

CHAPTER 9 - SENTENCING

9.01 SENTENCE

Sentence is a matter for the court. The Procurator Fiscal must not suggest a sentence but he should draw the court's attention to any mandatory sentence. Where the accused pleads guilty the Procurator Fiscal should ensure that all facts relevant to sentence are before the court. In cases which have gone to trial there may be evidence relevant to sentence which was not elicited during the course of the proof. Such evidence should be drawn to the attention of the court.

It is essential that Procurators Fiscal should contradict any false statement made by the defence in the course of a plea in mitigation. In this regard Procurators Fiscal should refer to Chapter 11 in relation to the Crown's right to appeal unduly lenient sentences.

The Procurator Fiscal must be aware of the court's power of sentence both in general and in relation to particular offences. He must draw the attention of the court immediately to any incompetent sentence. The Procurator Fiscal should also be familiar with special procedural rules relating to sentence (eg imprisonment of young offenders) and draw the attention of the court to any departure therefrom.

9.02 PREVIOUS CONVICTIONS

The Procurator Fiscal will lay before the court any previous convictions he has libelled against the accused immediately after moving for sentence in solemn cases and in summary cases when the accused has admitted or been found guilty of a charge. While it is not competent to libel appearances before the Children's Hearing as previous convictions the court should be advised if there is a history of appearances

before the hearing. Where referrals have not been established these should not be mentioned.

LIBELLING OF PREVIOUS CONVICTIONS: REHABILITATION OF OFFENDERS ACT 1974

Although this Act allows a Procurator Fiscal to place before the court any previous conviction in Parliament it was conceded that the spirit of the Act would be complied with in criminal proceedings in Scotland. Accordingly when Procurators Fiscal are considering which previous convictions to libel they should keep Sections 4-6 of this Act in mind and not libel spent convictions unless they are particularly relevant to the current charge(s).

Likewise in a case where it is considered necessary to put to a witness his criminal record the spirit of Sections 4-6 should be complied with and spent convictions should not be put to the witness unless there is a good reason for doing so.

Procurators Fiscal should bear in mind that in respect of particular offences the Rehabilitation of Offenders Act 1974 has been amended. The following enactments have amended 1974 Act:

(Children Act 1989 c41
Schedule 15 amends Section 5;

Broadcasting Act 1981 c53
Section 68 Schedule 8;

Criminal Justice and Public Order
Act 1994 Schedules 9, 10 and 11
amends Sections 4 and 5;

Armed Forces Act 1991 c62
Schedule 3;

Children (Scotland) Act 1995 c36
Schedules 4 and 5).

9.03 REMITS WHERE THE ACCUSED ARE ON SAME INDICTMENT

If the Sheriff decides that one accused should be remitted for sentence then unless circumstances are highly exceptional he must remit both accused for sentence even if it is clear that his powers are adequate for one. The practice is referred to in *HMA v Duffy 1974 SLT (Notes) 46*.

If an accused is charged on two or more indictments, each has to be dealt with separately. If the Sheriff considers his powers of sentence are inadequate, he can remit the case to the High Court for sentence. If more than one case falls into that category he can remit all such cases, and should do so where the charges in such indictments are inter-connected. Where, however, the maximum sentence which he can impose is within his competence, then he must dispose of the case himself and not remit it to the High Court. (*see HMA v Stern Appeal Circular A14/73*).

9.04 ADMINISTRATIVE PROCEDURE

Where any case is remitted for sentence, the Procurator Fiscal will notify Crown Office by telephone forthwith to enable the administrative arrangements to be made for the accused's appearance at the High Court. The whole proceedings, including a copy Indictment, amended if appropriate, will then be sent by the Procurator Fiscal to Crown Office with a note of all the information given by the Procurator Fiscal to the Sheriff and of the contents of the plea in mitigation. Any productions which it may be necessary for Crown Counsel to refer to when presenting the case in the High Court and in particular any productions which it may be desired to

forfeit should also be sent with the proceedings if practicable. If the remit follows a restricted plea or restricted conviction, or if the facts adduced do not conform to the precognition, a brief report covering these matters must also be made. If the charges on the Indictment differ from those on the petition the Procurator Fiscal should in his report draw the attention of Crown Counsel to this.

9.05 ADJOURNMENT FOR SENTENCE

After a person has been convicted but not sentenced the court has power to adjourn the case to enable enquiries to be made to determine the most suitable method of dealing with the case. In the majority of cases such adjournments are used to obtain Social Enquiry Reports and Community Service Assessment Reports.

