Neutral Citation Number: [2021] EWCA Crim 1708

Case Nos:

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT MERTHYR TYDFIL 202102531 A2
His Honour Judge Williams
S202110052, S20210089
ON APPEAL FROM THE CROWN COURT AT CHESTER 202102720 A3
His Honour Judge Everett
S20210171
ON APPEAL FROM THE CROWN COURT AT BOURNEMOUTH 202102911 A3
His Honour Judge Pawson
S20210279

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/11/2021

Before :

LORD JUSTICE EDIS
MR JUSTICE TURNER
and
HER HONOUR JUDGE KARU
Sitting as a judge of the Court of Appeal

- -

Between :

THE CROWN
- and -
GARETH OWEN JEX **Applicant**

THE CROWN
- and -
SHAUN CHRISTOPHER JOHNSON **Applicant**

THE CROWN
- and -
ADAM DANIEL ARCHER **Applicant**

- -
- -

Julia Cox (assigned by the **Registrar**) for the **Applicant in Jex**
Louis Mably QC and William Bebb (instructed by **CPS Appeals Unit**) for the **prosecution in Jex**

Stephen Ferns (assigned by the **Registrar**) for the **Applicant in Johnson**

Simon Mintz (instructed by the **CPS**) for the **prosecution in Johnson**

John Dyer (assigned by the **Registrar**) for the **Applicant in Archer**

Hearing dates: 21 October 2021

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Approved Judgment

Lord Justice Edis :

1. Gareth Jex and Shaun Johnson apply for leave to appeal against sentence, and Adam Archer appeals against sentence with leave of the single judge. We grant the applications for leave. These three separate appeals against sentence have been listed before the same constitution on the same day so that technical issues which arise from the committals for sentence in each can be considered in a coherent way. The issues are not identical, and the decisions in the individual cases will of course be specific to those cases. We shall refer to the appellants by their surnames only, not out of disrespect but for economy and simplicity. We apologise for the acronyms and abbreviations which feature throughout this judgment, but we have attempted to use only those which are in common use in the courts.

2. Each of these cases demonstrates the continuing difficulties created in the Crown Court by committals for sentence, and illustrates in particular problems which can arise from the inaccurate recording of the results of court cases. Failures to record sentences properly on the Police National Computer ("PNC") have caused errors in sentencing in two of the cases which have involved substantial public resources being expended in their correction. In Jex, the error on the PNC means that he escaped 9 weeks of a prison sentence which he richly deserved to serve. In Johnson it meant that he was sentenced to 10 months' imprisonment for breach of a suspended sentence order ("SSO") which he had not breached. There have also been errors in sentencing, and in recording those sentences in the court records. This is a very unhappy state of affairs. The errors in these cases came to light because the cases came to this court and, in the vast majority of cases, this does not happen. It is a worrying thought that this court may be seeing the tip of an iceberg,

3. We appreciate the pressures on the judges and staff at the Crown Court, and on the Crown Prosecution Service and defence lawyers as well. Those pressures always exist, but are particularly acute now. Two of these cases illustrate the dangers of relying on the PNC alone for the terms of previous orders made when sentencing an offender. Where an order was made in the Crown Court, the Digital Case System ("DCS") will often allow access for the judges and staff to the original digital file, which will be a way of checking the PNC entry quite quickly. It is perhaps a counsel of perfection to demand such a check in all cases, especially where the person being sentenced confirms that the record is correct when formally asked to do so. We would, however, suggest that where the PNC entry is unclear, or where it is obviously wrong in some respect, this checking will be required before imposing a custodial sentence. It is very much to be hoped that new IT systems will improve the reliability of records and access to them, because otherwise the burden on the court on top of all its other responsibilities will become unmanageable. It would obviously be better if all apparently relevant orders could be checked before the offender is dealt with for their breach, or sentenced for the original offences, but that would require the development of a resourced system for that purpose. No such system currently exists, as far as we are aware. In this situation, the court depends on the records which are available, and on the advocates to undertake such checks as are available to them.

4. These cases throw up a number of problems, but we highlight one at the start of this judgment, to which we will return later. A significant issue arises as to the power of the Magistrates' Court to commit for sentence for offences which are either entirely

summary or which the Magistrates have decided fall within their sentencing powers. Where the Sentencing Act 2020 ("the Code") applies to the new offences, but the committal is because those offences were committed during the operational period of a SSO or community order made under the previous legislation, there is an argument that the transitional provisions of the Code mean that there is now no power to commit at all. This is because section 6 of the Powers of Criminal Courts (Sentencing) Act 2000 ("PCC(S)A") lists the circumstances where the power arises, and that list does not refer to the Code. Conversely, section 20 of the Code, lists circumstances where such a committal order may be made and that list does not include reference to orders made under the pre-Code legislation. The same problem does not exist for committals under section 3 of the PCC(S)A and section 14 of the Code, because those are free standing powers, not contingent on any other committal to the Crown Court having occurred. We are clear that Parliament cannot have intended that consolidating legislation would create a lacuna of this kind, and we will have to consider whether there is a solution to this problem below. The statutory purpose of the Code was to clarify the statutory basis of sentencing, and not to change it.

Jex

5. S20210052. On 14 January 2021. the applicant entered a Tesco store in Pontypridd. The complainant was on duty as a security officer when he challenged the applicant regarding a potential Covid rule breach. As he did so, the applicant kicked out at him, kicking a cup of coffee out of his hand (Charge 1: assault by beating). The complainant sustained no injuries. Police attended at the store and identified the applicant from CCTV. The applicant was located, detained, and searched. He was found to be in possession of a debit card which its owner had accidentally dropped in Pontypridd that morning and, before he was able to contact his bank to report the loss, two unauthorised transactions had taken place using it. These resulted in charges under sections 1 and 2 of the Fraud Act 2006. Charge 2 related to £31.64 and charge 3 to £23.59 totalling £55.23.

6. On 19th March 2021 having pleaded guilty before Magistrates, Jex was committed for sentence pursuant to section 20 of the Code in respect of these three offences. Two of the charges were either way offences. The sentencing powers of the Magistrates were sufficient, hence the use of section 20. The committal was possible under that provision because the Magistrates believed that the offences occurred during the operational period of a Crown Court SSO. That committal was recorded as being made pursuant to paragraph 11(2), Schedule 16 to the Code. This was an error because the SSO was imposed prior to 1 December 2020, and the committal should have been made under paragraph 11(2), of Schedule 12 to the Criminal Justice Act 2003.

7. On 7th May 2021 in the Crown Court at Merthyr Tydfil H.H.J. Williams deferred sentence for a period of 3 months.

8. S20210089. Daria Davies, was the ex-partner of the applicant. They had been together for some eight years but the relationship ended over two years ago. At around midnight on 23 May 2021 she was having a party at her home address when Jex arrived. He had recently learnt that the complainant had a new boyfriend. About

half an hour after his arrival, when most of the guests had left, he began to assault the complainant. She was strangled four times by him using such force that she struggled to breathe. He covered her mouth with his hand to prevent her from breathing. He punched her to the lip causing swelling and a cut. She tried to run away from him, but he dragged her back into the kitchen by her hair. He threw a butter knife at her resulting in a cut to her head. In the garden he picked up a stick and hit her lower back with it without causing any injury. Back inside the address he placed her in a headlock for something approaching a minute.

