Judgment Approved by the court for handing down.

[2023] EWCA Crim 1311

Case No: 202300998A3/202300446A1/202300798A4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT NORWICH
HHJ Bate
T20227136

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/11/2023

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
LORD JUSTICE HOLROYDE
MR JUSTICE GOOSE
and
SIR ROBIN SPENCER

- -

Between:

ADAM ROYLE	**Applicants**
"AJC"	
"BCQ"	
- and -	
THE KING	**Respondent**

- -

Rob Pollington, Sean Minihan and Mark Heywood KC (all assigned by **the Registrar of Criminal Appeals**) for the **Applicants**
Jonathan Hall KC and Dominic Hockley (instructed by **CPS Appeals and Review Unit**) for the **Respondent**

Hearing dates: 19 July 2023

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Approved Judgment

This judgment was handed down remotely at 10am on 13 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Holroyde:

1. Each of these applications for leave to appeal against sentence raises issues relating to the reduction in sentence afforded to offenders who have provided information and assistance to the law enforcement authorities. For that reason, although otherwise unrelated, they were listed together for hearing.

2. In two of the cases, the court was satisfied that the risk of harm to the applicants if they were identified as informers necessitated a derogation from the important principle of open justice. We therefore ordered that those applicants should remain anonymous; and orders have been made, pursuant to section 11 of the Contempt of Court Act 1981, that nothing may be included in any report of these proceedings which names or may otherwise lead members of the public to identify those applicants, who must be referred to by the randomly chosen letters AJC and BCQ respectively.

3. Consistently with those orders, we shall not in this open judgment identify the courts in which, or the judges by whom, AJC and BCQ were sentenced. Nor shall we go into any of the details of the offences for which they were sentenced. In the case of Royle, the fact of his assistance to the police was already in the public domain (see paragraph 54 below). Most unusually, therefore, there was no need to take any steps to protect his identity in this appeal.

4. We heard initial submissions in open court as to general principles applicable to all cases involving the sentencing of offenders who have provided information and assistance, and then heard submissions – in private in the cases of AJC and BCQ – as to the individual applications. We are grateful to all counsel for their very helpful submissions, both written and oral.

5. In the case of the applicant Adam Royle (to whom, meaning no disrespect, we shall hereafter refer to by his surname alone), we refused his application for leave to appeal against sentence, and indicated that we would give our reasons in a written judgment at a later stage. In the cases of AJC and BCQ we reserved our decisions and reasons to be given in a written judgment.

6. We were helpfully referred to relevant statutory provisions, principally of the Sentencing Code introduced by the Sentencing Act 2020, and relevant provisions of

the Criminal Procedure Rules. For convenience, we shall refer to provisions of the Sentencing Code merely by the section number, and to Criminal Procedure Rules merely by the rule number.

7. We were also referred to a substantial number of cases. It is convenient to list at the outset those which we found most relevant to our decisions, and to indicate the shorthand names by which we shall refer to them: *R v King* (1985) 7 Cr App R (S) 227 (*"King"*); *R v Sivan and others* (1988) 87 Cr App R 407 (*"Sivan"*); *R v A and B* [1999] 1 Cr App R (S) 52 (*"A and B"*); *R v P and Blackburn* [2007] EWCA Crim 2290, [2008] 2 Cr App R (S) 5 (*"P and Blackburn"*); *R v D* [2010] EWCA Crim 1485, [2011] 1 Cr App R (S) 69 (*"D"*); *R v Z* [2015] EWCA Crim 1427, [2016] 1 Cr App R (S) 15 (*"Z"*); *R v N*, also referred to as *R v AYN and ZAR* [2016] EWCA Crim 590, [2016] 2 Cr App R (S) 33 (*"N"*); *R v S* [2019] EWCA Crim 569 (*"S"*); *R v AAF* [2021] EWCA Crim 840 (*"AAF"*); and *R v T* [2021] EWCA Crim 1474, [2022] 1 Cr App R (S) 55 (*"T"*).

8. We begin by considering the principles applicable to the sentencing of those who provided information and assistance, to whom we shall for convenience refer collectively as "informers". Again, for convenience, we shall refer to the various law enforcement authorities to whom information or assistance may be given as "the police".

Why do informers receive a reduction in sentence?

