

Joanna Shapland

Between Conviction
and Sentence

The Process
of Mitigation



BETWEEN CONVICTION AND SENTENCE

The process of mitigation

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ROUTLEDGE & KEGAN PAUL
London, Boston and Henley

First published in 1981
by Routledge & Kegan Paul Ltd
39 Store Street, London WC1E 7DD,
9 Park Street, Boston, Mass. 02108, USA and
Broadway House, Newtown Road,
Henley-on-Thames, Oxon RG9 1EN
Printed in Great Britain by
Biddles Ltd
Guildford, Surrey
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Library of Congress Cataloging in Publication Data

Shapland, Joanna, 1950-
Between conviction and sentence.

Bibliography: p.

Includes index.

1. Sentences (Criminal procedure)--Great Britain.

I. Title.

KD8406.S52 345.41' 077 81-10669

ISBN 0-7100-0945-3 344.10577 AACR2

ACKNOWLEDGMENTS

The research reported in this book was done while the author was Research Fellow in Criminology at King's College, University of London, on a grant from the Home Office. I would like to thank my steering committee, my colleagues at King's College and at the Centre for Criminological Research Oxford University, and members of the Home Office Research Unit and the Lord Chancellor's Office, who have all given me much advice and support.

I owe a major debt of gratitude to my research assistant, Ruth Harrison. Without her most of the field work could never have been attempted. She has also taken a considerable part in the analysis and the writing of this book.

I must also thank all the judges, barristers, solicitors, probation officers, justices' clerks and others who have given so freely of their time and their expertise in explaining to me how the system works and in helping me to explore the process between conviction and sentence.

Parts of the various drafts of this book have been read and most helpfully criticized by individuals too numerous to mention. The views expressed in this book and any mistakes and errors are, however, my own responsibility. Mrs Robertson and Mrs Schuster Bruce have very ably typed the manuscript.

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1 BETWEEN CONVICTION AND SENTENCE

For the vast majority of those brought before the criminal courts, the process between conviction and sentence is their main experience of the decision-making processes of the court. Over 80 per cent of those appearing for indictable offences plead guilty. Upon a plea of guilty, a conviction is immediately recorded and the court proceeds to consider sentence. Those pleading not guilty who are convicted will also go through the process between conviction and sentence. This process, therefore, is highly important, both to the defendant, for whom it may represent his only experience of how the court operates, and to the public, for whom the sentences given to offenders will often be the only measure available to judge how the courts view particular offences or particular kinds of offenders.

Almost all the information that the sentencer has on which to decide sentence will be presented to him during this process. What sentence is passed will, therefore, be determined very largely by the information presented to the sentencer at this point. What information is presented will depend upon the perceptions of the participants in the process as to what they should present - how they see their role in court, what they regard as important, how their particular profession has delineated their role in the past. Unlike a trial, there are no rules to exclude particular kinds of evidence - anything may be introduced at the discretion of the judge. There is nothing to say that particular circumstances must be regarded as mitigating or aggravating sentence. Again unlike a trial there are few rules of procedure which stem from statutes or case law. There is a standard procedure adopted by most courts but this has its roots in the historical development of the process since the beginning of this century, and has been as much determined by decisions of extra-judicial bodies such as the Home Office or professional associations such as the National Association of Probation Officers as by decisions of the courts.

There are many participants in this process for adult defendants. The prosecution provides a summary of the facts of the offence in a guilty plea. The police provide previous convictions and a brief summary of personal circumstances of the defendant, known as the antecedents. The probation service may produce a social enquiry report, containing more detailed analysis of the defendant's personal circumstances and attitudes and possibly a recommendation as to sentence. There may be a medical report from a doctor or psychiatrist on the defendant's medical and psychiatric history and

recommendations for sentence. There may be a report from a prison or Borstal governor. The defendant or his legal representative will present a speech in mitigation. This may include his view of the offence, his circumstances and his future plans, stressing the mitigating circumstances and explaining any aggravating features. This will often cover all features of the offence and the offender, bringing in factors mentioned by other participants and culminating in a suggestion as to sentence which may then be discussed with the sentencer.