9. He pushed her onto the stairs and bit her nose, saying words to the effect of, "I'm going to disfigure you so that nobody will want you". He pushed her onto the floor in the living room and said words to the effect of, "I really want to fucking hurt you and punch your face in".

10. She was frightened that he would kill her. She ran upstairs and called the police. He took her phone from her whilst she was trying to do so. He trawled through the phone to read her private messages and sent messages to her current partner. When the police arrived, he told her not to answer the door and pleaded with her not to report him. Photographs were taken of the complainant's injuries. We have seen these and there is no doubt that she suffered at least two cuts (wounds) and actual bodily harm.

11. This terrifying and protracted series of crimes was charged as a single offence of assault by beating, charge 1. It was in fact at least one offence of assault occasioning actual bodily harm contrary to section 47 of the Offences Against the Person Act 1861, seriously aggravated by manual strangulation in the context of sexual jealousy or possessiveness. There was a threat of disfigurement, which involved an incident of biting to the face. There were features of false imprisonment in the victim's own home.

12. He also caused damage to a small vase in the living room which he threw to the floor during his rage (Charge 2).

13. The charging decisions in this case are incomprehensible. It was an agreed fact, abundantly proved in any event, that the assault on Ms. Davies caused her actual bodily harm. In *R v. Carrigan* [2021] EWCA Crim 1553 at [11], this court observed that manual strangulation by a man of a woman (or any other weaker and therefore vulnerable victim) was a particularly serious aggravating feature of a section 47 offence. This is because of the risk that it can easily turn into lethal force and because of the fear it causes. It is a common feature of violent and controlling relationships, precisely because it creates that fear. The court pointed out that the maximum sentence for that offence is 5 years and not 3 years, which was the top of the then relevant new sentencing guideline bracket for Category 1A offences (now raised to 4 years in the guideline applicable in this case). "Strangulation/suffocation/asphyxiation" is now recorded in the guideline as a high culpability factor, which is a significant change. If properly charged, this offence would have justified a very substantial sentence, having regard in particular to the terrible record of the applicant, which includes repeated offences of breaches of a restraining order imposed to protect this victim. It is not entirely clear why the offence committed on 23 May 2021 was not a further breach of an existing restraining order, but it was not dealt with as such. The decision to charge a summary only

offence with a maximum sentence of 6 months was quite wrong. The addition of a charge in relation to some damage to a small vase adds an air of absurdity to the way in which this case was conducted.

14. There was a victim personal statement before the court. In view of what we have just said, it is worth setting it out in full, prefacing it with the observation that this miscarriage of justice would not have achieved the prominence it has, if the applicant had not sought leave to appeal against sentence, and the Registrar had not referred the case to the full court because of purely technical errors and a legal issue about the sentencing powers of the court. She said this:-

> Since the attack on me I have suffered physical and mental damage. I had to wait 7 hours in accident and emergency for treatment for my injuries which Gareth caused. I also had to visit my GP who has referred me to a mental health team after a short assessment as they are testing me for PTSD due to Gareth's actions over the past 10 years.
>
> I have been suffering with night terrors, sweating and sleep paralysis where I think Gareth is in my room strangling me.
>
> The damage Gareth has caused to me is very difficult to describe in one statement. Gareth has caused physical and mental damage to me for 10 years.
>
> I feel like I am fighting a losing battle as Gareth is so relentless. I do not feel safe in my own home and it is very difficult to explain in words how this makes me feel.
>
> I am constantly on edge and looking over my shoulder, I can't leave my windows or doors open even when it is summer due to Gareth previously climbing through my windows or walking through my door.
>
> I really hope that Gareth understands I will never be in a relationship with him and I will never have a family with him, he has ruined that chance.
>
> My children have had to endure their mother's anxiety due to what stress Gareth has put me under in the last 10 years.
>
> Before I entered a relationship with Gareth I was a bubbly outgoing person who had a large circle of friends who liked nothing more than socialising but due to Gareth's mental abuse, extreme jealousy and controlling ways I am now a shell of the person I previously was.
>
> I lost contact with my friends and even now have a strained relationship with my family because Gareth has caused so many problems over the years, like threatening to beat up any

> male relative of mine, threatening to smash my mother's windows and slash her cars tyres.
>
> We are all so tired of Gareth's behaviour, I want nothing more to do with him and I hope he realises this, and accepts that I am well within my right to move on and start a new relationship.
>
> It is so upsetting to hear that my mother say that she does not recognise her own daughter anymore.
>
> Gareth continues to treat me as his property and this is soul destroying for myself as I have had no life since I met him. I have constantly tried to make him happy, and not thought about what I want and what makes me happy.
>
> I feel when the lenient sentences are given to Gareth, for example his 8 week sentence in 2018 for threatening to throw acid in my face and constant restraining order breaches. I feel that the court are saying my freedom and happiness is only worth 8 weeks as I have no life when Gareth is around.
>
> I understand that there are protocols and guidelines to consider and I have little knowledge of the legal system, but what I do know, when Gareth does have these lenient sentences, his freedom is being chosen over mine and I am the victim
>
> I fully support the prosecution and the indefinite restraining order, thank you for listening to my victim personal statement today.

15. The judge asked for a written explanation from the Crown Prosecution Service for the charging decision in this case. He was quite right to do so. On 22 October 2021 this court received a letter of apology from the District Crown Prosecutor which said as follows:-

> **Level of charge**
>
> As a result of the above information, I have completed a further review of the evidence and concur with the comments of His Honour Judge Richard Williams as to the level of charge authorised in this case. The level of charge authorised by the Senior Crown Prosecutor based within CPS Direct, failed to give adequate consideration as to the mechanism of the assault, the use of the multiple weapons and the sustained nature of the attack. The correct charge on this case occasion and one that would have reflected the seriousness and mechanism of the assault would be an offence of Assault Occasioning Actual Bodily Harm.
>
> **Action Taken**

> I can also confirm that this case and the failings identified have been brought to the attention of the Senior District Crown Prosecutor and Deputy Chief Crown Prosecutor for the CPS Wales Area.
>
> Feedback is to be given to the Senior Crown Prosecutor based in CPS Direct that made the original charging decision.
>
> A review of this case and the failings that occurred is also currently underway within CPS Wales. The purpose of this review will be to identify what action can be taken to prevent a repetition of the error.

16. The person to whom an apology is really owed is the victim of the offending of the 23 May 2021 who has not been protected by the system as she should have been. We trust that this judgment will come to the personal attention of the Director of Public Prosecutions.

17. Jex was aged 35 at sentence. He had 39 convictions for 65 offences or breaches of court orders spanning from 2001 to 2020. He has 18 convictions for theft or attempted theft over the decades. Multiple community orders have been imposed on him over the years. He may perhaps have complied with some of them once in a while, but there are multiple appearances for breaches. His convictions for violence included convictions for assault occasioning actual bodily harm in 2001, 2002, 2007, and 2012 and wounding in 2011 for which he received his longest sentence of imprisonment of 2 years. In 2012 he was sentenced to 20 months for violent disorder. In 2017 he was convicted of common assault and sent to prison. A restraining order was made under the Protection from Harassment Act 1997. In 2018 he was convicted of breaching that order on no fewer than three separate occasions, and was sent to prison on the second and third of those. Some details of those convictions appear in the victim personal statement set out above.