9. There is a long-established practice of reducing the sentence which would otherwise have been imposed on an offender to reflect the fact that he has provided information and assistance to the police. The justification for doing so is purely pragmatic. The public interest in rewarding assistance to the authorities and protecting sources has long been recognised: see *Marks v Beyfus* (1890) 25 QBD 494. In *P and Blackburn*, at [22], Sir Igor Judge, President of the Queen's Bench Division (as he then was) put it in these terms:

> "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. … The solitary incentive to encourage cooperation 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."

10. As that passage indicates, the common law practice of making such a reduction in sentence in the light of a "text" from the police outlining assistance given is now also embodied in a statutory procedure, which was originally introduced by the Serious Organised Crime and Police Act 1997 and is now contained in ss74-75 and ss387-391 of the Sentencing Code. For convenience, we shall refer to "the text procedure" and "the statutory procedure" respectively.

11. The rationale for making a reduction is the same whether the statutory procedure or the text procedure has been engaged. The Sentencing Council's General guideline: overarching principles directs sentencers (at step 3 of the process set out in the guideline) to take into account s74 "and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator". In principle, there is no reason to distinguish between the two procedures in terms of the extent of the reduction which is made, though the differing circumstances of individual cases may result in a difference in practice. In *P and Blackburn* at [34] the court observed that an informer who chose to use the text procedure rather than the statutory procedure –

> "… 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 …"

12. The rationale for making a reduction is also the same whether the information provided relates to the offence for which the informer has been convicted or some other criminal activity: see *Sivan* at p412; and whether the information and assistance are provided before or after the apprehension of the informer.

13. It is, however, important to note that an offender who wishes to achieve a reduction in sentence by providing information or assistance to the police must do so before he is sentenced in the Crown Court. On an appeal, the function of this court is to review the sentence which was passed in the court below, not to conduct a fresh sentencing process. For that reason, as was said in *A and B* at p56:

> "If a defendant denies guilt but is convicted and sentenced following a contested trial without supplying valuable information to the authorities before sentence or expressing willingness to do so, the Court of Appeal Criminal Division will not ordinarily reduce a sentence to take account of information supplied to the authorities by the defendant after sentence."

14. The court recognised a partial exception to that rule: if a reduction in sentence is made in the Crown Court, and the assistance provided exceeds that which the sentencer expected, this court may review the sentence to reflect the true value of the assistance given, and to be given, by the offender.

15. In *Z* the court declined to depart from the principles stated in *A and B*, and rejected a submission that the common law should reflect the introduction of the statutory procedure by reducing a sentence on the basis of help provided by the informer after he had been convicted and sentenced.

The statutory procedure:

16. The statutory procedure in s74 involves an offender entering into a written agreement offering to give assistance to the prosecuting authority. The sentence originally imposed may be reviewed, whilst the offender is still serving it, in accordance with s387. By s388, a sentence may also be reviewed where an offender subsequently enters into an agreement to provide assistance.

17. So far as is material for present purposes, s74 provides:

> "**74 Reduction in sentence for assistance to prosecution**
>
> (1) This section applies where the Crown Court is determining what sentence to pass in respect of an offence on an offender who –
>
> (a) pleaded guilty to the offence,
>
> (b) was convicted in the Crown Court or committed to the Crown Court for sentence, and
>
> (c) pursuant to a written agreement made with a specified prosecutor, has assisted or offered to assist –
>
> (i) the investigator,
>
> (ii) or the specified prosecutor or any other prosecutor
>
> in relation to that or any other offence.
>
> (2) 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) If the court considers that it would not be in the public interest to disclose that the sentence had been discounted by virtue of this section –
>
> (a) subsection (3) does not apply,

(b) the court must give a written statement of the matters specified in subsection (3)(a) and (b) to –

(i) the prosecutor, and

(ii) the offender, and

(c) sections 52(2) and 322(4) (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 by virtue of this section."

18. Again so far as is material for present purposes, ss387 and 388 provide:

"**387 Failure by offender to provide agreed assistance: review of sentence**

(1) This section applies if –

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

(b) the sentence ('the original sentence') is a discounted sentence in consequence of the offender's having offered in pursuance of a written agreement to give assistance to the prosecutor or investigator of an offence, and

(c) the offender knowingly fails to any extent to give assistance in accordance with the agreement.

