saves (*cf Spence v HM Advocate*, para 14).

[34] The euphemism 'utilitarian value' may be thought to give the principle of discounting some ethical content; but sentence discounting is not an exercise in

Benthamite philosophy. It is not based on any high moral principle relating to the offence, the offender or the victim. On the contrary, it involves the court's passing a sentence that, in its considered judgment, is less than the offence truly warrants. It is a statutory encouragement of early pleas. In some cases, there is a saving of inconvenience to complainers and witnesses. In a small minority of cases there is a saving in jury costs. There is also a benefit to the criminal justice system in the avoidance of undue delay between arrest and sentencing. But the primary benefit that is realised in every case is the saving of administrative costs and the reduction of the court's workload. The reality is shown in the most recent available figures, those for 2005/2006, on the court costs of cases where there was an early plea of guilty and cases that went to trial. In the High Court in cases where there was a plea of guilty under sec 76 procedure or a plea of guilty at the trial diet, no evidence being led, the average cost per case was £348. Where the case went to trial with evidence led the average cost per case, including juror/reporting costs, was £17,492. In the sheriff court, where there was a plea at the first diet the average costs per case were £129 (solemn) and £86 (summary). Where the case went to trial with evidence led and with one adjournment for reports the average costs per case were £6,720 (solemn) and £1,576 (summary) (Scottish Government, *Costs and Equalities and the Scottish Criminal Justice System 2005/06*, p 5).

[35] For the same period, the average prosecution costs for a case indicted in the High Court in 2005/2006 were £4,419 where the guilty plea was tendered by way of sec 76 procedure, and £19,269 where there was a trial. The corresponding figures for the sheriff court were £2,276 and £9,347 (Scottish Government, *Costs and Equalities and the Scottish Criminal Justice System 2005/06*, p 6). Early pleas are conducive to savings in defence costs, and therefore in savings to the Scottish Legal Aid Board. In 2009/2010, the Board made 167,201 grants of criminal legal aid at a total cost of £98.1 million (*Annual Report 2009–2010*, pp 6–8). In these respects therefore sentence discounting is a pragmatic way of dealing with an administrative problem and of avoiding public expense.

[36] The earliness of the plea is a straightforward matter, but other relevant considerations do not necessarily apply in the individual case and should not be taken for granted.

[37] If I am right in my assessment of the justification of sentence discounting, it follows, in my view, that the assessment of the headline sentence and the assessment of any discount are separate processes governed by separate criteria. When the headline sentence is assessed at the first stage of the sentencing process, the sentencer makes a judgment from a consideration of numerous sentencing objectives, such as retribution, denunciation, public protection and deterrence. But when he considers the matter of a discount, the only relevant consideration, in my view, is how far the so-called utilitarian benefits of the early plea have been achieved. That is an objective consideration unrelated, in my opinion, to the moral values on which the headline sentence is fixed. Whether the accused has a serious criminal record, is a continuing danger to the public and is impenitent; or is a first offender, is not a danger to the public and has made amends to the victim, the utilitarian value of the early plea is the same.

[38] It follows, in my view, that when the court comes to the second and third stages of its consideration, the two questions to be answered are how early the plea was tendered and the extent to which the tendering of it furthered the objective justifications set out in *Du Plooy*.

[39] That does not mean that the accused's criminal record, the likelihood of his reoffending, the protection of the public and so on are irrelevant considerations. Of course not. But those considerations arise at the first stage when the sentencer decides on the starting figure.

[40] So far, I have set out what I consider to be the true basis of sentence discounting and the logical consequences of it. But in our approach to discounting we have also to consider the effects of sentence discounting on public perception; and in particular, its effects on the credibility of the court and its sentencing process. I shall return to that subject.

When is a discount allowable?

[41] Although sec 196 of the 1995 Act does not refer specifically to 'early' pleas, it clearly implies that when the court considers whether there should be a discount, and if so what it should be, the essential consideration is how early in the proceedings the accused has indicated his intention to plead guilty. In any given case, the discount will be greater the earlier the plea is tendered.

What is an early plea?

[42] We have become familiar in this court with the argument that the accused is justified in withholding an early plea yet invoking sec 196 of the 1995 Act where there has been a delay in obtaining Crown disclosure, police statements, forensic reports and the like; or where investigations have been carried out by the defence. This is a specious argument. I repeat what I said in *HM Advocate v Thomson and anr*:

> 'If an accused person has committed the crime charged, he can plead guilty to it at the outset and benefit from his plea by way of discount when the sentence is assessed; or he can defer pleading until he is sure that the Crown have a corroborated case, in the knowledge that a sentence discount may be reduced or refused altogether. That is the choice that he must make. He cannot have it both ways' (para [27]; cf also my comments in *HM Advocate* v *Graham* ... para [56]).

Therefore if those defending the accused make enquiries to test the strength of the Crown case or to try to strengthen the defence case, they must recognise that, so far as discounting is concerned, time is not on their side (*McKinlay and anr v HM Advocate*, para 9).

Factors relevant to discount

General principle

[43] The amount of the discount in any given case is directly related to the extent of the benefits of it that were identified in *Du Plooy*. Since there will always be some benefit in an early plea, if only in the administrative benefits that result from it, I find it difficult to imagine circumstances in which an early plea would not entitle the accused to at least a token discount. However, in any given case, no matter how early the plea, it may be that not all of those benefits apply.

Saving in jury costs, time and inconvenience

[44] The saving in jury costs and in inconvenience to jurors is a relevant consideration; but it applies in relatively few cases. In 2008–2009, for example,

125,889 persons were convicted in Scotland. Of these, only about five per cent were convicted on indictment. In 2009–2010, of 121,028 persons convicted that percentage was four per cent. In 2010–2011, of 115,398 persons convicted the percentage convicted on indictment was again four per cent. Percentages of around four to five per cent have remained constant throughout the last decade (Scottish Government, *Criminal Proceedings in Scotland, 2010–11*, pp 12, 13, 28).

Sparing complainers and other witnesses from giving evidence

[45] This can be a relevant sentencing consideration (*cf Khaliq v HM Advocate*; *Sweeney v HM Advocate*; *cf R v Millberry*, paras 27, 28); but sentencers should bear in mind that complainers and witnesses will not always be vulnerable. In some cases the complainer may not be required to give evidence at all. Moreover, it appears that many complainers wish the trial to proceed, in part because this will lead to their learning more about the offence and the offender (Sanders, Young and Burton, *Criminal Justice*, pp 494, 495). Some victims and witnesses may feel that, given the choice, they would prefer to give evidence rather than see the accused receive a sentence discount (Ashworth, *Sentencing and Criminal Justice*, p 172; Henham, '*Bargain Justice or Justice Denied? Sentence Discounts and the Criminal Process*', p 537).

[46] In many cases, particularly those prosecuted on complaint, the witnesses will be police officers. In other cases much of the evidence may come from experts. An early plea may have some utilitarian value for such witnesses, in the sense that they can get on with other useful work; but it can scarcely be said that they are spared an ordeal. In my opinion, an early plea in such cases can attract at most a token discount.

[47] In some cases, the idea of sparing the victim from the ordeal of giving evidence may be irrelevant; for example, in breaches of preventive statutes or social security frauds.

Factors not relevant to discount

Strength of the Crown case

[48] Several decisions of this court establish that the strength of the Crown case is a factor that restricts the discount. Having reconsidered the matter in these appeals, I have come to the view that this approach is unsound. For the court to refuse or to minimise a discount on this basis is for the court to decide what the outcome would have been if the accused had gone to trial. In my view, there are dangers in that approach. It is the common experience of practitioners that criminal trials regularly produce the unexpected. Moreover, it is undesirable in my view that in determining the sentence the court should become involved in an appraisal of the strength of the Crown case based mainly on the Crown narrative. Experience shows that Crown witnesses do not always live up to their precognitions and that on occasions even the strongest cases come to grief. I also agree with the point made by Lord Eassie that in many cases the strength of the Crown case results from the accused's frankness with the police. In some cases, without the accused's own admission, the Crown would be in difficulty in finding corroboration. It is illogical, in my view, to withhold a discount from the accused in such circumstances. I conclude therefore that the strength of the Crown case ought not to be treated as a factor influencing the amount of the discount.

Previous convictions and public protection

[49] For the reasons that I have given, I consider that at the second and third stages of the sentencing process, the logic of sec 196 of the 1995 Act applies whatever the accused's previous record may be. I agree with the view of the Supreme Court of Victoria (*R v Tasker*, para 25) and disagree with the decision on this point in *Horribine v Thomson* (para 7). In my view, *Horribine v Thomson* should be overruled on this point. The question of previous convictions raises the related question of the relevance of the public protection element in a sentence. I shall discuss this point separately when considering how discounts are to be applied.

Assistance to the authorities

[50] In *Du Plooy* (paras 22, 23), the court considered the significance of the accused's having assisted the authorities after the commission of the crime, but obscured the issue by considering it in the context of contrition (para 22). The court acknowledged that the conduct of the accused in such ways was regularly taken into account and might be significant in reducing the sentence, but thought it preferable that these matters should be taken into account along with the plea of guilty when the court was arriving at the discount (para 23). I think that the reasoning of the court on this point is confused. Any assistance that the accused may have given to the police or the Crown in the investigation and prosecution of the offence is properly a matter of mitigation and, as such, a matter to be taken into account in the assessment of the headline sentence. On the other hand, in my opinion, to spare witnesses the ordeal of giving evidence is a matter that goes to the question of the discount. It should not be taken into account as both mitigating the headline sentence and increasing the discount, otherwise there is double counting.

Remorse

[51] An offender's remorse cannot, in my opinion, be a proper justification for a sentence discount (*Balgowan v HM Advocate*, para 3; *cf* case commentary, *Criminal Law Bulletin*, pp 5, 6). Where sec 196 of the 1995 Act applies, it applies regardless of whether the accused has shown remorse. My own view is that there is seldom any sure criterion for assessing whether the accused is truly remorseful; but where there is convincing evidence of remorse, the sentencer may make allowance for it, as an aspect of mitigation, in deciding on the starting figure (Sentencing Guidelines Council, *Reduction in Sentence for a Guilty Plea*, para 2.4; Ashworth, *Sentencing and Criminal Justice*, p 173; *cf R v Barney*; *R v Delucca*).

Unco-operative behaviour

[52] In *Leonard v Houston* the court held that an offender's unco-operative behaviour following his tendering of a guilty plea was a factor to which a sentencer could have regard. I cannot regard this as a relevant factor unless the effect of such behaviour is to nullify the administrative benefits of the plea.

How is a discount applied?

Construction of sec 196

[53] A central question in these appeals is whether a sentence discount should be applied across the board or whether individual elements in the headline figure should be ring-fenced from the application of the discount. The cases to which I have referred are unanimous in deciding that discounting cannot apply to the

public protection element in the sentence. All of these decisions can be traced back to para 19 of *Du Plooy*.