The SSO

18. His 42nd sentencing hearing had resulted in an order recorded on the PNC as follows:-

> 42. 12/06/20 MERTHYR TYDFIL CROWN
>
> 1. Theft - Shoplifting On 01/02/19 (Plea:Guilty) Theft Act 1968 s.1.
>
> Suspended Imprisonment 6 Wks Concurrent, Wholly Suspended 18 Mths
>
> 2. Racially/Religiously Aggravated Intentional Harassment/Alarm/Distress Words/Writing On 28/02/19 (Plea: Guilty). Crime And Disorder Act 1998 s.31(1)(b)
>
> a. Suspended Imprisonment 12 Wks Wholly Suspended 18 Mths;

b. Restraining Order - - Protection From Harassment 3 Yrs
Victim Surcharge 140.00

3. Theft - Shoplifting On 17/01/19 - 28/02/19 (Plea: Guilty)
Suspended Imprisonment 6 Wks Concurrent, Wholly
Suspended Theft Act 1968 s.1 18 Mths

4. Theft – Shoplifting. On 28/02/19 (Plea: Guilty) Theft Act
1968 s.1. Suspended Imprisonment 6 Wks Consecutive,
Wholly Suspended 18 Mths

19. This means that Jex had committed 3 offences of shoplifting in January and February 2019. He had racially abused one of the shopkeepers. He received sentences totalling 18 weeks imprisonment, suspended for 18 months on 12 June 2020. After some enquiry, this was the basis on which the sentencing judge at the Crown Court acted. It has transpired that the entry on the PNC is wrong. The Registrar has obtained the papers in relation to the hearing on 12 June 2020 and a transcript. The actual sentence imposed totalled 27 weeks imprisonment suspended for 18 months.

The second committal for sentence

20. On 24th May 2021 having pleaded guilty before Magistrates, the applicant was committed for sentence pursuant to section 20 of the Code in respect of the offences against his former partner on 23 May 2021, and, also pursuant to paragraph 11(2), Schedule 16 of the Code on conviction of a further offence during the operational period of a Crown Court suspended sentence.

The sentence imposed by the Crown Court judge

21. On 20th July 2021 Judge Williams sentenced Jex to a total sentence of 56 weeks imprisonment. This was made up as follows:-

i) S20210052:

a) Assault by beating of the security officer: 14 weeks imprisonment.

b) Two offences of fraud by false representation, using the debit card twice: 8 weeks imprisonment concurrent with each other but consecutive to (a) above.

ii) S20210089

a) Assault by beating of his former partner: 16 weeks imprisonment consecutive.

b) Criminal damage, throwing the small vase, 4 weeks imprisonment concurrently.

iii) 18 weeks of a suspended sentence imposed in the Crown Court on 12 June 2020 for three offences of theft (shoplifting), and one offence of racially aggravated intentional harassment, alarm or distress was imposed consecutively. The judge believed that he was imposing the full term of that

suspended sentence, but because of the error in recording that order on the PNC he did not actually do so.

22. In the sentencing remarks it appears that the judge may have thought that there were further convictions for theft which he was required to deal with. In fact there were not.

The legal problems

23. The following issues of law arise in this case:-

i) Does this court have the power to correct the judge's error as to the length of the suspended term and to give effect to his intention to impose that term in full, thus increasing the sentence he imposed by 9 weeks? The answer to that is No, except to the extent that his good fortune in evading this part of that sentence may be relevant if we come to consider whether the totality of the sentences was excessive.

ii) What is the consequence of the judge's generous discount for the guilty plea in relation to the offence of common assault on the former partner? The judge said that the sentence before plea discount was 26 weeks and that sentence was then reduced by 10 weeks (nearly 40%) to give effect to the plea. The only possible consequence is that, again, this good fortune may be relevant when considering totality.

iii) **"The committal point"**: Can a Magistrates' Court commit for sentence under section 20 of the Code which refers to the committal power in paragraph 11(2) of Schedule 16 to the Code, when the offences so committed occurred during the operational period of a Crown Court SSO imposed at a time when the power to commit arose under paragraph 11(2) of Schedule 12 to the Criminal Justice Act 2003, i.e. prior to 1 December 2020?

iv) **"The consecutive sentence point"**. What is the true effect of section 133(2) of the Magistrates' Courts Act 1980 on the powers of the sentencing court in this case? We have been invited to consider *R v. King's Lynn Magistrate's' Court, ex p. Hyam* 10th March 1992, CO/1320/91, Lexis citation [1992] 3436 and *R v. Steadman* [2003] EWCA Crim 2031. In ground 4 of her Grounds of Appeal, Ms. Cox contends that *Hyam* on which the judge relied, was wrongly decided. In order that this conflict of authority can be resolved in an appeal, and not an application for leave, we have given leave to the applicant in respect of that ground of appeal.

The committal point

24. The first problem here is that the SSO was imposed on 12 June 2020, and the power to commit where offences occurred during its operational period arose under paragraph 11(2) of Schedule 12 to the Criminal Justice Act 2003. The committal was recorded as having been made under paragraph 11(2) of the Schedule 16 to the Code, which was an error.

25. Section 2 of the Code says:-

2 Application of Code

> (1) The Sentencing Code does not apply where a person is convicted of an offence before 1 December 2020.
>
> (2) Accordingly, any provision that corresponds to a provision of the Sentencing Code continues on and after that date to have effect as regards dealing with a person—
>
> (a) for an offence of which the person was convicted before that date, and
>
> (b) in relation to a sentence passed for an offence of which the person was convicted before that date.
>
> (3) Where on or after that date a court is dealing with a person in relation to an offence of which the person was convicted before that date and is required to treat the person as just convicted of the offence, the requirement does not mean that subsection (2) no longer applies.

26. Thus, where a person was convicted of an offence before 1 December 2020:-

    i) The power to commit for sentence for that offence arises under the PCC(S)A and, so far as the present issues are concerned, under sections 3 and 6 of that Act.

    ii) Where an offence was dealt with by way of a SSO or a community order and the court wishes to deal with the fact that the order has been breached by new offences committed during the currency of the order, the powers will be those in the Criminal Justice Act 2003 and not the Code.

27. Accordingly, in the case of this SSO, the power to commit on the ground that further offences occurred during its operational period is that contained in paragraph 11(2) of Schedule 12 to the Criminal Justice Act 2003, rather than the corresponding provision under the Code, paragraph 11(2) of Schedule 16.

28. However, the two provisions are simply corresponding provisions, conferring the same jurisdiction on the Magistrates' Court. It follows that regardless of which provision was recorded on the records drawn up in the Magistrates' Court, the committals were within the court's jurisdiction, and were therefore valid: *R v Ayhan* [2011] EWCA Crim 3184 deals with the position before the Code, and we will turn to the transitional provisions below. We shall have further recourse to this decision below.

29. We now turn to the problem foreshadowed at [4] above. We should begin with the transitional provisions of the Code which are to be read, if possible, in such a way as to give effect to the statutory purpose identified in that paragraph.