(2) A specified prosecutor may at any time refer the case back to the Crown Court if –

(a) the offender is still serving the original sentence, and

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

(4) If the court is satisfied that the offender knowingly failed to give the assistance it may substitute for the original sentence a sentence that is –

(a) greater than the original sentence, but

(b) not greater than the sentence which it would have passed but for the agreement mentioned in subsection (1)(b) ('the original maximum').

…

388 Review of sentence following subsequent agreement for assistance by offender

> (1) A case is eligible for review under this section if –
>
> (a) the Crown Court has passed a sentence on an offender in respect of an offence,
>
> (b) the offender is still serving the sentence, and
>
> (c) pursuant to a written agreement subsequently made with a specified prosecutor, the offender has assisted or offered to assist the investigator or prosecutor of any offence, but this is subject to subsection (2).
>
> (2) A case is not eligible for review under this section if –
>
> (a) the sentence was discounted and the offender has not given the assistance offered in accordance with the written agreement by virtue of which it was discounted, or
>
> (b) the offence was one for which the sentence was fixed by law and the offender did not plead guilty to it.
>
> (3) A specified prosecutor may at any time refer a case back to the Crown Court if –
>
> (a) the case is eligible for review under this section, and
>
> (b) the prosecutor considers it is in the interests of justice to do so….
>
> (5) 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.
>
> …"

19. In relation to each of those two types of review, the sentencer is required to state certain matters in open court unless he or she considers it would not be in the public interest to do so.

20. By s390, the court has power to exclude members of the public from proceedings under ss387 or 388.

The text procedure:

21. The statutory procedure has been used comparatively rarely, and does not supplant the common law procedure, which continues to be used more frequently. Under the text procedure, an officer who is not involved in the case prepares the text and brings it to court for the attention of the sentencing judge. Both the Crown Court and this court

have systems in place for the delivery of the text to the judge, and for a separate confidential record to confirm that the contents have been read. The author of the text should be at court and prepared to assist the judge with evidence if required; but, as we indicate in paragraph 22 below, that should very rarely be necessary.

22. As to the contents of the text, the police follow a practice which was summarised as follows in *N* at [7]:

> "The text will set out:
>
> (i) the offender's status and whether he is a Covert Human Intelligence Source (CHIS) under the Regulation of Investigatory Powers Act 2000;
>
> (ii) the details of the assistance provided, the information or intelligence provided and whether he is willing to be a witness;
>
> (iii) the effort to which the offender had gone to obtain the information;
>
> (iv) any risk to the offender or his family;
>
> (v) an assessment of the benefit derived by the police, including any arrests or convictions or any property recovered;
>
> (vi) any financial reward the offender has already received for the assistance provided; and
>
> (vii) a statement as to whether the offender will be of future use to the police."

23. The court in *N* also stated that it is a matter for the judgement of the police what response they are able to give if asked to provide a text: the police should not be required by a court to provide any information in relation to an offender's assertion that he had given them information and assistance. Further, if a text is provided but the offender disputes its contents, the normal rule is that no evidence should be given, it being difficult to conceive of any circumstances in which it would be in the interests of justice for the officer concerned to be cross-examined about the text. Evidence is only likely to be necessary in rare cases where the text is unclear, or where a matter established independently of the offender has not been covered in the text.

24. The text will always have been seen by a senior lawyer of the prosecuting authority, not least because it may be necessary to consider whether the sentence imposed was unduly lenient. We understand that there is a Crown Prosecution Service protocol in relation to the prosecuting advocate being aware of the contents of the text. The legal representatives of the offender will often be aware; but it cannot be assumed that they will, because an informer may not wish them to know that he has provided information and assistance. A judge who is uncertain as to who knows of the text is inhibited from making any enquiry of the defence advocate, because of the risk of inadvertent disclosure to an advocate who does not know that a text has been provided. We therefore think it important that the text should specifically state, if it

be the case, that the informer does not wish his legal representatives to know that there is a text, or to know the contents of it.

At what stage of sentencing should the reduction be made?

25. *King* was decided at a time before the current procedure for making a reduction to reflect a guilty plea had been established. As a result, a single reduction in sentence was made, to reflect both the guilty plea and the information and assistance given to the police. That feature must be kept in mind when considering the judgments in that case, and in some other cases decided many years ago in which a similar single reduction had been made.

