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# SENTENCE REDUCTIONS FOR ASSISTING THE POLICE AND PROSECUTION

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A Review of Current Law and Guidance

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# EXECUTIVE SUMMARY

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- All common law jurisdictions award sentence reductions to offenders who provide assistance to the police or the prosecution. This assistance usually consists of information about other offenders or offending.
- This review examines the legal frameworks and practical implications regarding sentence reductions for offenders who assist the police and prosecution in England and Wales.
- Rooted in a pragmatic rationale rather, these provisions serve as a tool to encourage cooperation from offenders, especially in responding to serious and organised crime.
- Three distinct schemes regulate sentence reductions. The statutory procedure, governed by the Sentencing Act 2020 (sections 74 and 388), offers formal sentence reductions in exchange for assistance, but is contingent upon a guilty plea and seemingly limited to Crown Court cases.
- The common law ‘text’ procedure is a less formal mechanism whereby police provide a letter to the prosecution detailing the assistance offered. The Court of Appeal’s decision in *Royle* (2023) has clarified many key issues, including the factors determining sentence reductions and the interaction between assistance and guilty plea discounts.
- There is only very limited research into the reductions awarded for assisting the police and prosecution. Little is known about the levels of reduction awarded, offenders’ awareness of the assistance schemes, or public attitudes to the propriety of rewarding offenders for assisting in the prosecution of others.

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# 1. SCOPE OF REVIEW

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It is well-entrenched in popular culture that offenders may attract a lower sentence should they, to use the popular terminology, ‘turn Queen’s evidence’ (Cambridge Dictionary, n.d.). These ‘assisting offenders’ provide information regarding other offenders or offending and, in many cases, testify for the prosecution. In return, they benefit from a mitigated sentence. The rationale for this sentence reduction for assisting offenders has not changed in 130 years.<sup>1</sup> As with reductions for guilty pleas, the justification is rooted in practicality rather than foundational concepts of culpability or harm.<sup>2</sup> It is a ‘longstanding and entirely pragmatic convention’,<sup>3</sup> a ‘price worth paying to achieve the overwhelming and recurring public interest that major criminals, in particular, should be caught and prosecuted to conviction’.<sup>4</sup> However, whilst the scheme for guilty plea reductions has been refined and is now set on a relatively clear footing, the same cannot be said of the provisions for assisting offenders.

This review of law and practice summarises the accumulated case law and current guidance from the Court of Appeal and the Sentencing Council. It also notes the very limited academic commentary relating to this little-known element of sentencing law in England and Wales.

# 2. THE AVAILABLE SCHEMES

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There are three separate schemes in operation which recognise assistance to the State. The first of these, the ‘SOCPA’ provision, so named for its origin in the Serious Organised Crime and Police Act (SOCPA) 2005, is focused on providing either immunity,<sup>5</sup> or a ‘restricted use undertaking’, whereby certain evidence is excluded from being used against the assisting offender.<sup>6</sup> This scheme is not discussed here, as its use does not affect sentencing: immunity prevents a charge being brought at all, and restricted use undertakings mean certain evidence may not be adduced at trial. However, the other two provisions do relate to sentencing. The first of these is referred to as the ‘statutory procedure’,<sup>7</sup> governed by the Sentencing Act 2020.<sup>8</sup> The second is a common law procedure referred to as the ‘text procedure’.<sup>9</sup>

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1 *Marks v Beyfus* (1890) 25 Q.B.D. 494.

2 *R v Royle* [2023] EWCA Crim 1311 at para. 9.

3 *R v P and Blackburn* [2007] EWCA Crim 2290 at para. 22.

4 [2007] EWCA Crim 2290 at para. 22.

5 Section 71 of the Serious Organised Crime and Police Act 2005.

6 Section 72 of the Serious Organised Crime and Police Act 2005.

7 *R v Royle* [2023] EWCA Crim 1311 at para. 10.

8 This scheme was previously governed by SOCPA, and thus in some older case law is referred to as the SOCPA procedure, notwithstanding the existence of the separate SOCPA provisions on immunity and restricted use.

9 *R v Royle* [2023] EWCA Crim 1311 at para. 10.

## The Statutory Scheme

The statutory procedure encompasses two different sections of the Sentencing Act 2020: sections 74 and 388. Section 74 provides for a formal, written agreement to be made between the assisting offender and the prosecutor in return for a reduction in sentence. The agreement will stipulate what the offender must do (e.g. act as a witness) (Crown Prosecution Service, n.d.), yet only promises in return that the prosecutor will notify the court of the assistance and invite them to consider this assistance at sentencing. The prosecutor can promise no more as the legislation makes no demand of the sentencing judge. The only requirement is that '[t]he court *may* take into account the extent and nature of the assistance given or offered' (emphasis added).<sup>10</sup> There are also some restrictions on who may take advantage of the statutory procedure: The conviction must be one by way of guilty plea. This is required by the legislation<sup>11</sup> and reiterated in *Blackburn*— 'the offender must publicly admit the full extent of his own criminality and agree to participate in a formalised process'.<sup>12</sup> As a result of this requirement, *Blackburn* held that the sentences for such admitted prior criminal activity should be passed concurrently.<sup>13</sup>

Section 74 is only exercisable by the Crown Court, thus the defendant must either be convicted in the Crown Court or committed to the Crown Court for sentence.<sup>14</sup> This may raise a difficulty for triable either way offences: By which mechanism do the prosecution ensure the case is committed to the Crown Court so that section 74 may take effect? No answer is provided for this in either Crown Prosecution Service (CPS) guidance or the legislation and there appears to be a tacit acknowledgement section 74 should only operate for offences that would attract a sentence beyond the sentencing powers of the magistrates' courts. This seems to further complicate the circumstances in which the statutory procedure can be used.