[54] In my opinion, these authorities are in error. I reach that view on an interpretation of sec 196 of the 1995 Act and on a review of some practical considerations.

[55] Section 196(1) entitles the court to allow a discount 'in determining what sentence to pass on, or what other disposal or order to make in relation to, an offender who has pled guilty to an offence.' It does not limit the scope of the discount in any way. The straightforward reading of the section is that the discount, if allowed, applies to the whole sentence. In my view, there is nothing in the wording of sec 196 to suggest that when the conditions of the section are fulfilled, the court should disaggregate any individual element from the starting figure and exclude it from the application of the discount.

[56] That interpretation of the section is in keeping with the general view that I have expressed as to the theory that underlies sentence discounting.

[57] Moreover, if the court should reduce the discount because of a factor that it has taken into account as an aggravating factor in its assessment of the headline sentence — the accused's criminal record, for example — there will be double counting, unfairly to the disadvantage of the accused.

[58] The view that I have taken on an interpretation of the legislation is fortified by practical considerations. Since so many diverse factors may be involved in the assessment of a sentence, the attribution of precise numerical values to individual elements in the sentence is to my mind an artificial exercise. That is shown, I think, in cases where this court has had to decide for itself what part of a sentence appealed against was referable to public protection (eg *Weir v HM Advocate*).

[59] The assessment of the headline sentence is not a matter of precise arithmetical calculation. It involves the making of an overall judgment from a consideration of numerous factors based on judicial experience. It is a process described in the Australian courts as that of 'instinctive synthesis' (*cf Markarian v R*) and seen in the Canadian courts as a delicate art based on competence and expertise (*R v M*; *R v LM*). In my view, the same process applies to the assessment of a sentence discount. On the interpretation that I favour, the sentencer should apply sec 196 by deciding what sentence is appropriate in the circumstances of the case and then simply applying the discount, if any. In this way the sentencer is saved the effort of making complex calculations, particularly in a busy sheriff court, and the resulting sentence represents a true exercise of judgment without a spurious appearance of arithmetical exactitude.

Is the public protection element ring-fenced?

[60] It follows from my interpretation of sec 196 of the 1995 Act that that part of the sentence that is referable to the protection of the public should not be excluded from the application of the discount.

[61] The contrary approach taken on this point in *Du Plooy* (para 19) and in subsequent cases (eg *Rennie v Frame*) rests on the view that the protection of the public must not be compromised by any discount. But we already have a penal policy in Scotland in which the protection of the public from dangerous offenders is expressly compromised by statute.

[62] Part I of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (cap 9) ('the 1993 Act') provides for the early release of prisoners on licence. A short-term prisoner, that is to say one who is serving a sentence of less than four years, is

entitled, whether he is dangerous or not, to be released after he has served half of his sentence. His release is unconditional unless he is made subject to a supervised release order (1993 Act, sec 1(1)).

[63] A long-term prisoner is entitled to be released on licence after he has served two-thirds of his sentence and must be released after serving half of it if the Parole Board so recommends (1993 Act, sec 1(2), (3); *cf* Renton and Brown, *Criminal Procedure*, paras 23.13 *et seq*).

[64] The release of a prisoner under these provisions does not depend on any consideration of public protection. A prisoner who behaves well will be given early release even though he is as great a danger to the public when he leaves prison as he was when he entered it. The serial road traffic offender who persistently drives while disqualified and uninsured is familiar in every sheriff court. Such an offender is a danger to the public and is sentenced on that basis. Sooner or later such an offender is given the statutory maximum sentence of 12 months' imprisonment. In such a case the early release of the offender under the 1993 Act after six months may well compromise the safety of the public.

[65] There are of course certain safeguards. In 2008/2009, the Parole Board considered the cases of 212 individuals on non-parole licences who were freed automatically under the provisions of the 1993 Act and whose behaviour in the community caused concern. The Parole Board recommended that 150 of those licensees should be recalled to custody (*Annual Report 2008–09*, pp 13, 14). In 2009/2010, the Parole Board considered a further 193 such cases and recommended that 123 licensees should be recalled to custody (*Annual Report 2009–10*, p 14).

Problem of extended sentences

[66] Notwithstanding the view that I have expressed in relation to the public protection element in a sentence (*supra*), I have come to the view that where an extended sentence is imposed, the extension period should not be subject to discounting.

[67] Discounting under sec 196 of the 1995 Act is open to the sentencer in relation to 'the sentence or other disposal or order'. Section 210A of the 1995 Act, added by the Crime and Disorder Act 1998 (cap 37), provides for the passing of an extended sentence on a sexual or violent offender where the requirements of the Act are met. An extended sentence is defined as a sentence of imprisonment that is the aggregate of the custodial term and the extension period (1995 Act, sec 210A(2)). The extension period of the sentence is imposed solely for the protection of the public (1995 Act, sec 210A(1)(b)). The section treats the custodial period and the extension period as together constituting 'the sentence'. On that basis, it could be argued that the aggregate sentence is the sentence to which any discount should be applied in terms of sec 196(1); or if it is not to be so regarded, is another form of 'disposal or order'. However, I have come to the view that, where discounting is concerned, the extension period is governed by its own special provisions. Section 210A provides, *inter alia*, that the extension period is a period during 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 [section 210A(1)(b)]', that is to say 'the purpose of protecting the public from serious harm from the offender.' In my view, where the sentencer is satisfied that an extended sentence should be imposed, the obligation to impose whatever extension period is 'necessary' for the purpose of protecting the public excludes the possibility of its being reduced to a period that *ex hypothesi* is not sufficient for that purpose by way of a discretionary

discount. I agree with the view of Lord Osborne on this point. An extended sentence is therefore, in my view, an exception to the general principle of sentence discounting that I have formulated.

Statutory minimum sentences

[68] The principle of sentence discounting is inevitably qualified by the principle that the court cannot alter what statute requires. A court cannot therefore discount a statutory minimum sentence except in the specific case of sec 196(2) of the 1995 Act which permits a sentencer to reduce the statutory minimum, in certain cases under the Misuse of Drugs Act 1971 (cap 38), by up to one-fifth.

Disqualification from driving and penalty points

[69] These disposals, in my opinion, constitute a sentence and come within the express wording of sec 196 of the 1995 Act.

Disqualification from driving

[70] In my opinion, a period of disqualification from driving is a penalty (*cf Adair v Munn*). As such it is a 'sentence ... or other disposal or order'. However, in the case of a disqualification, any discount granted cannot take the period of disqualification below the statutory minimum. The absence of an enabling provision such as is contained in sec 196(2) of the 1995 Act indicates that this result was intended by the Parliament, whether it was to protect the public or to punish the offender.

Penalty points

[71] For the same reasons, I consider that sentence discounting applies also to the imposition of penalty points for road traffic offences. The question was considered by a court of two judges in *Stewart v Griffiths*. In an *extempore* judgment that runs to 18 lines in the law report, the court held that penalty points were not like a financial penalty. They were in the nature of a warning to the accused as to his future driving. For that reason the court refused to reduce the number of penalty points imposed. The relevant authorities on the point were not cited to the court.

[72] In *Tudhope v Eadie* a Full Bench decided that the imposition of penalty points was a penalty in itself (*cf Coogans v MacDonald*, Lord Justice-General Cooper, p 104). The imposition of penalty points is a form of order that falls within the ambit of sec 196. The Strasbourg jurisprudence is to the same effect (*Malige v France*). In my opinion, *Stewart v Griffiths* was wrongly decided and should be overruled.

Sentence discounting in practice: the risks

Incentive to plead guilty

[73] There are two significant risks in sentence discounting. The first is that the allowance of substantial discounts may cause accused persons who have a stateable defence to play safe and plead guilty for the sake of the discount. The greater the potential discount, the greater is the risk of that, in my view. The prospect of a substantial discount is therefore a potentially dangerous incentive that may undermine the presumption of innocence (Ashworth and Redmayne, *The Criminal Process*, pp 312–314).

Public confidence in the criminal justice system and the credibility of sentences

[74] The second risk is that the allowance of substantial discounts may cause the sentencing decisions of the criminal courts to lose credibility and in this way may erode the authority of the courts generally.

[75] Research undertaken on behalf of the English Sentencing Advisory Panel on public attitudes to so-called date rape and to relationship rape (Clarke, Moran-Ellis and Sleney, *Attitudes to Date Rape and Relationship Rape: A qualitative study*) has indicated that there is some public scepticism about the justification for the sentence discount principle. The research found that while there was acknowledgment of the fact that a guilty plea spares the victim the trauma of giving evidence in court, there was a strong view among those members of the public interviewed that a reduction in sentence for such a plea was counter-productive and created opportunities for the offender to manipulate the judicial system to his own advantage. The problem with the policy of sentence discounting was seen in three different ways: a lack of equivalence if the offender received a reduced sentence for pleading guilty in relation to the severity of the crime and the effect on the victim; a perception that the principle is concerned with saving court time and costs, and prison costs, rather than sparing the victim from an ordeal; and a perception that an accused would use the sentence discount principle as an opportunity to play the system (pp 34, 55, 56).

[76] Perhaps the most fundamental problem, however, is the possible perception of injustice, particularly in cases where severe sentences are deserved. If in such a case there are two accused, the accused who pleads guilty at the earliest opportunity may receive a sentence that is less by a matter of years than that imposed on the accused who is found guilty after trial (*cf* Darbyshire, '*The Mischief of Plea Bargaining and Sentencing Rewards*', p 901).

[77] For all of these reasons I consider that the court's discretion to allow a discount should be exercised sparingly and only for convincing reasons.

Levels of discount

[78] In my opinion the sliding scale approach exemplified in the definitive guideline carries a risk of rigidity. That approach was favoured by this court in *Spence v HM Advocate*, but with the clear reservation that the amount of the discount, if any, would depend in every case on the circumstances (para 15). As it happens, the sliding scale mentioned in *Spence* coincides with the definitive guideline. I think that the approach in *Spence* is sound, but only so long as sentencers do not overlook that reservation (*cf HM Advocate v Graham*, para 46). In my view, the broad principle that, in general, the discount will be the greater the earlier the plea is probably a sufficient statement of guidance for most purposes.

[79] In *Du Plooy* this court said that discounting for an early plea should be kept within bounds (para 4). My own view is that this court may have to give further consideration to the suitability of discounts of a third or more contemplated in *Du Plooy* (para 26) and in *Spence* (para 14). To my mind, discounts of that size, particularly in the light of the early release provisions to which I have referred, could in certain cases raise a question of public confidence in the ability of our criminal justice system to deal with offenders fairly and resolutely. This, however, is not an opportune occasion for us to consider that matter since we heard no submissions on it.