The case may be adjourned only for 3 weeks where the accused is remanded in custody. If he is on bail or ordained to appear the court may adjourn the case for a maximum of 4 weeks or, on cause shown, 8 weeks.

If the court in adjourning the case attempts to exceed the appropriate periods stated the Procurator Fiscal should draw the relevant statutory provision to the court's attention. (Section 201 of the Criminal Procedure (Scotland) Act 1995).

9.06 COMMUNITY SERVICE BY OFFENDERS (HOURS OF WORK) (SCOTLAND) ORDER 1996 NO 1938 (S156)

The Community Service by Offenders (Hours of Work) (Scotland) Order 1996 No 1938 (S 156), which came into force on 18 July 1996, increased the minimum number of hours for which a community service order can be made from 40 to 80 hours. The maximum number of hours for which an order can be made by courts of

solemn jurisdiction has been increased from 240 to 300 hours. The previous maximum of 240 hours continues to apply in courts of summary jurisdiction.

The new provisions apply to all cases where the offence was committed on or after Thursday 18 July 1996.

9.07 MITIGATION OF PENALTIES

Although a statute may specify a minimum penalty, the Court has power to modify the penalty in terms of section 199 of the 1995 Act.

9.08 SOCIAL WORK SERVICES ACCESS TO SCRO CRIMINAL HISTORY INFORMATION

The Scottish Office has agreed to provide Social work Departments with direct access to the SCRO criminal history system. A terminal directly connected to the system has been located in the Stirling Office of Central Regional Council social Work Department. All other Social Work Departments in Scotland will access the system through Stirling.

The intention is to provide up-to-date information on previous convictions to court social workers charged with compiling social enquiry reports. Data protection implications require that access be restricted to information relevant only to the subject of the social enquiry report. This restricted access can be achieved if the enquirer uses the accused's Unique Reference Number (URN).

To enable access to be obtained the court social worker has to be given the accused's URN. It has been agreed that the number will be forwarded to the social worker by the Sheriff Clerk who, in turn, will receive the number from the Procurator Fiscal. To enable this to be done with the minimum of inconvenience to Fiscals in court, SCRO

has agreed that the URN will be recorded on a separate sheet of paper which will accompany the "court print" of previous convictions which will have been submitted along with the Police report. The URN will appear on the last sheet of the "court print" and will record the URN, accused's name and his date of birth.

This sheet of paper should be handed to the Sheriff Clerk when the court orders a social enquiry report. If an accused has a URN, and a "court print" of his previous convictions is with the Police report, the sheet of paper on which this number is recorded should be handed to the Sheriff Clerk irrespective of whether a schedule of previous convictions has been served on the accused. Although the Fiscal may not have libelled any previous convictions, that does not prevent the social worker from checking the accused's record with SCRO, especially as this may disclose convictions imposed after the commission of the offence.

It is appreciated that this procedure imposes an additional burden on Fiscals in court. However, the need for these arrangements became apparent following a case where an accused was convicted of various road traffic offences. A schedule of previous convictions had been served on the accused, and this was made available to the court social worker who was preparing a social enquiry report. The schedule libelled only road traffic convictions and did not disclose that the accused had previous convictions for sexually abusing children. This was unknown to the court social worker or to the court which subsequently made a community service order. In due course, the accused found himself being allocated to work in a children's home.

For the present, these arrangements apply only the Sheriff Court. In High Court cases the Crown Office will pass the URN to

Justiciary Office. Accordingly, this number must be recorded in the precognition, in the section giving the history of the accused. These arrangements should be implemented immediately. It is appreciated, however, that Sheriffs will be ordering social enquiry reports in cases which were reported to Fiscals before SCRO started to include a separate URN sheet with the accused's record. However, if this sheet is not with the case papers, no further action need be taken.

SCRO CRIMINAL HISTORY INFORMATION

Where a prisoner, who is being released after serving a proportion of his sentence, commits an offence punishable with imprisonment before the date on which he would (but for his release) have served his sentence in full, the court may order that he be returned to prison to serve the unexpired portion of the original sentence (see section 16 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 and 9.37). To enable a court to know whether this power is available, it is necessary for the court to know when the accused was released from prison. Release details will be automatically produced by SCRO when a print is requested by a Police Officer and these in turn will be forwarded to Procurators Fiscal by the Police.

