Neutral Citation Number: [2007] EWCA Crim 2290
Case Numbers: 2007/01764/B5 (1) and 2007/01455/A7(2)

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CENTRAL CRIMINAL COURT (1)
ON APPEAL FROM NEWCASTLE CROWN COURT (2)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/10/2007

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
MR JUSTICE PITCHERS
and
SIR RICHARD CURTIS

- -

Between :

R
-v-
P (1)

R
-v-
Blackburn (2)

- -
- -

Mr Andrew Mooney (Solicitor Advocate) (instructed by **Law Mooney Lee & Cook**) for the **appellant 'P'**
Mr Jonathan Rees (instructed by CPS) **for the Crown (1)**
Mr Christopher Knox (instructed by Graeme Cook) **for Blackburn**
Mr Toby Hedworth QC (instructed by CPS) **for the Crown (2)**

Hearing dates: 17th July 2007 and 10th October 2007

- -

Judgment

President of the Queen's Bench Division:

1. This is the first occasion when this court is required to address sections 71-75 of the Serious Organised Crime and Police Act 2005 (SOCPA). These provisions, which came into force on 1 April 2006, created a statutory framework which formalised and developed well established common law principles, formerly embraced in the well understood phrase – "Queen's Evidence".

R v P – The Facts

2. P was arrested in 2004 for offences arising from the importation of controlled drugs and remanded in custody. While awaiting trial, he instructed his solicitor to contact police officers investigating the murder of X, which occurred some years earlier. As a result, in early 2005, a meeting was arranged between the applicant and a senior investigating police officer. During the course of the meeting P provided information relating to the murder. He also provided information about the unrelated criminal activity of a major drug dealer.

3. In due course P pleaded guilty to conspiracy to supply a controlled drug of class C (cannabis resin). In July 2005 in the Central Criminal Court, he was convicted of two further conspiracies relating to the supply of class A drugs (crack cocaine). These convictions arose from his original arrest.

4. Shortly before the sentencing hearing, a "text" was prepared on P's behalf which informed the judge of the information which P had provided in the course of the meeting in early 2005. The text stated that no police operation had been instigated as a result of the information provided by P, and he had not placed himself at any exceptional risk in supplying the intelligence. There was nothing to indicate that he would be willing to assist the police in the future.

5. In the light of all the information available to the judge, total sentences of 17 years imprisonment were imposed.

6. Thereafter two separate processes were under way. P appealed against sentence and he also contacted the police again. He provided information relating to a current murder investigation. At a subsequent meeting he agreed to give evidence against those persons alleged by him to be responsible for the murder of X, as well as detailing the criminal offences which he had personally committed. The effect of these conversations were incorporated in a further "text" prepared by a senior police officer for the purposes of P's appeal against sentence. In February 2006 this court reduced the total sentence from 17 to 15 years imprisonment. Subsequently a confiscation order was made under the Proceeds of Crime Act for fractionally under £1 million.

7. The next chapter in this case begins with the coming into force of SOCPA 2005 on 1 April 2006. Following the earlier discussions, P entered into a written agreement with a prosecutor specified for the purposes of section 71 of SOCPA 2005. The agreement is signed by the specified prosecutor, and P himself, in the presence of his solicitor. It may be valuable to set out its terms, so that a typical example will be publicly available. Save only for redactions to avoid possible identification, the agreement is provided in full.

> "1. The parties to this agreement are:
> - P c/o Z, Solicitors, and
> - Y, a Crown Prosecutor and a specified prosecutor under section 71(4) and 73(10) of the Serious and Organised Crime and Police Act 2005.
>
> 2. It is hereby agreed that P will assist the investigator and/or prosecutor in relation to the investigation being conducted by the Metropolitan Police into the murder of X and associated offences.
>
> 3. Assistance under the terms of this agreement will include the following:
>
> (a) P will participate in a debriefing process. He undertakes during the process, which will be tape recorded and conducted following a caution, fully to admit his own involvement in any crimes.
>
> (b) P will plead guilty to and/or ask to have taken into consideration such of the offences he has admitted as agreed with/stipulated by the prosecutor; a schedule of offences admitted by P is attached to this agreement at Annex 'A'.
>
> (c) P must provide the investigator with all facts, statements, documents, evidence or any other information available to him relating to the said investigation and offences, and the existence and activities of all others involved.
>
> (d) P shall maintain continuous and complete co-operation throughout the investigation of the said offences and until the conclusion of any court proceedings arising as a result of the investigation. Such co-operation includes but is not limited to P
>
> (i) Voluntarily and without prompting, providing the investigators with all information that becomes known to him or available to him relating to the said offences, in addition to any such information already provided;
>
> (ii) Providing promptly, and without the prosecutor using powers under any section of the Act, all information available to him wherever located,

requested by the investigator in relation to the said offences, to the extent that it has not already been provided;

(iii) Complying with any agreement with, or instructions from, the Witness Protection Unit or other agency (including the Probation Service in relation to release on licence) as to his residence and travel arrangements (to include foreign travel and/or possession of travel documents) after his release from custody;

(e) P will attend court as required by the prosecutor and give truthful evidence in any court proceedings whatsoever arising from the investigation and the said offences, clarification of which has already been given to his solicitors and agreed by him.