VI APPEALS AGAINST SENTENCE ON THE GROUND OF THE AMOUNT OF THE DISCOUNT

[80] The complaint that an appellant has received an insufficient discount following his guilty plea is heard too frequently in this court. The application of a discount for a plea of guilty is not a purely mechanical exercise (*Brown v HM Advocate*, para 10). I agree with the following comments of Lord Philip in his dissenting opinion in *RB v HM Advocate*:

> 'I acknowledge that for the provisions of section 196 to operate effectively there is a need for accused persons and their advisers to have some general indication that an allowance may well be made for an early plea of guilty and of the likely extent of that allowance. But for that requirement to be fulfilled I do not consider it necessary or appropriate that the discretion of the sentencer should be impinged upon to the extent of rendering a discount in respect of an early plea of guilty virtually automatic. Where the sentencer considers the question and gives cogent reasons for declining to apply a discount, careful consideration should be given before the exercise of his discretion is interfered with' (para 22; *cf* also Lord Abernethy, para 17).

[81] Where the sentencer has given cogent reasons either for allowing the discount in question or for declining to apply a discount at all, I consider that it is only in exceptional circumstances that this court should interfere. I repeat what I said in *HM Advocate v Graham* (paras 21, 22). Guidelines provide a structure for, but do not remove, judicial discretion. Guidelines should not lead to a mechanistic approach. The sentencing exercise should always involve the sentencer's judgment and discretion which he must in every case exercise on a consideration of all of the circumstances. Those representing an accused who has tendered an early plea should bear this in mind when considering whether to lodge an appeal based solely on the amount of the discount.

VII DECISIONS ON THE APPEALS

(1) Gemmell v HM Advocate

[82] On 25 September 2008 the appellant and his co-accused appeared at the High Court at Glasgow at a continued preliminary hearing on charges of housebreaking with intent to steal and hamesucken and robbery. They tendered pleas of guilty subject to deletions that the Crown accepted.

[83] While the complainer was out of his flat, the appellant and the co-accused forced an entry to it. When the complainer returned, they attacked him. The appellant threatened him with a knife, demanded money and tied his wrists and ankles. They took from him his wallet and his mobile telephone. The appellant demanded that the complainer disclose his PIN number and threatened him with further violence if he should give them a false number. The police detained the appellant in the flat and the co-accused within the common close. Both tried to escape. The appellant was found to have a knife and items of property of the complainer, including the wallet and the telephone. The complainer was a recovering alcoholic who was disabled as a result of a stroke.

[84] The appellant had an extensive list of previous convictions, mainly for offences of dishonesty and for breaches of community-based disposals. The sentencing judge took the view that the appellant and his co-accused had inflicted an appalling act of violent criminality on a vulnerable individual, at night, in what

ought to have been the safety of his own home. He could find no mitigating factors. He considered that he had to have regard to the need to protect the public. He sentenced both accused to six years' imprisonment discounted from seven years to reflect the pleas of guilty. In doing so, he had regard to the decisions of this court in *Du Plooy* and *Weir v HM Advocate*; and he excluded the public protection element from the scope of the discount.

[85] In view of the nature of the offence, the starting figure of seven years was well justified. For the reasons that I have given, I would apply the discount to the whole of that figure. Since the plea was tendered at a preliminary hearing, I would allow a discount of 25 per cent and substitute a sentence of five years and three months.

(2) Robertson v HM Advocate

[86] The appellant was indicted on a charge of assaulting his partner to her severe injury. On 19 January 2009 at the trial diet at Kilmarnock Sheriff Court the Crown accepted his plea of guilty to assault to injury. The plea had been tendered at the first diet and refused by the Crown.

[87] In the course of an argument, the appellant grabbed the complainer by the hair and repeatedly slapped her on the face. When the complainer tried to call the police, the appellant grabbed the telephone from her. He then put his hands around her throat and compressed it.

[88] On 4 February 2009 the sheriff sentenced the appellant to 20 months' imprisonment, discounted from a period of two years and imposed a supervised release order in terms of sec 209 of the 1995 Act for a period of ten months. He had regard to the appellant's serious record for offences of violence, including assault and robbery, for which he had served terms of imprisonment. He placed great significance on the need to protect the public, and on that account restricted the discount to one-sixth.

[89] In my opinion, the headline figure of two years' imprisonment was appropriate. In deciding on that figure the sheriff took into account the element of public protection. In this case too I would allow a discount of 25 per cent in the circumstances and apply it to the whole starting figure of two years. I would therefore substitute a sentence of 18 months' imprisonment, and therefore a supervised release order of nine months.

(3) Gibson v HM Advocate

[90] The appellant was indicted on charges of assault with intent to rob and of possession of a knife. On 16 February 2009 at a first diet at Dundee Sheriff Court, he pled guilty subject to a minor deletion from charge 1 which the Crown accepted.

[91] The appellant shouted at the 59-year old complainer and demanded money. When the complainer ignored him, he jumped on his back causing him to fall to one knee. The appellant produced a large kitchen knife. The complainer struggled with him and took the knife from him. The appellant admitted to the police that he held the knife to the complainer and said that he had mistaken him for someone else.

[92] The sheriff took the view that the offences were serious and that any street robbery with a knife merited a lengthy sentence (*cf Kane v HM Advocate*). The appellant had sustained recent convictions for assault and robbery and the carrying of a knife. His record, which the sheriff described as deplorable, also included convictions for vandalism, theft, breach of probation, breach of the peace and

possession of heroin. The sheriff imposed a *cumulo* extended sentence of six years, comprising a custodial term of four years' detention, discounted from five years, and an extension period of two years. He considered that a period of two years of the custodial term was referable to the protection of the public and did not apply any discount to that part of it.

[93] In this case the custodial period of five years from which the sheriff began was appropriate. I would discount the whole of that period by 25 per cent and substitute a period of three years and nine months. For the reasons that I have given, I consider that the extension period should remain at two years.

(4) Peter Stephen McCourt

[94] On 12 August 2009 at Dumbarton Sheriff Court the appellant pled guilty by way of a plea under sec 76 of the 1995 Act to a contravention of sec 49(1) of the Criminal Law (Consolidation) (Scotland) Act 1995. On the date libelled in a superstore in Dumbarton the appellant was searched by police officers. He was found to have a knife with a four-inch blade concealed on his person. He was then arrested. Questions arose as to the legality of the search; but those were resolved after the CCTV footage became available. The appellant thereupon instructed a plea of guilty. The appellant had 28 previous convictions, several of them for serious violence and three for the carrying of knives. The sheriff imposed a sentence of three years and six months' imprisonment discounted from a starting figure of four years. He considered that half of the sentence was imposed for public protection and allowed no discount on that part. He then applied a discount of 25 per cent to the other half of the sentence, namely six months and discounted that from the period of four years. The sheriff considered that the plea was not tendered at the earliest opportunity and restricted the discount on that account.

[95] In my opinion, the sheriff's headline figure of four years' imprisonment was appropriate. I disagree with the sheriff in relation to the amount of the discount. In my view the sec 76 letter was to be treated in the circumstances as a plea tendered at the earliest stage. Therefore I would discount the starting figure of four years' imprisonment by one-third, apply that discount to the whole of the headline figure and substitute a sentence of two years and eight months.

(5) Ross v McGowan

[96] On 6 March 2009 at Aberdeen Sheriff Court at a continued first calling the appellant pled guilty on summary complaint to a contravention of sec 3 of the Road Traffic Act 1988. The *locus* was the A947 road in Aberdeenshire. Two cars were stationary behind a third vehicle, which was waiting to turn right across the oncoming traffic. The appellant drove towards this queue at speed. He drove into the first car, causing it to collide with the car ahead. All three vehicles sustained extensive damage; the first costing £4,000 to repair, the second costing £1,500. The appellant's vehicle was written off. The appellant's passenger sustained significant injuries including a fracture to his right wrist and left hand. The occupants of the other two vehicles sustained minor injuries.

[97] The appellant was a first offender. The sheriff fined him £500, discounted from £750, and imposed seven penalty points on which he allowed no discount. This resulted in the revocation of the appellant's licence under the Road Traffic (New Drivers) Act 1995 (cap 13).

[98] In my view, the fine was appropriate and should stand; but the sheriff should have discounted the penalty points. I would reduce the penalty points to five.

(6) Hart v PF, Alloa

[99] On 30 June 2009 at a continued first calling at Alloa Justice of the Peace Court, the appellant pled guilty on summary complaint to a contravention of sec 3 of the Road Traffic Act 1988. This charge arose from a straightforward collision between two cars at a junction. The other driver sustained minor neck and back injuries. The appellant had one previous conviction for the same offence. The justice fined him £500 discounted from £650 to reflect his plea of guilty. He also imposed six penalty points. Unfortunately, in his original report and in the supplementary report requested by this court, he fails to say whether he discounted the number of penalty points.

[100] Both of the justice's reports are unsatisfactory. There is no point in our wasting further time in trying to elucidate his reasoning. In my opinion, the appropriate headline sentence was a fine of £650 and six penalty points. On a broad view, the discount should be about 25 per cent. I would apply it to both elements in the sentence and substitute a fine of £500 and four penalty points.

(7) HM Advocate v Ogilvie

[101] On 21 September 2009 the respondent pled guilty to a contravention of sec 5(1)(a) of the Road Traffic Act 1988. Her blood/alcohol level was more than three times the legal limit.

[102] The respondent was a first offender. She was 22 at the time of the offence. She had two young children. It was said in mitigation that she had been persuaded to drive by her friends; that she was ashamed of her conduct and that she accepted responsibility for it.

[103] The sheriff says that her detention had been a salutary experience and that the loss of her driving licence would have a heavy impact upon her. He fined her £175. He reports that that represented a one-third discount. Partly because of the blood/alcohol level and partly because she was driving without lights, he considered that disqualification for 24 months would otherwise have been appropriate. He discounted that to 15 months. He comments that he might perhaps have reduced the discount to take account of the public safety and deterrent elements of the disqualification.

[104] This was his conclusion:

> 'I therefore considered public policy and safety but did decide to apply a sentence discount. I did this as the immediate impact upon the accused's life would be the same whether I imposed a disqualification of 15 months or 24 months but her ability to re-enter the job market would be severely effected [*sic*] by the longer ban. I was of the view that the accused was genuinely traumatised by her act of folly and sincerely contrite and that she would not pose a danger to the public were she allowed to regain her licence after 15 months.'

[105] The test is whether the sentence was unduly lenient; that is to say, outside the range of sentences that the sentencer, applying his mind to all relevant factors, could reasonably have imposed (*HM Advocate v Bell*, p 353).

[106] On any view, this was a lenient sentence; but in all the circumstances, in my opinion, it was not unduly so. I would refuse the Crown appeal.

LORD OSBORNE—

Background circumstances of these appeals

[107] I am grateful to your Lordship in the chair for your description of the details of circumstances which have given rise to these several appeals. It is sufficient for me to say that they all arise, in one way or another, out of the application of the provisions of sec 196 of the Criminal Procedure (Scotland) Act 1995 ('the 1995 Act'). Looking at the interlocutors pronounced remitting the several cases to this court for consideration, it is evident that two particular concerns have been expressed in relation to that matter. These are, first, the issue of public protection and the part that it may play in the process of sentencing following a plea of guilty, and, second, the matter of what has been described as 'double counting' that may be involved in such a sentencing process.