Procurators Fiscal should ensure that the release details are recorded on the notice of previous convictions served on the accused.

Page 2 of the printout contains the accused's name and date of birth, together with his Unique Reference Number (URN). **Procurators Fiscal should ensure that when a Sheriff requests a social inquiry report, the page containing the URN is handed to the Sheriff Clerk.** The Sheriff clerk will then attach this sheet of paper to

the copy complaint which will be sent to the social worker along with the request for the report.

9.09 MEANS COURT

Where a fine has not been paid and no alternative of imprisonment was specified in default of payment the Court must conduct an inquiry into the accused's means before imposing imprisonment. Although it is the duty of the Procurator Fiscal in certain cases to send to the accused a means form Procurators Fiscal have no locus in this inquiry and should not appear or take part. Procurators Fiscal play no part in the enforcement of any warrant issued.

9.10 ABSOLUTE DISCHARGE AND PROBATION

Where a person charged on Indictment is convicted of an offence (other than an offence the sentence for which is fixed by law) the Court may, instead of sentencing him, make an order discharging him absolutely, or make a probation order.

If a person charged on Indictment is placed on probation or granted an absolute discharge the conviction is deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made and of laying it before the Court as a previous conviction in subsequent proceedings for another offence (section 247(1) and (4) of the 1995 Act).

Where a person is charged before a Court of summary jurisdiction and the Court is satisfied that the person has committed an offence it may, without proceeding to conviction either grant him an absolute discharge or place him on probation.

9.11

If such a person subsequently commits another offence it is competent in proceedings for that offence to libel the probation order or absolute discharge as if it were a conviction (section 247(4) of the 1995 Act).

9.12 FAILURE TO COMPLY WITH REQUIREMENTS OF PROBATION ORDER/COMMUNITY SERVICE ORDER

In the event of a breach of probation/community service order the supervising officer will inform the Court of this in order to obtain the Court's decision as to whether proceedings for breach should be taken. If proceedings are to be taken the supervision officer swears to the breach before the Sheriff. The appropriate papers should then be passed to the Procurator Fiscal. The Procurator Fiscal will thereafter consider whether there is a sufficiency of evidence to prove a breach. If he considers that there is a sufficiency of evidence, he will arrange for the arrest or citation of the probationer and for service upon him of a document setting out the details of the breach and the fact that the supervising officer has sworn to these. In those cases where the Procurator Fiscal does not consider that there is a sufficiency of evidence he can decide not to proceed. In these situations however, the Procurator Fiscal should discuss the matter fully with the supervising officer before coming to a final decision.

PROOF OF BREACH OF COMMUNITY SERVICE

Following upon consultation with the Social Work Services Group guidance has been given to Community Service Officers in relation to proof of breach of community service. This guidance covers the following categories:

1. Failure to Attend

There are 2 separate elements which require to be proved for every case of breach for failure to attend namely (1) that the offender was given and received relevant work instructions, detailing the date, place and time of work; and (2) that the offender failed to attend work as instructed with no reasonable excuse. The absence must be recorded by the staff members in the case file and the entry initialled by them.

2. Punctuality

Staff members have been instructed that late arrival for work or early departure from work must take place within either the 15 minutes following the time the offender is expected to arrive or within 15 minutes before the offender is expected to leave.

3. Failure to Report to the Community Service Officer as Required

The following requires to be proved:

(a) That the reporting instructions were given and received. This may be by producing a recorded delivery slip or by parole evidence.

(b) That the offender failed to report as instructed without reasonable excuse. A check should be made by the staff that no notification was received from the offender either by the placement agency or the Community Service staff.

4. Failure to Notify Change of Address

The following requires to be proved:

- (a) The address from which the offender has moved. This would normally be proved by producing the signed order which records his current given address. This signature should have been witnessed. Any notified change of address must be recorded in similar fashion.
- (b) There are 2 ways of proving that the offender is no longer living at the given address namely (1) if the offender was living with others at the given address to obtain evidence from other residents that he no longer lives there and (2) if the offender is living alone, to obtain evidence by the return of 2 recorded delivery envelopes stamped by the Post Office.

Evidence of visits by members of staff may also be used.