Surprisingly, although there has been considerable research on social enquiry reports and some research on medical reports and on the general sociology of the courtroom, there has been no systematic recent look at facts of the offence, antecedents, previous convictions or the mitigation speech in courts of first instance. Even more serious, there has been no recent research in this country directed at how the whole process is put together, in terms of how the various participants determine what information to present, how they interact with one another both before the hearing and in court and what effect this has on the information that they do present.

In this book, I shall be concentrating on the speech in mitigation made by the defence in cases involving adult defendants (17 years or over). This covers all the aspects of the case. The content of the speech, in terms of what is considered mitigating and what aggravating, will be analysed. This will be compared with accounts that would be given if a person in the street or at home had caused offence to another, to see how far the concept of what is mitigating or aggravating in court is similar to or is divorced from everyday life (chapter 3). The role which the legal representative sees himself as having in the mitigation context and how this affects the structure and content of the speech will then be discussed (chapter 4). In chapter 5, how the legal representative gathers information from the defendant and other participants and how he then prepares the speech will be analysed. Other participants' contributions in court and how they are related to mitigation will then be considered in order to see the effect on the sentencer of the procedure and the contributions as a whole and hence to determine the usefulness of the mitigation speech (chapter 6). Finally, in chapter 7, I shall consider what type of process between conviction and sentence we have at present and its consequences for the unrepresented defendant, the training of participants, the concepts of the offence and the offender produced in the process and the direction in which the system may proceed in the future.

First, however, it is necessary to place each participant's contribution, including that of the mitigator, into its context. Each participant's contribution is affected by other participants in the present case and by the historical, legal and organizational constraints on him and on others. In this chapter I shall describe the present procedure and, in chapter 2, describe how it has developed since the beginning of the century, in order to discover the origin of the present constraints on the procedure.

THE PRESENT PROCEDURE

The procedure and the court surroundings will be illustrated using a guilty plea at a magistrates' court, since this type of case is the most common. Differences between the Crown Court and the magistrates' court, between guilty and not guilty pleas and between represented and unrepresented defendants will be discussed at the end of the section.

Magistrates' courts usually open half an hour before the time the court will sit to hear the first case. If one arrives early, there is usually a small group of people standing around on the pavement outside - defendants, relatives, barristers and solicitors. Apart from these knots of people there is often no indication that the building is a magistrates' court apart from its vaguely public-building appearance and often its proximity to the local police station. This connection with police stations stems from the historical beginnings of magistrates' courts as police courts and extends to cover much of the everyday administration. This is more apparent when the doors open and everyone enters the entrance hall which serves in most courts as a waiting room. This soon fills up and becomes very crowded and noisy - groups of defendants, lawyers, probation officers and the police officers in the case stand around or sit on the limited and usually wooden bench seating. It is in this atmosphere that most of the preparation of the cases to be heard occurs. Defence legal representatives hold conferences with defendants on bail, talk to the police officer in the case, confer with any prosecution lawyer, read social enquiry reports and confer with the probation officer. The list of cases for the day is posted on a board but this only says which cases will be heard in which court. The ordering of cases and the responsibility for ensuring that defendants are present and enter the court at the right time is often that of the police, usually in the person of the warrant officer or court inspector. There are normally many doors leading off this entrance hall - commonly three or four for each court plus those for the offices of the court staff, probation service and that to the cells where defendants in custody are held. Often none of these doors are marked with their function. Each court will have an entrance for the magistrates (usually from another, private part of the building), one for lawyers, probation officers, press and police, one for defendants and one for the public leading to the public gallery. Even inside the court, there are rarely any markings as to who should sit where. It is not only defendants and visitors who make mistakes in this context. Geoffrey Parkinson, an experienced probation officer, wrote in an article in 'New Society':

Probation occasionally takes me deep into unfamiliar petty sessional divisions and somehow I find I always manage to enter strange courts by the wrong entrances. Frequently I've been jostling in the public gallery when I should have been in the witness box; once I nearly joined the magistrates on the bench and, for one unforgettable hour in a

Middlesex court as a result of confusing seating arrangements, everyone including a defendant thought I was a defence solicitor.

This lack of markings and of a set list for hearing cases, together with the general confusion outside court means that the police tend to control movement and interaction. As Pat Carlen (1976) writes:

In the management of social occasions, time, like place, always belongs to somebody or some group. During formal social occasions certain persons are appointed to oversee the timing of events, to ensure both the continuity and punctuation of performances. During judicial proceedings in magistrates' courts the timing of events is monopolised by the police. They are the ones who set up the proceedings; it is their responsibility to see all defendants arrive at court; it is their job to ensure that all relevant documents are in the hands of the clerk of the court (p. 25).