[108] In my view, there are three particular areas of sentencing where, it has been perceived, problems arise. These are, first, the imposition of a normal custodial sentence, second, the imposition of an extended sentence for sexual or violent offences, under sec 210A of the 1995 Act, and, third, the making of orders for disqualification from obtaining or holding a licence to drive and for the imposition of the so-called penalty points in terms of the legislation relating to road traffic. I intend to deal with each of these areas in turn.

Relevant legislative provisions

[109] Section 196 of the 1995 Act, as it now stands, is in the following terms:

> '(1) In determining what sentence to pass on, or what other disposal or order to make in relation to, an offender who has pled guilty to an offence, a court shall take into account–
>
> (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty; and
> (b) the circumstances in which that indication was given.
>
> (1A) In passing sentence on an offender referred to in subsection (1) above the court shall–
>
> (a) state whether, having taken account of the matters mentioned in paragraphs (a) and (b) of that subsection, the sentence imposed in respect of the offence is different from that which the court would otherwise have imposed; and
> (b) if it is not, state reasons why it is not.'

[110] It should be explained that, as originally enacted, at sec 196, in subsec (1) there appeared the word 'may' where the word 'shall' now appears. Furthermore, it contained no subsec (1A). These changes were effected by sec 20 of the Criminal Procedure (Amendment) (Scotland) Act 2004, which came into force on 4 October 2004.

[111] It is appropriate at this stage to make one or two observations concerning sec 196 of the 1995 Act. First of all, it should be noted that what it requires is that the court, in determining what sentence to pass on, or what other disposal or order to make in relation to, an offender who has pled guilty is to 'take into account' the matters defined in subsec (1)(a) and (b). It is self-evident that, while those matters must be taken into account, they form but two of the wide spectrum of matters

which any court must necessarily take into account in determining an appropriate sentence or order. That spectrum plainly includes the need for the protection of the public to play a part in the selection of such a sentence or order. Putting the matter in another way, sec 196 expressly adds to the range of matters which must be taken into account, but does not prohibit the taking into account of other relevant matters, including any particular need for public protection. What weight may be given to the matters referred to in subsec (1)(a) and (b) must remain a matter for the discretion of the court. It is plain from the provisions of subsec (1A)(b) that the court may lawfully give no weight to them provided that it can state reasons why that course is being taken.

[112] Secondly, because of the language that is sometimes used in relation to the effect of sec 196, which includes references to 'entitlement' to a discount on a sentence, it must be emphasised that the process of sentencing is one which involves the exercise of a discretion by the court within the framework of the statutory provisions which apply to any situation under consideration, which is inconsistent with the idea of 'entitlement'. Thirdly, it is right to recognise that, following upon the enactment of sec 196 at least, it is beyond argument that there exists a proper rationale for making an allowance in a sentence in respect of a plea of guilty. That was not always recognised. The predecessor of sec 196 was sec 33 of the Criminal Justice (Scotland) Act 1995, the enactment of which arose out of the decision in an appeal against sentence in *Strawhorn v McLeod*. In that case the court commented adversely upon the propriety of the allowance of a discount upon a sentence in respect of an early plea of guilty. Lord Justice-Clerk (Ross) said (p 415):

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

It might be thought that that view would possess force if the only object of sentencing was retribution and deterrence. However, it is now recognised that wider considerations must play their part. In *Cameron v R*, a decision of the High Court of Australia, Kirby J said (para 65):

> 'The true foundation for the discount for a plea of guilty is not a reward for remorse or its anticipated consequences but acceptance that it is in the public interest to provide the discount.'

He went on (para 67):

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

In short, therefore, the legitimacy of according a discount in respect of a plea of guilty, in appropriate circumstances, cannot now be challenged.

Relevant authorities

[113] Section 118 of the 1995 Act, which is concerned with the disposal of solemn appeals under sec 106 of that Act, in subsec (7) provides that:

> 'In disposing of an appeal under section 106(1)(b) to (f) or 108 of this Act the High Court may, without prejudice to any other power in that regard, pronounce an opinion on–
>
> (a) the sentence or other disposal or order which is appropriate in any similar case'.

This is the basis for what have come to be known as guideline judgments. Such a judgment was given, after appropriate deliberation, in *Du Plooy v HM Advocate*, in which the court was concerned with the operation of sec 196 of the 1995 Act in its unamended form. The judgment of the court in that case must therefore enjoy the respect which a guideline judgment should enjoy. In the context of the present case it is worth examining that judgment in some detail.

[114] In the opinion of the court (para 5), consideration was given to the words of sec 196(1), as they then stood, which included the word 'may' and the corresponding enactment in England and Wales, sec 152(1) of the Powers of Criminal Courts (Sentencing) Act 2000 (cap 6), the wording of which was identical apart from the use of the word 'shall' in place of 'may' in the Scottish enactment. The conclusion reached was that this difference in the legislation as it then stood made no practical difference. The matters set forth in sec 196(1)(a) and (b) of the 1995 Act were matters which any sentencer would be expected to take into account. With that view, I would respectfully agree. Thus I would attribute no particular significance to the amendment effecting the substitution of the word 'shall' for the word 'may', to which I have referred. It must be borne in mind that the relevant matters are to be 'taken into account'; that does not mean that they are necessarily always to have a determinative influence in the selection of a sentence. That much is obvious from the terms of subsec (1A)(b).

[115] For the reason which I have already mentioned, it is worth emphasising what was said by the Lord Justice-General in the opinion of the court in *Du Plooy* (para 7):

> 'Fifthly, it is not in doubt that whatever allowance, if any, should be made in respect of a plea of guilty is a matter for the discretion of the sentencer. This is the approach which has been followed in Scotland (*HM Advocate v Forrest*; *Docherty v McGlennan*; *Tennie v Munro*) and in England (*R v Hussain* [[2002] 2 Cr App R (S) 59], paras 13, 14).'

In the light of that, the inappropriateness of talking of an 'entitlement' to a discount becomes obvious.

[116] In paras 16 to 23 in the opinion of the court in *Du Plooy* consideration was given to the factors relevant to an allowance in respect of a plea of guilty. In view of the fact that the need for the protection of the public was a subject of consideration in this part of the opinion, it is appropriate to note what was said there. In para 17, consideration was given to types of circumstances which might be unfavourable to the granting of an allowance in respect of a plea of guilty, as they had been

approached in English decisions. According to those judgments, they included: (1) circumstances where the imposition of a long sentence, if necessary the maximum, was considered to be necessary for the protection of the public; (2) where the seriousness of the offence was such that the public interest required the imposition of the maximum sentence; (3) where the plea of guilty was of a tactical nature; and (4) where the plea was practically inevitable. For the present purposes, what was said in relation to items (3) and (4) need not be further considered. However, in the present context, it is helpful to note what was said as regards the first two items. In para 18 of the opinion of the court the Lord Justice-General said this:

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

In light of the views which are from time to time expressed by sentencers concerning the inadequacy of statutory maximum sentences, that point is worthy of emphasis. Thus, I would respectfully agree with what was said in para 18.

[117] In para 19 of the opinion of the court in *Du Plooy*, the issue of the need for public protection as a factor was considered. This is at the heart of the concerns which have given rise to the present proceedings. In view of that, it is appropriate to quote the whole paragraph:

> 'What we have said in the last paragraph should be understood as subject to the following. Earlier in this opinion we indicated that the ''utilitarian value'' of the plea and the implications of the accused's acceptance of his guilt should be taken into consideration in determining the appropriate punishment of the accused. Thus they should be considered along with matters relevant to punishment, such as the seriousness of the offence and the accused's previous convictions. However, the sentence may also contain an element which is designed to protect the public against the accused's reoffending. In our view the ''utilitarian value'' of the plea of guilty and the accused's acceptance of his guilt should not be allowed to detract from the need to protect the public. Accordingly where a sentencer imposes an extended sentence under sec 210A of the 1995 Act, ie where the sentencer takes the view that the period for which the offender would be subject to a licence ''would not be adequate for the purpose of protecting the public from serious harm from the offender'', no allowance in respect of a plea of guilty should be made in determining the length of the extension period. Likewise, where the sentencer imposes a determinate sentence which contains an element which is designed to protect the public from the accused's reoffending, the sentence should not, to that extent, be subject to any allowance in respect of the plea of guilty. Comparison may be made with the fixing of a punishment part of a life sentence under sec 2(2) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (cap 9), as amended, which provides for the taking into account of the matters mentioned in paras (a) and (b) of sec 196(1).'

[118] In the debate before us, criticism was focused upon this paragraph; indeed, it was submitted that we should overrule or disapprove of the substance of it. With that submission I disagree. In my view, the worst than can be said of this paragraph is that certain parts of it may be ambiguous and require clarification. In that connection, the observation that 'the sentence may also contain an element which is designed to protect the public against the accused's reoffending', it seems to me, may have given rise to some confusion. The same may be said of the passage in this paragraph where it is said:

> 'Likewise where the sentencer imposes a determinate sentence which contains an element which is designed to protect the public from the accused's reoffending, the sentence should not, to that extent, be subject to any allowance in respect of the plea of guilty.'

As I see it, the difficulty with these passages arises from the references to 'an element which is designed to protect the public against the accused's reoffending'. There is a sense in which any custodial sentence, which will have the effect of preventing the offender from inflicting further damage upon the public for its duration, may be said to possess an element which is designed to protect the public against reoffending. However, I do not consider that that was what was meant in para 19. What I consider was meant in the passages under consideration was a reference to a sentence in which, because of the particular circumstances of the case, or of the offender, a material purpose in the identification of an appropriate sentence would be the protection of the public from the offender's reoffending. An example of such a situation might be where an offender had come before the court pleading guilty to an offence of a kind which was damaging to the public, but which, of itself, was not of major gravity. If the offender in question possessed a criminal record containing numerous previous convictions for the same type of offence, it might be appropriate for the court to select a sentence which might be substantially longer than might normally have been expected to have been imposed in respect of such an offence. The reason for the selection of that sentence would be the recognition of the need to protect the public against the habitual offending of the individual in question. In imposing such a sentence, the sentencer might specifically state that that was the explanation for the sentence which he imposed.

