Neutral Citation Number: [2019] EWCA Crim 629

Case No: 201800620 A1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM WOLVERHAMPTON CROWN COURT
HHJ WEBB
T20070244/S20060750/02

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 April 2019

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
SIR BRIAN LEVESON

MR JUSTICE JEREMY BAKER
and
MRS JUSTICE SIMLER DBE

- -

Between :

LIAM DAVID BENNETT	**Appellant**
- and -	
REGINA	**Respondent**

- -
- -

Mr John Burton QC and Mr Gerry Mohabir (instructed by **Public Defenders Service**) for the **Appellant**
Mr Adrian Keeling QC (instructed by **CPS Appeals & Review Unit**) for the **Respondent**

Hearing dates: 28 March 2019

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Approved Judgment

MR JUSTICE JEREMY BAKER:

1. On 8 November 2006, following a trial at Dudley Magistrates' Court, Liam Bennett was convicted of an offence of arson, contrary to section 1(3) of the Criminal Damage Act 1971 and was committed to the Crown Court for sentence in respect of that offence and two offences of Criminal Damage to which he had pleaded guilty.

2. On 24 May 2007, he appeared in the Crown Court at Wolverhampton where he was sentenced in respect of those offences, four others to which he had pleaded guilty on indictment and five offences which he admitted and asked to be taken into consideration, as follows.

   i) The offence of Arson – an indeterminate sentence of detention in a young offender institution for public protection with a minimum term of 2 years and 82 days;

   ii) The two offences of Criminal Damage – 2 months' detention in a young offender institution

   iii) Count 1 – Burglary of a dwelling – 2 years' detention in a young offender institution

   iv) Count 2 – Burglary of a dwelling – 12 months' detention in a young offender institution

   v) Counts 4 and 5 – attempted Burglary of a dwelling – 6 months' detention in a young offender institution

   These offences having been committed whilst he was subject to a 12 month order of Conditional Discharge which had been imposed by the Shrewsbury Juvenile Court on 7 February 2006 in respect of an offence of arson, he was sentenced to 4 months' detention in a young offender institution. The court ordered all of the periods of detention to run concurrently with one another. Therefore the overall sentence imposed upon him was one of indeterminate detention in a young offender institution for public protection with a minimum term of 2 years and 82 days.

3. Liam Bennett, whose date of birth is 21 July 1988, was 17 years of age when he committed the offence of arson on 14 July 2006, (albeit just a week short of his 18th birthday), but he was 18 when he was convicted of the offence on 8 November 2006 and sentenced. He is now 30 years of age and remains in custody under the terms of the sentence of detention for public protection. Having been granted the necessary substantial extension of time, he now seeks to appeal against sentence with the permission of the Full Court.

The offences

4. The circumstances giving rise to these offences can be briefly summarised as follows:

   i) The offence of arson took place late at night on 14 July 2006 when the appellant set alight various items of property in the loft space of a dwelling in Dudley causing over £3000.00 of damage. Although the dwelling itself was unoccupied at the time, the adjoining dwelling was occupied by a family with young children.

Further damage had been caused to the dwelling, including to the windows and pipework, and the appellant had daubed his name in blood on the exterior of the property.

ii) The offences of criminal damage and those which he admitted and asked to be taken into consideration took place between July 2006 – January 2007 and involved not only £4500.00 worth of damage to a series of motor vehicles but also to the window of a doctor's surgery.

iii) The offences of burglary and attempted burglary took place in February 2007, one of which involved the appellant spraying detergent over the walls, furnishings and electrical appliances.

Previous convictions

5. Despite his relatively young age, the appellant had amassed a significant history of previous convictions. There were three convictions for Criminal Damage in 2001, 2002 and 2003 respectively. In the following year, 2004, he was convicted of a further offence of criminal damage, battery and four offences of assault occasioning actual bodily harm. In 2005 he was convicted of two offences of robbery and three of attempted robbery in respect of which he was made the subject of a 14 month detention and training order at the Wolverhampton Crown Court. In the following year, 2006, he was convicted arson and was conditionally discharged by Shrewsbury Juvenile Court.

Sentencing hearing

6. At the sentencing hearing at Wolverhampton Crown Court on 24 May 2007 the court had before it a pre-sentence report dated 27 April 2007. The author explained that the appellant had been raised by his mother and step father with whom he experienced difficulties. He was disruptive at the various schools he had attended and was permanently excluded at the age of 14 as a result of having assaulted the head teacher. He consumed both alcohol and drugs and the author noted that at times, his attitude was belligerent and motivated by self-gratification. Moreover, the appellant lacked any motivation to alter his attitude and behaviour. After taking these factors into account together with his previous convictions and the circumstances of the current offences, it was concluded that the appellant presented a high risk of serious harm to members of the public from the commission of further offences of arson.

7. It is apparent that the court also had the benefit of a psychiatric opinion from Dr Hurani who stated that the appellant had been diagnosed with both Asperger's syndrome and attention deficit hyper activity disorder. However, the doctor was of the view that the appellant was not suffering from any other psychiatric disorder.

8. In the course of his sentencing remarks the judge stated,

> "The position is that by virtue of your age at the time you committed the offence of arson I am not required to assume that you are dangerous within the Criminal Justice Act 2003.

> However, the persistent commission of serious specified offences shows no signs of ceasing. You are prepared to commit serious damage by any means and there is an obvious danger that you will go on to commit further offences of arson and you have total disregard for your or other people's safety. In the circumstances, I am of the opinion that there is a significant risk to the public of death or serious personal injury caused by you committing further offences specified in schedule 15 of the Criminal Justice Act 2003. Arson is punishable with a sentence of life imprisonment but your offence is not sufficiently serious to qualify for a life sentence.
>
> In the circumstances, I am required by law to impose a sentence of detention in a Young Offender Institution for public protection …"

Post-sentence

9. Since the imposition of the sentence the appellant has remained in custody in closed conditions subject to periodic reviews by the Parole Board.