Inside the courtroom, somewhat more order pertains. The magistrates enter and hear any applications for summonses, warrants, maintenance problems and any other non-criminal or private matters. The public are then let in to the public gallery and the list of cases for the day commences. The seating pattern in the court is defined by role. Although unmarked, strict segregation between different participants applies. The magistrates sit on a raised tier behind a table or bench. The clerk sits in front of them near the witness box. Then come rows of benches for lawyers with rows usually at right angles for probation officers, press, the usher, the court inspector and police officers in other cases. At the back of the court is the dock for the defendant and the public gallery, usually boxed off from the main part of the court. The public gallery is normally small and it is often difficult to fit in the number of relatives of the defendants and members of the public that wish to attend. Many magistrates' courts were built in the last century. This style of architecture tends to produce a considerable distance between magistrates and defendant such that the proceedings are often only semi-audible to defendants and to the public. During the proceedings police officers, lawyers and others are coming in and out of court so that it is very difficult to follow what is being said.

The procedure in a guilty plea case where the defendant is represented is illustrated by the following transcript of a theft case concerning two defendants from a London court. The time for each part is given at the side.

A Warrant officer to magistrate: Case number 12, sir, A B and C D. (A B and C D, the two defendants, enter door on far right with warrant officer. Defendants go into dock. Warrant officer takes up position beside dock)

Warrant officer to magistrate: Both are represented. (Defendants are standing in dock. Police officer moves to witness box)

- B Clerk to defendants: On these charges you have a right to jury trial at the Crown Court. If you don't exercise this right you will be tried here. Before you decide, if you choose to be tried here and are found guilty the magistrate still has the power to send you up for sentence if, after hearing your previous convictions, he feels his powers of punishment are not adequate. Do you understand?
- 22 sec. Defendants to clerk: Yes.
- 2 sec. Clerk to 1st defendant: Where do you wish to be tried, Mr B?
- 1 sec. 1st defendant to clerk: Here.
- 4 sec. Clerk to 2nd defendant: Where do you wish to be tried, Mr D?
- sec. 2nd defendant to clerk: Here.
- 12 sec. Clerk to defendants: The first charge is that on 7th June 1977 in E Street you stole a car radio from a vehicle valued at £30, the property of a person unknown. Do you plead guilty or not guilty, Mr B?
- 1 sec. 1st defendant to clerk: Guilty.
- 5 sec. Clerk to 2nd defendant: Do you plead guilty or not guilty, Mr D?
- sec. 2nd defendant to clerk: Guilty.
- 16 sec. Clerk to defendants: The second charge is that on 7th June 1977 in E Street you stole a cassette player and seven cassette cartridges from a vehicle, valued at £55, the property of a person unknown. Do you plead guilty or not guilty, Mr B?
- 1 sec. 1st defendant to clerk: Guilty.
- 5 sec. Clerk to 2nd defendant: Do you plead guilty or not guilty, Mr D?
- sec. 2nd defendant to clerk: Guilty.
- C Magistrate to police officer: Yes?
(Defendants sit down on signal from warrant officer)
- 29 sec. Police officer to magistrate: The brief facts of the case are - on Tuesday 7th June at approximately 2.25 a.m. the accused were seen by the police. When asked to explain their activities, they ran off. When B's car was searched the property was found in the boot, and had been stolen from cars in E Street. They made no replies to any of the cautions.
- D Magistrate to police officer: I see.
- 27 sec. Police officer to magistrate: In respect of B, he is of previous good character, but D is known, sir.
(Police officer gives papers to usher, who gives one to clerk and one to magistrate)
- 1 sec. Magistrate to police officer: Yes.
(Magistrate reads)
- Yes, yes. I've read this.

27 sec. Police officer to magistrate: In respect of D, your worship, he is a married man, married in 1975. He lives in a council maisonette. He pays £46 a week for rent, food and HP. He earns £40 a week as a roof tiler, and his wife also works, earning £40 a week. They have no children. He has no savings but D has a bank overdraft of £400.

Magistrate to police officer: Yes.

16 sec. Police officer to magistrate: In respect of B, he is a single man who lives with his mother and sister. Magistrate to police officer: Yes.