[119] Reverting to the particular passages in para 19 under consideration, in view of the course which has been adopted by certain sentencers, in situations where they conceived that there was a need for protection of the public against offenders reoffending, which has included, in a sentence of any given duration, the identification of a specific proportion of that sentence which was intended to serve as a protection of the public, it is necessary to say more. In the light of that approach, there have been cases where, following a plea of guilty, a sentencer has applied what might be called the normal discount to that portion of the sentence not intended specifically for the protection of the public and no discount to the section of the sentence which was intended for the protection of the public. In my view, such an approach is productive of unnecessary complication in the sentencing process and not justified by anything said in para 19 of *Du Plooy*. What I believe was intended in the passages under consideration was the application of a diminished allowance, or even possibly no allowance, in respect of a plea of guilty in the kind of situation where there was an obvious need for a sentence specifically designed for the protection of the public. It is my view that such a purpose would be quite consistent with the terms of sec 196(1A)(b) of the 1995 Act, which plainly

contemplates that either no allowance, or, *a fortiori*, a reduced discount might be appropriate in the particular circumstances of a case. Summarising my own view as to the decision in *Du Plooy*, I consider that there is no need for any part of it to be overruled or disapproved, subject to the explanation of its effect which I have sought to give.

Other authorities relating to normal custodial sentences

[120] I turn now to consider the other authorities on which criticism was focussed before us. The first of these was *Weir v HM Advocate*, a case arising from a plea of guilty to a breach of sec 2 of the Road Traffic Act 1988. The maximum penalty available in respect of such a breach was two years' imprisonment. The sentencing judge took the view that the case with which he had to deal was one of the most serious cases of dangerous driving that he had come upon. Against that background, despite the plea of guilty at a preliminary hearing, the sentencing judge imposed the maximum available sentence of imprisonment, against which the accused appealed. Before us, particular criticism was directed against what was said in paras 12, 13 and 15 of the opinion of the court. It appears to me that in para 12, all that is to be found is a narrative of what had been said in *Du Plooy*. However, in para 13, the court is considering the whole relevant circumstances which a sentencer requires to take into account, including the matters referred to in sec 196(1) of the 1995 Act. Looking carefully at the terms of para 13, it appears to me that they simply echo what was said in *Du Plooy* (para 19), about which I have already expressed my view. In para 15 of *Weir* the court explained its disposal of the appeal. It said:

> 'We recognise that in this case a major element of the sentence imposed can properly be attributed to the need to protect the public. Accordingly, there can be no question of the application of a discount of 25%. In the whole circumstances we shall apply a discount of one-third of that percentage. Accordingly the appeal is allowed to the extent of quashing the sentence of two years imprisonment and substituting for a it a sentence of 22 months, being two months less than the custodial sentence would otherwise have been.'

In my opinion, the approach taken to the allowance of a discount in that case was wholly in accordance with the principles set forth in *Du Plooy*, as properly understood. The allowance of a small discount in the circumstances, having regard to the stage of the plea, was explained by the existence of a major element in the sentence attributable to the need to protect the public.

[121] In *Coyle v HM Advocate* the appellant had pleaded guilty at the earliest opportunity to driving while disqualified and had admitted nine analogous previous convictions, the offence having been committed about five weeks after his release from a prison sentence. He had been sentenced to 11 months' imprisonment, representing a discount of one month on the maximum sentence of 12 months. He appealed to the High Court on the ground that the sentence should have been discounted by one third, being the normal level for a plea given at the earliest opportunity. In his report to the High Court the sentencing sheriff stated that he had restricted the discount because of the appellant's record. The court held that the sheriff had been entitled to restrict the discount as he did. Before us, criticism was focussed particularly on what was said in para 8 of the opinion of the court. In that paragraph the court said:

> 'The main thrust of counsel's submission for the appellant was that the sheriff had erred by, in effect taking account of the appellant's record of analogous previous convictions twice over, both in selecting the starting point of the sentence and then again in restricting the discount. While there is at first sight an appearance of merit in that point, we have come to the conclusion that it is not well founded. There was no challenge to the relevance of the appellant's record to the decision to take as the starting point the maximum sentence permitted by statute. The question is, when the sheriff came to consider what discount to allow under sec 196 for the early plea, the appellant's record of analogous previous convictions was relevant to the exercise of his discretion under that section, or had to be left wholly out of account. We are not prepared to hold that it was irrelevant. If that proposition were accepted, the result would be that a persistent offender, however richly he deserved the maximum sentence, both as a punishment and to protect the public from his lawless driving, would be able to secure the ''normal'' discount for a sec 76 plea, and thus avoid the maximum sentence by a considerable margin. In the absence of any other considerations pointing to a discount of less than one-third, that discount would have to be allowed despite the record. We do not consider that we are driven to that unattractive result by the relevant statutory provisions. The sheriff was in our view entitled to restrict the discount as he did'.

In my view there is no basis for criticism of that passage. It appears to me to recognise the part to be played by the need to protect the public not only in the selection of the appropriate starting point, but also in the consideration of an appropriate discount in terms of sec 196.

[122] In view of what is said in the passage which I have just quoted, it is perhaps appropriate to consider for a moment the concept of 'double counting'. As I understand it, that concept is more commonly referred to in the context of statistical or financial calculations. However, in the present context, if what is meant by it, is the taking into account of a factor which may legitimately influence the selection of the starting point in the sentencing process and then the taking into account of that factor in the assessment of any appropriate discount, I would reject the alleged illegitimacy of that approach. It simply reflects the relevance to both stages of the sentencing process, for example, of the record of the individual concerned.

[123] In *Horribine v Thomson*, once again, the court was concerned with a case of driving while disqualified. The appellant had pleaded guilty at the first calling of his case, but had been sentenced to the maximum sentence of six months' imprisonment. He appealed to the High Court against the sentence on the ground that he had not been given a discount for his plea. In his report, the sheriff stated that he had not given any discount because his powers were wholly inadequate, the appellant had an appalling record and should have been dealt with on indictment, and the only protection which could be afforded to the public was by removing him for the maximum period from the temptation of driving. The High Court held that it was illegitimate for a sentencer, in circumstances where discounting factors otherwise existed, to impose the maximum sentence by reason of his belief that the maximum available to him was inadequate punishment for the offence in question. Before us, criticism was focussed upon para 7 of the opinion of the court. In that paragraph the court recognised that, while the sheriff in sentencing had proceeded to some extent upon the need to protect the public, it was reasonably plain that punitive and deterrent elements were also taken into consideration. That rendered the case a mixed one. A discount to some extent was therefore appropriate. However the court considered that the sentencer had a discretion in relation to its amount. It observed that the appellant had a very serious record for analogous offences which was seen

as a reason for modifying the amount of the discount which might otherwise have been appropriate. Its decision was that the appeal should be allowed to the extent of quashing the sentence of six months' imprisonment and substituting therefor a period of five months and two weeks. In my view, there is nothing which is properly open to criticism in that decision. In effect, the court recognised that a material factor in the sheriff's sentencing process was the need to protect the public. In view of that, it was a proper exercise of discretion to accord to the appellant a very limited discount in respect of his plea.

[124] In *Jackson v HM Advocate* the appellant pleaded guilty at a sec 76 diet to a charge of the culpable homicide of a child and the causing of severe injury to her mother, committed by what was described as a series of appalling pieces of driving. The sentencing judge took a starting point of 16 years' imprisonment and selected seven years of that period to reflect the need for public protection. He then applied a discount of one-third to the remaining part of the sentence which he reduced to one of 13 years. The appellant appealed to the High Court. After holding that the starting point in the sentencing process was not excessive, it held that there was an element of public protection in the sentence of 16 years and that the appropriate method was to apply a discount to the whole sentence, but at a reduced rate of 25 per cent in order to reflect that element. The appeal was therefore allowed and the sentence quashed and the sentence of 12 years' imprisonment substituted for it. The decision in this case was criticised as having departed from the use of a level of discount which would have been normal in the circumstances of the case, on account of the factor of public protection. In my opinion, that criticism is quite unwarranted for the reasons that I have explained. It respectfully appears to me that the decision in *Jackson* was taken in accordance with a proper interpretation of para 19 in *Du Plooy*.

Extended sentences under sec 210A of the 1995 Act

[125] At the outset, it is necessary to note the provisions of sec 210A of the 1995 Act, which provide for extended sentences for those convicted on indictment of a sexual or violent offence. In relation to such cases it is provided that:

'(1) ... the court may, if it–

(a) intends, in relation to–

(i) a sexual offence, to pass a determinate sentence of imprisonment; or

(ii) a violent offence, to pass such a sentence for a term of four years or more; and

(b) 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 protecting the public from serious harm from the offender,

pass an extended sentence on the offender.

(2) An extended sentence is a sentence of imprisonment which is the aggregate of–

(a) the term of imprisonment (''the custodial term'') which the court would have passed on the offender otherwise than by virtue of this section; and

(b) a further period (''the extension period'') for which the offender is to be subject to a licence and which is, subject to the provisions of this section, of such length as the court considers necessary for the purpose mentioned in subsection (1)(b) above.'

[126] In the debate before us, the issue of the proper approach to be taken in relation to sec 196 of the 1995 Act, where an extended sentence under sec 210A of that Act was considered appropriate, arose in connection with the appeal of David Alexander Gibson. In order to focus the issue, it is necessary to consider what was done in that case. The appellant appeared at Dundee Sheriff Court on an indictment containing charges of assault with intent to rob, involving the use of a knife and possession of a knife contrary to sec 49(1) of the Criminal Law (Consolidation) (Scotland) Act 1995. At a first diet, the appellant pled guilty to charge 1 as amended and to charge 2 as libelled. Subsequently the sheriff sentenced the appellant to an extended sentence, having a custodial term of four years' imprisonment and an extension period of two years. The court was informed that the appellant had always admitted his guilt and that attempts had been made to resolve the case by means of a sec 76 letter, but this had proved not to be possible for technical reasons. The sheriff took the view that the offences with which he was dealing were extremely serious. The social enquiry report before him expressed the view that the appellant was at a high risk of reconviction and a high risk of causing harm. The appellant had a deplorable record. In all the circumstances he considered that the period during which the appellant might be subject to a licence would not be adequate for the purposes of protection of the public. Accordingly he decided to pass an extended sentence. His view was that the appropriate custodial term would be one of five years' detention. Two years of that he considered was for the protection of the public. He did not apply any discount to that part of the sentence. However, he considered that a discount of one year was appropriate having regard to the timing of the plea. Upon that basis the period of licence would be between two years and 32 months, depending on the date of release. The sheriff did not consider that to be adequate. Accordingly he imposed the extension period of two years. That period was not discounted. In the grounds of appeal for the appellant it is averred that the extension period of two years satisfied the sheriff's concern for public protection and that a discount should have been given on the whole custodial part of the sentence. The length of that custodial term was also criticised.

[127] For reasons that I hope I have already made clear, in my opinion, while in the imposition of a custodial sentence, the element of concern for public protection may result in the application of a percentage discount lesser than that which might have otherwise been appropriate having regard to the timing and circumstances of a plea, it is not appropriate for a sentencer to identify a particular part of a custodial sentence which is said to be necessary for the protection of the public. Thus, to the extent that the sheriff in the case just described followed that course, I consider that his sentence was reached upon a misconceived basis.