The final element of the statutory procedure is its safeguard: If the offender reneges on the agreement, section 387 allows the court to remove any benefit conferred for assistance.<sup>15</sup> The legislation remits these cases not to the Court of Appeal, but to the Crown Court, preferably to be dealt with by the same sentencer who passed the initial sentence.<sup>16</sup> This sentence must only be what they would have received 'but for' the assistance, and cannot act to punish the withdrawal:<sup>17</sup> '[n]on compliance is not a separate crime'.<sup>18</sup> Martin (2018) has discussed just how easily prosecutors make a referral for such a review, concluding that whether or not non-compliance occurred, or is of a meaningful nature, is entirely a matter of prosecutorial discretion; moreover, the courts have approved this approach, satisfied that prosecutors are unlikely to make referrals for minor breaches.

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10 Section 74(2) of the Sentencing Act 2020.

11 Section 74(1)(a) of the Sentencing Act 2020.

12 [2007] EWCA Crim 2290 at para. 27.

13 [2007] EWCA Crim 2290 at para. 40.

14 Section 74(1)(b) of the Sentencing Act 2020.

15 Section 387(4) of the Sentencing Act 2020.

16 Section 388(4) of the Sentencing Act 2020.

17 *R v P and Blackburn* [2007] EWCA Crim 2290 at para. 30.

18 [2007] EWCA Crim 2290 at para. 30.

Section 388, the second part of the statutory procedure, allows for an offender currently serving a sentence (including one in the community) to have it amended to reflect any assistance they may provide, known as a review of sentence. A review under section 388 is not truly a review, as it is not an appeal against sentence, rather it is a ‘fresh process’ (therefore it is also unaffected by any previous appeals to the court).<sup>19</sup> As with section 74, the original sentence must have emanated from the Crown Court,<sup>20</sup> yet unlike section 74, there is no requirement that the offender plead guilty unless the sentence is one fixed by law.<sup>21</sup>

The only sentence ‘fixed by law’ is murder, where the only possible sentence is life imprisonment.<sup>22</sup> The fact that the requirement to plead guilty only applies in these cases is interesting: It would be understandable if the legislation stopped sentences fixed by law from being eligible for the discount; but the law does allow for reductions, so long as the offender originally pleaded guilty. In fact, the legislation is explicit that Schedule 21, which regulates minimum terms for mandatory life sentences, does not affect a court’s power to review sentences under section 388.<sup>23</sup> It is unclear why only sentences fixed by law require a guilty plea to benefit from a discount.

Requiring a guilty plea makes practical sense — it prevents an offender from ‘playing both sides’. If a guilty plea were not required, a defendant could offer information to secure a discount on their sentence but simultaneously plead not guilty and go to trial. Even if convicted they can benefit from their negotiated discount. Yet this does not explain why section 388, which can only be used after conviction and sentence, requires a guilty plea when the sentence is fixed by law. The defendant is not in a position to play both sides, they have already been convicted. Either they gain a discount from their information, or they return to their sentence. Thus, it is unclear why they must have pleaded guilty at their original trial in order to gain a discount. If the rationale is a pragmatic one, surely the aim would be to incentivise everyone with information to come forward?

It also does not help to explain that the guilty plea is a demand for contrition. In *Z* the court considered a case in which the defendant had pleaded not guilty, and subsequently received a sentence fixed by law. As such, they were not eligible for review under section 388. The appeal asked whether this could be remedied through the common law procedure (discussed below). The court rejected this, firstly, on the basis that it would turn the Court of Appeal into a mechanism for ‘rewarding someone for good behaviour during his sentence’.<sup>24</sup> Secondly, it suggested that ‘some may be motivated to manufacture assistance after conviction in the hope of a reduction in a long sentence’.<sup>25</sup> It is unclear how in providing a discount the court would reward for good behaviour that section 388 does not already reward for those who have a sentence not fixed by law, or who have a sentence fixed by law but plead guilty.

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19 *R v P and Blackburn* [2007] EWCA Crim 2290 at para. 33.

20 Section 388(1)(a) of the Sentencing Act 2020.

21 Section 388(2)(b) of the Sentencing Act 2020.

22 Section 275 of the Sentencing Act 2020.

23 Section 388(6)(b) of the Sentencing Act 2020.

24 *R v Z* [2015] EWCA Crim 1427 at para. 19.

25 [2015] EWCA Crim 1427 at para. 19.