- 5. Failure to Notify Change in Employment
- 6. Unsatisfactory Performance at Work
This may be proved as in a failure to attend.
- 7. The current law in this matter can be found in sections 238 to 245 of the Criminal Procedure (Scotland) Act 1995. In terms of section 239(5) if the court holds that the order has been breached, it may (a)

impose a fine on the offender not greater than level 3 on the standard scale, (b) revoke the order and deal with the offender in any manner in which he could have been dealt with for the original offence by the court which made the order if the order had not been made, or (c) subject to section 238(1) of the 1995 Act, vary the number of hours specified in the order.

Section 239(6) is authority that the evidence of one witness is sufficient for the purposes of sub-section (5), that is, to prove to the satisfaction of the court that an offender has failed without reasonable excuse to comply with any of the requirements of sub-sections (1) to (3) of section 239.

9.13 CUSTODIAL DISPOSALS: SPECIAL RULES APPLYING TO AGE GROUPS OVER 21

Imprisonment is now the only custodial sentence for persons of the age of 21 or over. A court must not pass a sentence of imprisonment on a person of or over 21 years who has not been previously sentenced to imprisonment or detention unless the Court considers that no other method of dealing with him is appropriate. To this end, the court must obtain (from an officer of a local authority or otherwise) such information as it can about the offender's circumstances (Section 204(2) of the 1995 Act). The court must state the reason for its opinion that no other method of dealing with him is appropriate and must have that reason entered in the record of the proceedings.

9.14–9.15 16 TO 21 CUSTODIAL SENTENCES

With the abolition of the separate sentences of Borstal training and detention

centre training by the 1980 Act, the only custodial sentence for persons who are not less than 16 but under 21 years of age is detention. Detention must not be imposed unless the Court is of the opinion no other method of dealing with the person is appropriate; and the Court must state its reasons for that opinion. To enable the Court to form such an opinion it should obtain a social enquiry report (section 207 of the 1995 Act).

9.15

Where the sentence is for murder and the person convicted is under the age of 18 years he must be sentenced to be detained without limit of time. Where a person convicted of murder has obtained the age of 18 years but is under 21 years he must be sentenced to be detained in a Young Offenders' Institution for life.

9.16 UNDER 16

Apart from the foregoing case of a conviction for murder, where a child is convicted on indictment and the court is of the opinion that no other method of dealing with him is appropriate, it may sentence him to be detained for a period which must be specified in the sentence. Detention will be in such place and in such conditions as the Secretary of State may direct (section 208 of the 1995 Act). Where a child is charged summarily before the Sheriff and convicted, the Sheriff may order that the child be committed for such a period not exceeding 2 years as may be specified in the order to such place as the Secretary of State may direct for the purpose of undergoing residential training (section 44 of the 1995 Act).

9.17 RESTRICTIONS ON IMPRISONMENT

A court must not pass a sentence of

imprisonment or of detention in respect of any offence, nor impose imprisonment or detention for failure to pay a fine, on an accused who is not legally represented and has not previously been sentenced to imprisonment or detention by a Court in any part of the United Kingdom, unless the accused either (a) applied for legal aid and the application was refused on the ground that he was not financially eligible or (b) having been informed of his right to apply for legal aid, and having had the opportunity, failed to do so (section 204 of the 1995 Act).

9.18 VERIFICATION OF ACCUSED'S AGE

There have been instances of accused persons giving a false date of birth to the court after conviction on indictment and, in particular, claiming to be 21 years of age instead of 20.

This has resulted in such persons being sent to prison instead of a Young Offenders Institution.

Section 46(1) of the 1995 Act provides that "where a person charged with an offence is brought before a court other than for the purpose of giving evidence, and it appears to the court that he is a child, the courts will make due enquiry as to the age of that person, and for that purpose shall take such evidence as may be forthcoming at the hearing of the case, and the age presumed or declared by the court to be the age of that person shall, for the purposes of this Act, or the Children and Young Persons (Scotland) Act 1937, be deemed to be the true age of that person". In the cases which have given difficulty in the past, the only evidence "as to age has been given verbally by the accused".

Procurators Fiscal, to overcome this difficulty, should ask the police to attempt to confirm the age of the accused person before he attends court in every instance

where the accused states that he is 21 and where deprivation of liberty is likely after conviction on indictment. This can be done either by checking the birth entry personally at the Public Room, General Register Office, New Register House, Edinburgh, or by writing to that address asking for verification of the details held by the police. An extract of the birth entry is not required.

If for any reason, verification has not been obtained and the issue of the accused's age arises in court, Procurators Fiscal should request an adjournment in order that the age may be verified by telephone with the Public Room of the General Register Office.

b.