[128] In the course of the debate before us, it was suggested that what was said in *McGowan v HM Advocate*, in particular what was said in para 16 of the opinion of the court, should be disapproved. In para 16 Lord Justice-General Cullen said this:

> 'We should add that, as was stated in *Du Plooy* at the paragraph to which we have been referred, for the purposes of discounting in respect of a plea of guilty, no allowance should be made in respect of an extension period or any element in a custodial term which is for the protection of the public.'

That paragraph simply mirrors the language employed in para 19 in *Du Plooy*. What I have already said in relation to the interpretation of that latter paragraph is apt in relation to para 16 in *McGowan*. Anything said in *McGowan* should not be

interpreted as justifying the identification of a specific period in a custodial sentence considered necessary for the protection of the public.

[129] In my opinion *McGowan* is also significant for the reason that, in para 15 of the opinion of the court there is a useful explanation of the approach to be followed in the identification of a custodial term as part of an extended sentence. In that paragraph, the Lord Justice-General said:

> 'As was pointed out in *Du Plooy v HM Advocate* (para 19) a determinate sentence which is not an extended sentence may contain an element for the protection of the public from the offender's reoffending. However, that protection cannot extend beyond the period for which the offender is subject to a licence after his release. An extended sentence is intended to provide protection for the public from serious harm from the offender beyond the normal period of the licence, that is, of course, assuming that risk of serious harm is not so great as to make it necessary for the court to impose a life sentence. Thus, in considering whether to impose an extended sentence and, if so, the length of the extension period, the court is concerned that the risk of serious harm to the public from the offender following the end of the normal period of the licence. It follows that the imposition of an extended sentence should not affect the length of the custodial term, that is to say in terms of subsec (2)(a) [of sec 210A of the 1995 Act], ''the term of imprisonment which the court would have passed on the offender'' otherwise and by virtue of sec 210A.'

I would respectfully agree with that observation. Thus, in my opinion, in selecting a custodial term as part of an extended sentence, the approach to be taken by the sentencer should be the same as that which would be taken if the sentencer was selecting a custodial sentence of the normal kind. It is upon that basis that I doubt the soundness of what was said in para 19 of the opinion of the court in *Jordan v HM Advocate*. There, Lord Nimmo Smith said:

> 'Where an extended sentence is appropriate, the length of the custodial term will be dictated primarily by the requirements of retribution and deterrence, while the length of the extension period will be dictated by the requirement of public protection.'

I take no issue with the observation that the length of the extension period will be dictated by the requirement of public protection, however, it appears to me that the suggestion that the custodial term might be dictated primarily by the requirements of retribution and deterrence is misleading and apparently inconsistent with what was said in *McGowan*, to which I have referred. If it is the case that the imposition of an extended sentence should not affect the length of the custodial term of that sentence, it seems to me to follow that it is quite legitimate for the sentencer to reflect in the custodial term itself the element of the need for protection of the public. Putting the matter in another way, simply because the court considers it necessary for public protection to impose an extended sentence with an extension period, in my opinion, does not mean that, in the selection of the custodial term, the court should close its eyes to the need for the protection of the public.

[130] In the course of the debate before us, it appeared to me to be suggested that the effect of secs 196 and 210A of the 1995 Act, when read together, required that both parts of an extended sentence should be potentially subject to the discounting procedure developed in implementation of sec 196. The argument seems to be that the procedure required by sec 196(1) is to apply to the determination of 'what sentence to pass on' an offender who has pled guilty. Under sec 210A(2),

> 'An extended sentence is a sentence of imprisonment which is the aggregate of–
>
> (a) the term of imprisonment (''the custodial term'') which the court would have passed on the offender otherwise than by virtue of this section; and
> (b) a further period (''the extension period'') for which the offender is to be subject to a licence and which is, subject to the provisions of this section, of such length as the court considers necessary for the purpose mentioned in subsection (1)(b) above.'

Thus, because the extension period is part of the extended sentence, which is a 'sentence of imprisonment', the discounting procedure should apply to both parts of the extended sentence. I reject that argument. In my opinion sec 196 must be read, so far as possible, in a manner consistent with the terms of sec 210A. In sec 210A(2)(b) where the extension period is defined, that period is said to be

> 'a further period ... for which the offender is to be subject to a licence and which is, subject to the provisions of this section, of such length as the court considers necessary for the purpose mentioned in subsection (1)(b) above.'

In the light of those words, it appears to me that the discounting of an extension period would be anomalous, even absurd. That period is to be of 'such length as the court considers necessary' for the specified purposes. If the court were to identify such a period, and then to discount it, the court would be undermining the whole basis of its own decision to select an extended sentence with a particular extension period, in my opinion. Such an interpretation of the statute, I consider, cannot reflect the intentions of Parliament. Thus I would respectfully agree with those *dicta* in the authorities which I have examined that suggest that an extension period should, in no circumstances, be the subject of a discount developed under sec 196.

Sentences for road traffic offences

[131] I turn now to consider those issues raised before us concerned with disqualification from driving and the imposition of penalty points in terms of sec 44 of the Road Traffic Offenders Act 1988 (cap 53). As I understand it, since at least the decision in *Rennie v Frame*, it has been recognised that, in Scotland, in appropriate circumstances, an order for disqualification from driving may be the subject of a discount in implementation of the provisions of sec 196 of the 1995 Act. It appears to me that the words of sec 196(1), which refer to 'what sentence to pass on, or what other disposal or order to make' are broad enough to encompass the making of an order for disqualification. In *Rennie v Frame* it was recognised that there might be several factors involved in the making of an order for disqualification. In particular, the selection of a period for disqualification might be made in the light of a perceived need to punish the offender concerned or to deter others from similarly offending. To that extent, it would be appropriate to discount the period in terms of sec 196, where appropriate. However, it was also recognised that an element in the making of a particular order for disqualification might be a consideration of what was required for the protection of the public. To the extent that that factor was involved, on the analogy of what was said in para 19 of the opinion of the court in *Du Plooy* a discount would not be appropriate. I would respectfully agree with that approach. It seems to me that the issue of the making of a discount in relation to a period of disqualification can be approached in the same

way as would the making of a discount in relation to a custodial sentence. In the debate before us, it was submitted that this court should disapprove of what was said in para 8 of the opinion of the court in *Rennie v Frame*, to the extent that it referred to the making of no allowance in respect of an element in the order which was for the protection of the public. In *Rennie v Frame* (para 8) Lord Penrose said:

> 'It is inevitable the protection of the public will be a material factor in selecting a period of disqualification. But other facts may legitimately be taken into account and, in particular punishment and deterrence: *Leslie v McNaughton* (p 37). In *Barrie v Procurator Fiscal[, Paisley]*, the court allowed a discount following the approach of the sheriff, which does not appear to have been controversial in that case. The opinion does not disclose the basis on which the discount was allowed, or the reasons for the substantial discount allowed. But it may be taken as an illustration that a discount may not be inappropriate. If the sentencing court approaches the selection of a period of disqualification in the light of a perceived need to punish the offender, or to deter offending, some part of the period selected would be within the scope of the observations in *Du Plooy*, and, to that extent, sec 196 would require to be considered, and some discount might be allowed. Any such discount would require a careful exercise of discretion but avoided reduction of a period below what was required for the protection of the public. This degree of discrimination may not have been common in the past. But it may be inevitable if a proper and just approach is to be assured that gives a recognition to a plea of guilty so far as it can, without undermining a disposal selected for public protection.'

I would respectfully agree with these observations. They seem to me to be wholly in accord with what I have desiderated in relation to the approach to be adopted for the protection of the public in relation to the discounting of custodial sentences. Accordingly, I would reject the submission that any part of that paragraph should be disapproved. What I have said in relation to the discounting of periods of disqualification is, of course, to be taken within the context of the statutory provisions which, in certain situations, prescribe the imposition of a minimum period of disqualification. Where a statutory minimum period is prescribed, plainly the period ordered could not fall below that level on account of the application of sec 196.

[132] Turning finally to the matter of penalty points, in terms of sec 44(1) of the Road Traffic Offenders Act 1988, I have come to think that no distinction can logically be made between an order for disqualification and an order for the imposition of penalty points where endorsement of a licence to drive is involved. Having considered *Ross v McGowan* I am persuaded that what is said in para 5 of the opinion of the court in that case is sound. I must therefore acknowledge that what I myself said in *Stewart v Griffiths* cannot be supported. It is, perhaps, regrettable that, in that latter case, no full argument was presented to the court in relation to the issue concerned. For the avoidance of any doubt, it appears to me that what was said by Lord Penrose in para 8 of the opinion of the court in *Rennie v Frame* in relation to the need to protect the public in relation to disqualification possesses equal force in the context of consideration of an order for endorsement of penalty points.

[133] Finally, it is right to mention that our attention was drawn during the course of the debate to the contents of the document *Reduction in Sentence for a Guilty Plea*, a definitive guideline, revised in 2007, by the Sentencing Guidelines Council of England and Wales. In that document it is stated that (para 2.6):

> 'A reduction in sentence should only be applied to the **punitive elements** of a penalty. The guilty plea reduction has no impact on sentencing decisions in

> relation to ancillary orders, including orders of disqualification from driving.' (Original emphasis.)

It is evident from that document that, at least in relation to disqualification from driving, no discount in respect of a plea of guilty is available. I would presume that the same would be the case in relation to endorsement of penalty points. While it is to be regretted that, in this regard, practice in England and Wales and Scotland differs, as I would see it, the Scottish practice may be justified by reference to the relevant statutory provisions and to a consideration of the principles involved.

[134] I regret that the views that I have expressed in this opinion are not consistent in all respects with those expressed by your Lordship in the chair. To that extent that they are inconsistent, I must dissent from them.

[135] As regards the disposal of the appeals before the court, in my opinion, they should be determined in this way:

(1) James Kelly Gemmell: This appeal should be refused. In my opinion, the sentencing judge followed a correct course, in the light of the opinion of the court in *Du Plooy v HM Advocate*, and the exercise of his discretion cannot be impugned.

(2) Paul Robertson: This appeal should be refused. In my opinion the sheriff was entitled to select the discount of approximately one sixth in the light of the need to protect the public and did not err in the exercise of his discretion.

(3) David Alexander Gibson: This appeal should be refused. The sheriff's decision as regards the starting point of the custodial term was not criticised, nor was his decision to select an extended sentence, in view of his assessment of the importance of the protection of the public. While I consider his identification of a specific part of the custodial term to which a discount was not to be applied was misconceived, I consider that the discount of the custodial term actually selected was within his discretion; also that he was correct in not applying any discount to the extension period, for the reasons I have explained.

(4) Peter Stephen McCourt: While, in my opinion the sheriff was wrong to identify a particular part of the sentence selected as for the protection of the public and not to discount that part at all, he was justified in reducing the discount to be applied in the light of the need for public protection. I am of the view that the overall result reached by him, which reflects a discount of 12.5 per cent was within his discretion. I would not interfere with his sentence.