## The Text Scheme

Finally, there is the text scheme, so-called because it requires only that the police produce a letter describing any assistance given by the defendant which the police and prosecution believe should be considered at sentencing (Crown Prosecution Service, n.d.). Both case law and the Criminal Procedure Rules elaborate on exactly what it must contain,<sup>26</sup> and the text itself must be detailed enough as to preclude any necessity for examination of the officer presenting the text, *in camera* or otherwise.<sup>27</sup> The text must be hand delivered to the CPS by the police, and no record must be made of its existence (Crown Prosecution Service, n.d.). Texts can be viewed by defence counsel and the judge, in addition to the prosecutor, although a defendant may stipulate that their counsel should not be shown the text.<sup>28</sup>

The use of texts is significantly more flexible than the statutory scheme. They do not require the defendant to plead guilty; they also make no demands of the defendant (e.g. providing testimony) other than the provision of information. The CPS guidance states that they are suitable when time or safety concerns preclude the formality requirements of the statutory scheme (Crown Prosecution Service, n.d.). The CPS also notes that a text can be of use where a defendant has provided assistance prior to the formulation of an agreement (Crown Prosecution Service, n.d.). This should be read carefully however, and in conjunction with the case law that specifies that even where a defendant makes a formal request for a text through the courts, the police are under no obligation to provide one.<sup>29</sup> Thus, although a text may be a way of providing mitigation to a defendant who provided assistance without an agreement, this is at the discretion of the police. However, once a text exists the Court of Appeal has been prepared to review sentences where the sentencing judge did not take the text into consideration.<sup>30</sup>

Additionally, courts are clear that whilst '[t]he investigative process is not to be deprived of the assistance derived from those who are, for whatever reason, unable or unwilling to enter into the formalised process' those who refuse to do so 'must take the consequence that any discount of sentence may be correspondingly reduced',<sup>31</sup> partly because it does not require so much from the defendant, and partly because it is not susceptible to review under what is now section 388. The courts have not been clear as to how this operates when the defendant was not given a chance to enter into a formalised agreement before providing such information. Nor is the CPS clear as to whether provision of assistance prior to an agreement necessarily forecloses the possibility of a formal agreement.

The Court of Appeal does make one point of differentiation within the text procedure as to whether the defendant pleads guilty or not guilty. Those who wish to take advantage of the text procedure are expected to either provide information, or express a willingness to provide information, prior to

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26 *R v X* (No. 2) [1999] 2 Cr App R (S) 294; Criminal Procedural Rule 28.

27 *R v X* (No. 2) [1999] 2 Cr App R (S) 294.

28 *R v Royle* [2023] EWCA Crim 1311.

29 *R v AXN and ZAR* [2016] EWCA Crim 590 at para. 18.

30 *R v Aib* [2024] EWCA Crim 422 at para. 8.

31 *R v P and Blackburn* [2007] EWCA Crim 2290 at para. 34.

a contested trial.<sup>32</sup> Where the defendant pleads not guilty, the Court of Appeal will not revise a sentence for any assistance provided after conviction.<sup>33</sup> In such a situation the Court of Appeal directs that ‘a defendant must address appropriate representations to the Parole Board or the Home Office’ (now presumably the Ministry of Justice).<sup>34</sup> The Court of Appeal does however create a review mechanism, somewhat akin to section 388, for where a defendant pleads guilty, has their sentence reduced for their assistance, but ‘the value of the help is not at that stage fully appreciated, or that the help thereafter given greatly exceeds, in quality or quantity or both, what could reasonably be expected when sentence was passed, so that in either event the credit given did not reflect the true measure of the help in fact received by the authorities’.<sup>35</sup> In such situations the Court of Appeal will provide review and may modify a sentence.<sup>36</sup>

Whilst the Court of Appeal in *A* comments that ‘[a] defendant who has denied guilt and withheld all co-operation before conviction and sentence cannot hope to negotiate a reduced sentence in the Court of Appeal by cooperating with the authorities after conviction’,<sup>37</sup> there is no reason why assistance provided *between* conviction and sentence cannot be taken into account in the Crown Court.

It would be beneficial for the Court of Appeal to address the status of assistance provided between conviction and sentence. Interestingly, in a case confirming the principle of *A*, the court does specifically reference that the defendant had been ‘convicted *and* sentenced’ (emphasis added).<sup>38</sup> This view is also seemingly restated in *Royle*: ‘an offender who wishes to achieve a reduction in sentence by providing information or assistance to the police must do so before he is sentenced in the Crown Court’.<sup>39</sup> Whilst it is less than ideal for a defendant to provide information after a contested trial, and in some ways allows the defendant to ‘play both sides’, hoping for an acquittal but knowing that he can negotiate a reduced sentence if he does not receive one, the rationale of sentence reductions for assistance is not, like for that of an early guilty plea, to avoid trial, but rather to respond to more serious criminality.<sup>40</sup> On this basis, when the information is received appears to be a moot point in considering eligibility for sentence reduction.

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32 *R v A, B* [1998] EWCA Crim 3529.

33 *R v A, B* [1998] EWCA Crim 3529.; *R v Z* [2015] EWCA Crim 1427; *R v Royle* [2023] EWCA Crim 1311.

34 *R v A, B* [1998] EWCA Crim 3529.

35 *R v A, B* [1998] EWCA Crim 3529.

36 *R v A, B* [1998] EWCA Crim 3529.; *R v Royle* [2023] EWCA Crim 1311 at para. 14.