26. The procedure which should now be followed is clear from case law, and is consistent with the structure of the Sentencing Council's definitive guidelines. The sentencer should first identify, by reference to any applicable guideline, the appropriate starting point, which should then be adjusted upwards or downwards to reflect the balance of any aggravating and mitigating factors. Having thus arrived at the sentence which would otherwise be imposed, the sentencer should reduce the sentence to the extent which appears appropriate in the light of information and assistance given to the police. That reduced sentence should then be further reduced as appropriate to reflect a guilty plea.

27. In determining the appropriate level of reduction to reflect a guilty plea, the court is required by s73 to take into account the stage in the proceedings at which the offender indicated the intention to plead guilty and the circumstances in which that indication was given. The Sentencing Council's definitive guideline on Reduction in sentence for a guilty plea sets out the principles to be applied, and requires the sentencer to state the amount of the reduction.

28. As is implicit in paragraph 13 above, a guilty plea is not an essential prerequisite of the making of a reduction for information and assistance provided. The fact that an offender has contested his trial may, however, be one of the factors relevant to the extent of the reduction made.

How great a reduction should be made?

29. In *King* the Lord Chief Justice referred to the risk to informers of suffering violent reprisals, and observed that it is to the advantage of the public that criminals should be encouraged to inform upon other criminals. He continued:

> "Consequently, an expectation of some substantial mitigation of what would otherwise be the proper sentence is required in order to produce the desired result, namely the information. The amount of that reduction, it seems to us, will vary, as [counsel] submitted to us, from about one half to two thirds reduction according to the circumstances as outlined above."

30. In *King*, the term of about 10 years' imprisonment which would otherwise have been appropriate was reduced to a term of four and half years. As we have noted, it was a single reduction which encompassed both the credit for the guilty plea and a discount for the information and assistance provided. Assuming a reduction for the guilty pleas of around one-quarter applied at the final stage, that would seem to indicate a reduction of only about 40% for the information and assistance provided. Nonetheless, the reference to a reduction of between one-half and two-thirds has been repeated in subsequent cases in which a separate reduction for a guilty plea has been made. In *P and Blackburn*, a case involving the statutory procedure, the court stated at [41] that it could not envisage any circumstances in which defendant who had committed serious crimes could or should escape punishment altogether because he had provided information and assistance. The President continued:

> "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."

31. We emphasise, however, that neither that nor any other level of reduction can be regarded as a standard or conventional discount to which an offender will invariably be entitled, or to which he will be entitled unless there is some compelling reason to depart from the norm. The decision as to what reduction is appropriate requires a fact-specific assessment of all relevant circumstances: see *S* at [32]. Lord Bingham CJ stated the correct approach as follows in *A and B* at p56:

> "The extent of the discount will ordinarily depend on the value of the help given and expected to be given. Value is a function of quality and quantity. If the information given is unreliable, vague, lacking in practical utility or already known to the authorities, no identifiable discount may be given or, if given, any discount will be minimal. If the information given is accurate, particularised, useful in practice, and hitherto unknown to the authorities, enabling serious criminal activity to be stopped and serious criminals brought to book, the discount may be substantial. Hence little or no credit will be given for the supply of a mass of information which is worthless or virtually so, but the greater the supply of good quality information the greater in the ordinary way the discount will be. Where, by supplying valuable information to the authorities, a defendant exposes himself or his family to personal jeopardy, it will ordinarily be recognised in the sentence passed. For all these purposes, account will be taken

> of help given and reasonably expected to be given in the future."

It follows that the value of the assistance given is likely to be a crucial factor in the court's decision as to whether a reduction in the range of half to two thirds is justified.

32. By way of examples of the need for a fact-specific decision:

i) In *Sivan*, where the offender had given "certain information which was or is of value", this court reduced a sentence which would otherwise have been nine years' imprisonment to one of six and a half years.

ii) In *P and Blackburn* this court held that the offender P (who had given extensive information about the criminal activities of himself and his associates, had identified two suspects in relation to a murder and had agreed to give evidence at their trial) should have received a somewhat greater discount than the two thirds which the judge below had allowed.