(5) Euan McWilliam Ross: In my opinion the starting point for the fine and penalty points cannot be criticised, nor can the discount applied to the fine. I accept that it would have been appropriate for the seven penalty points also to have been discounted. Applying, so far as possible, the same discount, I consider that five points should have been imposed. I would allow the appeal to that extent.

(6) David John Forsyth Hart: In my opinion, the discount to the fine applied by the justice was within his discretion, in the circumstances, and should not be disturbed. It would appear from the supplementary report to this court that the penalty points were not discounted. I would propose that they should be discounted to four penalty points and the appeal allowed only to that extent.

(7) Charlene Elisabeth Ogilvie (Crown Appeal): I am not persuaded that the sheriff erred in the exercise of his discretion and would therefore refuse this appeal.

LORD EASSIE— [136] Your Lordship in the chair has set out the statutory provisions in issue in these appeals and I am also grateful to your Lordship for

your Lordship's survey of many of the reported judicial decisions on the discounting of sentences on account of the accused's having tendered a plea of guilty at an early stage in the proceedings.

[137] As is apparent from that survey, the basis or reason for giving a discount is the 'utilitarian' approach expounded in the Australian judgments to which reference was made in *Du Plooy v HM Advocate* and which no doubt also provided the policy reason for enacting in 1995 what became sec 196 of the Criminal Procedure (Scotland) Act 1995. While debate may be had elsewhere about that policy — for among others the reasons expressed in *Strawhorn v McLeod* — for my part I do not consider sec 196 can be construed otherwise than as reversing that judgment and enjoining the court to have regard to the utilitarian benefit of an early plea of guilty as the basis for discounting the sentence otherwise appropriate in the case in question. To the extent that the discounting of the sentence to take account of the timing of the plea of guilty may impinge upon the protection of the public inherent in virtually all sentences, it seems to me that such is a consequence of the legislature's decision to reverse *Strawhorn v McLeod*.

[138] The first group of appeals involve cases in which the sentencer has imposed a determinate custodial sentence. In one of those, Gibson, the sentencer isolated a particular portion of the custodial sentence, to which he declined to apply any discount, as being for the protection of the public. In the others, following the approach in *Weir v HM Advocate*, the sentencer materially reduced the percentage discount which he might otherwise have applied, attributing that reduction to a concern for the protection of the public. While the former approach was disapproved in *Weir*, from an arithmetical point of view, depending on the selected figures, both approaches might produce the same practical result. The core question is whether in discounting a determinate sentence the amount of the discount which the sentencer would otherwise have allowed should be reduced on the basis of some discrete consideration of public protection peculiar to the case in question.

[139] As I observed more fully in my opinion in *Petch v HM Advocate* (paras 70 *et seq*), the imposition of any sentence generally has as its leading purpose the protection of the public, including deterring the individual from reoffending or by deterring others. In the case of a determinate custodial sentence, the sentencing judge selects the sentence from his knowledge of the general practice of the courts in the area of offending in question and the particular circumstances of the offence and the offender. The exercise does not involve the building in of any discrete element of preventive detention. Accordingly, in so far as the sentencer considers that the antecedents of the offender demonstrate a tendency to recidivism and on that account a more severe sentence is appropriate, I consider that, where such an offender has pled guilty at an early stage, any enhancement of the length of the sentence on account of the risk of recidivism should be brought into play in fixing the pre-discount sentence. That, after all, is what the sentencing judge would do after trial, and in doing so he would not include a discrete element of preventive detention. Similarly, in so far as the offender has demonstrated extra-judicially genuine remorse, that factor would also come into play in the selection of the pre-discount sentence.

[140] Given that the basis for discounting sentences on account of an early guilty plea is its 'utilitarian' benefit to the public interest in, among other things, facilitating the expeditious and efficient running of the justice system, and given that the sentencer has taken into account all the relevant public protection factors in the selection of the sentence which would have been imposed following a trial resulting

in the same conviction, I consider, in broad agreement with your Lordship in the chair, that there is no place for modifying (by whatever arithmetical method) the discount which would otherwise fall to be applied in recognition of that utilitarian benefit on account of some notion of further protection of the public. To do so involves, in my respectful view, what may be termed, perhaps a little crudely, 'double counting'. In any given case the utilitarian benefit to the general public interest of a plea of guilty remains the same, irrespective of the public protection function of the determinate sentence in question, which function will have been incorporated in the sentencer's assessment of the sentence which he would have imposed after trial and which thus constitutes his starting point. It respectfully appears to me that when the matter is analysed there is thus no logical reason for giving a reduced discount on account of that public protection factor. As I remarked earlier, the policy decided upon by the legislature of requiring the courts to consider discounting sentences on account of early pleas of guilt on utilitarian grounds implies a recognition that the reduction in the public protection factor entailed in such a discount is to be accepted as a counterpart to the utilitarian benefit to the public interest of securing early pleas of guilt.

[141] Accordingly, on the principal question argued in the first group of these appeals (ordinary, determinate custodial sentences), namely whether the amount of the discount otherwise appropriate should be restricted on the ground of some particular consideration of protection of the public, I find myself in agreement with the view which your Lordship in the chair takes, namely that matters pertinent to the protection of the public should be taken into account in the starting sentence, being that which the sentencing judge would impose after trial, and, that having been done, it is not appropriate to decline to accord to the offender who has pled guilty at an early stage the proper recognition of the utilitarian benefit to the public conferred by that early plea. It therefore seems to me that to the extent that, within para 19 of the opinion of the court in *Du Plooy* and in the decision in *Weir v HM Advocate*, one finds a contrary view and approach, that view and approach should be disapproved.

[142] So far I have been considering ordinary, determinate custodial sentences. An extended sentence presents its own specialities. Your Lordship in the chair has already referred to the relevant legislative provisions. In my view those statutory provisions require the court to address a particular concern for the protection of the public, in the limited categories of offences to which the provisions apply, which is not applicable in the ordinary course of sentencing. That concern is whether the period of licence, not incarceration, must necessarily be extended to protect the public from serious harm. It is to be noted that the extension of the period of licence must be judged necessary — not merely desirable or helpful — for the protection of the public from serious harm. The legislature having set that high test of both necessity for protection of the public and also that the protection be from serious harm, it seems to me that, if both those tests are satisfied, it would be contrary to that statutory intention that the extended period of licence be discounted on account of a plea of guilty. In that respect, sec 210A of the 1995 Act may be seen as *lex specialis* to be given priority over the general provision in sec 196. Accordingly, in practical terms I consider that when faced with a case in which the criteria for the imposition of an extended sentence may be met, and an early plea of guilty is tendered and accepted, the sentencing judge should first consider the appropriate, ordinary determinate custodial sentence, which the crime, or crimes, would attract. That sentence should then be discounted in the normal way, according to the timing of the plea. Thereafter, the sentencing judge would require to consider the adequacy of

the period of licence flowing from the discounted custodial sentence. The fact that the offender had pled guilty is of course not irrelevant to that assessment; it may in some cases point towards the adequacy of the period of licence ensuing upon the discounted custodial term. Only if the sentencing judge then considers that ordering an extension of that period of licence met the test of necessity to protect the public from serious harm would he then decide on the extension period, which would thus be decided upon a basis independent of the timing of the plea of guilt. It follows, in my view, that notwithstanding the statutory provisions aggregating the extension period with the notion to a sentence for susceptibility to appeal, the extension period with the custodial term for the notion of a sentence escapes sec 196 and should not be discounted.

[143] Other appeals before us concern discounting in road traffic cases where the sentencer makes an order disqualifying the accused for holding or obtaining a driving licence or imposing penalty points. I agree with your Lordship in the chair that, apart from the restricted scope for discounting covered by sec 196(2) of the 1995 Act in the case of certain offenders under the Misuse of Drugs Act 1971, the court may not impose, by reason of discount, a sentence below the statutory minimum. That is required by the statute in question and that requirement must be satisfied, irrespective of the early plea of guilty. If, in terms of juridical thinking, a more theoretical explanation were required, I would see the particular statutory provision requiring the minimum sentence as also being *lex specialis* to which the general rule must yield. Matters of minimum sentences apart, I further agree with the view which is held by your Lordship in the chair that being banned from driving or receiving penalty points are not distinguishable in principle from sentences generally when questions of discounting arise. Being disqualified from driving is a restriction on the liberty which the offender would otherwise enjoy to drive a motorvehicle; commonly presents substantial inconvenience; and may have financial consequences including the loss of employment. As is pointed out in para 72 of the opinion delivered by your Lordship in the chair, this court, and also the European Court of Human Rights, have held the imposition of penalty points to be a penalty in itself. I agree that *Stewart v Griffiths* should be overruled.

[144] While I believe that the foregoing expression of opinion addresses the issues argued before us in these conjoined appeals, more general views on various aspects of discounting of sentences are expressed by your Lordship in the chair and other members of the Bench before whom the appeals were argued. It is, I think, appropriate that I contribute my thoughts on at least some of those aspects.

[145] The first matter to which I would advert is the weight to be placed on the element of discretion involved in the allowance of a reduction of sentence on account of the timing of the plea of guilty. While I of course agree that the allowance of that reduction is, in its essential nature, an exercise of discretion, one is well familiar with areas of discretionary judgment in which the discretion is generally guided by established rules or principles. The utility of such rules or principles guiding or directing the exercise of the discretion enables the court not only to achieve consistency in its decisions — in essence, comparative justice — but also enables practitioners to offer advice with some reasonable degree of confidence. While one may take issue with the use of language to the effect that there is an 'entitlement' to a discount, it respectfully seems to me that if the utilitarian and cost-saving benefits underlying the principle of discounting sanctioned by the legislature are usefully to be realised, practitioners should, in general, be able to advise the client of the amount of the likely discount with some degree of confidence. That necessarily

involves the elaboration of principles, or guidance, for the exercise of the discretion upon which practitioners can have some reliance and hence the creation of a legitimate expectation, peculiar circumstances apart, that the guidance will be followed.

[146] The ability of practitioners to tender reasonably confident advice is made more difficult if the sentencer is required to enter into some detailed examination in the individual case of the particular administrative and other utilitarian benefits of the accused's having pled guilty at the particular stage at which he or she did. It also complicates the sentencing exercise. Your Lordship in the chair has set out various costings in paras 34 and 35 of the opinion and in para 44 your Lordship observes that saving in jury costs applies in relatively few cases. However, in view of the proposals for the actual disposal of the appeals, which do not involve such a detailed consideration, I take it that such an examination is not intended as part of the sentencing process. In my view, practical considerations dictate that the utilitarian benefit be taken on a 'broad brush' basis, without distinction between solemn and summary procedure; the principle criterion should be the timing of the plea.

