**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. 230 Sentencing Act 2020 (SA) 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 persistently and wilfully refuses to comply with a requirement imposed as part of a community sentence. 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 231 SA 2020 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 SA 2020 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 SA 2020, 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) <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/theft-from-a-shop-or-stall/>. You need to make an assessment of the seriousness of this particular theft and Celia’s culpability. Based on the facts of this offence, it is suggested that this particular theft falls within category 4 (C) giving a starting point of a Band B fine with a range going upwards to a Band C fine and downwards to a conditional discharge. 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. Try to assess the relative seriousness of the theft and Louise’s culpability, this time using the ‘Theft General’ guideline at: <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/theft-general/>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. Based on the facts of this offence it is arguably a **Category 4 offence** (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.

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 [Production of a controlled drug/ Cultivation of cannabis plant – Sentencing (sentencingcouncil.org.uk)](https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/production-of-a-controlled-drug-cultivation-of-cannabis-plant-2/). 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 low-level community order with a range up to a medium level order and down to a Band B 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 perhaps more appropriately a Band C or B fine. Andrew is entitled to a sentencing discount on account of his timely guilty plea.

EXERCISE 4

This offence would now be charged as common assault on an emergency worker, contrary to **section 1 Assault on Emergency Workers (Offences) Act 2018**. It is classified as an either-way offence carrying a potential maximum sentence of 12 months imprisonment. With that in mind, we invite you to access the new guideline for this offence which can be found: [Common assault / Racially or religiously aggravated common assault/ Common assault on emergency worker – Sentencing (sentencingcouncil.org.uk)](https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/common-assault-racially-or-religiously-aggravated-common-assault-common-assault-on-emergency-worker/)

Assess the seriousness of this 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 fall within A in terms of culpability 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. In terms of harm, arguably this is a Category 1 assault (thus higher culpability and greater harm). The starting point for an A1 assault on an emergency worker is a high-level community order with arrange that goes up to 26 weeks in custody. 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 a case where the custody threshold test is passed. The offence is further aggravated by it is committed on an emergency worker -the guideline states that where the court view the basic offence as being A1 it should: “Increase the length of custodial sentence if already considered for the basic offence **or** consider a custodial sentence, if not already considered for the basic offence.” Given the number of aggravating features, the magistrates’ court may feel that the starting point in terms of sentence ought to be increased.

The magistrates’ court would have the power to commit Darren to sentence in the Crown Court under s14 SA 2020. Do you know why? Because assaulting an emergency worker is triable either-way. **However**, with the doubling of the magistrates’ court maximum power of sentence to 12 months for a single either-way offence which is due to come into effect on the 25/4/22 means its powers are probably sufficient.

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.