**CHAPTER 22**

1.  A custodial sentence is a sentence of last resort and is reserved for the most serious offences. The custody threshold test must be met before a custodial sentence can be imposed. The test under s. 152 CJA 2003 is whether the offence is so serious that neither a fine alone, nor a community sentence can be justified. A court can also impose a custodial term on an offender who refuses to comply with a requirement imposed as part of a community sentence or who fails to comply with a pre-sentence drug test under s. 161(2) CJA 2003. For the majority of offences that are sentenced in magistrates’ courts, the key to determining the seriousness of the offence is the balance of aggravating and mitigating factors in the offence, informed by sentencing guidelines, such as those contained in the Magistrates’ Court Sentencing Guidelines. Likewise in the Crown Court, regard should be had to sentencing guidelines which provide guidance to the court on the appropriateness of custodial sentences (see Chapter 21).

2.  The easy answer to the question is the seriousness of the offence to be sentenced. Section 153(2) CJA 2003 provides that the custodial term should be the shortest term commensurate with the seriousness of the offence. The picture is complicated, however, by a number of factors discussed in Chapter 21, including:

• credit for guilty plea;

• restrictions on magistrates’ court’s sentencing powers;

• the decision to impose consecutive or concurrent terms in a case where the defendant stands to be sentenced for two or more offences, or is currently subject to a suspended sentence;

• some statutes require the imposition of mandatory terms of imprisonment;

• special provision made under the CJA 2003 for those who are deemed ‘dangerous’ offenders and those who qualify for extended sentences because of the nature of the crimes they have committed.

3.  Under the CJA 2003, a court can choose to impose an immediate custodial term or a suspended term of imprisonment.

Question 4

EXERCISE 1

Start by looking at the MCSGs for theft from a shop (you can access the Guidelines via the SC’s webpages). The specific guideline can be found at <https://www.sentencingcouncil.org.uk/wp-content/uploads/SC-Theft-Offences-Definitive-Guideline-content_FINAL-web_.pdf> Based on the facts of this offence, the starting point in terms of sentence is a Band B fine with other sentencing options ranging upwards to a Band C fine and downwards to a conditional discharge. It is suggested that this particular theft falls within category 4 (C).You need to make an assessment of the seriousness of this particular theft and Celia’s culpability. The mitigating features would be that it was impulsive and unsophisticated. The offence is aggravated by the fact that Celia is subject to a conditional discharge for an identical offence imposed only six months ago. Celia therefore stands to be sentenced for the original theft for which she was given a conditional discharge. For this reason a further conditional discharge is somewhat unrealistic.

Celia will most probably be subject to a Band C fine (most probably charged at that is 150% of her relevant weekly income. In arriving at the eventual sentence, the court should give her full credit for her guilty plea. She will also be sentenced for the breach of the conditional discharge. The court may extend this or impose a further fine on her for the original offence.

Exercise 2

Louise is also charged with theft, but there is a crucial difference between her offence and that of Celia. Louise’s theft involves a breach of trust. She has stolen from her employer. Based on the facts of this offence and again, applying the guideline at: https://www.sentencingcouncil.org.uk/wp-content/uploads/SC-Theft-Offences-Definitive-Guideline-content\_FINAL-web\_.pdf **Category 4**
Low value goods stolen (up to £500) **and**
Little or no significant additional harm to the victim or others, the starting point in terms of sentence is a low level community order a sentence range up to a medium community level and down to a Band C fine. Try to assess the relative seriousness of the theft and Louise’s culpability.

The aggravating features include the fact that suspicion would have been cast on the other employees and that the offence was committed over a period of time. On the mitigating side of things the amount involved is small: hence this is a Category 4 (B) offence.

This is a case where a fast delivery pre-sentence report should be ordered. Louise has plenty of personal offender mitigation and could well be looking at a low end community order perhaps combining a rehabilitation activity requirement with an unpaid work requirement. She can expect to be ordered to pay £150 in compensation and some or all of the prosecution’s costs. Given her limited means, priority would be given to the compensation. In arriving at the eventual sentence, the court should give a discount for her guilty plea, perhaps reflected in the length and nature of the community order.

EXERCISE 3

The applicable sentencing guideline for this offence can be found at https://www.sentencingcouncil.org.uk/offences/item/production-of-a-controlled-drug-cultivation-of-cannabis-plant/. Based on the facts, Andrew’s criminal activity arguably falls within a Category 4 offence for a Class B drug based on a lesser role (essentially this is small scale cultivation for personal use and non-commercial supply). The sentencing starting point, based on this categorization, is a Band C fine. Aggravating features include the fact that this is not Andrew's first offence. Mitigating features include the fact that the drug is used to alleviate his partner's chronic medical condition. Subject to any strong personal offender mitigation, the most appropriate sentence, based on the guideline, is probably a low level community order or Band C fine. Andrew is entitled to a sentencing discount on account of his timely guilty plea.

EXERCISE 4

You need to access the s. 89 Police Act 1996 guideline in the MCSGs. It can be found at http://www.sentencingcouncil.org.uk/offences/item/assault-on-a-police-constable-in-execution-of-his-duty/. Assess the seriousness of this particular assault on a police officer, by reference to the harm caused and to Darren’s culpability. Which category of assault would you place it in? Arguably it could be deemed to be a Category 3 assault (greater harm and higher culpability). This was an intentional assault involving sustained kicking of the officer whilst he was on the ground. Injuries were caused leading to the officer having three weeks off work. On the assumption that it is correctly classified as a Category 3 assault, the starting point in terms of sentence is a 12-week custodial term. Are there any aggravating or mitigating features? Look at the guideline. Darren has two previous convictions for relevant offences and committed the offence whilst drunk. This is not a case where the court would have the power to commit Darren to sentence in the Crown Court under s. 3 PCC(S)A 2000. Do you know why? The answer is because it is a summary-only offence. Given the number of aggravating features, the court may feel that the starting point in terms of sentence ought to be increased.

A realistic sentencing objective in this case would be to avoid a custodial sentence and secure a medium to high-level community order. This will not be easy. There is evidence of regret. You should certainly refer to *R v Kefford* [2002] 2 Cr App R (S) 495 and the question of whether a prison sentence would serve any useful purpose in this case. A custodial sentence would probably result in Darren losing his job and being unable to pay compensation. Darren should be given credit for his early guilty plea. Darren could well be given a custodial sentence in the region of three months. This was a nasty assault on a serving police officer trying to fulfil his public duty. The court will feel the need to punish Darren and send out the right message. If the Bench was feeling lenient, Darren might be made the subject of a community order with a lengthy unpaid work requirement and/or curfew requirement and/or a prohibited activity order. If this were imposed, he would be in a position to pay compensation to the police constable as well as prosecution costs.