30. Schedule 27 to the Code contains these provisions:-

> **1 Continuity of the law: general**
>
> The substitution of the Sentencing Code for the provisions repealed by this Act does not affect the continuity of the law.
>
> **3 References to provisions of the Sentencing Code**
>
> (1) A reference (express or implied) to a provision of the Sentencing Code, if contained in—
>
> (a) a document, or
>
> (b) a statutory provision that is amended by a specified paragraph of Schedule 24 (see sub-paragraph (2)),
>
> is to be read (so far as the context permits) as including, as respects times, circumstances or purposes in relation to which the corresponding provision repealed by this Act had effect, a reference to that corresponding provision.
>
> **4 References to provisions repealed by this Act**
>
> A reference (express or implied) to a provision repealed by this Act, if contained in—
>
> (a) a document, or
>
> (b) a statutory provision that is not amended by this Act,
>
> is to be read (so far as the context permits), as respects an offence of which the offender is convicted on or after the commencement date, as being or (according to the context) including a reference to the corresponding provision of the Sentencing Code.

31. Paragraph 1 is, at first sight, a highly unusual provision. The concept of "the continuity of the law" is a novel one. One of the reasons why the Code was required was that in this area of the law there was very little continuity. Constant amendments, repeals and new enactments over a period of years created an impenetrable body of statutory law spread across multiple different provisions. On deeper reflection, however, the purpose of this paragraph becomes clear. It is a "statutory steer" or aid to construction of the Code, giving effect to the statutory purpose we described at [4] above. Any difficulty in construing the Code is to be resolved in favour of preserving the powers which existed immediately prior to the Code becoming law. In other words, the Code is not intended to introduce any discontinuity into the law, and in that way the continuity of the law is not affected by it.

32. It appears to us that paragraphs 1, 3 and 4 taken together enable the recording of the wrong statutory provision in the Memorandum of Conviction to be read as referring to the correct provision. That is because the Memorandum of Conviction is a "document". It is therefore not necessary to invoke *Ayhan* to produce that effect.

33. A more difficult problem is that the committals for sentence under section 20 of the Code were dependent upon the court exercising at the same time one of the powers listed in section 20(1)(a)-(g), of which only (d), underlined below, could apply:-

> **20 Committal in certain cases where offender committed in respect of another offence**
>
> (1) This section applies where a magistrates' court ("the committing court") commits an offender to the Crown Court under—
>
> (a) sections 14 to 19 (committal for sentence for indictable offences),
>
> (b) paragraph 5(4) of Schedule 2 (further offence committed by offender given conditional discharge order),
>
> (c) paragraph 24(2) of Schedule 10 (committal to Crown Court where offender convicted of further offence while community order is in force),
>
> <u>(d) paragraph 11(2) of Schedule 16 (committal to Crown Court where offender commits further offence during operational period of suspended sentence order),</u>
>
> (e) section 43 of the Mental Health Act 1980 (power of magistrates' courts to commit for restriction order),
>
> (f) section 6(6) or 9(3) of the Bail Act 1976 (committal to Crown Court for offences of absconding by person released on bail or agreeing to indemnify sureties in criminal proceedings), or
>
> (g) the Vagrancy Act 1824 (incorrigible rogues),
>
> to be sentenced or otherwise dealt with in respect of an offence ("the relevant offence").

34. In this case, sub-paragraph (d) was satisfied, but only in error. The committal should have been under paragraph 11(2) of Schedule 12 to the 2003 Act, and we have read the document in that way as required by Schedule 27 paragraph 3. This means that no event listed in section 20(1) of the Code occurred. The issue is how any power to commit for post-Code offences where the Magistrates find that their powers to sentence would have been adequate arises where the SSO was made under the 2003 Act.

35. Section 2(2) of the Code means that paragraph 11(2) of Schedule 12 to the Criminal Justice Act 2003 continues to apply in respect of the 2019 offences for which the SSO was imposed, and enables the Magistrates' Court to commit for sentence. Those offences are described at [18] and [19] above. If the new offences resulted in

convictions prior to 1 December 2020, then section 6 of the PCC(S)A applied. This provided as follows:-

> **6.— Committal for sentence in certain cases where offender committed in respect of another offence.**
>
> (1) This section applies where a magistrates' court ("the committing court") commits a person in custody or on bail to the Crown Court under any enactment mentioned in subsection (4) below to be sentenced or otherwise dealt with in respect of an offence ("the relevant offence").
>
> ……..
>
> (4) The enactments referred to in subsection (1) above are—
>
> (e) paragraph 11(2) of Schedule 12 to that Act [the Criminal Justice Act 2003] (committal to Crown Court where offender convicted during operational period of suspended sentence).

36. We have held that although the wrong power was recorded, this does not invalidate the committal which was therefore a committal under paragraph 11(2) of Schedule 12 to the Criminal Justice Act 2003. The convictions for all the new offences occurred after 1 December 2020 and the Code therefore applied. Section 20(1)(d) does not refer to a committal under the 2003 Act, although the parenthesis in it does describe the power arising under that Act in colloquial terms: "(committal to Crown Court where offender commits further offence during operational period of suspended sentence order)".

37. In *R v. S* [2021] EWCA Crim 1148 at [41]-[42], after disposing of an appeal, the court added this:-

> 41. Although the magistrates purported to commit offences 1 and 2 to the Crown Court under sections 3 and 6, respectively, of the 2000 Act, their power to do so on that date derived from sections 14 and 20, respectively, of the Sentencing Act 2020. The error of the magistrates in recording the power intended to be used in committing those offences to the Crown Court for sentence did not invalidate the committal: *R v Ayhan* [2011] EWCA Crim 3184, [2012] 1 Cr App R 27 (CA).
>
> 42. This, however, does not save the committal of offence 3 because neither section 14 nor section 20 of the Sentencing Act 2020 is mentioned in section 6(4) of the 2000 Act. Without deciding the point, it appears that the position is not saved by paragraph 4 of Schedule 27 to the Sentencing Act 2020. It appears, therefore, that the purported committal of offence 3 to the Crown Court for sentence was a nullity. In the circumstances, where it makes no difference to the outcome of this appeal, there would appear to be nothing further necessary

> or desirable to be done in relation to offence 3. We simply note the position.

38. We note that the court in *S* was not assisted by argument from the prosecution on the issue. Given the terms in which these reservations were expressed -"without deciding the point" – it is clear that the court did not intend that its conclusion should be binding on a different constitution of this court where the point is necessary to the decision on the appeal, and where full argument has been received. We have given careful thought to its conclusion but have formed the view that we are unable to agree. We do agree that paragraphs (3) and (4) of Schedule 27 do not enable a statute to be read in the way there prescribed because of the reference to particular statutes in paragraph 3(1)(b) and 4(b). Those provisions concern the way in which documents and those particular statutes are to be read. However, we approach the question as one involving the construction of section 6 of the PCC(S)(A) and section 20 of the Code. We conclude that, having regard to the "statutory steer" we can and should decide that section 6(4) of the PCC(S)A should be read so that the reference to paragraph 11(2) of Schedule 12 to the Criminal Justice Act 2003 includes a reference to the identical provision in the Code, section 20(1)(d). Similarly, and where necessary, the reference to 11(2) of Schedule 16 in section 20(1)(d) should be read as including a reference to paragraph 11(2) of Schedule 12 to the Criminal Justice Act 2003. Parallel reasoning will apply to other sub-sections of sections 6 and 20, including in particular the references to community orders. By adopting this construction the continuity of the law is not affected, as required by paragraph 1 of Schedule 27. We would also, if necessary, hold that the omission of a reference to the 2003 Act in section 20(1)(d) of the Code was a clear drafting error and that the parenthesis clearly indicates that it was intended to catch all available committal powers of that kind. Applying *Inco Europe v. First Choice Distribution Limited* [2000] 1 WLR 586 we therefore read into that sub-section a reference to the 2003 Act. Something similar was done in a criminal context in *R (oao Crown Prosecution Service) v. Bow Street Magistrates' Court* [2006] EWHC 1763 (Admin).

