

## **THE MAGISTRATES' ASSOCIATION**

### **JUDICIAL POLICY & PRACTICE COMMITTEE**

#### **Evidence to Justice Select Committee Inquiry on the work of the CPS**

The Magistrates' Association represents some 28,000 magistrates sitting throughout England and Wales.

Magistrates encounter CPS prosecutors whenever they are sitting in a criminal court. There are three types of prosecutors, salaried CPS lawyers, salaried associate prosecutors (formerly known as designated case workers), and agency staff who may be Counsel.

We welcome the opportunity to contribute to the Justice Committee inquiry and wish to comment on the following matters:

- Associate Prosecutors
- Use of agency staff
- Prosecutors as sentencers
- Undercharging
- The effect of any upturn in crime during a recession

#### *Associate Prosecutors*

The Association has met with CPS staff to discuss the pilot programmes currently underway whereby Associate Prosecutors may take responsibility for conducting trials in non custodial matters. We await the results. Although not enthusiastic about the extension of the powers granted to Associate Prosecutors during 2008 following the passage of the Criminal Justice & Immigration Act, the Association welcomes the need for professional registration through ILEX and the setting of minimum standards of fitness that will result. With adequate training and selection, Associate Prosecutors should be able to provide a satisfactory level of service to the courts in their role as prosecutors as some have already been doing for many years in their former role as dedicated case workers.

However, we remain anxious about the deployment of Associate Prosecutors in the smaller courthouses where they may not always be able to provide a full service to the court, particularly if unexpected matters arise, such as prisoners in custody. We are also concerned that if legal advisers are withdrawn from courts where District Judges (MC) are presiding there would be no fully qualified lawyer present in the courtroom in the event of a defendant being unrepresented.

#### *Use of agency staff*

Our members generally report few issues with salaried prosecutors, although magistrates often report that agency staff, including counsel, have not been briefed in sufficient time to allow a trial to commence on time. This wastes both court time and that of defence advocates if the prosecution requests an initial adjournment. However, it can also lead to situations where the matter is decided without the trial proceeding. Those of our members who sit in the smaller courthouses that are closer to their communities often find there is no other work that

can be transferred into the court that the agency staff can undertake, thus wasting court time. Although the use of agency staff has been declining we have heard of some recent increases in their use. If this is for budgetary reasons, such as a freeze on filling vacancies, then this can be a short-sighted policy, and the Committee may wish to investigate whether our concerns are justified.

### *Prosecutors as sentencers*

With the introduction of Conditional Cautions, the CPS has taken on the role of sentencers. Whilst the Association accepts the use of fixed penalty and penalty notices for disorder for minor offences, where all who accept them receive the same punishment, it has always believed that where a choice of sentence has to be made, that is a judicial decision and not one that should be reserved to an arm of the executive. To do so fundamentally blurs the boundary between the role of the courts and the role of the prosecutor in our adversarial system of justice. Conditional Cautions are an example of the triumph of pragmatism over principle. A court conducts its matters in the open where justice can be seen to be done by victims, witnesses and the public, as opposed to a Conditional Caution which is NOT administered in public. In addition there is no appeal mechanism. We have been told that 38% of those that fail to comply with the conditions of a Conditional Caution are not then taken to court and the matter is just dropped. This means that although the offence might be recorded as one that has been brought to justice, the offender remains unpunished. We note that disquiet about Conditional Cautions was expressed by one of your academic witnesses in the oral evidence session of the 20<sup>th</sup> January. He suggested the change had largely occurred unnoticed: magistrates have noticed and we have opposed it for the reasons given above.

### *Undercharging*

Although this is difficult to detect, our members have been highlighting examples of cases brought into court where the magistrates felt the matter had been undercharged. Some report that it is the POA s4 and s5 charges and s39/s47 assaults which give particular cause for concern. The charging criteria for s39 are very wide and it might be helpful if they were more widely known. Some examples of perceived undercharging are included in the attached paper. We do not know whether this represents a back door attempt to introduce a plea bargaining system into our courts or whether these are isolated examples from inexperienced prosecutors. We note that the CPS maintains a high level of success in its prosecutions. During October 2008, their overall success rate nationally was 86.5% of prosecutions: for our courts, the percentage in some offence groups such as motoring offences was higher at 90% and 93% for theft and handling offences.