4. Y will ensure that full details of the assistance provided by P under the terms of this agreement are placed before any court before which P appears for sentencing; a copy of the above details will be made available for prior examination by his solicitors.

5. Y will also ensure that, in relation to the term of imprisonment currently being served by P, full details of the assistance provided by P under the terms of this agreement are placed before the Crown Court in accordance with the provisions of Section 74 Serious Organised Crime and Police Act 2005; a copy of the above details will be made available for prior examination by his solicitors.

6. Nothing in this agreement will affect the liability of P for any confiscation order made under the provisions of the Proceeds of Crime Act 2002 (or similar legislation).

7. Failure to comply with the terms of this agreement may result in any sentence of the court that P may receive

- In relation to the offences admitted under this agreement or
- In consequence of any referral to the Crown Court under paragraph 5 above, being referred back to the court for review pursuant to section 74 of the Act."

8. P was removed from the prison where he was serving his sentence. He was relocated at a secure unit. The debriefing process began in May 2006 and concluded at the end of the year. A number of interviews under caution took place. They resulted in the production of four witness statements signed by P. They described (a) his own criminal activities, (b) the murder of X, (c) the alleged commission of a serious drugs offence and (d) his comments on transcripts of covert tape recordings of conversations

between himself and others which had taken place during 2004, and formed part of the evidence against him at his 2005 trial.

9. As a result of his own admissions during the debriefing sessions, P was then charged in a further separate indictment with a number of offences. He appeared at the Central Criminal Court on 9 March 2007. He pleaded guilty to an indictment containing 13 counts of criminal activities in connection with the supply of drugs, largely class B (cannabis) but also one count of being concerned in the supply of class A drugs (cocaine) and another for allowing premises to be used for the purposes of such supply. These offences went back to February 1983 and varied in their seriousness, but taken together undoubtedly constituted serious criminality. Nine further offences were admitted and taken into consideration. The TICs include an incident of theft of a motor car which took place between 1970 and 1974 and theft of a plant during 1991. Although there are some serious offences in the list of TICs, the major criminal activity was encompassed in the counts in the indictment. The minor, virtually historic offences of theft, provides an indication that P was expected to and did admit such criminal activity that he could remember. The second matter before the Judge was a reference back under section 74(3) of SOCPA by the specified prosecutor for a review of the sentence of 15 years imprisonment, as substituted by the Court of Appeal for the original sentence.

10. The judge was supplied with witness statements which set out the nature and extent of the assistance provided by P in accordance with his written agreement. As a result P placed not only himself personally, but his family at considerable risk. He will need the support of the Police Witness Protection Unit for the rest of his life. In summary P had

    i) Given extensive information about his own criminal activities and the criminal activities of his associates. The extent of his own criminal activities would "never had been realised without his making a full and frank admission". Checks of the information he had given about others had largely been substantiated, and none had been undermined.

    ii) In relation to the inquiry into X's murder P identified two suspects and provided further details about the circumstances. This information led to a reopening of an old investigation and this had revealed further information, as well as the uncovering of criminal offences committed by those allegedly concerned in the murder. P agreed to give evidence at any subsequent trial. It was said that the investigation into the murder would not have reached "such an advanced stage" without the information from P.

    iii) Quite apart from the murder of X, P provided further information about the criminal activities of others, in respect of an alleged conspiracy to murder. The information enabled the police to ensure the safety of the intended victim. P agreed to give evidence if required to do so.

11. Faced with this information, the Judge imposed concurrent sentences of 4 years imprisonment on each count of the 13 count indictment. He reviewed the sentence of 15 years imprisonment, and substituted a sentence of 5 years imprisonment. In accordance with the written agreement, the confiscation order was unaffected. Both groups of sentences were to run concurrently, but as P had not been on remand for the matters dealt with on the indictment, the 4 year sentence started on the day it was imposed. P had, in the meantime, been serving the 5 year sentence. In the result the date of P's eventual release will be determined not by the reduced sentence imposed on the review, but by the sentence following his recent guilty plea to the indictment.

12. P's application for leave to appeal against both sentences was referred to the full court by the Registrar. In view of the issues of principle which arose leave was granted, and we proceeded to decide the appeal.

Blackburn – The Facts

13. On 9 March 2007, having pleaded guilty, and entered into a written agreement with a specified prosecutor pursuant to section 73 of SOCPA, Blackburn appeared in the Crown Court at Newcastle before Simon J and was sentenced to a total of 4 years imprisonment, less 162 days spent on remand. He was sentenced to 30 months imprisonment for assisting an offender and 18 months imprisonment, to run consecutively, for conspiracy to supply controlled drugs.