3 sec. Police officer to magistrate: He earns £80 a week as a film technician. He pays his mother £10 a week for his keep.

Magistrate to defence counsel: Yes, Mr F?
(Defence counsel stands)

1 sec. Defence counsel to magistrate: I have no questions for the officer.

E Magistrate to defence counsel: Yes.

Defence counsel to magistrate: Sir, this as you have heard was on Tuesday morning, the 7th June. Of course, that was the morning of the Jubilee.

Magistrate to defence counsel: Yes.

Defence counsel to magistrate: In fact, when it happened these two men had been celebrating on Jubilee Monday, Whit Monday, and had consumed a lot of drink in the celebrations at two public houses along with members of D's family. You may remember, sir, that the public houses stayed open until 12 o'clock that night.

Magistrate to defence counsel: Yes.

2 min. 13 sec. Defence counsel to magistrate: D's wife suggested they should go to the West End to see the bunting and decorations and see the crowds. Unfortunately, before that mission was accomplished she became sick and, therefore, didn't go with them. As a result they went up to the West End. They had a look round and then went into a club in the West End and stayed for an hour or two. On the way back to their car, unfortunately this happened, they took this wild notion because they saw two car windows open and they took the two radios. Sir, it is something that one can say that it was unpremeditated. It is perhaps unfortunate to have to carp at Her Majesty's happy event but because of the amount of celebration they both succumbed easily to temptation. That's all I have to say with regard to the offence, sir, and because of the special reasons particular to the occasion, I would ask you on their behalf to treat the matter as one deserving of a fine.

12 sec. Magistrate to defence counsel: If it will assist you in any way, I don't contemplate custody; (pause) I don't have it in mind to send them to prison.

- 5 sec. Defence counsel to magistrate: Much obliged. Sir,
3 sec. Mr B has not been in prison before.
- 21 sec. Magistrate to defence counsel: I appreciate that.
Defence counsel to magistrate: He earns, he works as
a freelance film technician earning £80 a week and lives
with his mother and sister. Sir, there is perhaps more
to be said in mitigation for him than for Mr D, who has
a considerable number of previous convictions.
- 24 sec. Magistrate to defence counsel: Yes.
Defence counsel to magistrate: Nevertheless, since he
got out of prison in July 75 he has stayed out of trouble
and worked for those two years. He has made consid-
erable efforts indeed in the task of rehabilitating him-
self in society. He married in 1975 and has been married
17 months.
- 10 sec. Magistrate to defence counsel: Yes.
Defence counsel to magistrate: His employers are willing
to continue his employment and think enough of him to
provide a reference for him which I place before the
court.
- 21 sec. (Defence counsel gives reference to warrant officer who
moves to clerk, who hands it up to magistrate. Magis-
trate reads)
- 12 sec. Magistrate to defence counsel: Yes.
Defence counsel to magistrate: Sir, at that employment
he earns £40 a week and his wife who works as a com-
puter programmer
- 14 sec. Magistrate to defence counsel: Yes.
Defence counsel to magistrate: with, I understand, G,
also earns or, takes home, £40 a week. In the circum-
stances, if you have occasion to impose a fine, please
make it an appropriate and just one.
- 2 sec. Magistrate to defence counsel: Yes.
sec. (Defence counsel sits down)
- F Warrant officer to defendants: Stand up.
1 sec. (Defendants stand up)
- 1 min. 17 sec. Magistrate to defendants: Now, AB and CD, I've
listened to what Mr F said on your behalf. I intend to
deal with this by way of fine. You, AB, have not been
in trouble before. You will pay £25 in respect of each
offence. Now, CD, you're getting something of a record,
you know. You will pay £50 in respect of each offence
and I will sentence you to 3 months prison suspended
for 2 years. That means this, - if you keep out of
trouble for the next 2 years that's the end of this.
Understand?
- 2nd defendant to magistrate: Yes.
Magistrate to 2nd defendant: But bear this in mind. If
you commit another offence punishable by prison you're
almost certainly going to prison, and in view of your
record, that may be quite substantial. Do you understand?