### *The effect of any upturn in crime during a recession*

We note from a partial analysis of prosecutions that in some areas the CPS was recording an increase in the number of defendants prosecuted during October 2008 (the latest month for which data has been published) when compared with October 2007. In the Metropolitan and City area of London, the number of defendants prosecuted in October 2007 was 11,646 compared with 13,100 in October 2008. Even allowing for trials with multiple defendants and differing lengths of trials, and number of guilty pleas, this almost certainly represents an upturn in work. We are anxious that, if crime increases during the current recession, the provision of speedy justice in our courts gained through the introduction of CJSSS (Criminal Justice Simple Speedy Summary) and the Persistent Young Offender project are not eroded due to a shortage of funds for prosecutors. In passing, we would note that it is not only

funding for prosecutors that will be needed if there is an upturn in crime, HMCS who operate the courts and the legal aid budget are also likely to be affected as is the NOMS budget.

*Conclusion*

The CPS generally conduct cases in a professional manner in our courts and individual prosecutors have taken on board the changes brought about by CJSSS. We are aware that they may more frequently be confronted by unrepresented defendants and that in those circumstances they do their best to assist the smooth running of the court. We do wish to ensure that, if crime increases during the recession, the CPS are adequately funded to cope with any extra work without affecting the gains resulting from CJSSS.

February 2009

## Addendum

Evidence session of Committee 20<sup>th</sup> January 2009

The following question was asked of a witness:

**Q32 Mr Tyrrie:** You are a recorder. Is it not correct that generally recorders process these cases much faster than magistrates? Certainly, the figures for London support that. But the appeal rate and successful overturning of recorders' decisions is lower.

Nicola Padfield: I think you are talking about district judges' magistrates court, in old language the stipendiary magistrates. The stipes definitely have the reputation you say. I am a recorder and a recorder is a part-time circuit judge in the crown court and is a rather different animal, if I may put it that way.

**Q33 Mr Tyrrie:** But the point I make stands, does it not? On the whole, the amateurs end up making more mistakes than the professionals?

Nicola Padfield: I would need to look that up to know whether that is correct. Certainly, the district judges' courts tend to be much faster. Whether or not there are fewer appeals I cannot tell you off the top of my head.

## Note for committee

Justices of the Peace are amateurs only in respect of the fact that they are not paid. They receive considerable training for their role in court and probably sentence more cases than any other level of the judiciary, including District Judges (Magistrates' Courts) who often sit on trials lasting several days. It is not unusual for a bench of three magistrates to sentence 15-20 cases within a three hour period. Remarkably few appeals from Magistrates' Courts take place in the Crown Court and the breakdown between those from decisions of magistrates and DJs(MC) is not published. The Committee could ask the Ministry of Justice if it collects the figures.

## APPENDIX

### Examples of undercharging from magistrates on non-metropolitan benches across the country

1. A 2-day trial where the defendant was charged with 3 counts of harassment (without violence) S.2 over a 6-month period. The three charges were against three different people – the grandparents and mother of the defendant's girlfriend.

It was clear to us that at least two of the charges should have been S 4.

The grandparents, mature, solid citizens, were clearly terrified of the defendant and his behaviour to them and their family over a long period. The grandfather slept in his clothes, their house has been fortified with alarms and the post box blocked up so nothing could be put through it.

Examples of defendant's behaviour, which have to be put in context of two days of evidence of his behaviour:

- (a) He had rung them in Spain to ask the grandfather if he had a petrol can. They came home to find a bedroom window broken and a petrol can in their garden. The defendant's gloves were found in the road but no evidence was offered by the CPS as to any link between the defendant and the can. It turned out that there had been an incident while they were away with the mother taking her daughter and grandchildren away from the home as they were scared of the defendant. Was this his reaction to this?
- (b) In a separate incident the granddaughter was taken for safety by the mother to a flat in Stevenage. I can't remember all the ins and outs of it now, however it ended up with the grandparents coming to pick them up and the defendant arriving at approximately the same time. The defendant threatened the grandparents and mother with language that to us would have put the bench in fear of violence had it happened to us.