37 *R v A, B* [1998] EWCA Crim 3529.

38 *R v P and Blackburn* [2007] EWCA Crim 2290.

39 *R v Royle* [2023] EWCA Crim 1311 at para. 13. As this refers to the text procedure it is unclear why the Crown Court was specifically mentioned.

40 *R v P and Blackburn* [2007] EWCA Crim 2290 at para. 39.

## 3. USE OF THE PROVISIONS

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The CPS has historically published statistics for the use of the statutory schemes, including the immunity and restricted use SOCPA schemes. From May 2022 to April 2023 the powers were used nine times, with one person receiving an immunity agreement, and no one a restricted use agreement. Six people received a written agreement for a reduction in sentence, and one a review of an existing sentence. The remaining person received a Northern Ireland-specific agreement for reduction in sentence (Hill, 2023). There are no statistics on the use of Texts, owing to the rule that no record can be made of them. The statutory schemes are the professed preference of the CPS (Crown Prosecution Service, n.d.), yet the scheme's restrictions at times seemingly without rationale, exclude some forms of assistance. The statutory scheme's formalisation, and thus required record keeping, may well exclude some offenders who are eligible by law, but who have concerns for their safety. With nowhere else to turn, the police, prosecutors and offenders may find themselves using the text scheme. This provides fewer safeguards for prosecutors, and less certainty for the offender, as the police are not obliged to produce a text.

### Quantifying The Reduction

The path laid out above by which offenders can gain a reduction is a complex one, not least because it is a patchwork of statute and common law. Historically, the principles that govern the extent of a reduction have been similarly piecemeal. However, in 2023 the Court of Appeal's decision in *Royle*<sup>41</sup> provided definitive guidance. The most important lesson of *Royle* is that there is no difference in the approach to be taken whether a reduction is achieved by the statutory or text procedure.<sup>42</sup>

### Assistance Mitigation in the Guidelines

Mitigation for assisting the state is also incorporated into the sentencing guidelines. Unlike most other sources of mitigation, the reductions for this factor are determined at a separate step. The Sentencing Council's nine step procedure allocates assistance to the prosecution to Step 4 (for example, Sentencing Council, 2022).

#### Step 4 – Consider any other factors which indicate a reduction, such as assistance to the prosecution

The court should take into account [section 74 of the Sentencing Code](#) (reduction in sentence for assistance to prosecution) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

Whilst Step 4 only explicitly refers to section 74, the statutory procedure, it also makes a generalised reference to the text procedure, allowing the court to also consider 'any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered)' (Sentencing Council, 2022). This places the consideration of assistance as the first step after determining the offence category, the starting point, and aggravating and mitigating factors. This

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41 [2023] EWCA Crim 1311.

42 [2023] EWCA Crim 1311 at para. 11.

facilitates the formulation of the sentence that would have been passed ‘but for the assistance given or offered’,<sup>43</sup> ensuring that a resentencing under section 387 has a basis from which to work. The effect of this is also that the offender receives any guilty plea discount as a *further* reduction.<sup>44</sup> The courts have noted that cases like *King*, decided before the codification of the guilty plea discount, combine the guilty plea and the assisting discounts to produce a single reduction.<sup>45</sup> *Royle* clarifies that the discounts must be treated separately.<sup>46</sup>

There is good reason to treat the discounts separately. Whilst both are pragmatic concessions, they serve different purposes. The guilty plea discount serves to incentivise an early guilty plea and thus avoid a trial. The assistance discount aims to incentivise providing information on wider criminality. Yet there must also be attention paid to how these discounts are intertwined. The statutory procedure *requires* a guilty plea.<sup>47</sup> As noted, the text procedure seems to contain a preference for one. The courts have even sometimes considered a guilty plea to be a function of assisting the prosecution: ‘defendants co-operate with the prosecuting authorities, *not only by pleading guilty* but by testifying or expressing willingness to testify or making a witness statement which incriminates a co-defendant’ (emphasis added).<sup>48</sup>

As the statutory procedure requires a guilty plea, there is an argument that it is envisaged that the discount for assistance should also act as the discount for a guilty plea, the former being an umbrella term of cooperation that encompasses the latter. On the other hand, should a defendant renege on their agreement, they cannot undo their guilty plea. If the law accepts that a defendant can leave the agreement, but cannot reverse their plea, then it is conceptually coherent to render them as separate. On this basis, it is perhaps better to consider the guilty plea a necessary prerequisite for cooperation, rather than a component, but this raises questions about the text procedure which does not have such a prerequisite. Moreover, in terms of the text procedure, ‘[t]he fact that an offender has contested his trial may... be one of the factors relevant to the extent of the reduction made’,<sup>49</sup> though this comment is never expanded upon.

The role of the guilty plea is thus a confused one. In terms of applying a reduction, its place is doctrinally clear; the reduction should be applied after any reduction for assistance. The picture conceptually is murkier. Offenders who plead guilty receive the benefit of credit for guilty plea and for assistance. For those who plead not guilty, they receive no guilty plea discount and may also see their assistance discount reduced. This reduction in discount suggests that the guilty plea is a component of cooperation, not a prerequisite. If this is the case, some discussion of double counting is warranted for those who receive both discounts.