- [1 2nd defendant to magistrate: Yes, sir.
 [sec. Magistrate to defendants: Very well, go away and keep
 [5 out of trouble.
 [sec. (Defence counsel stands)
 [2 Defence counsel to magistrate: Sir, may I take instruct-
 [sec. ions on how to pay?
 [Magistrate to defence counsel: Yes, of course.
 [8 (Defence counsel goes to defendants in dock. Confers.
 [sec. Defence counsel goes back to counsel's bench)
 [6 Defence counsel to magistrate: Sir, both can be paid
 [sec. today. There's no need for time.
 [2 Magistrate to defence counsel: Yes.
 [sec. Warrant officer to defendants: This way.
 [5 (Defendants leave dock and leave court by door to cells)
 [sec. Defence counsel to magistrate: Much obliged.
 (Some time after, warrant officer comes out of door to
 cells)
 Warrant officer to magistrate: Seven days for the def-
 endant to pay by cheque in the last case, sir?
 Magistrate to warrant officer: Yes, of course.

The whole case took approximately nine minutes. In section A the defendants are ushered into the court by the warrant officer who tells the magistrate (a stipendiary magistrate sitting alone) which case is to be heard. In section B, the defendants are told of their right to elect trial at the Crown Court on this charge. They choose to be tried at the magistrates' court and the charges are put to them. They plead guilty. The process between conviction and sentence thus begins at section C. Here the police officer gives a brief summary of the facts of the offence. Had there been a prosecuting counsel or solicitor, he would have given the summary. The procedure then moves immediately on to the presentation of the antecedents and previous convictions of the defendants in section D. In this case, defendant B has no previous convictions but defendant D does have some. The typed sheets containing the convictions and the antecedents are handed to the magistrate. At least some of the previous convictions are often read out in court but this does not happen in this case. The police officer then goes on to give the antecedents of both defendants from the typed sheet. Previous convictions and antecedents are always given by a police officer standing in the witness box, sometimes on oath. They may either take the form of a statement by the officer, as in this case, or, if there is a prosecuting counsel or solicitor, by means of question and answer between the prosecution lawyer and the police officer. Antecedents may either precede or follow convictions. The sentencer may ask questions or make comments at any stage in the process. The defence are given a specific opportunity to ask questions of the police officer at the end of the antecedents and previous convictions. These questions may be about the facts of the offence, the previous convictions or antecedents of the defendants or any other relevant matter.

There are no medical, social enquiry or other reports in this

case but if there had been they would have been presented after the end of section D. Social enquiry reports are presented by the probation officer preparing the report or by the liaison probation officer of the court. The report will be read by the sentencer and then the probation officer may give evidence or be asked questions by the sentencer or the defence. Medical and governors' reports are presented by the clerk of the court. Occasionally, the defence legal representative may be the person who makes mention of any reports. Reports are not read out in open court.

Section E is the mitigation by the defendant or in this case, his legal representative. Letters, such as references by an employer, may be produced and handed to the sentencer. The defendant or other witnesses may be called with the permission of the sentencer. The sentencer, as in this case, may give an indication of what sentence he has in mind. Mitigations vary very greatly in length and in detail, those by unrepresented defendants usually being very short. The defendant does not normally say anything if he is represented. After the mitigation, sentence is pronounced by the sentencer (section F). The sentencer may or may not give reasons for his sentence. Certain sentences, such as probation or a suspended sentence, should be explained to the defendant. In the case illustrated, the defendants were sentenced at their first appearance in which the case was actually heard (as opposed to remands while the police gathered evidence or for legal representation). It would have been possible for the sentencer to have decided that he required reports, in which case the case would have been adjourned for a specified period for the preparation of these reports. The subsequent hearing would have taken a similar form to the present one.

It is possible for some of the sections described above not to occur in some cases. The facts of the offence and the antecedents and previous convictions are not always stated in open court, particularly if the case was previously remanded for reports. The form of procedure given above has little legal prescription - it is largely a form that has grown up during this century. The order may vary slightly from place to place and with different sentencers. The legal and historical constraints on the procedure and on the participants are discussed in chapter 2.

Procedure in the Crown Court is very similar to that in the magistrates' court, except that a prosecuting counsel will always be present at the first substantive hearing of the case. He may also attend at the hearing after a remand for reports. Cases in the Crown Court are usually taken in the order given on the written list. The functions of the warrant officer are performed mainly by the usher. Defendants are almost always represented at the Crown Court but often unrepresented at the magistrates' court. There are no substantive differences in procedure for an unrepresented defendant, differences in practice stemming from the defendant's inability or unwillingness to ask questions of the police officer or probation officer and to give a detailed mitigation. If a defendant pleads not guilty and is convicted, either at the Crown Court or

the magistrates' court, the facts of the case have usually all been given in the evidence in the trial, so the process between conviction and sentence starts with the antecedents and previous convictions (section D).