14. He sought leave to appeal against sentence. This was referred to the full court by the Registrar. In view of the issues which required to be examined, leave to appeal was granted.

15. This case concerns the execution by shooting on 24 May 2006 of David Rice. On that date Mr Rice was parked in a car park in South Shields. He was in the driver's seat of his car, waiting the arrival of a man called Steven Bevens. He was also in possession of a large quantity of cash. A black car pulled up next to him. It contained two front seat occupants, both wearing balaclavas. The passenger shot Rice a number of times with a semi-automatic handgun, fitted with a silencer. Already badly injured, Rice tried to escape, scrambling across to the passenger side of his car, and out of the door. The gunman left his car, walked to the back of Rice's car, and cold bloodedly shot him again, and then once again, at point blank range, shot him through the head to make sure he was dead. The car drove away, and after a short distance, the two men abandoned it, setting it on fire to destroy the evidence. They transferred to an orange van, with Blackburn as the waiting driver.

16. Both Rice and Bevens worked for a man called Foster. The Crown's case is that Foster was the gunman and Bevens the driver of the car which pulled up beside Rice's car. Foster and Bevens met in prison while serving sentences for conspiracy to supply drugs, and they subsequently worked together importing and distributing drugs. Rice's role involved collecting drugs from Foster, or his partner, and fetching and

carrying money. Foster started to distance himself from Rice because he, Foster, believed that Rice told his partner that Foster was involved with another woman.

17. On the morning of 23 May Bevens was twice in contact with Rice. Foster returned to the United Kingdom from Majorca using a false passport early in the morning of 24 May. On the afternoon of the shooting Rice asked a friend to help him count £6000 in cash, and said he was meeting Stevie. Bevens telephone Rice at 3.43. At 3.50 Rice called his friend and asked him to bring the money to him. Thereafter Rice drove to the car park where he was shot dead. £6000 in cash he had taken to the meeting place, together with an additional £2000 in cash was later found in his car.

18. Blackburn's involvement in the case arose because the police knew that he possessed an orange van of the type used as the getaway vehicle. Initially he claimed to have sold it and denied any knowledge of the killing. He was arrested on 3 August. In interview he admitted that he knew Foster and Bevens, having met them in prison. He explained his involvement with Foster in connection with Foster's drug activities. He also explained that on 24 May, he was contacted by Foster and told to go to an address in Doncaster to collect £2000 which Foster owed him. When he arrived Foster was there with Bevens. Foster said that he needed the orange van to shift some gear in the North East. He was offered £100 to drive it. He agreed. He travelled to Sunderland where he met Foster and Bevens. They told him to wait while they went to collect the gear they needed. About half an hour later two masked men ran to the van. He recognised their voices. They were Bevens and Foster. Foster was carrying a handgun, and shouted "drive drive drive" which he did. In the car he heard Bevens discussing the wounds Rice had received as a result of the shooting. When he stopped at a service station, Foster removed his telephones, broke them and threw them out of the window. With Blackburn's assistance, they were later recovered by the police. Blackburn heard further discussion between Foster and Bevens about the shooting. He asked Foster why someone had been shot, but the only response he received was "who dares wins". Bevens carried two bags which contained clothing, as well as the gun.

19. A few days later, while Blackburn and his girlfriend were abroad, he was contacted by Foster who told him to return home. Foster had arranged for some of his associates to collect Blackburn's van. In due course Blackburn took the van to an industrial estate near Grimsby. Two men took it away.

20. On 28 September 2006 the appellant entered into the SOCPA agreement. On 10 October 2006 he pleaded guilty on the following basis, accepted by the Crown. As to the murder offence, he had no prior knowledge of any offence of violence, much less a murder by shooting. On being told to drive off he realised that a shooting had taken place, but was unaware it was fatal until later. He facilitated the disposal of telephones, which he later helped the police to recover. The payment he received was, as he described in his police interviews, very modest. As to the drug conspiracy, he accepted taking cash to Amsterdam on Foster's behalf, and collecting two large holdalls containing cannabis which he delivered to a trawler skipper.

21. On 27 and 29 October 2006 Blackburn provided a witness statement describing his knowledge of the circumstances surrounding the death of Mr Rice. Thereafter he was called by the prosecution and gave evidence at Bevens' trial for murder. After he had been cross-examined for about an hour, Bevens changed his plea to guilty. Blackburn's evidence was critical to Bevens' conviction. Indeed without it the charge against Bevens would have been discontinued. Simon J concluded that Blackburn had given truthful evidence. The assistance given to the prosecution in connection with the murder of David Rice speaks for itself, but, in addition to the evidence at trial, Blackburn's witness statement enabled the prosecution to obtain a European Arrest Warrant in respect of Foster. In relation to the drug related conspiracy, the judge believed that Blackburn's role was that of a trusted courier in a well resourced conspiracy in relation to cannabis. The significant mitigation was that the information about it came entirely from himself, in fulfilment of his agreement to assist the prosecution.