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43 Section 74(2) of the Sentencing Act 2020.

44 *R v Royle* [2023] EWCA Crim 1311 at para. 26.

45 *R v King* [1985] 6 WLUK 283.

46 *R v Royle* [2023] EWCA Crim 1311 at para. 25.

47 Section 74(1)(a) of the Sentencing Act 2020; see also *R v P and Blackburn* [2007] EWCA Crim 2290 [39], where the timing of a guilty plea under SOCPA is acknowledged as needing ‘close attention’.

48 *R v A, B* [1998] EWCA Crim 3529.

49 *R v Royle* [2023] EWCA Crim 1311 at para. 28.

## 4. LEVEL OF REDUCTION FOR ASSISTANCE

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The discounts available for assistance appear substantial, and can be much higher than the maximum one-third reduction prescribed by the Sentencing Council for a guilty plea. In *King*, it was suggested that the discount would range from ‘one half to two thirds’.<sup>50</sup> Yet *Royle*, *King* and *Blackburn* all make clear that the exact reduction will be a fact-specific decision.<sup>51</sup> The courts have rejected the idea of a ‘normal’ level of reduction from which any deviation must be justified,<sup>52</sup> and *Blackburn* stresses the need to avoid a ‘mathematical’ approach.<sup>53</sup> Reductions for a guilty plea can be systematically calibrated to the timing of a plea: early pleas save more time and resources. Accordingly, the definitive guideline operates a sliding scale of time-based sentence reductions. However, reductions for assisting the police or prosecution defy a similar approach: reductions will reflect the utility of the assistance provided and this will vary from case to case.

At the high end of the range, the courts have held that ‘only in the most exceptional case that the appropriate level of reduction would exceed three quarters of the total sentence which would otherwise be passed’.<sup>54</sup> The rationale for this is that a sentence should still punish; the reward for assistance is similarly a reduction.<sup>55</sup> This is supported by the existence of immunity agreements, with the courts arguing that should the prosecution desire the defendant not be punished at all, immunity, not a section 74 agreement or a text, would have been agreed.<sup>56</sup>

### Factors Determining the Level of Reduction

When it comes to the relevant factors for consideration in determining a reduction, *Royle* provides a useful list.<sup>57</sup> The first two refer to the ‘quality and quantity of the information provided’, including whether it ‘related to trivial or to serious offences’.<sup>58</sup> The justification given for consideration of the latter part is that the risk to the assisting offender is greater the more serious the criminality, despite the fact that risk to the offender is a separate factor.<sup>59</sup> There is not much to say of the assessment of value, though it is well described by Bingham LJ:

*‘Value is a function of quality and quantity. If the information given is unreliable, vague, lacking in practical utility or already known to the authorities, no identifiable discount may be given or, if given, any discount will be minimal. If the information given is accurate, particularised, useful in*

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50 *R v King* [1985] 6 WLUK 283.

51 *R v Royle* [2023] EWCA Crim 1311 at para. 31; *R v King* [1985] 6 WLUK 283; *R v P and Blackburn* [2007] EWCA Crim 2290 at para. 39.

52 *R v Royle* [2023] EWCA Crim 1311 at para. 31.

53 *R v P and Blackburn* [2007] EWCA Crim 2290 at para. 39.

54 [2007] EWCA Crim 2290 at para.41.

55 [2007] EWCA Crim 2290 at para. 41.

56 [2007] EWCA Crim 2290 at para. 41.

57 *R v Royle* [2023] EWCA Crim 1311 at para. 33.

58 [2023] EWCA Crim 1311 at para. 33.

59 [2023] EWCA Crim 1311 at para. 33.

*practice, and hitherto unknown to the authorities, enabling serious criminal activity to be stopped and serious criminals brought to book, the discount may be substantial. Hence little or no credit will be given for the supply of a mass of information which is worthless or virtually so, but the greater the supply of good quality information the greater in the ordinary way the discount will be.*<sup>60</sup>

Within this assessment of value is contained another of the factors identified in *Royle*, namely ‘whether it assisted the authorities to bring to justice persons who would not otherwise have been brought to justice’,<sup>61</sup> and, separately, the ‘degree of assistance which was provided, including whether the informer gave, or was willing to give, evidence confirming the information he had provided’.<sup>62</sup> The courts have generally had an outcome-oriented approach to these factors, with discounts earned ‘particularly where such conduct leads to the conviction of a co-defendant or induces a co-defendant to plead guilty’.<sup>63</sup> This latter point, where co-defendants plead guilty, seems to attract particular credit.<sup>64</sup> The Court of Appeal has also been critical of those who have not fully engaged, even where cooperation such as giving evidence was not a term of the agreement. In one case it was highlighted, with respect to justifying a relatively small discount, that the ‘agreement he entered into was much less comprehensive than it might have been’,<sup>65</sup> in that the offender ‘did not agree or offer to give evidence against anyone’.<sup>66</sup> Moreover, the fact the offender was not invited to provide evidence did not entitle him to be treated ‘as if he had offered’ to.<sup>67</sup>

In contrast to the result-oriented interpretation, the courts have also recognised that ‘the absence of any arrest consequent on the provision of information automatically [does not] render[...] it less valuable’.<sup>68</sup> This is a particularly valuable insight where an offender may provide information that is of ‘value to the administration of justice’ but is nonetheless inadmissible at trial.<sup>69</sup> These factors perhaps also engage the above-mentioned lesser-weighting of the text procedure, owing to the fact it does not oblige the defendant in the same way, a principle restated, though not expanded on, in *Royle*.<sup>70</sup> As with other factors, the courts have been clear that the weighting of these factors lies with the sentencing judge.<sup>71</sup>

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60 *R v A, B* [1998] EWCA Crim 3529.