10. In a Sentence Planning and Review Report by the Registered Forensic Psychologist Darren Hinder dated 27 January 2015, he considered that it was difficult to determine whether the appellant had Autistic Spectrum Disorder and he did not present in interview with many autistic type traits. It was noted that in the past the appellant had exhibited violence and aggression towards staff and prisoners. However, the appellant had undergone a large amount of offending behaviour work and as a result he appeared to demonstrate some progress both through his ability to articulate an understanding of risk management skills at a theoretical level and through a reduction in the frequency of instances of challenging/aggressive and violent behaviour over recent years.

11. Overall, the appellant was assessed as posing a high risk of future violence and causing serious harm to others if he was released on licence at that time. However, it was recommended that the appellant should be transferred to open conditions where it was considered that his levels of risk, which in closed and open conditions were assessed as being moderate, could be appropriately managed and he could undergo a period of testing in preparation for release on licence.

12. There have been two reports from the chartered psychologist Dr Anderson dated 22 November 2015 and 23 October 2016.

13. In the first of these reports, Dr Anderson also considered that the appellant did not present with Autistic Spectrum Disorder. However, he considered that both the appellant's previous offending and his more recent behaviour in custody was likely to be contributed to by the lack of emotional regulation associated with ADHD and that if this was correct then there was evidence that it was more controlled now than in his childhood. Dr Anderson was of the opinion that whereas he would not recommend the appellant's release on licence at that time, he would recommend a move to open conditions. He stated that it was his impression that part of the appellant's current difficulties was due to his frustration at the lack of progress towards moving to open

conditions and that it was Dr Anderson's opinion that, in order to avoid institutionalisation, a move to open conditions would be likely to bring about a significant improvement in the appellant's behaviour.

14. By the time of the second of the two reports the appellant had been moved to another prison which the appellant believed was unjustified and there had been a significant deterioration in his behaviour due to difficulties with his ability to control his emotions. Dr Anderson believed that the recent deterioration in the appellant's behaviour had been influenced by his lack of progress towards open conditions. He considered that a move towards such conditions together with a resumption of medication to assist the symptoms associated with his ADHD would be of benefit to the appellant. However, he was realistic about the prospects of such a move at this stage due to the deterioration in the appellant's behaviour and he noted that the appellant himself considered that a more cautious progress to such conditions was likely to be beneficial to him.

15. Finally, in a Parole Assessment Report Offender Manager dated 27 September 2017, it was noted that the appellant had twice been refused parole due to continued bad behaviour. However, the appellant was progressing much better now than previously and it was recommended that the appellant should be moved to a more local category B establishment following which a reassessment should take place with a view to considering whether re-categorisation should take place.

Grounds of appeal

16. On behalf of the appellant there is no challenge either to the sentencing judge's determination that the appellant was a dangerous offender or to the length of the minimum term.

17. The main ground of appeal concerns the proper interpretation of sections 225 and 226 of the Criminal Justice Act 2003 ("the CJA 2003") as it was originally enacted and in particular whether it is the person's age at the date of the commission of an offence, or the person's age at the date of their conviction for the offence, which is determinative of whether they are to be dealt with under section 225 or 226.

18. On behalf of the appellant, it is submitted that it is the person's age at the date of the commission of the offence which is determinative, such that in the present case, as the appellant was 17 when he committed the offence of arson, he should have been dealt with for that offence under section 226.

19. It is pointed out that under section 226 it was necessary for the judge to consider whether an extended sentence would be adequate for the purpose of protecting the public from serious harm occasioned by the commission by the appellant of further specified offences and that in his sentencing remarks the judge did not specify under which section he was imposing the indeterminate sentence of detention (albeit the Record Sheet provided by the Crown Court stated that the sentence was imposed under section 226), nor was any express consideration given to the question of the adequacy of an extended sentence, prior to the imposition of the indeterminate sentence of detention.

20. Therefore it is submitted that to the extent that the judge imposed the indeterminate sentence under section 225 this was an error of law as he should have imposed it under section 226, and in that event the judge failed to consider the adequacy of an extended sentence prior to imposing the indeterminate sentence of detention.

21. In furtherance of these grounds, Mr Burton QC submits that the interpretation relied upon by the appellant reflects the domestic approach to sentencing, set out in cases such as *Ghafoor* [2003] 1 Cr App R (S) 84 and *Britton* [2006] EWCA Crim 2875. Moreover, that bearing in mind the provisions of section 3 of the Human Rights Act 1998 ("HRA 1998"), the principle of *lex gravior*, encapsulated in Article 7 of the European Convention on Human Rights ("ECHR"), requires such an interpretation.

22. It is submitted that a previous constitution of this court in *Robson* [2006] EWCA Crim 1414 wrongly interpreted the provisions of sections 225 and 226 of the CJA 2003. Moreover, that in *Bowker* [2007] EWCA Crim 1608, the court's reliance on *Taylor v UK* Application No 48864/99, 03/12/2002 in rejecting the applicability of Article 7 to a similar situation has been undermined by the more recent cases of *Gabarri Moreno v Spain* Application No 68066/01 (2004) 39 EHRR 40, *Camilleri v Malta* Application No 42931/10, 27/05/2013 and *Scoppola v Italy* (no 2) (2010) 51 EHRR.

23. Finally it is submitted that the interpretation relied upon by the appellant is supported by the approach taken in *Venables* [2014] EWCA Crim 659 and that as a result of the imposition of the unlawful sentence, the appellant has remained in custody long after his tariff has expired with the risk of institutionalisation.

Respondent's submissions

24. On behalf of the respondent it is submitted that it is clear from what the judge said in the course of his sentencing remarks, that he was dealing with the appellant for the offence of arson under section 225 of the CJA 2003. Moreover, that given the fact that the appellant was 18 years of age at the date of his conviction, this was the appropriate section of the Act, as section 226 only applies where the offender is under the age of 18 when convicted of the offence under consideration.