The Common Law

22. There never has been, and never will be, much enthusiasm about a process by which criminals receive lower sentences than they otherwise deserve because they have informed on or given evidence against those who participated in the same or linked crimes, or in relation to crimes in which they had no personal involvement, but about which they have provided useful information to the investigating authorities. However, like the process which provides for a reduced sentence following a guilty plea, this is a longstanding and entirely pragmatic convention. The stark reality is that without it major criminals who should be convicted and sentenced for offences of the utmost seriousness might, and in many cases, certainly would escape justice. Moreover the very existence of this process, and the risk that an individual for his own selfish motives may provide incriminating evidence, provides something of a check against the belief, deliberately fostered to increase their power, that gangs of criminals, and in particular the leaders of such gangs, are untouchable and beyond the reach of justice. The greatest disincentive to the provision of assistance to the authorities is an understandable fear of consequent reprisals. Those who do assist the prosecution are liable to violent ill-treatment by fellow prisoners generally, but quite apart from the inevitable pressures on them while they are serving their sentences, the stark reality is that those who betray major criminals face torture and execution. The solitary incentive to encourage co-operation is provided by a reduced sentence, and the common law, and now statute, have accepted that this is a price worth paying to achieve the overwhelming and recurring public interest that major criminals, in particular, should be caught and prosecuted to conviction.

The Statutory Framework

23. Section 71 of SOCPA addresses possible immunity from prosecution of an offender who provides assistance in the investigation or prosecution of an offence. Features of critical importance, echoed later in the legislation are, first, that the process requires the involvement of prosecutors specified and identified in the legislation, and, second, that an individual who is given an immunity notice will be deprived of its benefits

unless he complies with its conditions. However, as we are not here addressing immunity from prosecution, section 71 does not arise for further analysis in this judgment. Much the same applies to the provisions in section 72 which enable a specified prosecutor to provide an individual with an undertaking that any information provided by him will not be used in evidence. This is a "restricted use undertaking", and again does not arise for immediate consideration.

24. Section 73 now governs the arrangements for a reduction in sentence for a defendant who in specified circumstances has provided assistance. It provides:

> "(1) This section applies if a defendant-
>
> (a) following a plea of guilty is either convicted of an offence in proceedings in the Crown court or is committed to the Crown court for sentence, and
>
> (b) has, pursuant to a written agreement made with a specified prosecutor, assisted or offered to assist the investigator or prosecutor in relation to that or any other offence.
>
> (2) In determining what sentence to pass on the defendant the court may take into account the extent and nature of the assistance given or offered.
>
> (3) If the court passes a sentence which is less than it would have passed but for the assistance given or offered, it must state in open court-
>
> (a) that it has passed a lesser sentence than it would otherwise have passed and
>
> (b) what the greater sentence would have been.
>
> (4) Subsection (3) does not apply if the court thinks that it would not be in the public interest to disclose that the sentence has been discounted; but in such a case the court must give written notice of the matters specified in paragraphs (a) and (b) of subsection (3) to both the prosecutor and the defendant.
>
> (5) Nothing in any enactment which-
>
> (a) requires that a minimum sentence is passed in respect of any offence or an offence of any description or by reference to the circumstance of any offender (whether or not the enactment also permits the court to pass a lesser sentence in particular circumstances), or
>
> (b) in the case of a sentence which is fixed by law, requires the court to take into account certain matters for the purposes of making an order which determines or has the effect of determining the minimum period of imprisonment which the offender must serve (whether or not the enactment also permits the court to fix a lesser period in particular circumstances),

affects the power of a court to act under subsection (2).

(6) If, in determining what sentence to pass on the defendant, the court takes into account the extent and nature of the assistance given or offered as mentioned in subsection (2), that does not prevent the court from also taking account of any other matter which it is entitled by virtue of any other enactment to take account of for the purposes of determining-

(a) the sentence, or

(b) in the case of a sentence which is fixed by law, any minimum period of imprisonment which an offender must serve.

(7) If subsection (3) above does not apply by virtue of subsection (4) above, section 174(1)(a) and 270 of the Criminal Justice Act 2003 (c.44) (requirement to explain reasons for sentence or other order) do not apply to the extent that the explanation will disclose that a sentence has been discounted in pursuance of this section.

(8) In this section-

(a) a reference to a sentence includes, in the case of a sentence which is fixed by law, a reference to the minimum period an offender is required to serve, and a reference to a lesser sentence must be construed accordingly;

(b) a reference to imprisonment includes a reference to any other custodial sentence within the meaning of section 76 of the Powers of Criminal Courts (Sentencing) Act 2000 (c.6) or Article 2 of the Criminal Justice (Northern Ireland) Order 1996 (S.I. 1996/3160).