61 *R v Royle* [2023] EWCA Crim 1311 at para. 33.

62 [2023] EWCA Crim 1311 at para. 33.

63 *R v A, B* [1998] EWCA Crim 3529.

64 [1998] EWCA Crim 3529.

65 *R v D* [2010] EWCA Crim 1485 at para. 13.

66 [2010] EWCA Crim 1485 at para. 7.

67 [2010] EWCA Crim 1485 at para. 13.

68 [2010] EWCA Crim 1485 at para. 15.

69 [2010] EWCA Crim 1485 at para. 15.

70 *R v Royle* [2023] EWCA Crim 1311 at para. 11.

71 *R v D* [2010] EWCA Crim 1485 at para. 14; *R v Royle* [2023] EWCA Crim 1311 at para. 34.

## 5. RISK TO THE OFFENDER ARISING FROM STATE CO-OPERATION

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*Royle*, and the wider case law, is also greatly concerned with risk to the offender.<sup>72</sup> Discounts are greater because of the level of risk to the offender and their family. Even in cases where ‘the level of risk... is not as serious as it can sometimes be’ the courts remain astute to the fact that ‘risk inevitably remains’, and offer discounts accordingly.<sup>73</sup> This does mean that the more ‘vicious characteristics’ those who the offender provides evidence against have, the greater discount the offender will receive.<sup>74</sup> The discount for assistance can be seen as the price paid by the state for the risk taken by the offender.

Some may oppose rewarding offenders who have been involved in the most serious crime with the highest sentence reductions. This may be offset by another of *Royle*’s factors, ‘the nature and extent of the crime in which the informer has himself been involved’,<sup>75</sup> but this is not nearly as discussed in the case law as risk. Once again, the overarching pragmatic reasoning is engaged: If someone involved in serious crime is willing to provide evidence against someone even more dangerous, then this is a price worth paying.

Three other factors are considered in *Royle*: (i) The period of time over which the information was provided<sup>76</sup>; (ii) whether the offender has relied on the same information in a previous sentencing, or before a Parole Board. The view of the court in *Royle* is that credit for information can only be received once;<sup>77</sup> and (iii) Whether the informer received payment for the assistance.<sup>78</sup> It is, however, emphasised that ‘a financial reward and a reduction in sentence are complementary means of showing offenders that it is worth their while to disclose the criminal activities of others’,<sup>79</sup> and thus ‘a financial reward, unless exceptionally generous, should therefore play only a small, if any, part in the sentencer’s decision’.<sup>80</sup>

Another factor identified in the case law but not *Royle* is delay.<sup>81</sup> Despite the mixed case law presented above on when information is provided, if such information is considered, a delay in providing it does not affect its weight. In *D*, an offender was criticised for seeking to ‘manipulate the system to his advantage’ by providing information after he entered custody, yet did not receive any

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<sup>72</sup> *R v Royle* [2023] EWCA Crim 1311; *R v A, B* [1998] EWCA Crim 3529; *R v D* [2010] EWCA Crim 1485.

<sup>73</sup> *R v D* [2010] EWCA Crim 1485 at para. 14.

<sup>74</sup> [2010] EWCA Crim 1485 at para. 14.

<sup>75</sup> *R v Royle* [2023] EWCA Crim 1311 at para. 33.

<sup>76</sup> [2023] EWCA Crim 1311 at para. 33.

<sup>77</sup> [2023] EWCA Crim 1311 at para. 33.

<sup>78</sup> [2023] EWCA Crim 1311 at para. 33.

<sup>79</sup> [2023] EWCA Crim 1311 at para. 33.

<sup>80</sup> [2023] EWCA Crim 1311 at para. 33.

<sup>81</sup> *R v D* [2010] EWCA Crim 1485 at para. 15.

penalty for the delay *per se*.<sup>82</sup> He did, however, receive a lower sentence reduction because of further delays (which the court admits were not his fault) which led to the diminished value of his information.<sup>83</sup> This is consistent with other case law which holds that, ‘unlike the current arrangements by which discounts for a guilty plea’ the juncture at which the information was provided is not relevant, reflecting the different rationales.<sup>84</sup> The exception to this is that, as in *D*, where the delay has ‘diminished the value of the assistance’ the reduction should be proportionately reduced, even where the delay is not the fault of the offender.<sup>85</sup>

Finally, the discount can also be applied to Proceeds of Crime Act 2002 (POCA) proceedings. In *S*, the court considered that although POCA proceedings aim not to punish but to ‘remove the benefit of offending’, it was ‘just’ to still reflect assistance to the prosecution in any confiscation.<sup>86</sup> However, reductions may be lower because they ‘will have the effect of allowing the offender to benefit to that extent from his crime or crimes’.<sup>87</sup>