25. It is pointed out that this interpretation follows from the express wording of the two sections and was the manner in which these sections were interpreted in *Robson.*

26. The respondent submits that although the *Ghafoor* line of authorities establishes that, when sentencing an individual who has passed a relevant age threshold between the commission of an offence and being convicted, it is necessary for the court when determining the length of any period of custody to take as the starting point the period which would have been applicable at the time when the offence was committed, it has no application to the present case which involved the application of a mandatory sentencing regime concerning the type of sentence which was to be imposed upon offenders who were considered to be dangerous, as opposed to the length of the custodial term.

27. It is pointed out that the court in *Bowker* considered the application of Article 7 ECHR and held that it was directed towards preventing retrospective changes in the law adversely affecting the individual and that in the present case there were no such changes, nor was there any lack of foreseeability.

28. It is submitted that the judge in the present case imposed the only type of sentence which was lawfully open to him to impose at that time and that *Roberts* [2016] EWCA Crim 71 makes it clear that on appeal this court has no power to intervene in a situation where the individual's continued detention arises from a lawfully imposed sentence.

Statutory provisions

29. At the date of the sentencing hearing in 2007 the relevant provisions of the CJA 2003 provided as follows:

> "Section 225 – **Life Sentence or imprisonment for public protection for serious offences**
>
> (1) This section applies where –
>
> (a) A person aged 18 or over is convicted of a serious offence committed after the commencement of this section, and
>
> (b) The Court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by him of further specified offences.
>
> (2) If –
>
> (a) The offence is one in respect of which the offender would apart from this section be liable to imprisonment for life, and
>
> (b) The court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life,
>
> the court must impose a sentence of imprisonment for life.
>
> (3) In a case not falling within subsection (2), the court must impose a sentence of imprisonment for public protection.
>
> Section 226 – **Detention for life or detention for public protection for serious offences committed by those under 18**
>
> (1) This section applies where –
>
> (a) A person aged under 18 is convicted of a serious offence committed after the commencement of this section, and
>
> (b) The court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences.
>
> (2) If –

(a) The offence is one in respect of which the offender would apart from this section be liable to a sentence of detention for life under section 91 of the Sentencing Act, and

(b) The court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of detention for life,

The court must impose a sentence of detention for life under that section.

(3) If, in a case not falling within subsection (2), the court considers that an extended sentence under section 228 would not be adequate for the purpose of protecting the public from serious harm occasioned by the commission by the offender of further specified offences, the court must impose a sentence of detention for public protection.

Section 228 **Extended sentence for certain violent or sexual offences: persons under 18**

(1) This section applies where –

(a) A person aged under 18 is convicted of a specified offence committed after the commencement of this section, and

(b) The court considers –

(i) That there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences, and

(ii) Where the specified offence is a serious offence, that the case is not one in which the court is required by section 226(2) to impose a sentence of detention for life under section 91 of the Sentencing Act or by section 226(3) to impose a sentence of detention for public protection.

(2) The court must impose on the offender an extended sentence of detention, that is to say, a sentence of detention the term of which is equal to the aggregate of

-

(a) The appropriate custodial term,

(b) A further period ("the extension period") for which the offender is to be subject to a licence and which is of such length as the court considers necessary for purpose of protecting members of the public from serious harm occasioned by the commission by him of further specified offences.

(3) In subsection (2) "the appropriate custodial term" means such term as the court considers appropriate, which –

(a) Must be at least 12 months, and

(b) Must not exceed the maximum term of imprisonment permitted for the offence.

(4) The extension period must not exceed –

(a) Five years in the case of a specified violent offence, and

(b) Eight years in the case of a specified sexual offence.

(5) The term of an extended sentence of detention passed under this section in respect of an offence must not exceed the maximum term of imprisonment permitted for the offence.

(6) Any reference in this section to the maximum term of imprisonment permitted for an offence is a reference to the maximum term of imprisonment that is, apart from section 225, permitted for the offence in the case of a person aged 18 or over."

30. Article 7.1 of the ECHR provides:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law at the time when it was committed. Nor shall a heavier penalty be imposed that the one that was applicable at the time the criminal offence was committed."

Authorities

31. The court in *Ghafoor* was concerned with an offender who was 17 years of age when he committed an offence of riot but 18 years of age when he pleaded guilty to the offence and sentenced in respect of it. The judge in the Crown Court had imposed a sentence of 4½ years' detention in a young offender institution under section 96 of the Powers of the Criminal Court (Sentencing) Act 2000. It was argued on appeal that as section 100 of the 2000 Act limited the court's powers in relation to offenders who were aged under 18 at the time when they were convicted of an offence to the imposition of a detention and training order which has a maximum duration of 24 months, the judge in the crown court should have similarly limited the period of detention imposed on the offender.

32. Although the submission was based on Article 7 ECHR, the court did not feel the need to deal with the case on that basis as it considered that, having reviewed the authorities since *Danga* (1992) 13 Cr App R(S) 408, the approach to sentencing cases where an offender has crossed a relevant age threshold between the date of the commission of the offence and the date of his conviction was similar in effect to a strict application of Article 7. Dyson LJ (as he then was) explained the position between [31] – [34],

"31. The approach to be adopted where a defendant crosses a relevant age threshold between the date of the commission of the offence and the date of conviction should now be clear. The starting point is the sentence that the defendant would have been likely to receive if he had been sentenced at the date of the commission of the offence. It has been described as "a powerful factor". That is for the obvious reason that, as Mr Emmerson points out, the philosophy of restricting sentencing powers in relation to young persons reflects both (a) society's acceptance that young offenders are less responsible for their actions and therefore less culpable than adults, and (b) the recognition that, in consequence, sentencing them should place greater emphasis on rehabilitation, and less on retribution and deterrence than in the case of adults. It should be noted that the "starting point" is not the maximum sentence that could lawfully have been imposed, but the sentence that the offender would have been likely to receive.