39. For these reasons, we conclude that there was power to commit Jex's new offences alongside the committal based on the currency of the SSO when they were committed, and the committal which occurred was lawful.

The consecutive sentence point

40. Section 133 of the Magistrates Court Act 1980, so far as relevant, and as amended by the Code, reads as follows:-

> **133.— Consecutive terms of imprisonment.**
>
> (1) Subject to section 225 of the Sentencing Code a magistrates' court imposing imprisonment or youth custody on any person may order that the term of imprisonment or youth custody shall commence on the expiration of any other term of imprisonment or youth custody imposed by that or any other court; but where a magistrates' court imposes two or more terms of imprisonment or youth custody to run consecutively the

> aggregate of such terms shall not, subject to the provisions of this section, exceed 6 months.
>
> (2) If two or more of the terms imposed by the court are imposed in respect of an offence triable either way which was tried summarily otherwise than in pursuance of section 22(2) above, the aggregate of the terms so imposed and any other terms imposed by the court may exceed 6 months but shall not, subject to the following provisions of this section, exceed 12 months.

41. This 40 year old provision now requires interpretation in circumstances where there is a real argument about what it means. Ms. Cox for Jex submits that section 133(2) means that the powers of the court are limited to the imposition of sentences totalling 12 months for the either way offences only, and that the total sentences for all summary offences cannot exceed 6 months. In this case, the fraud offences were either way offences, and the judge imposed sentences of 8 weeks concurrently on each of them. The sentences totalling 30 weeks imposed for the two separate offences of assault by beating were, on this analysis in excess of the powers of the court, and failed to give any credit for the early guilty pleas.

42. Mr. Mably, Q.C., for the Crown submits that the proper construction of section 133(2) of the 1980 Act is to be found in the plain words of the provision, in particular the phrase underlined above. He also submits that the position is covered by authority.

43. *R. v. Chamberlain* (1992) 13 Cr. App. R. (S.) 525 is relevant to this issue, but we mention it at this stage to make it clear that the maximum sentence permitted by section 133(2) does not restrict the powers of the court when ordering that the term of a SSO should be served. The court held in that case that this was because the court was not "imposing" that sentence, which had been "imposed" by the sentencing court when the SSO was made.

44. In *R v King's Lynn Magistrates Court ex parte Hyam*, the High Court considered a 10-month sentence imposed in the Magistrates' Court, comprised of 9 months in respect of summary offences, and one month in respect of two either-way offences. The court held that it was "clear beyond argument" that by subsection (2), once a Magistrates' Court was sentencing for two either-way matters, it had the power to impose a sentence up to 12 months in any aggregate combination, and that its sentencing powers in respect of summary offences were not restricted to 6 months. Therefore, the sentence was held to be lawful even though the aggregate of the summary offences was 9 months.

45. This approach was supported in *R v Chamberlain*. The Court of Appeal considered a sentence of 12 months imposed by the Crown Court following a committal under the same jurisdiction as the present case. The aggregate of the summary offences was 12 months, and the two either way offences had been dealt with by the imposition of one month concurrent in one case, and no separate penalty in the other. The court held that the sentence in respect of the summary offences was unlawful, as only one sentence had been imposed in respect of either way offences, and subsection (2) only applied where sentences were imposed in respect of two such offences. Nevertheless, when analysing subsection (2), the court said at 528-529:

> "If therefore a court imposes two or more sentences of imprisonment in respect of an offence triable either way, it may impose a total of twelve months in respect of those and any other offences."

46. In *R v Steadman*, the Court of Appeal took a different approach. The prosecution was not represented, and it does not appear that *ex parte Hyam* or *Chamberlain* were cited. The court considered a sentence of 8 months and 2 weeks, consisting of 4 months and 2 weeks in respect of summary offences, and 4 months in respect of two either way offences. The matters had been committed from the Magistrates' Court under provisions which meant subsection (2) applied. At paragraphs 7-8, the court stated:

> "[A]s we understand [subsection (2)], where consecutive sentences have been passed that total six months but less than twelve months, it is required that each of those offences shall have been offences capable of being tried either way…In this case neither the offence of driving whilst disqualified, nor the offence of failing to surrender to bail was in the circumstances of this case triable otherwise than summarily."

47. The court, therefore, appeared to be stating that only the aggregate term of either way offences could exceed 6 months, and that subsection (2) did not permit a combination of summary offences and either-way offences to exceed that figure, even if the summary offence component was itself limited to 6 months (or less). The court quashed the sentence, and substituted a term of 5 months and 2 weeks.

48. We are clearly of the view that *ex parte Hyam* and *Chamberlain* were rightly decided and that *Steadman* was decided *per incuriam* on this issue and should not be followed. Our decision is based on the plain words of section 133(2) of the 1980 Act which is, in our judgment, clear on the point. Accordingly, we dismiss the appeal on Ground 4.

Grounds 1-3

49. These grounds were persuasively presented by Ms. Cox, on behalf of Jex, but in truth they are all quite hopeless, and we refuse leave. In brief, our reasons are as follows:-

i) Ground 1: This suggests that the categorisation of the fraud offences was in error. The judge said that they were category 5B offences and it is submitted that they could only have been described as category 5C offences, involving lesser culpability. The only lesser culpability factor which may arguably be present is that the offending was "one off, involving little or no planning". There were two offences. In any event, Jex's criminal antecedents meant that it was entirely reasonable to move up from one category to the next.

ii) Ground 2: This suggests that the sentence of 14 weeks for the assault on the shop security officer should have been within the category 3A range given the lack of physical injuries and low level of distress caused. This would suggest a non-custodial penalty. In this case, the assault was on a man who was employed to provide security in a shop and who was, therefore exposed to the risk of assault. Such workers are entitled to the protection of the court. Moreover, he was attacked because he wanted Jex to comply with the rules

then in place for public protection against COVID. This was at the height of lockdown in January 2021, when the maintenance of those rules was a matter of great public importance, but when they were already giving rise to incidents of disorder. This is a very serious aggravating feature which is not identified in the guideline for obvious reasons, but which the court was certainly not required to ignore.

iii) Ground 3: The sentences for assault and fraud should not have been consecutive and, if they were, further reductions should have been made to reflect totality. This is simply wrong.

iv) In addition, we refer above to the good fortune which Jex has encountered in that:-

a) The maximum sentence for the offence of assault on his former partner was far less than it should have been because of an error by the Crown Prosecution Service.

b) The credit for the plea on that sentence was somewhat higher than it should have been.

c) The suspended sentence of 27 weeks was activated only as to 18 weeks because of an error in recording it on the PNC.

v) Finally, the second pair of offences was committed just 17 days after sentence had been deferred in respect of the first pair of offences. That was a merciful course, which, it transpired, was wholly undeserved. Its consequence was that if Jex offended again prior to the deferred sentence being considered, both sets of offences would be significantly aggravated by that fact.

vi) In the result Jex has received a sentenced which is far shorter than it should have been had he been prosecuted properly and sentenced on the basis of reliable records. His appeal on these three grounds is dismissed also.