## 6. OPEN JUSTICE

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There is a tacit understanding that these sentence reductions are primarily for those involved in organised crime who are willing to expose those higher up in their criminal network. There is no explicit requirement that reductions are only used for such cases, yet the courts discuss fear of reprisal, and the risk taken by assisting offenders in a way that rings particularly familiar for cases in the realm of organised crime. Most explicitly, the original statutory provisions were contained in the Serious *Organised Crime and Police Act*. Where an offender who provides information on his sole companion may not derive any benefit from non-disclosure of assistance, it being clear to his co-defendant who must have informed, those in vast organised crime networks may be able to avoid reprisal through non-disclosure. For this purpose, the law on assisting offenders dedicates some space to the public interest balance between such non-disclosure and the principle of open justice.

It is necessary here to distinguish the statutory and text procedures. The statutory procedure is simpler. Both section 388 and section 74 require that should the court pass a sentence less than normal ‘but for’ the assistance it must state ‘in open court’ that it has done so, and what the sentence would have otherwise been.<sup>88</sup> However, once again in both section 388 and section 74, if

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82 [2010] EWCA Crim 1485 at para. 15.

83 [2010] EWCA Crim 1485 at para. 15.

84 *R v P and Blackburn* [2007] EWCA Crim 2290 at para. 31.

85 [2007] EWCA Crim 2290 at para. 31.

86 *R v S* [2019] EWCA Crim 569 at para. 24.

87 [2019] EWCA Crim 569 at para. 30.

88 Section 74(3) of the Sentencing Act 2020.

the court considers it would ‘not be in the public interest’ then this requirement is disapplied.<sup>89</sup> Only the prosecutor and the offender must receive such reasoning.<sup>90</sup> It also disapplies the section 52 duty to provide reasons to the same effect.<sup>91</sup> These stipulations are reflected in the Criminal Procedure Rules. There is no reported case law as to how public interest is decided, but almost all reported cases on this subject matter are anonymised, which may suggest such circumstances are not exceptional.

The current scheme of non-disclosure is different from when first promulgated. Firstly, the public interest test is instead a two-limbed test that first requires that ‘exclusion of the public’ is ‘necessary to do so to protect the safety of any person’ *and* it ‘is in the interests of justice’.<sup>92</sup> The field of those who cannot be excluded is also wider, including ‘a member or officer of the court; a party to the proceedings; counsel or a solicitor for a party to the proceedings; a person otherwise directly concerned with the proceedings’.<sup>93</sup> Now, only the judge, prosecutor (it is unclear whether this extends only to counsel or to the wider prosecutorial team), and the defendant themselves must be informed.<sup>94</sup> The 2020 requirements appear more streamlined, and given the infrequency of use of these provisions it hardly seems a significant threat to open justice. Perhaps the greatest point of contention is that a requirement of the use of section 74 is that the defendant must ‘publicly admit the full extent of his own criminality’.<sup>95</sup> There is, in the use of the non-disclosure requirements, a reduction in the extent to which an admission is public. However, returning to the pragmatic rationale for the scheme, it seems wholly defensible that the gathering of information that could seriously hinder or halt serious crime outweighs the value of public contrition by the offender.

As for the text scheme’s non-disclosure requirements, *Royle* is once again authoritative. *Royle* holds that Rule 28.1, which mirrors the statute’s exception to the general duty to give reasons in open court, applies only to the statutory procedure.<sup>96</sup> However, the text procedure is also not bound by the requirement of sections 74 and 388 to disclose that a sentence was altered owing to assistance. The text procedure is bound only by the general section 52 duty, which only requires a sentence to be reasoned ‘in general terms’.<sup>97</sup> Thus, a user of the text procedure can quite easily obtain non-disclosure. Though, of course, the duty to give reasons to the prosecutor and defendant are also foregone under the text procedure, yet the Court of Appeal says a judge may still choose to do so.<sup>98</sup>

The scheme of non-disclosure of assistance not only hinders open justice but also undermines the incentivising purpose of the reduction. Other defendants cannot see the benefits of assistance and

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89 Sections 74(4) and 388(10) of the Sentencing Act 2020.

90 Sections 74(4)(b) and 388(10)(b) of the Sentencing Act 2020.

91 Sections 74(4)(c) and 388(10)(c) of the Sentencing Act 2020.

92 Section 75(3) of the SOCPA 2005.

93 Section 75(4) of the SOCPA 2005.

94 Sections 74(4)(b) and 388(10)(b) of the Sentencing Act 2020.

95 *R v P and Blackburn* [2007] EWCA Crim 2290 at para. 27.

96 *R v Royle* [2023] EWCA Crim 1311 at paras. 38-41.