9.19 TIME SPENT IN CUSTODY AWAITING TRIAL

Section 210 of the 1995 Act provides that a Court in Scotland in passing a sentence of imprisonment or detention in a young offenders institution shall in determining the period of imprisonment or detention, have regard to any period of time spent in custody by the accused on remand awaiting trial or sentence.

Accordingly before sentence is pronounced Procurators Fiscal will inform the court of any period or periods the accused has spent in custody.

9.20 FORFEITURE OF PROPERTY BY THE COURT

Part II of the Proceeds of Crime (Scotland) Act 1995 deals with forfeiture of property used in crime and introduces a new Order known as a "Suspended Forfeiture Order" ("the Order"). The Order allows the court to take control of the property affected, while ensuring that innocent third parties' interests and, where compensation is appropriate, victims' interests, are

protected. The provisions impose obligations on the Procurator Fiscal not only during the currency of the case but also post-conviction. The following paragraphs specify the principal effect of each of the sections of Part II but require to be read in conjunction with the sections themselves. Part III of the Act extends restraint procedures, similar to those available on confiscation cases, to items which are to be the subject of an application for an Order.

Section 21 provides for the Suspended Forfeiture Order both in summary and solemn proceedings. The Order is not competent in the District Court. The Order can only be made on the application of the prosecutor in respect of property which was at the time of the offence or of the accused's apprehension in his ownership or possession or under his control and had been used for the purpose of committing or facilitating the commission of the offence or was intended to be used for that purpose.

The motion for forfeiture should be made in solemn cases when moving for sentence and in summary cases following conviction of the accused. The prosecutor is required to notify the court of any person he knows, or reasonably suspects, as being the owner of, or otherwise having an interest in, the property at the time of moving for the Order. The fact that there is a power of forfeiture attached to the statute under which the accused is convicted and that specific power would not apply to the particular property is not a bar to the making of a Suspended Forfeiture Order. Procurators Fiscal should also refer to para 5.16 in relation to the need to seek a warrant to seize and retain property prior to criminal proceedings being concluded against the particular accused concerned where the property has no evidential connection to the proceedings against an accused.

9.21 SPECIFIC POWERS RE FORFEITURE

Forfeiture can, however, still be achieved under existing statutory provisions, eg section 27 of the Misuse of Drugs Act 1971, and these should be utilised where possible. If the forfeiture provisions of the Act contravened do not cover all articles sought to be forfeited then forfeiture of the remainder should be the subject of a motion in terms of the appropriate section of the Proceeds of Crime (Scotland) Act 1995.

9.22

Where the court makes both a Suspended Forfeiture Order and a Compensation Order under section 249 of the Criminal Procedure (Scotland) Act 1995 against the same accused, the court may direct that the proceeds of sale of that property shall be first directed towards satisfaction of the Compensation Order. Where the court makes a Suspended Forfeiture Order the property passes to the control of the Clerk of Court until the Order is recalled or the property is forfeited. The prosecutor is required to notify interested parties in writing that the Order has been made and that the parties may be entitled to apply to the Court for the Order to be recalled under section 25 of the Act, or for a direction under section 26 of the Act. Where the property is heritable property in Scotland the prosecutor must have a certified copy of the Order entered in the appropriate Property Register. The court is also empowered to direct the prosecutor to insert a notice in the Edinburgh Gazette or other newspaper or journal specifying the terms of Suspended Forfeiture Orders. For the purpose of any appeal or review a Suspended Forfeiture Order is a sentence.

9.23 FORFEITURE: DISTRICT COURT

Section 22 provides for forfeiture in the

District Court. This section replaces the existing powers available under section 436 of the Criminal Procedure (Scotland) Act 1975. The provisions for forfeiture in the District Court are on similar lines to those available to other courts under section 21, but omitting the element of suspension of the Forfeiture Order and restricted to moveable property only.

9.24 WARRANT TO SEARCH FOR AND SEIZE PROPERTY

Section 23 introduces additional powers for a Sheriff to grant warrant for search and seizure of property likely to be the subject of a Suspended Forfeiture order on conviction. The Sheriff requires to be satisfied that proceedings have been, or are likely to be, instituted against a person; and there is reasonable cause to believe that the property specified in the application will be subject to a Suspended Forfeiture Order; and there are reasonable grounds for his thinking that a Suspended Forfeiture Order might be made. The Sheriff is also empowered to grant a warrant in respect of such property after a Suspended Forfeiture Order has been made. An application for such a warrant can be made at the same time as an application for a Suspended Forfeiture Order. The item to be made the subject of a Suspended Forfeiture Order does not require to be in court when the motion for such an Order is made. Procurators Fiscal should also refer to paragraph 5.16 in this regard.