iii) In *D* the offender entered into an agreement to provide details of the drug trafficking and money laundering activities of about 36 persons, but did not agree to give evidence against anyone and did not make full admissions of all his own criminal activities. The court at [16] made clear that the appropriate reward for the assistance given to the administration of justice was a fact-specific decision, and that a defendant who had entered into the statutory procedure was not entitled to a "normal" discount of between one-half and two-thirds simply because he had done all that was required of him under his agreement. Nor was he entitled to be treated as if he had given evidence, or had offered to give evidence, merely because he had not been invited to do so. On the facts of that case, this court upheld the reduction of about 25% which had been made by the sentencing judge.

iv) In *S* this court upheld the decision of the sentencer that a reduction of 40% was appropriate to reflect both the assistance provided and an element of delay.

v) In *AAF* this court held that a reduction of 20% from the sentence which would otherwise have been appropriate was the maximum which was appropriate for the provision of information which "while of some value, was of a relatively low grade".

What factors are relevant in determining the appropriate reduction?

33. Having regard to the case law, we identify the following factors which may be relevant to the decision as to what reduction is appropriate in a particular case:

i) the quality and quantity of the information provided, including whether it related to trivial or to serious offences (the risk to the informer generally being greater when the criminality concerned is more serious);

ii) the period of time over which the information was provided;

iii) whether it assisted the authorities to bring to justice persons who would not otherwise have been brought to justice, or to prevent or disrupt the commission of serious crime, or to recover property;

iv) the degree of assistance which was provided, including whether the informer gave, or was willing to give, evidence confirming the information he had provided;

v) the degree of risk to which the informer has exposed himself and his family by providing the information or assistance;

vi) the nature and extent of the crime in which the informer has himself been involved, and the extent to which he has been prepared to admit the full extent of his criminality;

vii) whether the informer has relied on the same provision of information and assistance when being sentenced on a previous occasion, or when making an application to the Parole Board: in our view, an informer can generally only expect to receive credit once for past information or assistance, and for that reason the text should where applicable state whether particular information and assistance has been taken into account in imposing a previous sentence;

viii) whether the informer has been paid for the assistance he has provided, and if so, how much; but it is important to note that in *T* at [8] the court emphasised that a financial reward and a reduction in sentence are complementary means of showing offenders that it is worth their while to disclose the criminal activities of others: a financial reward, unless exceptionally generous, should therefore play only a small, if any, part in the sentencer's decision.

34. The weight to be given to the provision of information and assistance is a matter for the sentencer in the Crown Court to assess: this court will not interfere with his or her findings unless the decision involved an error of law or principle, or was outside the proper scope of the sentencer's discretion or was "fundamentally lacking in any underlying reasoning": see *S* at [35].

Must the sentencer state in open court the level of reduction made?

35. The general duty of a sentencer to explain the reasons for the sentence passed on an adult offender is stated as follows in s52:

> "**52 Duty to give reasons for and to explain effect of sentence**
>
> (1) A court passing sentence on an offender has the duties in subsections (2) and (3).
>
> (2) The court must state in open court, in ordinary language and in general terms, the court's reasons for deciding on the sentence.
>
> (3) The court must explain to the offender in ordinary language

> (a) the effect of the sentence,
>
> (b) the effects of non-compliance with any order that the offender is required to comply with and that forms part of the sentence,
>
> (c) any power of the court to vary or review any order that forms part of the sentence, and
>
> (d) the effects of failure to pay a fine, if the sentence consists of or includes a fine.
>
> (4) Criminal Procedure Rules may –
>
> (a) prescribe cases in which either duty does not apply, and
>
> (b) make provision about how an explanation under subsection (3) is to be given.
>
> (5) Subsections (6) to (9) are particular duties of the court in complying with the duty in subsection (2).
>
> Sentencing guidelines
>
> (6) The court must identify any sentencing guidelines relevant to the offender's case and –
>
> (a) explain how the court discharged any duty imposed on it by section 59 or 60 (duty to follow guidelines unless satisfied it would be contrary to the interests of justice to do so);
>
> (b) where the court was satisfied that it would be contrary to the interests of justice to follow the guidelines, state why.
>
> (7) Where as a result of taking into account any matter mentioned in section 73(2) (guilty pleas), the court imposes a punishment on the offender which is less severe than the punishment it would otherwise have imposed, the court must state that fact."