97 Section 52(2) of the Sentencing Act 2020.

98 *R v Royle* [2023] EWCA Crim 1311 at para. 41.

thus may themselves decline to assist the police. The Court of Appeal presents a convincing counter argument: Other potential assisting offenders are more likely to be put off by knowing their assistance would be revealed in open court than any incentivising impact such openness would reveal.<sup>99</sup> The courts have also considered whether the open justice argument holds any weight in these cases. The position is that ‘the circumstances in which information and assistance have been offered may necessitate some derogation from the principle of open justice’,<sup>100</sup> and further that such derogation is necessary to protect the defendant’s Article 8 rights.<sup>101</sup>

Courts are clearly aware of the complexities of informing. In *Blackburn* the court discusses how ‘[p]rofessional criminals appreciate the likely range of sentence if they are convicted, and more important, they will quickly discover the purpose of any review process’.<sup>102</sup> They acknowledge that a section 388 (as it is now) review would communicate that ‘something very unusual has happened, and criminals are perfectly well able to ask themselves why a reduction has been ordered, and then form their own conclusions’.<sup>103</sup> Nonetheless, the court concluded that the suspicion of non-disclosure is better than the actual knowledge given by holding hearings in open court.<sup>104</sup> Though the court does encourage sentencers to ‘provide information about the outcome of the review, together with a brief summary of the reasons for the decision, sufficient, even if brief, to enable the public to understand it, without disclosing any relevant identities’.<sup>105</sup> Whilst open justice is important, as is the rule in this area of law, ‘pragmatism... obtains’.<sup>106</sup>

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99 [2023] EWCA Crim 1311 at para. 42.

100 [2023] EWCA Crim 1311 at para. 42.

101 [2023] EWCA Crim 1311 at para. 42.

102 *R v P and Blackburn* [2007] EWCA Crim 2290 at para. 36.

103 [2007] EWCA Crim 2290 at para. 36.

104 [2007] EWCA Crim 2290 at para. 36.

105 [2007] EWCA Crim 2290 at para. 36.

106 *R v P and Blackburn* [2007] EWCA Crim 2290 at para. 34.

## 7. CONCLUSION

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Sentence reductions for assisting the police and prosecution is not a well-researched area of law. Ashworth and Kelly (2021) note this form of mitigation in their sentencing text, but the discussion is limited to a single paragraph compared to many pages on the guilty plea discount. A literature review of scholarly commentary revealed a commentary by Harris (2024) and little else. The term assisting offenders reveals even less, with the exception of Martin's piece, cited earlier, focusing on prosecutorial discretion, in particular in Northern Ireland (Martin, 2018) and Azmeh's (2025) commentary on *Hutchinson*.

The shortage of academic research and commentary in this area is perhaps understandable. Of hundreds of thousands of cases go in front of the courts each year, only nine cases in 2022-23 saw the statutory procedure employed. Yet the need to respond to organised crime is as great, if not greater, than before. The government has made clear that stopping the gangs which facilitate small boat crossings is a top priority (Home Office News Team, 2024). Discussion of fighting 'County Lines' gangs dominates current policing (National County Lines Coordination Centre, 2025). Procedures that entice offenders to assist the police and prosecution to subvert this criminality must be of particular value in these efforts. The production of in-depth CPS guidelines (Crown Prosecution Service, n.d.), and a College of Policing guide (n.d.), suggests there is a more than trivial use of such procedures. Against this background, research and policy must act to fill in the gaps left by the current scheme.

There is a need to review the text scheme. It does not, at present, provide certainty for prosecutors or defendants. The statutory scheme could be widened to include all cases of informing, and then could offer, through the codification of Royle, a structured approach to grading the quality of information, with grades corresponding to a set level of sentence reduction. This would provide for greater certainty, a particular necessity when a defendant is left weighing up whether they are willing to assume the risk of informing, as well as ensuring the remedial scheme of section 387 is applicable to all assisting offenders. Alternatively, a scheme similar to that of the guilty plea reduction, whereby the principles are codified but the specifics are handled by the Sentencing Council could also achieve greater certainty. The lack of data on texts is also worrying, and it would appear that there are perfectly well anonymised methods of ascertaining indicative figures. Researchers could ask judges to report how many times they see a text in a year. This would help determine the volume of text use without identifying any specific cases.

Finally, the question of open justice persists. The government is discussing the need for greater openness about criminal investigations following the Southport Attack (Home Office, 2025). Can such opaque procedures for sentencing serious criminals who assist the criminal justice system survive? It is a pragmatic element of sentencing to allow criminals to reduce their sentence in order to apprehend more serious offenders.

Research on the attitudes of the British public to this value judgement may inform this debate. Although several studies have documented and explored public attitudes to sentence reductions for

guilty pleas, there has been no research on public attitudes to mitigating sentence in return for information leading to the prosecution of other offenders. It is unclear where the public are likely to stand on the issue. On one hand they may oppose mitigating sentence for offenders who assist the police, particularly since most of these cases involve serious criminality. Yet the public may also adopt a pragmatic approach and see the benefit of encouraging offenders to inform on their criminal associates or otherwise assisted the police or prosecution.

Research should also seek to establish whether offenders are as informed as the courts may believe they are— do they know what a ‘normal’ sentence for a given offence would be, are they alert to when it seems suspiciously low? Research on the attitudes of offenders both to informing, and being informed on, from the perspective of impact on sentencing may be a useful aide to the courts in balancing open justice and the effectiveness of the scheme. Until additional research is carried out, our awareness of this little-researched aspect of sentencing will remain limited.

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