32. So the sentence that would have been passed at the date of the commission of the offence is a "powerful factor". It is the starting point, and other factors may have to be considered. But in our judgment, there have to be good reasons for departing from the starting point. An examination of the authorities to which we have been referred shows that, although the court has looked at other factors to see whether there should be a departure from the starting point, it is not obvious that there has in fact been a departure in any of them. This serves to demonstrate how powerful a factor the starting point is. That is because justice requires there to be good reason to pass a sentence higher than would have been passed at the date of the commission of the offence.

33. That is not to say that the starting point may not be tempered somewhat in certain cases. We have in mind in particular cases where there is a long interval between the date of commission of the offence and the date of conviction. By the date of conviction, circumstances may have changed significantly. The offender may now have been revealed as a dangerous criminal, whereas at the date of the offence that was not so. By the date of conviction, the tariff for the offence in question may have increased. These are factors that can be taken into account, and can, in an appropriate case, properly lead to the passing of a sentence somewhat higher than the sentence that would have been passed at the date of the commission of the offence. It will rarely be necessary for a court even to consider passing a sentence that is more severe than the maximum that it would have had jurisdiction to pass at the date of commission of the offence.

> 34. But in a case such as the present where the date of conviction is only a few months after the date of the offence, we think that it would rarely be appropriate to pass a longer sentence than that which would have been passed at the date of the offence. In this case, then, if the appellant had been sentenced at the time of the offence, having regard to his plea of guilty, he should have received a sentence of 18 months detention and training. The maximum permissible sentence would have been 24 months: he would have been entitled to credit for his plea of guilty which could not have been less than 6 months (see section 101(1) of the PCCSA). The equivalent sentence for an 18 year old is 18 months detention in a young offender institution. The judge should, therefore, have arrived at this sentence as the correct starting point. He should then have considered whether there were any good reasons for departing from it. In our view, there were plainly none. The interval of time between the date of the offence and the date of conviction was relatively short. The judge identified no reasons for passing a higher sentence than the starting point sentence, let alone one which was three times as long."

33. Before considering the case of *Britton*, it is of assistance to consider what had been decided in *Danga.* This case concerned an offender who had crossed a relevant age threshold between the date of the commission of an offence and the date of conviction. The relevant age was 21 and the issue was whether the offender should be sentenced to a term of detention in a young offender institution for those aged under 21 or imprisonment for those aged 21 or older.

34. The relevant statutory provision was section 1 of the Criminal Justice Act 1982, as amended by the Criminal Justice Act 1988, which provided that,

> "Subject to section 53 of the Children and Young Persons Act 1933 (punishment of certain grave crimes), the only custodial orders that a court may make where a person under 21 years is convicted or found guilty of an offence are…"

35. The court held that the relevant date for determining the age of an offender, so as to restrict the type of custodial orders to ones other than imprisonment, was the date of conviction. This being consistent with previous observations of Bingham LJ in *R v Rotherham Magistrates' Court Ex Parte Zaine Floyd Brough* (October 19, 1990) and the Lord Chief Justice in *Symes and Lowery* (December 10, 1982).

36. Moreover, May J (as he then was) giving judgment of the court, went on to observe that,

> "It is, however, important to say that the broad conceptual approach of a sentencing court does not undergo a fundamental change simply because the offender passes his 21st birthday. If all factors were identical an offender aged 21 years and few days is likely to receive in substance much the same punishment as one who is 20 years and 11 months, and the

> court will in substance take into account, for instance, of the criteria of section 1(4) and (5) of the 1982 Act for the slightly older person although not in terms strictly required by statute to do so."

37. In *Britton*, the offender had been 17 years of age when he committed the offences in respect of which he pleaded guilty at the age of 18. The judge in the Crown Court had imposed a sentence of 2½ years' detention in a young offender institution. The point taken on appeal was that the length of the period of detention was excessive bearing in mind that at the date of the commission of the offences, the court's powers would have been limited to the imposition of a period of 24 months' detention and training order.

38. The court accepted that the approach to sentencing those crossing a relevant age threshold as set out in *Ghafoor* applied unless it could be distinguished,

> "…almost without exception to the present case."

Accordingly, the court reduced the sentence to one of 18 months' detention in a young offender institution. However, the court also made it clear that in so far as the form of sentence was concerned, the relevant date for determining the offender's age was the date of conviction. As May LJ explained.

> "It has for some years been clear that when an offender passes one of these relevant birthdays, the form of sentence is dictated by the appellant's age at the date of conviction. That was decided in this court in a case called *R v Danga* in (1992) 94 Cr App R 252. The sentencing regime applicable to an offender is that current at the date of conviction."

39. In *Robson* the court was concerned with an offender who was aged 17 at the date both of the commission of the offences and his conviction but aged 18 at the date when he was sentenced in respect of them. The relevant statutory provisions were those with which this court is concerned in the present case, namely sections 225 and 226 of the 2003 Act.

40. The judge in the crown court had determined that the appellant was a dangerous offender and Keith J, giving the judgment of the court, explained the significance of the choice of the date when his age was to be determined at [10],

> "…The difference between the two regimes was critical in this case, in view of the judge's opinion that there was a significant risk to members of the public of serious harm occasioned by the appellant of further specified offences. If the appellant had been treated as aged 18, so that section 225 of the 2003 Act applied to him, the judge would have had to impose at the very least a sentence of detention for public protection pursuant to section 225(3) of the 2003 Act (as modified by section 96 of the 2000 Act to reflect the fact that the appellant was less than 21). The option of an extended sentence of detention under section 227 of the 2003 Act would not have been available

> because the offences of sexual assault were serious offences for the purpose of Chapter 5 of Part 12 of the 2003 Act. On the other hand, as the appellant was treated as being under 18, the judge had the option of imposing a sentence of detention for public protection under section 226(3) of the 2003 Act, or an extended sentence of detention under section 228 of the 2003 Act, depending on his view as to whether an extended sentence of detention would be adequate for the purpose of protecting the public from serious harm from him."