36. That general duty is reflected in r25.16(b), which requires the court when passing sentence to –

> "(i) explain the reasons,
>
> (ii) explain to the defendant its effect, the consequences of failing to comply with any order to pay any fine, and any power that the court has to vary or review the sentence, unless the defendant is absent, or the defendant's ill-health or disorderly conduct makes such an explanation impracticable, and

> (iii) give any such explanation in terms the defendant, if present, can understand (with help, if necessary) … "

37. Those provisions as to the general duty of a court passing sentence do not contain any requirement to state the extent of any reduction made because an offender has provided information or assistance.

38. In relation to the statutory procedure, we have noted in paragraphs 16 and 17 above that there are specific provisions requiring the court to state in open court what the sentence would have been if the reduction had not been made, or to give that information to the prosecutor and the offender in writing if it would not be in the public interest to disclose in open court that the sentence has been discounted. Those provisions are reflected in rule 28.1 which, so far as material, states –

> "**28.1 Reasons for not following usual sentencing requirements**
>
> (1) This rule applies where the court decides –
>
> …
>
> (d) to pass a lesser sentence than it otherwise would have passed because the defendant has assisted, or has agreed to assist, an investigator or prosecutor in relation to an offence.
>
> (2) The court must explain why it has so decided, when it explains the sentence that it has passed.
>
> (3) Where paragraph (1)(d) applies, the court must arrange for such an explanation to be given to the defendant and to the prosecutor in writing, if the court thinks that it not be in the public interest to explain in public."

39. The present terms of r28.1 have their origin in an amendment (to what was then r42.1 of the 2012 Rules) introduced by the Criminal Procedure (Amendment) Rules 2012. The Explanatory Memorandum stated that the amendment was intended to include explicit reference to the reduced sentence which a court can give, at that time under s73 of the 2005 Act, where a defendant has assisted in the investigation or prosecution of an offence.

40. There is, therefore, a clear statutory indication of what the court must do when the statutory procedure applies. In such circumstances, of course, the informer has entered into a formal agreement, of which the prosecutor and his legal representatives are necessarily aware, and to which the court can refer either in open court or, where the public interest so requires, in writing. But what, if any, explanation is required when the text procedure applies, a circumstance which the informer will generally not wish to revealed,for fear of reprisals, and which may not be known even to his legal representatives? We were assisted by helpful submissions as to the possible answers to that question.

41. We are satisfied that the present r28.1 applies only to the statutory procedure and not to the text procedure. At present, therefore, the duty on a sentencer who has reduced a sentence in a case in which the text procedure has been adopted is only the duty under s52 to explain the reasons for a sentence "in general terms". With the exception of the requirement to state the extent of any reduction for a guilty plea, as noted in paragraph 27 above, there is no general obligation for a sentencer to state the precise approach or the precise arithmetic by which the sentence has been reached. The duty to give an explanation in general terms does not, for example, require a sentencer to specify precisely by how much the identified starting point has been adjusted upwards or downwards in relation to each aggravating or mitigating factor: all that is required is a statement of the overall effect of the balancing of those factors. The law does not at present prescribe a further exception to that general rule where the text procedure has been followed.

42. There are unlikely to be many cases under the text procedure in which a statement that a specific reduction in sentence had been made to reflect information or assistance provided to the police, could be given in open court without risk to the informer. On the contrary, the risk to the informer, and the importance of the public interest in encouraging criminals to inform on other criminals, will generally mean that the sentencer will not be able to make any explicit reference in open court to the provision of information or the reduction of the sentence on that ground. Quite apart from the risk of reprisals to an individual informer, the prospect of an announcement in open court may well act as a deterrent to other offenders who are contemplating providing information or assistance. For those reasons, case law has long recognised that in cases involving the text procedure judges will generally pass a reduced (and sometimes, greatly reduced) sentence without stating in open court that the reduction has been made. See, for example, *Sivan*, where the court recognised that the circumstances in which information and assistance have been offered may necessitate some derogation from the principle of open justice. That derogation is justified by the need to safeguard the article 8 rights of the informer and his family. The s52 duty will be discharged in such cases by the judge making clear (in whatever terms he or she thinks best) that the court has considered all the matters of mitigation which have been brought to its attention.

43. Should the judge in such circumstances provide to the prosecution and the defence a written statement of the fact and the extent of the reduction made? The judge may choose to do so; and such a statement will no doubt be helpful to legal representatives in advising on appeal and to this court in considering the merits of an appeal if one is brought. But for the reasons we have given, the present position is that neither r28.1 nor any other rule requires the judge to do so.