Johnson

50. On 30 June 2021 Johnson, pleaded guilty to two offences, both of which, importantly, were committed on 28 March 2021. The first was an offence of using threatening, abusive, or insulting words or behaviour with intent to cause harassment, alarm, or distress, contrary to section 4A(1) and (5) of the Public Order Act 1986, and the second an offence of assault of an emergency worker by beating contrary to section 39 of the Criminal Justice Act 1988 and section 1 of the Assaults on Emergency Workers (Offences) Act 2018. The Magistrates also committed Johnson for sentence pursuant to paragraph 11(2) of Schedule 12 to the Criminal Justice Act 2003 because they believed that these two convictions were further offences during the operational period of a Crown Court SSO. The Memorandum of Conviction records the way in which the order made by the justices was "resulted" by the legal adviser in identical terms for both offences. It reads against each offence as follows:-

> "Committed to Chester Crown Court on commission of a further offence during the operational period of a Crown Court

> suspended sentence (Para. 11(2)(a), Sch. 12 Criminal Justice Act 2003) on 28/07/2021 at 09:45 or such other date, time or place as the Crown Court directs on unconditional bail. No direction under section 45 of the Youth Justice and Criminal Evidence Act 1999 was made. No indication given re VPS."

51. Paragraph 11(2)(a) of Schedule 12 to the Criminal Justice Act 2003 provided a power to commit where a new offence was committed in breach of a Crown Court SSO, but not a power to commit for sentence for the offence itself. That power arose either under section 3 or section 6 of the PCC(S)A. Section 14 of the Code is the equivalent of the old section 3 of the PCC(S)A and section 20 of section 6 of that Act. The committal under section 14 of an either way offence gives the Crown Court the same power it would have following conviction on indictment. A committal under section 20 limits the Crown Court to the powers which the justices would have had had they not committed for sentence, as discussed above in the case of *Jex*.

52. Provided that the justices commit for sentence, and have power to do so, the recording on the Memorandum of Conviction of the wrong power will not invalidate the committal, *R v. Ayhan* [2012] 1 Cr App R 27, referred to above. The Registrar therefore wrote to the Magistrates' Court to enquire what power the justices had in fact exercised when committing the offence of assault on an emergency worker. The Court replies as follows:-

> "Further to your letter of 22/09/2021 I have checked my notes and can confirm on 30/06/2021 the magistrates committed the s.4A Public Order offence AND the assault on the emergency worker under S20 Sentencing Act 2020. Regarding the latter offence, they believed their sentencing powers of six months were adequate. Due to an unfortunate error on my behalf the memorandum contained errors for which I apologise. The defendant admitted he had committed a new offence during the operational period of a suspended sentence imposed on 03/11/2020 by Chester Crown Court for assault by beating."

53. The Assaults on Emergency Workers (Offences) Act 2018 provides as follows:-

> **1 Common assault and battery**
>
> (1) The section applies to an offence of common assault, or battery, that is committed against an emergency worker acting in the exercise of functions as such a worker.
>
> (2) A person guilty of an offence to which this section applies is liable—
>
> (a) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine, or to both;

> (b) on conviction on indictment, to imprisonment for a term not exceeding 12 months, or to a fine, or to both.
>
> (3) For the purposes of subsection (1), the circumstances in which an offence is to be taken as committed against a person acting in the exercise of functions as an emergency worker include circumstances where the offence takes place at a time when the person is not at work but is carrying Assaults on Emergency Workers (Offences) Act 2018 Page 1 out functions which, if done in work time, would have been in the exercise of functions as an emergency worker.
>
> (4) In relation to an offence committed before the coming into force of paragraph 24(2) of Schedule 22 to the Sentencing Act 2020 (increase in maximum term that may be imposed on summary conviction of offence triable either way), the reference in subsection (2)(a) to 12 months is to be read as a reference to 6 months.

54. This means that, had the appellant been in breach of a Crown Court SSO as the court believed, the committal for sentence in respect of the assault on an emergency worker would have been valid, but that the powers of the Crown Court in respect of the offence of assault on an emergency worker were limited to 6 months imprisonment. The committal for sentence is to be understood as involving three orders:-

    i) Two committals for sentence for the substantive offences under section 20 of the Code.

    ii) One committal under paragraph 11(2)(a) of Schedule 12 to the Criminal Justice Act 2003 because it appeared to the court that these two offences had been committed during the operational period of a Crown Court suspended sentence of 10 months imposed on 3 November 2020 for one offence of battery. This order involved obvious unlawfulness. A sentence of 10 months imprisonment would have exceeded the maximum term of imprisonment available to the court. In fact, no such order was made, as would have been discovered had counsel or the judge investigated what had occurred on 3 November 2020. They could have been alerted to the error on the PNC and the need for investigation by the apparent imposition of a sentence of 10 months for an offence of battery.

55. In the Crown Court on 29 July 2021 Johnson was sentenced to a total of 20 months' imprisonment. This was made up of 10 months for the assault on the emergency worker, and 10 months consecutive, being the purported imposition of the whole term of a 10 month SSO apparently made on 3 November 2020 when that term was suspended for 24 months. No separate penalty was imposed for the offence contrary to section 4 of the Public Order Act 1986.

56. It is necessary to explain how the SSO came about. The Registrar has pieced this together from transcripts and the digital case system.

57. T20190031: On 27th October 2018 the applicant committed offences of affray and assault to which he pleaded guilty. On 26th March 2019 he was sentenced at Chester Crown Court to a total term of 10 months imprisonment suspended for 24 months (this was structured as 9 months for the affray and 1 month consecutive for the assault). This conviction relates to entry 17 on the PNC record which is inaccurate in that it fails to record the conviction and consecutive sentence for the assault. It says:-

> 17. 26/03/19 Chester Crown
>
> 1. Affray
>
> On 27/10/18 (Plea: Guilty) Public Order Act 1986 s.3: Suspended Imprisonment 9 Mths Wholly Suspended 24 Mths Rehabilitation Activity Requirement 35 Days. Programme Requirement Curfew Requirement 3 Mths. To Remain At Address Each Day Between 8pm And 5:30am Victim Surcharge 140.00; Costs 350.00

58. The offences committed on 28 March 2021 were not committed during the period of suspension of the SSO imposed on 26 March 2019.

59. S20200277: On 2 July 2020 the applicant committed an offence of assault by beating which meant that he was in breach of this SSO. He pleaded guilty on 6 October 2020 and was committed for sentence under paragraph 11(2)(a) of Schedule 12 to the Criminal Justice Act 2003 for the breach and under section 6 of the PCC(S)A for the new offence.

60. On 3rd November 2020 in the Chester Crown Court the Judge imposed more onerous requirements of 200 hours unpaid work in respect of the breach of the SSO. In respect of the new offence of assault the Judge appeared initially to impose a freestanding Rehabilitation Activity Requirement (RAR) of 20 days (consecutive to the 35 days RAR that had been previously imposed with the SSO for the affray). However, there was no power to impose a freestanding RAR unattached to either a SSO or a Community Order. The Probation Officer sought to clarify with the Judge whether this was intended as a 12 month Community Order with a RAR and the Judge confirmed that it was. We conclude therefore that the Judge imposed a 12 month Community Order with a RAR of 20 days for the new offence of assault. This outcome was not accurately recorded, but that was the order which the judge made.