(9) An agreement with a specific prosecutor may provide for assistance to be given to that prosecutor or to any other prosecutor.

(10) Reference to a specified prosecutor must be construed in accordance with section 71."

25. Section 74 introduces a new process, a "review" of a sentence which has already been imposed. The section provides:

"(1) This section applies if-

(a) the Crown Court has passed a sentence on a person in respect of an offence, and

(b) the person falls within subsection (2).

(2) A person falls within this subsection if-

(a) he received a discounted sentence in consequence of his having offered in pursuance of a written agreement to give assistance to the prosecutor or investigator of an offence but he knowingly fails to any extent to give assistance in accordance with the agreement;

(b) he receives a discounted sentence in consequence of his having offered in pursuance of a written agreement to give assistance to the prosecutor or investigator of an offence and, having given the assistance in accordance with the agreement, in pursuance of another written agreement gives or offers to give further assistance;

(c) he receives a sentence which is not discounted but in pursuance of a written agreement he subsequently gives or offers to give assistance to the prosecutor or investigator of an offence.

(3) A specified prosecutor may at any time refer the case back to the court by which the sentence was passed if-

(a) the person is still serving his sentence, and

(b) the specified prosecutor thinks it is in the interests of justice to do so.

(4) A case so referred must, if possible, be heard by the judge who passed the sentence to which the referral relates.

(5) If the court is satisfied that a person who falls within subsection (2)(a) knowingly failed to give the assistance it may substitute for the sentence to which the referral relates such greater sentence (not exceeding that which it would have passed but for the agreement to give assistance) as it thinks appropriate.

(6) In a case of a person who falls within subsection (2)(b) or (c) the court may –

(a) take into account the extent and nature of the assistance given or offered;

(b) substitute for the sentence to which the referral relates such lesser sentence as it thinks appropriate.

(7) Any part of the sentence to which the referral relates which the person has already served must be taken into account in determining when a greater or lesser sentence imposed by subsection (5) or (6) has been served.

(8) A person in respect of whom a reference is made under this section and the specified prosecutor may with the leave of the Court of Appeal appeal to the Court of Appeal against the decision of the Crown Court.

(9) Section 33(3) of the Criminal Appeal Act 1968 (c.19) (limitation on appeal from the criminal division of the Court of Appeal) does not prevent an appeal to the Supreme Court under this section.

(10) A discounted sentence is a sentence passed in pursuance of section 73 or subsection (6) above.

(11) References-

(a) to a written agreement are to an agreement made in writing with a specified prosecutor;

(b) to a specified prosecutor must be construed in accordance with section 71.

(12) In relation to any proceedings under this section, the Secretary of State may make an order containing provision corresponding to any provision in-

(a) the Criminal Appeal Act 1968 (subject to any specified modifications), or

(b) the Criminal Appeal (Northern Ireland) Act 1980 (c.47) (subject to any specified modifications).

(13) A person does not fall within subsection (2) if-

(a) he was convicted of an offence for which the sentence is fixed by law, and

(b) he did not plead guilty to the offence for which he was sentenced.

(14) Section 174(1)(a) or 270 of the Criminal Justice Act 2003 (c.44) (as the case may be) applies to a sentence substituted under subsection (5) above unless the court thinks that it is not in the public interest to disclose that the person falls within subsection (2)(a) above.

(15) Subsections (3) to (9) of section 73 apply for the purposes of this section as they apply for the purposes of that section and any reference in those subsections to subsection (2) of that section must be construed as a reference to subsection (6) of this section."

26. Section 75 addresses important procedural issues arising in the context of the section 74 review process. It addresses the circumstances in which the court may make an order excluding the public from such hearings, and prohibiting the publication of reports or the whole or part of any relevant proceedings. It must be considered as part of the new context, following the implementation of SOCPA, that reviews based on post-sentence assistance are no longer decided in private by the Home Office and the Parole Board. It provides:

"(1) This section applies to-

(a) any proceedings relating to a reference made under section 74(3), and

(b) any other proceedings arising in consequence of such proceedings.

(2) The court in which the proceedings will be or are being heard may make such order as it thinks appropriate-

(a) to exclude from the proceedings any person who does not fall within subsection (4);

(b) to give such directions as it thinks appropriate prohibiting the publication of any matter relating to the proceedings (including the fact that the reference has been made).

(3) An order under subsection (2) may be made only to the extent that the court thinks-

(a) that it is necessary to do so to protect the safety of any person, and

(b) that it is in the interests of justice.

(4) The following persons fall within this subsection-

(a) a member or officer of the court;

(b) a party to the proceedings;

(c) counsel or a solicitor for a party to the proceedings;

(d) a person otherwise directly concerned with the proceedings.