44. Should such a requirement be imposed? It was submitted to us that it should. However, to do so would be likely to give rise to significant practical difficulties, especially if the informer had indicated that he did not wish his assistance to the police to be revealed to his legal representatives. Moreover, we do not think the imposition of such a requirement is essential to the fair resolution of any appeal which may be brought. In *P and Blackburn* at [39] the court emphasised –

> "… 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."

45. This is a difficult issue, and one which we think would most appropriately be considered by the Criminal Procedure Rules Committee, which will be able to consider the views of all the bodies who may be affected by the legal and practical implications of a possible amendment to the Criminal Procedure Rules. Accordingly, having stated the effect of the law as it stands at present, we invite the Criminal Procedure Rules Committee to consider whether any amendment of rule 28.1 may be necessary or desirable, either to confirm that it is confined to the statutory procedure, or explicitly to extend the duty to the text procedure.

46. We turn to our consideration of the application of these principles to the circumstances of the applications before the court.

The case of Royle:

47. In September 2022, in the Crown Court at Norwich, Royle pleaded guilty to an offence of robbery. On 10 March 2023 he was sentenced by HH Judge Bate to three years' imprisonment. The sole ground of appeal argued before this court was that the sentence failed properly to reflect the assistance he had given to the police and the risk of harm he had incurred by providing that assistance.

48. The facts of the offence can be summarised briefly. A man walking home in the early hours, after an evening spent drinking with friends, was attacked by Royle and another man, Draper. He was rendered unconscious, and robbed of his phone, wallet and bank card. He suffered injuries to his head and face. At some point he must have been made to reveal his PIN, though he could not remember what had happened. His bank card was used by Draper later that morning to make cash withdrawals totalling £500.

49. When arrested and interviewed under caution Royle made no comment; but at the conclusion of the interview he told the police that they should be speaking to Draper rather than to him.

50. Royle was then aged in his mid-forties. He had been sentenced on a total of 58 occasions for 152 offences, principally offences of dishonesty but also some offences of violence. Draper was of a similar age and had a similar criminal record.

51. Draper pleaded guilty both to the joint offence of robbery with Royle, and to a later offence of fraud.

52. The judge sentenced on the basis that both Royle and Draper had been willingly and actively involved in the robbery. He assessed the offence as falling within category 2B of the relevant guideline, with a starting point of four years' custody and a range from three to six years. The judge identified a number of aggravating features: joint offending; in the street, in the early hours; by men with long criminal records; against a victim whose ability to defend himself was reduced by his consumption of alcohol. He stated that he took into account all the mitigation advanced on behalf of each defendant. He concluded that, before giving credit for guilty pleas, the appropriate

sentences for the offence of robbery were four years' imprisonment in Royle's case, four and half years' imprisonment in Draper's case.

53. The judge reduced that sentence in Royle's case by one-quarter to reflect his guilty plea, and so imposed the sentence of three years' imprisonment. Draper's later guilty plea resulted in a reduction of his sentence to three years nine month's imprisonment, with a concurrent sentence of six months' imprisonment for the offence of fraud.

54. Mr Pollington submitted that Royle had provided information which was integral to the prosecution of Draper. CCTV footage had not enabled the police to identify the other man involved in the robbery, but information provided by Royle led to the identification and charging of Draper. Subsequently, the fact that Royle had done so was made public in a television broadcast; but, Mr Pollington submitted, Royle did not know that would happen when he provided the information. It was submitted that the reduction from four and a half years to four years, around 11%, failed sufficiently to reflect the assistance given and the risk of harm incurred.

55. We were unable to accept that submission. The judge made clear in his sentencing remarks that the difference in the sentences imposed on the two men reflected their differing mitigation. In our view, the assistance which Royle gave to the police, and to the administration of justice, was very modest. Moreover, the assistance was given in circumstances where each of the two men was seeking, by their mutually-inconsistent bases of plea, to cast as much of the blame as possible on the other. We concluded that the reduction of about 11% which the judge made from the sentence which would otherwise have been appropriate was comfortably within the range properly open to him. We were satisfied that there was no basis on which the contrary could be argued. We therefore refused the application for leave to appeal against sentence.

The cases of AJC and BCQ:

56. We state our decisions on these applications in two separate CLOSED judgments.