41. The court determined that the critical date for the purpose of assessing the offender's age was the date when he had been convicted of the offences. This was explained by Keith J at [13],

> "In our judgment, the sentencing regime under which the appellant was to be sentenced was to be determined by what was contemplated by the provisions which created the new sentencing regime. If that is the correct focus, it is not difficult to identify what sections 225−228 of the 2003 Act contemplated as being the age of the offender for the purpose of sentence. Sections 225 and 227 apply where "a person aged 18 or over is convicted " of a serious (section 225(1)) or specified (section 227(1)) offence. Sections 226 and 228 apply where "a person aged under 18 is convicted " of a serious (section 226(1)) or specified (section 228(1)) offence. If the relevant age for the purpose of sentence was the offender's age at the date of sentence, sections 226(1) and 228(1) would have been drafted as follows:
>
> "This section applies where … a person aged under 18 is to be sentenced for…"
>
> If the relevant age for the purpose of sentence was the offender's age at the date of the offence, sections 226(1) and 228(1) would have been drafted as follows:
>
> "This section applies where… a person is convicted of a serious [or specified] offence committed when he was aged under 1…"
>
> Sections 225(1) and 227(1) would have been similarly drafted. As a matter of statutory construction, we conclude that the age of the offender for the purpose of determining which of the statutory regimes under Chapter 5 of Part 12 of the 2003 Act applies to him is the offender's age at the date of conviction, and that Judge Darwall Smith was right to sentence the appellant by reference to sections 226 and 228 of the 2003 Act."

42. *Bowker* is yet a further example of the application of the *Ghafoor* approach to sentencing those crossing a relevant age threshold between the date of commission of the offence and conviction. The court in that case reduced a sentence of detention in a

young offender institution to reflect the fact that although the offender was 18 when he pleaded guilty to an offence of violent disorder, he had been aged 17 at the date of the commission of the offence; albeit that because of the need for deterrence the court considered that despite having pleaded guilty, the reduction would not be below the maximum period of custody to which an offender under 18 was liable.

43. A secondary argument had been mounted on behalf of the offender that in these circumstances, Article 7 ECHR applied which would also limit the period of custody which could be imposed on the offender to that available to those aged under 18. The court determined that Article 7 did not apply and Latham LJ explained the position between [25] – [27],

> "25. The question which then arises is whether we are constrained to deal with the matter differently because of the provisions of Article 7.1 of the European Convention on Human rights to which we have already referred. In one sense the matter does not strictly arise for determination because the sentence we propose of 24 months detention does not exceed the maximum available to the court had the appellant been sentenced when he was under 18. But as we have come to a firm conclusion on the issue, it may be helpful for us to indicate our views.
>
> 26. The argument can be shortly stated. Cherie Booth submits that the phrase "nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed" refers not merely to the maximum for the offence, but the maximum available as punishment for the appellant at the time of the commission of the offence. She accepts that there is no direct authority in her favour. The decision of the House of Lords in R on the application of Uttley –v- Secretary of State for the Home Department [UKHLR 38] dealt with what might be called "tariff cases", that is cases where the courts' policy approach has resulted in an increase in prison terms over time, within the same maximum sentence constraint. She further accepts that the only decision in point in Strasburg is the decision of the Commission as to the admissibility of the application of Taylor No 48864/99. In that case the offence was committed when the applicant was 14 years old, when it was said that he could not have anticipated that he might have been sentenced to a term of detention. When he was ultimately convicted he was 15, and was sentenced to 18 months detention. The European Commission rejected the argument that this is capable of amounting to a breach of Article 7.1. It concluded that the law was clear. The applicant knew perfectly well what the sentencing power of the court would be when he was 15. He would be liable to detention. And there had been no impugnable delay in the proceedings.
>
> 27. Nonetheless Cherie Booth submits that a matter of principle, the relevant date for the purposes Article 7.1 must be

> the date of the commission of the offence. The decision of the Commission is not determinative of the matter. The heavier penalty applicable as a result of the passage of time is, in effect, she submits, a retroactive punishment precluded by Article 7.1. We have no hesitation in rejecting that argument. Quite apart from the view of the Commission in Taylor that the question was simply whether or not the applicant knew the effect of passage of time on the powers of the court, it seems to us that the provisions of Article 7.1 are clearly directed to the mischief of retroactive or retrospective changes in the law. In the present case, there was no change in the law. The penalties for violent disorder remained the same. All that changed was the penal regime to which the appellant would be exposed as a result of the normal operation of existing law to his age at the time of conviction. For those reasons, we do not consider that the court is constrained in any way by the provisions of Article 7 in situations such as the present."

44. In *Gabarri Moreno v Spain* the European Court of Human Rights was concerned with an offender who was found guilty of an offence of heroin trafficking. The sentencing court had accepted that the state of the offender's mental health amounted to a mitigating factor which under the statutory sentencing regime required the court to reduce his sentence below the maximum sentencing bracket for the offence, but nevertheless imposed a sentence within that bracket. The ECtHR held that, bearing in mind the existence of the mitigating factor which under the statutory sentencing regime, required a reduction in sentence from the maximum available, this amounted to a violation of Article 7.

45. In doing so the ECtHR observed at [23] that,

> "…Art.7(1) of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty. Furthermore, the principle of no punishment without law requires that the accused not be subjected to the imposition of a heavier sentence than that carried by the offence of which he was found guilty."