(5) This section does not affect any other power which the court has by virtue of any rule of law or other enactment-

(a) to exclude any person from proceedings, or

(b) to restrict the publication of any matter relating to proceedings."

Discussion

27. The essential feature of the new statutory framework is that the offender must publicly admit the full extent of his own criminality and agree to participate in a formalised process. The formalities have their own immediate purposes, and are intended to avoid some of the problems to which the previous processes could sometimes give rise. These were often "private" arrangements between the police and the criminal, revealed of course to the court, but exposed to the potential for

corruption and criminal double dealing, and even if not in any way corrupt, nevertheless subject to the perception of possible corruption. In other words the formalities ensure that the decision to enter into the agreement with a criminal is specifically and separately considered by an identified prosecutor and should avoid later questions to which any kind of "private" arrangements can be subject.

28. Section 73 addresses sentencing decisions following assistance provided by the defendant. The structure in effect confirms well understood principles. At a later stage in this judgment we shall identify some of the features likely to arise for consideration, but for the moment record that, provided they admit their own criminality in full, the process is not confined to offenders who provide assistance in relation to crimes in which they were participants, or accessories, or with which they were otherwise linked. At the end of this process the sentence actually imposed may be appealed to this court in the usual way.

29. Section 74 is concerned with the new process by which a "review" of the sentence passed in the Crown Court is reviewed in a judicial process on a reference back to the court by a specified prosecutor. The responsibility for considering whether any reduction in sentence should follow a post-sentence agreement within SOCPA is vested in the Crown Court. This reverses the former practice in relation to post-sentence assistance which was formerly left to the Home Office and the Parole Board (*R v A* [1999] 1 CAR(S) 52; *R v K* [2003] 1 CAR(S) 6) and creates a statutory scheme which expressly entitles the Court to take account of relevant events after conviction and sentence. Section 74(2) identifies three post-sentence situations in which the sentence being served by the defendant is susceptible to review. In particular, the review process can arise following a sentence discounted for assistance, if the defendant reneges on the written agreement which produced the original reduction, and provides an important safeguard against dishonest manipulation of the process by the defendant. It may also arise for the defendant who was not previously offered to provide assistance, and decides, after all, to do so. In each situation specified by s. 74(2) the defendant may be re-sentenced in the Crown Court, and where possible, this decision should be made by the judge who passed the original sentence. At the conclusion of the review, his decision may then be reconsidered in this Court.

30. Where the review arises from the defendant's failure or refusal to provide assistance in accordance with the written agreement, the sentencing judge will already have in mind the sentence which would have been passed "but for the assistance given or offered". This sentence should be readily ascertained from the sentencing remarks where the judge, in compliance with section 73(3)(b), has identified, as he normally should, the sentence which would have been imposed but for the assistance given or offered. We doubt whether, save exceptionally, it would be right for the sentence indicated at that stage to be subject to any reduction, but equally, as section 73(5) provides, it should not be increased by way of punishment for a defendant who has backed away from the agreement. Non compliance is not a separate crime, nor indeed an aggravating feature of the original offence; the penalty is that the defendant will be deprived of the reduction of sentence which would have been allowed if he had complied with the agreement. Instead he will normally serve the appropriate sentence for his criminality in full.

31. When a review is under consideration after sentence, the specified prosecutor will no doubt be astute to the risk that a professional criminal may be seeking to manipulate the system for his own purposes. One question which will normally require to be addressed is why the offer to give assistance has been delayed, and another, whether the delay may have diminished its value. Again, however, unlike the current arrangements by which discounts for a guilty plea should normally be reflective of the time when it was tendered, for the purposes of a review, any discount should continue to reflect the extent and nature of the assistance given or offered. Unless the delay has diminished the value of the assistance, the defendant should not be penalised by a lesser reduction, but if it has, only to a proportionate extent.

32. The review process is directed towards a sentence which has already been imposed. There are no transitional provisions. It may take place "at any time" after the legislation came into force, whether the original sentence was imposed before or after the implementation of SOCPA. In particular, nothing in the legislative structure suggests that sentences imposed before that date fall outside the ambit of section 74, and indeed in our judgment SOCPA provides a comprehensive framework of general application for reviews of sentences, whenever imposed, and whenever the crime or crimes in question were committed.

33. P's appeal raises a specific question relating to the involvement of this court. The original 17 year sentence was reduced to 15 years when this court exercised its powers under section 9 of the Criminal Appeal Act 1968. The jurisdiction to conduct a review of sentence on the basis of post-sentence assistance is vested in the Crown Court. Its decision on the review is subject to appeal to this court. Therefore the review itself is not an appeal against sentence, whether imposed in the Crown Court or this Court. It is a fresh process which takes place in new circumstances. Accordingly the process of review is not inhibited by the fact that this court has already heard and decided an appeal against the original sentence, whether the sentence is varied on appeal or not. This Court may be required to address either a sentence imposed in the light of the written section 73 agreement, or a review conducted in accordance with section 74, or, as here in the case of P, where the assistance provided may impinge on both decisions.