9.25 FORFEITURE OF PROPERTY SUBJECT TO SUSPENDED FORFEITURE ORDER

This section specifies the time after which property, subject to a Suspended Forfeiture Order, is forfeited. Section 24(1) provides that heritable property in Scotland is forfeited 6 months after the date on which a certified copy of the Suspended Forfeiture order is entered in the appropriate Property

Register. Moveable property is forfeited 60 days after the making of the Order, subject to the exceptions specified in sub-section (2), namely, that any property which is perishable, of no commercial value or cannot lawfully be sold, supplied or possessed, shall be forfeited immediately after the making of the Suspended Forfeiture Order. The majority of property subject to such an Order, other than money, may well fall into these categories. Sub-section (3) deals with the situation where there is an application for recall or variation of the Suspended Forfeiture Order and specifies that the property shall not be forfeited until the application is disposed of or the time limits mentioned in section 25 are reached. Sub-section (4) specifies that in the event of an appeal there should be no forfeiture of property before that matter is determined. Sub-section (6) specifies that a certificate by the Clerk of Court, that property has been forfeited, shall be conclusive evidence of that fact. In any case where heritable property is forfeited the prosecutor is required to record a certified copy of that certificate in the General Register of Sasines or Land Register of Scotland.

9.26 RECALL OR VARIATION OF SUSPENDED FORFEITURE ORDER

This section provides for the recall or variation of a Suspended Forfeiture Order. Section 25(1) requires the court to recall a Suspended Forfeiture Order if satisfied on the balance of probabilities that the applicant is the owner of the property or has an interest in it and if sub-sections (2) and (3) are applicable. Sub-section (2) requires the court to recall the Order if, having been satisfied by the applicant in terms of sub-section (1), it is not satisfied by the prosecutor that the applicant knew, or ought to have known, that the property was to be used for criminal purposes and did not take reasonable steps to prevent that use: or, if acquired after it had been so

used, knew or ought to have known the property had been so used. Sub-section (3) specifies that, notwithstanding the fact that the court is satisfied by the prosecutor in terms of sub-section (2), if it considers that forfeiture of the property would be excessive or inappropriate, the Order is to be recalled. Sub-section (4) requires the prosecutor to cause a certified copy of the recalling Order to be lodged in the General Register of Sasines or Land Register of Scotland in relation to heritable property. Sub-section (5) specifies that the prosecutor may apply to the court to vary a Suspended Forfeiture Order where the information provided to the court under section 21(4) is found to be incorrect by deleting the name of the interested party and, in appropriate circumstances, substituting the correct person. In all cases where such information comes to light an application should be made. Sub-section (6) enables the prosecutor to apply to the court to insert a name in a Suspended Forfeiture Order where no person has been named. Procurators Fiscal should make such an application in all cases where relevant information comes to light. The application under this section can be made at any time before the property is forfeited. Sub-section (9) specifies that when the court is considering recall of a Suspended Forfeiture Order it is not entitled to review the sentence passed.

9.27 PROPERTY WRONGLY FORFEITED: RETURN OR COMPENSATION

Section 26 entitles any person, other than the accused, to apply to the court for return of an article wrongly forfeited or for compensation should that not be practical. The criteria which are to be satisfied mirror those provided for by section 25 in relation to recall of Suspended Forfeiture Orders. Sub-section (7) requires the prosecutor, when he comes to believe that the person named in the Suspended Forfeiture Order

is not the owner of, or a person otherwise having an interest in, the property to notify the court in writing and where the identity of the person who was the true owner, or who truly had an interest in the property, is known to notify that person that he may be entitled to apply to the court for return of the property or for compensation under this section.

APPEALS PROCEDURES

Section 27 specifies the methods of appeal against a decision by the court under sections 25(1) or 26(1).