46. In *Camilleri v Malta* the ECtHR was concerned with an offender who was convicted of drugs offences the penalty range for which depended upon the court in which he was tried. The minimum sentencing range available in the Magistrates court, being less than that available in the criminal court. The choice of court was decided by the prosecutor and there was no ascertainable criteria available to the offender as to the basis for the prosecutor's decision.

47. The offender was convicted and sentenced in the criminal court, and therefore sentenced in accordance with the higher penalty range. The ECtHR determined that this amounted to a violation of Article 7 because prior to the prosecutor's decision the offender was unable to ascertain which penalty range would apply to the offence. The ECtHR observed at [30] that,

> "When speaking of "law" art.7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statute law as well as case-law and implies qualitative requirements, including those of accessibility and foreseeability. These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence in question carries. An individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable and what penalty will be imposed for the act and/or omission committed."

48. In *Scoppola v Italy (no 2)* the offender had unlawfully killed his wife and child the penalty for which was life imprisonment. After being charged with these offences the law was altered to permit them to be tried summarily and the offender elected to be tried summarily with the effect that the maximum penalty for the offences was limited 30 years' imprisonment. However, following his conviction but before sentence the statutory limitation on the court's sentencing powers was removed and he was sentenced to life imprisonment. The offender claimed that this amounted to a violation of his Article 7 rights.

49. The ECtHR agreed that there had been a violation of Article 7 and explained its general approach to Article 7, between [93] – [95],

> "Article 7(1) of the Convention goes beyond prohibition of the retrospective application of criminal law to the detriment of the accused. It also sets forth, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*). While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy.
>
> 94. It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.
>
> 95. The Court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision."

And its application to the offender's case, between [105] – [109],

> "105. The Court considers that a long time has elapsed since the Commission gave the above-mentioned X v Federal

Republic of Germany decision and that during that time there have been important developments internationally. In particular, apart from the entry into force of the American Convention on Human Rights, art.9 of which guarantees the retrospective effect of a law providing for a more lenient penalty enacted after the commission of the relevant offence, mention should be made of the proclamation of the European Union's Charter of Fundamental Rights. The wording of art.49(1) of the Charter differs—and this can only be deliberate—from that of art.7 of the Convention in that it states: "If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable". In the case of *Berlusconi and Others* , the Court of Justice of the European Communities, whose ruling was endorsed by the French Court of Cassation, held that this principle formed part of the constitutional traditions common to the member States. Lastly, the applicability of the more lenient criminal law was set forth in the statute of the International Criminal Court and affirmed in the case law of the ICTY.

106. The Court therefore concludes that since the X v Federal Republic of Germany decision a consensus has gradually emerged in Europe and internationally around the view that application of a criminal law providing for a more lenient penalty, even one enacted after the commission of the offence, has become a fundamental 353 principle of criminal law. It is also significant that the legislation of the respondent State had recognised that principle since 1930.

107. Admittedly, art.7 of the Convention does not expressly mention an obligation for Contracting States to grant an accused the benefit of a change in the law subsequent to the commission of the offence. It was precisely on the basis of that argument relating to the wording of the Convention that the Commission rejected the applicant's complaint in the case of X v Federal Republic of Germany. However, taking into account the developments mentioned above, the Court cannot regard that argument as decisive. Moreover, it observes that in prohibiting the imposition of "a heavier penalty … than the one that was applicable at the time the criminal offence was committed", para.1 in fine of art.7 does not exclude granting the accused the benefit of a more lenient sentence, prescribed by legislation subsequent to the offence.

108. In the Court's opinion, it is consistent with the principle of the rule of law, of which art.7 forms an essential part, to expect a trial court to apply to each punishable act the penalty which the legislator considers proportionate. Inflicting a heavier penalty for the sole reason that it was prescribed at the time of the commission of the offence would mean applying to the

> defendant's detriment the rules governing the succession of criminal laws in time. In addition, it would amount to disregarding any legislative change favourable to the accused which might have come in before the conviction and continuing to impose penalties which the State—and the community it represents—now consider excessive. The Court notes that the obligation to apply, from among several criminal laws, the one whose provisions are the most favourable to the accused is a clarification of the rules on the succession of criminal laws, which is in accord with another essential element of art.7, namely the foreseeability of penalties.
>
> 109. In the light of the foregoing considerations, the Court takes the view that it is necessary to depart from the case law established by the Commission in the case of X v Federal Republic of Germany and affirm that art.7(1) of the Convention guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law. That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant."

50. Returning to the domestic case law, *Venables* was an appeal against sentence arising from the imposition of an indeterminate sentence of detention for public protection for offences of s18 causing grievous bodily harm with intent and robbery to which the offender had pleaded guilty. On behalf of the offender it was submitted that in view of his age, the judge should have imposed an extended sentence rather than an indeterminate sentence of detention.

51. It was clear from the judgment of the court that whilst the offender was 17 years of age at the date of the commission of the offences he was 18 years of age at the date of the sentencing hearing. Although it appeared from what was said in the course of the judgment that the offender was also 17 years of age at the date of his conviction for the offences, this was not expressly stated in the judgment. However, in the course of the present proceedings the Registrar was able to obtain a copy of the case summary for *Venables* from when it was considered by this court on appeal, from which it is apparent that the offender was indeed 17 at the date of his conviction for the offences.