The situation was so bad that in the long run the grandfather left home and his marriage of 50-ish years. The grandparents are now reconciled but they no longer see their granddaughter or great grandchildren as the defendant has banned it.

This was a very serious case with a defendant who I felt was a truly evil manipulative man. Unfortunately as he was charged with S.2 it was summary only we could not give him more than 6 months and he had been on remand for approximately 11 weeks. We tried to get him on a probation order but he couldn't be bothered to turn up for the report (even though he was in prison and probation had booked the video link) so we had no choice than to give him custody. As he had been on remand for such a long time he effectively got approx an additional 2 weeks in custody for his offences and for putting three people through the hell of a trial.

2. In a television programme where a cameraman accompanies police on the beat, a motorway patrol gave a 'warning' on three separate occasions when they stopped vehicles travelling at over 100 mph.

On one of the occasions the officer told the young woman (who had only just passed her test) recorded travelling at 103 mph that if he sent her to the magistrates court she would lose her licence and perhaps be sent to prison, but as he did not feel that appropriate he would just give her a warning on this occasion.

In a similar programme, one patrol officer gave a fixed penalty of £60 and three points to a driver recorded travelling at £68 mph in a 40 mph zone.

In others I have seen clear cases of persons guilty of GBH (with photographic evidence) being released without charge and persons being in possession of class A drugs being issued with a 'street caution'.

I watch a number of these programmes and what the police dole out to offenders is nothing short of alarming, making a mockery of our judicial system and of our Sentencing Guidelines which are provided primarily to ensure fairness and equality throughout the country.

3. It is my perception that under-charging is standard practice in my county. In fact it is very rare to see charges of ABH and my guess is that they are reserved for cases where injury is sufficiently serious to require hospital treatment, ie broken bones. It is extremely common to see photographs of bruises, scratches etc in cases of Common Assault and I have asked legal advisers why the higher charge has not been brought.
4. Just last week a public order offence which was contested became the lesser one (S.4 to S.5) – it was spitting at a policeman and resisting. I have seen a number of these occur in the courtroom, it is the norm.
5. I sat in the Crown Court with Judge X on an appeal against sentence for two accounts of common assault. The defendant had pleaded guilty in the lower court to two charges of common assault and given 6 months custody. He appealed saying he did not get any discount for his guilty plea. At the time, the lower court had been given the advice that as there were two charges they could give two lots of 6 months custody so they had in fact given him a discount. However, the law had changed and now for this summary only offence, you can only give a maximum of 6 months custody irrespective of how many charges are brought on the same day. This particular case was quite appalling. A young, fit guy had gone round to his Grandmother's flat and intimidated and assaulted her. He had tipped her off a sofa on to the floor bruising her face. The next day he had returned to her flat this time with his father (i.e. her son) and this time the two of them had assaulted and intimidated her again tipping her off the sofa and bruising her. This was a most appalling crime with many aggravating features not least of all it being domestic violence on a vulnerable person. In terms of level of seriousness the Judge, myself and the other magistrate were adamant that it deserved a year's imprisonment with a reduction for guilty plea. We were then totally appalled to find that we could a) only give a total of 6 month's custody even though there were two charges and b) we were obliged to give a discount off the 6 months for the guilty plea. His appeal was allowed and 6 months was reduced to 4 months.

I am not only frustrated by the law as it stands but by the CPS as well. I expect it was a plea bargain (though I do not know that for a fact but it was the opinion of the judge as well at the time). So by agreeing to plead guilty to the lesser charge he saves the public purse. But in a case like this is that justice? I certainly do not think so. Surely each case

of common assault should carry a maximum 6 months custody. Especially where a higher charge could have been brought, as in this case as the victim was injured as a result of the assault and ABH would have been made out.