9.28 TELECOMMUNICATIONS ACT 1984 SECTION 81: FORFEITURE

Section 81 contains a provision which is of importance to Procurators Fiscal. This section provides for forfeiture proceedings to be taken in respect of restricted apparatus (which is defined in section 80(1)) seized in pursuance of a warrant under section 15(1) of the 1949 Act or in exercise of the power conferred by section 79(3) of the 1984 Act without the necessity of a conviction having been obtained against any person. Sub-section (2) provides that an application under section 81 shall be made in the manner specified in section 134 of the Criminal Procedure (Scotland) Act 1995 and must be made within 6 months of the seizure of the apparatus. Sub-section (3) provides that the Procurator Fiscal shall, in making an application, serve a notice on any person appearing to him to be the owner of, or otherwise interested in, the apparatus attached to which is a copy of the application giving him the opportunity to appear at the hearing of the application to show cause why the apparatus should not be forfeited. Sub-section (4) provides for the manner of service under sub-section (3).

Sub-section (8) provides for an appeal by

way of Bill of Suspension within 21 days of the making of the order by any person who appeared, or was entitled to appear, to show cause why the apparatus should not be forfeited and sub-section (9) provides that no order for forfeiture shall take effect until the end of the period of 21 days after the day in which the order is made, or, if appeal proceedings are brought in respect of the order within that period, until the conclusion of those proceedings.

Procurators Fiscal should note that, as well as being useful in providing a procedure for disposing of restricted apparatus where there is insufficient evidence to charge any person, this section will also be available where criminal proceedings have been taken but no charge has been proved.

Section 82 substitutes a number of new sub-sections to replace sub-section (3) of section 14 of the 1949 Act and the result is that the provisions for forfeiture are considerably expanded. The new sub-section (3) contains the principal forfeiture provisions. Sub-section (3A) provides that, in respect of restricted apparatus, the court shall order the apparatus to be forfeited where a person is convicted of an offence under the 1949 Act unless the accused or any person claiming to be the owner of, or otherwise interested in the apparatus shows cause why the apparatus should not be forfeited. Sub-section (3B) provides the apparatus may be ordered to be forfeited notwithstanding that it is not the property of the person by whom the offence giving rise to the forfeiture was committed. Sub-section (3D) provides that the court by whom any apparatus is ordered to be forfeited under section 14 may also order the person by whom the offence giving rise to the forfeiture was committed not to dispose of that apparatus except by delivering it up to the Secretary of State within 48 hours of being so required by him.

Sub-section (3E) provides that if a person against whom an order is made contravenes that order, or fails to deliver up

the apparatus to the Secretary of State, he shall be guilty of a further offence. The sub-section also provides for the determination of the appropriate penalty. Procurators Fiscal are directed to the case of *Aitken v Lockhart* 1989 SCCR in which a justice found that an apparatus was not designed or adapted for emission but forfeited the apparatus in any event. The Appeal Court held that it was not appropriate for the justice to have ordered forfeiture under section 14(3) of the Act given that the power conferred by that section does not extend to apparatus not designed or adapted for emission.

CONFISCATION

In relation to matters regarding confiscation under the Proceeds of Crime (Scotland) Act 1995 and the Criminal Law (Consolidation) (Scotland) Act 1995 Procurators Fiscal should refer to Chapter 20 which deals generally with confiscation.

9.29 ALTERATION OF SENTENCE

The court has power in summary cases to alter or modify but not to increase a sentence it has pronounced. If the sentence is one of imprisonment, this must be done before the imprisonment is commenced. (*Skeen v Sim CO Circular A16/75*; section 167(8) of the 1995 Act.)

9.30 FURTHER OFFENCE WHILE UNDER SUSPENDED SENTENCE

Where an offender is convicted by a Court in Scotland of an offence punishable by imprisonment and the Court is informed that the offence was committed while the offender was the subject of a suspended sentence passed in England and Wales, the Court in Scotland is obliged to give written notice of the conviction to the Court by which the suspended sentence was passed - section 25(3) of the Powers of Criminal Courts Act 1973.

If the fact that the offender is the subject of a suspended sentence is libelled no difficulties should arise, but, in order to ensure that the courts in Scotland comply with the terms of this provision, Procurators Fiscal should draw the attention of the Clerk of Court to any suspended sentence.

9.31 FURTHER OFFENCE WHILE ON DEFERRED SENTENCE

Section 202 of the 1995 Act make provision for a court to deal with persons convicted of another offence while on deferred sentence. Where the same court which deferred sentence is involved with subsequent proceedings the Procurator Fiscal should ensure that the original offence can be dealt with by the court at the same time as the offence committed during the period of deferment.