61. On Record Sheet S20200277 the sentence was recorded as a Suspended Sentence (without specifying either the length of prison term or the operational period) with the 20 day RAR attached. The only order uploaded to the DCS under S20200277 is headed "Change of SSO". This incorporates not only the 200 hours unpaid work added for the breach but also the 20 days RAR imposed for the new offence. There is no separate Community Order uploaded to the digital case system. These administrative errors have been corrected by the Crown Court at the request of the Registrar and orders which reflect the judge's actual sentence have now been drawn up. These are an amended SSO and a Community Order.

62. What matters is that the judge did not impose a SSO for the new offence of assault, whether for a term of imprisonment of 10 months or any other length. This being so,

the applicant could not have been committed for breach of a SSO imposed for the offence of assault on 3 November 2020 because no such order was made.

63. Once again, the PNC misled the courts in this case. On 29 July 2021, the Crown Court proceeded on the basis that entry number 19 was accurate. It records the sentence imposed on 3 November 2020:-

> 1. Battery on 2 July 2020 (Plea Guilty) Suspended Imprisonment 10 Mths Wholly Suspended 24 Mths; Rehabilitation Activity Requirement 20 Days Consecutive; Victim Surcharge 156.00
>
> 2. Sentenced Resulting from Original Conviction of 26/03/19, Suspended Imprisonment 10 Mths Wholly Suspended 2 Yrs Unpaid Work Requirement 200 Hrs

64. Both parts of that entry are wrong on their face.

i) The maximum sentence for battery is 6 months and a SSO with a term of 10 months would be unlawful.

ii) The powers of the Crown Court on dealing with a SSO when sentencing for an offence committed during its operational period do not extend to making a new SSO to start again on the day when it is dealt with.

65. In *R v. Gould* [2021] EWCA Crim 447; [2021] 2 Cr App R 7 at [96], the court said this:-

> "96. It may be that the use of the apparently technical word "remit" has led to confusion, as exemplified in the case of *Gould*, about the powers of the Crown Court in relation to committals. If there is an obviously bad committal, the Crown Court has no power to do anything because the origin of its jurisdiction is a committal which is at least valid on its face. If there is no such committal the case has never left the magistrates' court where jurisdiction remains. It will usually be a matter for the prosecution to have the case listed there so that it can be sorted out. The Crown Court has no power to do anything by way of an order to remit a case. It will no doubt inform the magistrates' court what has occurred, but that is not the same thing as making an order in a case where there is no jurisdiction."

66. The committal under paragraph 11(2)(a) of Schedule 12 to the Criminal Justice Act 2003 on the apparent basis that the new offences were a breach of a Crown Court SSO was obviously bad on its face. The Crown Court should have declined to take action on it, having established the correct position. That being so, there was no proper basis for committing the new summary offences alongside it. The fact that Memorandum of Conviction purported to show that the committal occurred by way of dealing with the offences themselves and that the sentence apparently imposed on 3 November

2020 exceeded the maximum available were a sufficient signpost of the illegality of the Magistrates' Court Order as drawn up.

67. As decided in *Gould* the effect of an obviously bad committal is that the case remains in the Magistrates Court, the attempt to commit being treated as a nullity. The judge's sentences are therefore quashed on the day this judgment is handed down. For the sake of good order, although this may not be necessary, I will then sit as a judge of the High Court and will:

i) Give leave to Johnson to seek judicial review of the committal to the Crown Court;

ii) Dispense with service of a claim form and all other procedural requirements of such a claim;

iii) Quash the committal. It follows that the sentences imposed in the Crown Court will also be quashed, having been imposed without jurisdiction because the committal was a nullity, and there was enough to put the parties and the court on enquiry as to its lawfulness in the apparent errors just described.

68. Section 6(4) of the PCC(S)A was amended by paragraph 12(b) of Schedule 2 to the Sentencing (Pre-Consolidation Amendments) Act 2020 so as to include breaches of community orders under that subsection. That amendment came into force immediately before the Sentencing Act 2020 came into force. Therefore, applying the statutory interpretation explained above in the case of Jex, a member of the court sitting as a District Judge (Magistrates Court) under section 66 of the Courts Act 2003 can commit the breach of the community order under paragraph 22 of Schedule 8 to the Criminal Justice Act 2003, and also commit for sentence the new offences under section 20 of the Code.

69. Thereafter a Judge sitting as a Crown Court judge under section 8 of the Senior Courts Act can then deal with all matters. The breach of the community order can be dealt with under paragraph 23 of Schedule 8 to the 2003 Act in either of the following ways:

> (2) (a) revoke the order, or
>
> (b) both—
>
> (i) revoke the order, and
>
> (ii) deal with the offender, for the offence in respect of which the order was made, in any way in which he could have been dealt with for that offence by the court which made the order if the order had not been made.

70. On the date when this judgment is handed down, I, having been authorised to sit as a judge of the Crown Court for this purpose, will first sit as a District Judge (MC) under section 66 of the Courts Act 2003. I will decide whether a committal under section 6(4)(e) in respect of the community order which was current when the new summary offences were committed should be ordered. If that order is made, l will then sit as a

Crown Court judge and deal with sentencing. Johnson should therefore be present by CVP and counsel should attend. There should be a report from the Probation Service about the performance of Johnson on the RAR and counsel should be prepared to deal with sentencing in the way described. The facts of the offences giving rise to the SSO in March 2019, the appearance on 3 November 2020, and the present offences should all be available to be placed before the court.

Archer

71. On 26 August 2021 in the Crown Court at Bournemouth, Archer was sentenced to 20 months' imprisonment for an offence of burglary which offence happened on 18 July 2021. He had been committed for sentence having pleaded guilty before the Magistrates' Court, pursuant to section 14 of the Code. Having been convicted of an offence committed during the period of a 1 year conditional discharge imposed by Magistrates on 13 November 2020 for an offence of theft, he was also committed for sentence for that offence of theft. The Crown Court judge imposed a sentence of 3 weeks' imprisonment, concurrent with the substantive sentence. It is the committal for sentence for the conditional discharge offence which has been examined by the Registrar and questioned on technical grounds. It is academic because the sentence was ordered to run concurrently, and whatever the technical error, the breach of a conditional discharge was an aggravating feature which the judge was entitled to take into account when sentencing for the burglary. Moreover, the Crown Court had a free-standing statutory power to sentence whether or not there was a committal for sentence, see section 13(7) of the PCC(S)A, set out below.

72. Archer was aged 42 at sentence (born 09/08/1979). He had 30 convictions for 71 offences spanning from 1994 to 2020. He had convictions for 35 theft and related offences. He was sentenced for offences of dwelling burglary in 1995, 1997 and 1999 (all whilst he was a youth). His most recent sentence was for an offence of theft for which he was sentenced to a 12 month conditional discharge in November 2020. When committing for sentence in relation to the burglary, the Memorandum of Conviction records that the Magistrates made the following order in relation to the conditional discharge:-

> "Committed to Bournemouth Crown Court for sentence or to be otherwise dealt with under Section 20 of the Sentencing Act 2020 on 20/08/2021 at 10:00 or such other date, time or place as the Crown Court directs in custody on the grounds that likely to offend. Additional reasons: Previous record & character. No direction under section 45 of the Youth Justice and Criminal Evidence Act 1999 was made. No indication given re VPS."