34. The legislation does not abolish a well understood feature of the sentencing process. There will be occasions when a defendant has provided assistance to the police which does not fall within the new arrangements, and in particular the written agreement. He is not thereby deprived of whatever consequent benefit he should receive. The existing "text" system, verified in the usual way, (as to which see *R v X* [1999] 2CAR 125: *R v R* [2002] EWCA Crim 267) may still be used, where appropriate, either before sentence is imposed in the Crown Court, or indeed at the hearing of an appeal against sentence. In summary, pragmatism still obtains. The investigative process is not to be deprived of the assistance derived from those who are, for whatever reason, unable or unwilling to enter into the formalised process envisaged in SOCPA, but they must take the consequence that any discount of sentence may be correspondingly reduced, simply because the value of assistance provided in this form is likely to be less, and is in any event less readily susceptible to a safeguarding review under s.

74(2) than it would if provided under the formal arrangements now available under s. 73.

35. No new powers in relation to publicity arise in relation to sentences imposed in the context of a written agreement under s. 73. The publicity provisions in s. 75 are directed to reviews under s. 74. While it is crucial to the entire process that the identity of those who provide assistance should, so far as practicable, be concealed, it is simultaneously fundamental to our criminal justice system that sentences should be imposed in open court, after public hearings. As reviews produce a decision of the court relating to sentence, unless absolutely necessary, the normal principle that sentences must not be imposed or reduced or altered after private hearings, privately ordered, should so far as possible be applied to them.

36. In the review process section 73(4) and (7) enable the court, first, not to disclose, save to the prosecutor and the defendant, that a sentence has been discounted, and second, allow the court to disapply section 174 of the Criminal Justice Act 2003, which requires the court to explain the reasons for its sentences. Reality must be faced. Professional criminals appreciate the likely range of sentence if they are convicted, and more important, they will quickly discover the purpose of any review process. A post-sentence reduction following a s.74 review will convey, at the very least, that something very unusual has happened, and criminals are perfectly well able to ask themselves why a reduction has been ordered, and then form their own conclusions. That said, actual knowledge will turn suspicion into confirmed fact. By section 75 the court is empowered to exclude the media and its representatives from the review. The power should be used with great caution, particularly where the review arises under s. 74(2) following failure to fulfil an agreement to provide assistance. In any event where practicable alternatives are available, they should if possible, be adopted. For example, it may be possible to anonymise the proceedings. It may also be possible to admit authorised representatives of the media subject to an order prohibiting publication of the whole or any specific aspect of the proceedings without the approval of the court. Alternatively, if the media has been excluded from any part of the hearing, the court may be able to provide information about the outcome of the review, together with a brief summary of the reasons for the decision, sufficient, even if brief, to enable the public to understand it, without disclosing any relevant identities. To the fullest extent it can, it should. In any event a full transcript of the entire hearing of the proceedings should be prepared immediately after its conclusion, and retained in appropriate conditions of secrecy by the specified prosecutor, and kept available for further directions by the court in relation to publicity if and when the public interest so requires, at least until further order by the court, and in any event until the end of the sentence.

The sentencing decision

37. SOCPA does not include any direct provision suggesting the level of discount appropriate to be provided to the defendant who enters into and performs the SOCPA agreement. The general principles are well established in a series of decided cases. These include *R v Sinfield* [1981] 3CAR (s) 258, *R v King* [1986] 82 CAR 120, *R v*

Sivan [1988] 87 CAR 407, *R v Debbag and Izzet* [1990-1] 12 CAR (S) 733, *R v X* [1994] 15 CAR (S) 750, *R v Sehitoglu* [1988] 1 CAR (S) 89, *R v A and B, R v K and R v R*, cited earlier, *R v A* [2006] EWCA Crim 1803, and *R v Z* [2007] EWCA Crim 1473.

38. The first principle is obvious. No hard and fast rules can be laid down for what, as in so many other aspects of the sentencing decision, is a fact specific decision.