9.32 DISQUALIFICATION AND ENDORSEMENT

Orders for consecutive periods of disqualification in cases of obligatory or discretionary disqualification not involving the application of the "totting up" procedure are incompetent (*Williamson v MacMillan 1962 SLT 63*) and Procurators Fiscal will seek to ensure that when a person is disqualified by a Court from holding or obtaining a driving licence the disqualification is ordered to run from the date from which it is imposed.

9.33

In the case of a person who is convicted of an offence involving obligatory endorsement of penalty points on driving licences the Court shall require the accused's licence to be produced to it before endorsing or disqualifying. Where a driving licence is not produced the case should be continued to a later diet for that

purpose. The court may take into consideration a previous conviction or disqualification endorsed on the licence of the accused (Road Traffic Offenders Act 1988, section 31). Driving licences submitted with letters pleading guilty should be examined by the Procurator Fiscal's Office and any convictions or disqualifications endorsed thereon which do not appear in the schedule of previous convictions should be drawn to the attention of the Procurator Fiscal or Depute who will take the case in Court so that he in turn may bring them to the notice of the Sheriff at the appropriate stage.

9.34

Section 19 and Schedule 7 of the Transport Act 1981 provide for disqualification for certain repeated Road Traffic offences and the endorsement of penalty points on driving licences. Under these provisions which require the date of the offence as well as the penalty points to be endorsed on the offender's licence, it will be the licence, rather than the schedule of previous convictions, which will be of principal importance to the court in determining whether an accused is liable to disqualification under the "totting up" provisions.

9.35

Section 248(1) of the Criminal Procedure (Scotland) Act 1995 empowers the court where a person is convicted of an offence, other than one triable only summarily where a motor vehicle has been used for the purposes of committing or facilitating the commission of that offence to make an order disqualifying the accused for holding or obtaining a licence to drive.

9.36

Schedule 2 Part II of the Road Traffic Offenders Act 1972 provides obligatory

disqualification on conviction of culpable homicide of the driver of a motor vehicle and Schedule 2 Part II of the same Act also provides discretionary disqualification for stealing or attempting to steal a motor vehicle. In summary proceedings a notice in terms of Form F80 should be served with a complaint containing a common law charge of theft of a vehicle. Although there is no statutory requirement to serve a notice of penalty, it is considered that in fairness to the accused notice should be given of the liability to disqualification from driving.

9.37 SECTION 16 OF THE PRISONERS AND CRIMINAL PROCEEDINGS (SCOTLAND) ACT 1993

Section 16 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 makes provision for dealing with a prisoner who is released under Part I of the 1993 Act and commits an offence during the balance of the period of his sentence. Section 16(2) provides that the court which deals with him for that offence may, in addition to any penalty imposed for that offence, order his return to prison for a period not exceeding the period between the date of commission of that offence and the date on which he would have served his earlier sentence in full but for his release under the Act. Section 16(2)(b) provides that where the court which deals with the later offence is inferior to the court which imposed the sentence for the original offence, it may refer him to the original, superior, court which may order his return.

Where a case is to be referred to the High Court of Justiciary, to determine whether an order in terms of section 16(2) should be made, the proper procedure is to refer the case before and not after the inferior court imposes sentence in respect of the new offence (see *HMA v Donnachie* 1994 SCCR 937). Before sentence is imposed in respect of the new offence the court should be invited to adjourn to a specified

date giving a sufficient period of not more than 3 weeks in custody cases and 4 weeks in bail cases, to allow the High Court to deal with the referral in terms of section 16(2)(b). Such an adjournment should be sought in terms of the court's common law power to adjourn, rather than as an exercise of statutory powers in terms of section 179(1) and section 380(1) of the 1975 Act.

In no circumstances should the new case be referred to the High Court as, if this should occur, the new case will have been referred to the High court "to a date to be fixed", ie not to a specific diet and this will result in the instance in the new case falling at midnight (see **HMA v Fraser** (1852) 1 Irv 1).

When a case is referred to the High Court of Justiciary in terms of section 16(2)(b) the Appeals Unit at Crown Office should be informed immediately by telephone. A report should be sent as soon as possible thereafter. The Appeals Unit will arrange with the Clerk of Justiciary for a date for the hearing of the case and inform the Procurator Fiscal of the outcome of the referral as soon as the result is known.

Procurators Fiscal are reminded that an order in terms of section 16(2) of the Act can only be made in respect of sentences of imprisonment passed on or after 1 October 1993 (see Article 3, paragraph 4 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 Commencement, Transitional Provisions and Savings Order 1993, SI 1993/2050).