52. In *Venables* the court agreed with the submission which had been made on behalf of the offender and substituted an extended sentence in respect of the offences. Jackson LJ explained the court's reasoning at [11] – [12],

> "11. The appellant does not dispute the judge's finding of dangerousness. Nor does he challenge the appropriateness of a notional 5 year determinate sentence, having regard to the circumstances of this case. The essential argument on the appeal is this. The judge had a discretion to impose either an

> extended sentence or detention for public protection. Neither counsel appears to have drawn this discretion to the judge's attention. The judge's sentencing remarks read as if he was moving straight from a finding of dangerousness to the imposition of detention for public protection. Of course, if the appellant had been an adult when he committed the offence then different considerations would have applied under the Criminal Justice Act 2003, but at the time of his offending the appellant was aged under 18 and the judge had a discretion. The judge did not in his sentencing remarks refer to that discretion or the factors which he took into account, if he did take any factors into account in exercising that discretion. So the argument runs the Court of Appeal should now consider the issue afresh and it is urged that if this court considers the issue afresh we should impose an extended sentence.
>
> 12. We have carefully considered counsel's written advice and written submissions. We think that this argument is well founded. It appears that relevant authorities were not cited to the sentencing judge. In particular, the judge's attention was not drawn to authorities indicating that the court should be cautious before imposing detention for public protection on young offenders. There are two principal reasons for that need for caution. First, younger people have the potential to develop and mature over a shorter period than adults; indeed, we have seen some evidence of this in the appellant's case when one looks at the various prison reports. Secondly, a sentence of detention for public protection on a young offender may cause feelings of hopelessness. This will adversely impact upon his behaviour in custody. Indeed, we have seen evidence of this too in the early years of the appellant's custodial sentence. In our view, the proper sentence in this case was an extended sentence of 10 years comprising a 5 year custodial term and a 5 year extension period."

53. Finally in *Roberts* which dealt with a series of cases in which indeterminate sentences of detention or imprisonment had been imposed upon the offenders between 2005 – 2008 pursuant to either section 225 or 226 of the CJA 2003, the court was faced with various submissions challenging the legality of those sentences, including reliance upon Articles 3, 5 and 7 ECHR. All of these were rejected by the court and giving the judgment, Lord Thomas CJ explained the reasons for their rejection of the ECHR based challenges between [30] – [34],

> "30. There is nothing to suggest that a sentence of IPP in itself is a violation of Articles 3 or 5. All that has been suggested is that the way in which a person subject to IPP has been dealt with long after sentence may render the detention arbitrary. This would not make the original decision of the court wrong. In *James v UK* (2013) 56 EHHR 12 the Fourth Section of the Strasbourg Court concluded that the failure to provide those

serving IPPs access to courses to enable them to satisfy the conditions for release could render their continued detention arbitrary. In *R (Kaiyam) and R (Haney) v Secretary of State for Justice* [2015] AC 1344, the Supreme Court analysed that decision. It held that although the Secretary of State had a duty to provide facilities for rehabilitation, if he failed to do so, the remedy was damages rather than a declaration that the detention was unlawful. As Lord Mance and Lord Hughes said at paragraph 39 in giving the judgment of the court: "his detention remains the direct causal consequence of his indefinite sentence until his risk is judged by the independent Parole Board to be such as to permit his release on licence."

31. It is only if the system of review breaks down or ceases to be effective could it possibly be the case that the detention becomes arbitrary: see *R (Walker) v Secretary of State for Justice (Parole Board intervening)* [2010] AC 553 as explained at paragraph 11 of *Kaiyam and Haney*. If such a state of affairs was reached, this would not be the consequence of the original sentence providing for arbitrary detention, but of subsequent events. It would not, therefore, be a matter for this court. It would be as a result of a failure by the Secretary of State properly to carry out the sentence of the court or a failure by the Parole Board. Thus it would be a matter for judicial review of the actions of the Secretary of State or the Parole Board by the procedures provided before the Administrative Court with the evidence necessary for such an application.

32. A final submission was made based on Mr Rule's submissions in *R v Docherty* [2014] EWCA Crim 1197, [2014] 2 Cr App R (S) 76. In that case the appellant was convicted of an offence of wounding with intent on 13 November 2012. As the provisions abrogating the sentence of IPP to which we have referred in paragraph 9 did not come into force until 3 December 2012, although enacted by Parliament on 1 May 2012, the judge applied, as he was bound to do, the law as set out in s.225 and following of the CJA 2003. He found that he was dangerous and sentenced him to IPP. Apart from the conventional submission that the sentence of IPP should not have been imposed, it was submitted that the imposition of such a sentence after Parliament had decided to abolish it was a breach of the ECHR (Articles 7, 5 or 14) and of the principle of what is known as the lex mitior.

33. As we understand the argument, it was submitted that there was unlawful discrimination against the appellant as he was being subjected to a sentence of IPP when Parliament enacted LASPO 2012 in May 2012 with effect from a date to be appointed, but he was nonetheless subject to that sentence by reason of the date of his conviction being between that date and

> the date the abolition was brought into force on 3 December 2012. It was also submitted that Article 7, as interpreted by the Strasbourg Court in *Scoppola v Italy (no 2)* (2010) 51 EHHR 12, required a court, in the event that the legislature had reduced the penalty between the time the crime was committed and the conviction, to impose the reduced penalty. This court did not accept these arguments, but a point of law was certified and permission to appeal was granted in February 2015. The appeal is to be considered by the Supreme Court in May 2016.
>
> 34. If the Supreme Court accepts the arguments advanced on behalf of Docherty, it can make no difference whatsoever to the present applications, as all were convicted and sentenced many years before Parliament enacted LASPO 2012 in May 2012 abolishing the sentence of IPP with effect from a date to be appointed. We cannot see how it can be suggested that a sentence lawfully and properly passed many years before Parliament enacted the change in the law can be invalidated by that subsequent change in the law by Parliament."

54. The court having been satisfied that in the cases before it the sentences had been lawfully imposed, Lord Thomas CJ went on to explain at [42] that in relation to future cases in which these points were raised that,

> "42. …we wish to make clear that where the judge has followed the provisions of the CJA 2003 as interpreted by the decisions of this court and passed a sentence of IPP in circumstances where it was properly open to the judge to pass such a sentence, this court will not now revisit sentences of IPP on the bases argued in these applications. Unless clear new points are raised, the court will in all such cases in the future simply refuse an extension of time without more. The remedy, if any, is one that the Executive and Parliament must address."