[147] Similarly, as respects the observations in the succeeding three paragraphs of the opinion respecting the sparing of complainers and other witnesses from giving evidence, while it may well be that not all complainers or witnesses may be described as vulnerable, and indeed that some complainers may possibly feel disappointed by not having the opportunity to give evidence, I do not consider that the sentencing process, and particularly the question of discount, should be subject to some question as to the attitudes of the prospective witnesses to giving evidence. In the absence of inquiry and examination of the actual complainer, or other witness, I think it difficult for the sentencer to make any judgment in the individual case. (Indeed, without having undergone the experience, a witness may well have difficulty in giving a useful answer.) As a generality, avoiding the need for witnesses to come to court to give evidence is of utilitarian benefit and so is relevant to the timing of the plea. While it may no doubt be that giving evidence is not an 'ordeal' for, at least most, police officers, the fact that by virtue of the early plea the police officers in question are freed not only from the need to attend at the trial, but also from the need to programme their activities to take account of that possibility, and are thereby available to perform other duties, seems to me to be a matter of important public benefit, increasing the protection of the public from crime and thus a material factor in the equation of discounting sentences against utilitarian benefit.

[148] I agree with the view to which your Lordship in the chair has come that the strength of the Crown case is not a material factor to be taken into account. For my part, I have serious reservations in principle respecting the proposition that the strength of the Crown case should enter into consideration. An accused is always entitled to put the prosecution to proof of its case; and there may often be potential advantage to the accused in delaying a plea. Apart from the natural human tendency to put off the evil moment, one never knows but that the principal Crown witness may become unavailable, by reason of death or otherwise. And for the accused on bail, there is an attraction in retaining his liberty for as long as possible. In terms of utilitarian benefit to the public interest in saving costs and accelerating disposal of cases, it seems to me to that the strength of the prosecution case is, in principle, of little relevance. Further, and importantly, it seems to me that if one measures the extent of the discount against the perceived strength of the

prosecution case one is necessarily — and openly — putting increased pressure on the accused against whom the Crown case is weak.

[149] There are also practical problems. Sometimes the strength of the Crown case will be constituted by the accused's frankness and confessions. *Gibson v HM Advocate*, one of the appeals under consideration, is only such a strong Crown case by reason of the appellant's confessions to the police both at the scene and subsequently. More generally, it is in my view wholly undesirable that on a plea of guilt the court should begin to entertain competing submissions as to the respective strengths of the Crown and defence case. A narration of agreed facts tendered at a plea is no basis for assessment of actual strengths and weaknesses of the parties' positions and to inquire beyond that, as a matter relevant to the giving or extent of any discount on account of the timing of the plea of guilty, would, in my view, put in jeopardy the practical working of our system of criminal procedure in disposing of cases in which an accused pleads guilty. Ultimately, the strength of the prosecution case can only be tested by trial.

[150] Lastly, I turn to the actual disposals of the appeals before us. As I understand it, all other members of the bench are agreed on the headline sentence to be imposed prior to any discount. Since — leaving aside the Crown appeal — the revisions to the discount allowed by the respective sentencers which are proposed by your Lordship in the chair accord with the views which I have expressed, I am content with the practical results for each appellant which flow from those revisions. I am also in agreement with the view that the Crown appeal in Miss Ogilvie's case should be refused.

LADY PATON—

Discounts and the protection of the public

[151] The protection of the public is such a fundamental consideration in sentencing that a court should, in my view, keep that issue in mind at every stage, unless prohibited or disempowered from doing so.

[152] An example of a statutory prohibition can be found in sec 2(2) of the Prisoners and Criminal Proceedings (Scotland) Act 1993, as amended, which directs the court to fix the punishment part of a discretionary life sentence having regard to 'the requirements of retribution and deterrence (ignoring the period of confinement, if any, which may be necessary for the protection of the public)'. However no such prohibition is contained either expressly or impliedly in secs 196(1) and 210A of the Criminal Procedure (Scotland) Act 1995. Nor is there any clearly established principle or precedent having the effect of excluding consideration of risk to the public when assessing the discount, or the custodial element in an extended sentence.

[153] Examples of release provisions beyond the powers of the court include the early release provisions contained in sec 1 of the 1993 Act, which reflect a penal policy decided upon by the government. Similarly the early release of a prisoner with a tagging condition is not a matter for the court.

[154] It was submitted that if a sentencing court took account of the protection of the public when (a) determining the length of the sentence *ab initio* and (b) exercising the discretionary power given by sec 196 to discount the sentence to reflect an early plea of guilty, that would result in 'double-counting', thus penalising the accused. I do not agree. As indicated above, it is my view that

the protection of the public is a proper consideration to be taken into account by the court at all stages of sentencing, unless prohibited or disempowered from doing so.

[155] In the result therefore I respectfully agree with the views expressed by Lord Osborne in these appeals, including his reservations about para 19 of *Jordan v HM Advocate*.

Discounts and penalty points, periods of disqualification, and fines

[156] I accept that it is open to the court to allow a discount in terms of sec 196 of the 1995 Act in respect of non-custodial disposals such as penalty points, periods of disqualification, and fines, with the result that *Stewart v Griffiths* falls to be overruled. However, the protection of the public remains an important and relevant consideration (*cf Rennie v Frame*, para 8; *Neilson v Procurator Fiscal, Elgin*). If, for example, someone with a bad record of driving offences pleads guilty to another road traffic offence resulting in disqualification, the court, when assessing whether or not to give a discount, would be entitled in terms of sec 196(1) to have regard to all the circumstances including any risk to the public. The court would therefore be entitled to refuse to make any discount in respect of the period of disqualification, or to give a lesser discount than might otherwise have been the case.

The particular appeals

[157] I am indebted to the Lord Justice-Clerk for setting out the circumstances of each appeal. In the light of the views expressed above, I would suggest the following disposals:

James Kelly Gemmell (30)

[158] The appeal should be refused. In all the circumstances, a starting point of seven years was justified. In relation to the discount of one year (14.2 per cent), the sentencing judge was entitled to take the view that the offer of a sec 76 plea was ineffective because it contained a 'sheriff and jury' qualification, and also to take into account the danger which the appellant presented to the public.

Paul Robertson (34)

[159] The appeal should be refused. The sheriff was entitled to 'be influenced by [the] need for public protection' (report, p8), and to give a discount of one-sixth rather than one-fifth or one-quarter.

David Alexander Gibson (22)

[160] The appeal should be refused. In the circumstances, the starting-point cannot be criticised. While any discount should have been applied to the whole five years (*cf Jackson v HM Advocate*), if the sheriff had adopted the proper approach, he would in my view have modified the discount to 20 per cent, reflecting, *inter alia*, the need to protect the public. Accordingly the custodial part of the extended sentence remains at four years.

Peter Stephen McCourt (50)

[161] In the circumstances, the starting-point cannot be criticised. Any discount should properly have been applied to the whole sentence. Had the sheriff adopted that approach, he would in my view have modified the discount to reflect, *inter alia*, the need to protect the public. I consider that an appropriate modified discount

would be 20 per cent, resulting in a sentence of three years and two months. I propose that the appeal be allowed to that extent.

Euan McWilliam Ross (20)

[162] The starting-point for the fine and penalty points (£750 and seven penalty points) cannot be criticised. A discount of one-third was allowed in relation to the fine. It would be appropriate that the penalty points should also be discounted by one-third, namely from seven points to five points. I propose that the appeal be allowed to that extent.

David John Forsyth Hart (36)

[163] The justice discounted the fine imposed from £650 to £500 (ie by about 23 per cent). Assuming that he did not discount the penalty points, it would be appropriate that the six penalty points imposed be discounted to four penalty points. I propose that the appeal be allowed to that extent.

Charlene Elisabeth Ogilvie (24): Crown appeal

[164] The sheriff explains in his report that the appellant was a first offender, a young mother then aged 22 with two small children aged two and five. She impressed the sheriff as genuinely distraught and penitent about her foolish behaviour. In these circumstances the sheriff was entitled, when assessing the discount (if any) and bearing in mind public safety, to form the view that the appellant intended to mend her ways and was thus unlikely to present any further danger to the public (unlike, for example, repeat offenders who continue to drive under the influence despite previous sentences imposed by the court). I am not therefore persuaded that the sheriff erred, and would propose that the appeal be refused.

LORD WHEATLEY— [165] In these cases, two questions are raised. The first is concerned with what part the issue of public protection plays in sentencing following a plea of guilty, in terms of sec 196 of the Criminal Procedure (Scotland) Act 1995, as amended. By virtue of that section the court must take into account in imposing sentence the stage at which the offender indicated his intention to plead guilty. Clearly there are a number of public interest reasons why a discount might be applied in such circumstances, not least of which is that statute requires that it should be taken into account. However, the stage at which an accused indicates that he wishes to plead guilty is only one ingredient in what goes to make up a sentence; among many others is the issue of public protection, which is at the heart of the first part of these appeals. I agree that at this point it is worth emphasising it is necessary to distinguish between those matters which properly should be considered in assessing the length of any sentence imposed, and those matters which have a bearing on the question of the application and extent of any discount to be given to that sentence. I refer to the opinion of your Lordship in the chair at para 36, with which I respectfully agree.

[166] The first matter which then arises in these appeals is whether that part of any custodial sentence imposed following a plea of guilty which is intended to bear on the need for public protection should be subject to, or excluded from, the application of any discount. I agree with the Lord Justice-Clerk and Lord Eassie that any discount in these circumstances should apply to the whole sentence, and should not be calculated only in respect of that part of the sentence which does not

apply to the period selected for public protection. That seems to me to be the clear purport of what sec 196 says, and this is confirmed by the reasoning of the court in *Du Plooy v HM Advocate* (para 19), with which I agree. Although it is not central to the argument, the procedure involved in sentencing, if the alternative view were to be taken, would be elaborate and impractical, and by implication might suggest that the court should quantify the remaining periods in any sentence that were designed to cover each of the other individual purposes which the sentence was designed to serve. However, the application of any discount to an extended sentence is not justified by the terms of sec 196; any discount is applied only to the custodial part.

[167] This also means that, in respect of the other parts of the appeals, both the imposition of disqualification and penalty points may be subject to a discount in appropriate circumstances. This may produce some minor anomalous consequences at the lower end of the sentencing scale. As sentencers cannot impose a sentence below the statutory minimum, which is a feature of both disqualification and penalty points, those who plead guilty in cases where the minimum sentence of disqualification or imposition of penalty points would have been selected in any event, cannot obtain a discount in respect of those parts of the sentence. However, an appropriate discount would be available on other parts of the sentence, such as the fine. This is no doubt unfortunate but it is, I think, a necessary consequence of the legislation, and it is to be hoped that it will be a relatively minor and infrequent cause for concern.

THE COURT allowed the appeals and dismissed the cross-appeal.

Paterson Bell – Paterson Bell – Paterson Bell – Paterson Bell –
Grant Smith Law, Aberdeen – Dalling, Stirling –
Public Defence Solicitors, Dundee – Crown Agent