39. The first factor in any sentencing decision is the criminality of the defendant, weight being given to such mitigating and aggregating features as there may be. Thereafter, the quality and quantity of the material provided by the defendant in the investigation and subsequent prosecution of crime falls to be considered. Addressing this issue, particular value should be attached to those cases where the defendant provides evidence in the form of a witness statement or is prepared to give evidence at any subsequent trial, and does so, with added force where the information either produces convictions for the most serious offences, including terrorism and murder, or prevents them, or which leads to disruption to or indeed the break up of major criminal gangs. Considerations like these then have to be put in the context of the nature and extent of the personal risks to and potential consequences faced by the defendant and the members of his family. In most cases the greater the nature of the criminality revealed by the defendant, the greater the consequent risks. The vast majority of the earlier authorities were decided before the arrangements for calculating the discounts for a guilty plea were formalised, as they now have been by statute (s.152 of the Powers of Criminal Courts (Sentencing) Act 2000 and s. 144 and s. 174 (2) (d) of the Criminal Justice Act 2003) and the definitive guidelines, Reduction in Sentence for a Guilty Plea, issued by the Sentencing Guidelines Council, and in particular the statement of purpose in paragraphs 2.1 – 2.6. When it applies, the discount for the guilty plea is separate from and additional to the appropriate reduction for assistance provided by the defendant (*R v Wood* [1997] 1 CAR(S) 347). Accordingly, the discount for the assistance provided by the defendant should be assessed first, against all other relevant considerations, and the notional sentence so achieved should be further discounted for the guilty plea. In the particular context of the SOCPA arrangements, the circumstances in which the guilty plea indication was given, and whether it was made at the first available opportunity, may require close attention. Finally we emphasise that in this type of sentencing decision a mathematical approach is liable to produce an inappropriate answer, and that the totality principle is fundamental. In this Court, on appeal, focus will be the sentence, which should reflect all the relevant circumstances, rather than its mathematical computation.

40. The SOCPA procedure requires the defendant to reveal the whole of his previous criminal activities. This will almost inevitably mean that he will admit, and plead guilty to offences which would never otherwise have been attributed to him, and may indeed have been unknown to the police. In order for the process to work as intended, sentencing for offences which fall into this category should usually be approached with these realities in mind and, so far as section 73 agreements are concerned, should normally lead to the imposition of concurrent sentences. In the review process in relation to a defendant who is already serving his sentence, and who enters into an appropriate agreement to provide information, in which he discloses his previous

criminal activities, he will come before the court, as P did, to be sentenced for the new crimes he has disclosed, as well as for a review of the original sentence. When the original sentence is reduced, it has already been running, while the sentence for any new offence will run from the date it was imposed. As we emphasised in the previous paragraph, in this context too, the totality principle is critical.

41. We were asked to consider the possibility of a discount in an exceptional case which, in effect, was that the defendant would not serve any sentence at all. We cannot envisage any circumstances in which a defendant who has committed and for these purposes admitted serious crimes can or should escape punishment altogether. The process under sections 73 and 74 does not provide immunity from punishment, and, subject to appropriate discounts, an effective sentence remains a basic characteristic of the process. Issues of immunity are addressed in section 71. What the defendant has earned by participating in the written agreement system is an appropriate reward for the assistance provided to the administration of justice, and to encourage others to do the same, the reward takes the form of a discount from the sentence which would otherwise be appropriate. It is only in the most exceptional case that the appropriate level of reduction would exceed three quarters of the total sentence which would otherwise be passed, and the normal level will continue, as before, to be a reduction of somewhere between one half and two thirds of that sentence.

The instant appeals

P

42. Both on the review of the original sentence, and when assessing sentence for the offences to which P pleaded guilty following the briefing process, the Judge, following the pre-SOCPA authorities, decided that a reduction of two thirds should follow. Although we disagree with the submission on P's behalf that the assistance provided by him, and the risks he ran and will now be running, merited a discount which would have provided for his immediate release, in the light of the considerations we have addressed, this case, involving important assistance to the investigation of a murder in which he himself was not involved, directly or indirectly, might without injustice, have attracted a somewhat higher discount. Approaching the problem on the basis of totality, the sentence on the review will be left at 5 years. However the 4 year sentence for the offences disclosed by P himself which could not otherwise have been prosecuted to conviction, and followed entirely from P's obligation under the SOCPA process to disclose his entire criminality, will be reduced to 3 years' imprisonment to run from 9th March 2007. To this extent, this appeal succeeds.

Blackburn

43. Simon J approached the discount in Blackburn's case in the same way. Blackburn gave damning evidence against a man who had participated in the execution of David Rice. Bevens was convicted of his murder. Blackburn, will, if necessary, give

evidence against the man who shot Rice. However, Blackburn was very close indeed to the offence, and plainly linked to it by the evidence available to the police well before he offered to provide assistance. On the other hand it was accepted by the prosecution, and Blackburn fell to be sentenced, on the basis that his participation in Rice's death did not begin until after he was murdered by others. The drug offences which he admitted in the debriefing process were linked to his criminal activities with the man who allegedly shot Rice, but were, as the Crown accepts, limited to cannabis. Approaching this sentencing decision on the basis of totality, we have concluded that the sentence of 4 years' imprisonment did not entirely reflect the appropriate discount for the assistance given by Blackburn, and the overall starting point was probably a little too high. The overall impact is that we shall reduce the sentence of 4 years' to a total of 2 ½ years' imprisonment. This sentence will be achieved by ordering that the sentences on both counts will run concurrently. To this extent, the appeal will be allowed.