STUDYING THE PROCESS BETWEEN CONVICTION AND SENTENCE

1 *Methods*

Given the lack of any previous in-depth research on the whole process, the methods used in the present study should be those suitable to exploratory research rather than to the testing of previously defined hypotheses. They should be capable of producing an analysis of the complex interaction between participants both in and out of court and of highlighting aspects of the roles of the participants which are crucial to the determination of the end-product, the sentence. It will be necessary to discover several different aspects of the process: what the content of each participant's contribution is; what constraints operate upon the participants to determine what they say; in what way the participants obtain the information they present in court; how they interact; and what effect each of these has on the nature of the overall process and on the provision of information to the sentence. No one method of research can provide even provisional answers to all these questions. The best approach is to use different methods to illumine different aspects. Possible methods, however, vary as to how far they themselves impose order or interpretations on the data. In a traditional experiment, for example, the use of particular hypotheses by the experimenter predetermines what factors may be discussed at the end of the analysis. If the hypotheses produce concepts or methods of analysis alien to the process to be studied then the resulting work may be useless. In the present study it will be necessary to find the concepts before testing any hypotheses. Methods of data gathering must thus permit the gathering of the maximum amount of information about possible concepts and the ascertaining of the reaction of participants to any topics investigated.

There is an additional problem for the researcher in this particular field. This is that discussion outside the courtroom (i.e. anything said between participants which is not in open court) is normally confidential. The researcher may not be present during these discussions, nor may he obtain answers to questions about specific real cases. Any interviews with participants should not touch on specific real cases. There is to some extent a way round this - it is to use a fictitious case and ask the participants to discuss what they would do with it. It is not an ideal answer - it can never be known how far what they say is influenced by knowing that they are taking part in research, or by the element of play-acting involved. It may, however, be possible using this technique to gain some idea of the preparation of what is said in open court and of the pre-court discussions.

The methods used to gather data were as follows:

- 1 observation and transcription of cases in open court;
- 2 following this, semi-structured interviews with participants to elucidate what was happening in court, what they perceived their roles to be and how they perceived other participants;
- 3 inclusion of a fictitious case in some of the interviews to look at pre-court discussion and preparation.

The analysis of the resulting data is primarily a case of drawing out important strands from the transcripts of cases and interviews together with more statistical analysis of the cases to discover how important those strands are. In this, content analysis, analysis of the concepts used by participants and analysis of the structure of the speeches made in open court are all important. The danger comes if the patterns of thought of the researcher start to influence to a considerable extent the concepts found. At sensitive places, therefore, two analysers were used. Throughout the text quotations from interviews or cases have been given to illustrate the concepts and findings.

2 The transcribed cases

A sample of 100 cases involving adult defendants (aged 17 years or over) was constructed to fulfil the following requirements:

- 1 that the proportion of cases of each type of court, plea and representation should conform as far as possible to the proportions actually occurring (based on the figures in Bottoms and McClean's (1976) Sheffield study);
- 2 that all types of criminal cases except driving offences, very trivial cases (for example, 'begging, drunk, street trading without a licence) and cases involving companies as defendants should be included as far as possible;
- 3 that there should be sufficient cases of each type of court, plea and representation to enable statistical comparisons between types to be made.

Each case was observed in open court and a verbatim transcript made by the researcher and/or the research assistant of the process between conviction and sentence. If the case involved a not guilty plea, notes of the evidence given were made. If there was more than one substantive hearing of the case (because of remands for reports or deferment of sentence) all hearings were covered. There might be more than one defendant in a case. All defendants were followed through to sentence unless they were juveniles charged with adults and sent to the juvenile court for sentence (two cases).

The 100 cases comprised:

- 20 Crown Court guilty pleas, defendant represented
(33 defendants - CGR)
- 10 Crown Court not guilty pleas, defendant represented
(14 defendants - CNR)
- 40 magistrates' court guilty pleas, defendant represented
(50 defendants - MGR)