73. Section 20 of the Code applies to a conviction for an offence on or after 1st December 2020. Whilst the appellant admitted the breach of the conditional discharge on 20th July 2021, that is not an offence in itself. The relevant date is 3rd November 2020 when the appellant was convicted of the original theft. It therefore appears that the provisions of the Code did not apply when dealing with the sentence for this offence. As we have explained above, the provisions of section 2 of the Code and Schedule 27 mean that the continuity of the law is preserved by reading section 6 of the PCC(S)A (as it was immediately before its repeal) as if it referred to powers conferred by the

Code, and by reading section 20 of the Code as if it referred to the powers which existed immediately before it came into force.

74. It appears that the Magistrates' Court could not have committed the appellant for sentence for the theft under the PCCS(A). This is the effect of the decisions in *R v. Worcester Crown Court (ex p Lamb)* (1985) 7 Cr. App. R. (S.) 44 and *R v. Andrews* [2006] EWCA Crim 2228 about the meaning of identically worded provisions relating to community orders (section 16(3) of the PCC(S)A). It is unnecessary to decide this point because the Crown Court had power to deal with him under section 13(7) whether they did so or not. Section 13 of the PCC(S)A, preserved in its application to this case by section 2 of the Code, provided as follows:-

> **13 Commission of further offence by person conditionally discharged**
>
> (6) Where it is proved to the satisfaction of the court by which an order for conditional discharge was made that the person in whose case the order was made has been convicted of an offence committed during the period of conditional discharge, the court may deal with him, for the offence for which the order was made, in any way in which it could deal with him if he had just been convicted by or before that court of that offence.
>
> (7) If a person in whose case an order for conditional discharge has been made by a magistrates' court—
>
> (a) is convicted before the Crown Court of an offence committed during the period of conditional discharge, or
>
> (b) is dealt with by the Crown Court for any such offence in respect of which he was committed for sentence to the Crown Court,
>
> the Crown Court may deal with him, for the offence for which the order was made, in any way in which the magistrates' court could deal with him if it had just convicted him of that offence.

75. The existence of the power in section 13(7) of the PCC(S)A is an additional reason for following the decisions just mentioned (and the other cases cited in *Andrews*). The only reason why a Magistrates' Court conditional discharge should ever be before the Crown Court would be because the person subject to it was there to be dealt with for other matters. The Crown Court has the power to sentence in respect of it in those circumstances, and no committal is required.

76. We now turn to the appeal on the merits.

77. This was a burglary of a dwelling house. The judge's sentencing remarks were concise and comprehensive. We will set them out in full:-

> On 18 July this year, you used a partially opened window to effect entry to 4 The Circle, which was a family home to Mr

and Mrs McDonald and their young children. And while you were in there, and you made a thorough search of the property, I have no doubt about that, the McDonalds came back. So there was a confrontation, firstly between you and Mrs McDonald, who sounds like an extremely redoubtable woman, and then by her husband, who chased you down the street and managed to get from you a bag containing property.

You say that you have no memory of this, but you certainly had enough of your wits about you, Mr Archer, to keep the £530 cash or so in your pocket and make off. Later Mr McDonald and Mrs McDonald realised that was also missing, and they sought you out and they caught you. And it was, as Mr Gabb has described, the general public working together to stop a thief.

The way I sentence you is in accordance with the guidelines. There was a confrontation between you and the householders. Whether or not they were already in the house, or they come back after you had already entered makes no difference whatsoever. What does make a difference, in my judgment, is that the confrontation was not just with one person, it was with two people, Mr and Mrs. And in fact the confrontation took place twice, because you had lied about where the money was.

In any event, it is Category 2. A starting point for someone with no previous convictions is 1 year. Given this was a double confrontation, twice, and the loss of over £500 to any young family would be significant it seems to me. I move up from the starting point towards the upper end. I then have to take into account other aggravating and mitigating features. The aggravating features, the primary one, is your previous convictions, which I have already referred to. You have not burgled a dwelling house since 1999. You have burgled non dwellings more recently in 2014.

You have repeatedly breached court orders and re-offended during the term of court orders, which it seems to me suggests that the assertion that your response to supervision has been good is just not borne out. The Pre-Sentence Report also says that this offence does not amount to an escalation. I disagree with that. It may not have been an escalation had you done it in 2000 or 2001, but the fact that you have gone back to burglary, over 20 years after your last dwelling burglary, and it involved a confrontation, it seems to me, does amount to an escalation.

You were also intoxicated. I disregard the suggestion which you made, it was your own lying suggestion that there was more than one person involved in the burglary. Your previous convictions include breach of a conditional discharge on this

> occasion. Thefts from a person. Repeated dishonesty over a number of years, breaches and so on and so forth.
>
> In terms of mitigation, you have expressed some remorse, and I take into consideration the fact that at the moment although it, one assumes, is beginning to diminish, the fact is that the Covid pandemic means that custodial sentences are more punitive than they would normally be. Weighing up everything that I have read and heard, it seems to me that the aggravating features outweigh the mitigating features, and I move just outside the range, such that if you had stood trial the sentence would have been in the region of 30 months. In particular, as I say, there is the aggravation for breach of the conditional discharge but, and I should say in fact, you miss activation of a 12 week suspended sentence by 24 hours.
>
> But to reflect the principle of totality, and to avoid double counting, the sentence I will impose for the breach of the conditional discharge will be concurrent. I give you full credit, such that your sentence on this matter is one of 20 months' imprisonment. The breach of the conditional discharge, the sentence is 3 weeks, concurrent. There will be a victim surcharge in the requisite amount, and all other things being equal you will be released at the halfway point of that sentence. All time you have served will count against it.

78. We agree with the judge's categorisation of this offence as a category 2 burglary. There was a higher harm factor as identified in the guideline in that the "occupier [was] at home (or returns home) while offender present". This means that a starting point of 1 year was applicable with a range going up to 2 years applied. There is no doubt that the factors identified by the judge justified going to the top of that range, but we do not think it was appropriate to go above it.

79. That produces a sentence of 16 months after giving full credit for the plea. That is only 4 months less than the judge imposed, and it may be thought that there is an element of "tinkering" in making this reduction. We do not agree. First, a reduction of 25% in the length of a custodial sentence is not negligible, particularly from the point of view of the appellant. Secondly, where the court is required to follow a guideline unless it would be unjust to do so, and departs from it without an adequate justification this may produce a sentence which is demonstrably or "manifestly" excessive. In the era of guidelines sometimes therefore reductions may be made on appeal which are smaller than might previously have been the case. This emphasises the importance of the guidelines. It does not reinforce them as tramlines, because departure is always available to the court provided there is a proper basis for it in the interests of justice. Here there was not. Confrontation with the occupier is the factor which takes the burglary into category 2 in the first place, and this confrontation occurred at midday in the driveway outside the house. As the judge pointed out, Mr. and Mrs. McDonald were together when it happened. It was not, therefore, a case

where a lone occupier was disturbed while in bed by the sounds of an intruder breaking into the house. We do not agree that the circumstances of this confrontation justified taking the case out of the category 2 bracket. The sentence of 20 months' imprisonment is therefore quashed, and a sentence of 16 months' imprisonment is imposed in its place. To that extent this appeal is allowed.