Discussion

55. It is apparent from a review of the authorities concerning the application of section 225 and 226 of the CJA 2003 that this is not the first occasion upon which this court has been asked to apply its mind to their interpretation. In particular in *Robson* the court was required to consider the proper construction of these provisions and came to a clear view that the expression "is convicted" which is common to both sections, meant that the relevant date for ascertaining the age of the offender for the purposes of distinguishing which of the two sections applied, was the date when the offender was convicted of the offence under consideration.

56. Although we acknowledge that the circumstances in which the court was asked to consider this question was different from the present, in that the court was being asked to distinguish between the date of conviction and the date of sentence, rather than in the present case between the date of the commission of the offence and the date of conviction, we see no reason to doubt the analysis carried out by the court in

that case, and we respectively agree as a matter of construction with its conclusion, namely that,

> "…the age of the offender for the purpose of determining which of the statutory regimes under Chapter 5 of Part 12 of the 2003 Act applies to him is the offender's age at the date of conviction"

57. Indeed we note that the construction of similarly worded provisions has been consistently approached in this manner, as for example in *Danga* in relation to section 1 of the Criminal Justice Act 1982, as amended by the Criminal Justice Act 1988. Moreover, to the extent that the heading to section 266 of the CJA 2003 might suggest otherwise, it is a well-established tenet of statutory construction that, although a heading may be considered in construing any provision of an Act, due account must be taken of the fact that its function is merely to serve as a brief, and therefore necessarily inaccurate, guide to the material to which it is attached (see Bennion on Statutory Interpretation, 7th Ed, S 16.7). Where, as here, the heading differs from the material it describes, we do not consider that it allows the plain literal meaning of the words of the statutory provision to be overridden. In our judgment the heading does not assist in the interpretation of this section.

58. We perceive that it is because of a tacit recognition of the proper construction of the wording of these provisions that, on behalf of the appellant, it is submitted that nevertheless we should either approach the sentencing exercise in respect of an offender in the appellant's position in accordance with *Ghafoor* and determine that the judge ought to have sentenced the appellant in accordance with section 226 or by applying section 3 of the HRA 1995 and interpreting these provisions in accordance with Article 7 ECHR, we should determine that the relevant date for ascertaining the age of the of the appellant under these provisions is the date of the commission of the offence.

59. In either circumstance, the submission made by Mr Burton QC on behalf of the appellant is that the effect would be to permit if not require this court to construe the wording of both sections 225(1)(a) and 226(1)(a) of the CJA 2003 as though the word "commits" could be substituted for the words "is convicted of" in these provisions.

60. There can be no doubt that the approach to sentencing those who cross a relevant threshold between the date of the commission of an offence and the date of conviction as explained in *Ghafoor*, represents a well-established sentencing principle which has been consistently applied over the ensuing years. Moreover, this principle does not rely upon the application of Article 7 ECHR but exists independently as part of the domestic system of criminal justice.

61. Therefore, the court's approach to sentencing someone who has crossed a relevant age threshold between the date of the commission of the offence and the date of conviction, has been to limit the extent of any period of custody to that which could have been imposed at the date when the offender committed the offence. However, what has also been made clear with equal consistency in those cases is that this does not affect the type of sentencing regime which is to be applied to the offender, which is to be determined by the age of the offender at the date of conviction which in the

present case dictates that the appellant was subject to the sentencing regime provided for by section 225 of the CJA 2003.

62. Moreover, to the extent that the *Ghafoor* approach to sentencing is perceived to be a reflection of the principle of *lex gravior*, it is clear that this principle has its limits, in that it essentially prohibits applying to a case a rule which was not the law when the acts under judgment were committed. If this is applied to the circumstances of the present case, it is clear that both sections 225 and 226 were operative at the time when the appellant committed the offence of arson, which expressly provided that regardless of the date of the commission of the offence, in the event of an offender crossing the relevant age threshold before his conviction he would be subject to the sentencing regime set out in section 225.

63. In relation to the alternative submission that Article 7 dictates that this court should interpret section 226 as applying to the circumstances of the present case, this has already been considered by this court in *Bowker* and rejected. As Latham LJ explained in the course of the judgment, this would require the court to take the view that,

> "…the phrase 'nor shall a heavier penalty be imposed than the one that was applicable at the time of the criminal offence was committed' refers not merely to the maximum for the offence, but the maximum available punishment for the appellant at the time of the commission of the offence."

Just as the court rejected that interpretation of the phrase contained in Article 7, so too do we. As we have already pointed out, sections 225 and 226 were operative at the time of the commission of the offence of arson by the appellant, and it was not a change in the law which took place between then and the date of his conviction and sentence, but a change in his personal status from being 17 to 18 years of age which was a matter which had already been provided for within those sections.

64. Moreover, we do not see anything in the European cases relied upon which would alter this view. It is correct that in *Camilleri v Malta* the ECtHR extended the scope of Article 7 beyond a prohibition on retrospectivity, so as to encompass the concepts of both accessibility and foreseeability. However, unlike the circumstances of that case in which there was no ascertainable criteria available to the offender as to the basis upon which the prosecutor's choice of court would be made, in contrast in the present case the provisions of the CJA 2003 were both accessible to the appellant and from which it was foreseeable that if he committed the offence of arson whilst he was under the age of 18 but convicted after he was 18, then he would be dealt with in accordance with section 225.

65. Likewise in *Scoppola v Italy (no 2)* the circumstantial context in which the court was considering the scope of Article 7 was fundamentally different to the one with which we are concerned. In that in *Scoppola* the domestic law had altered between the date of the commission of the offence and the date of sentence, whereas in the present case there was no change in the law only a change in the age of the appellant.

66. Originally those acting for the appellant in the present case had sought to rely upon *Venables* as an example of this court having favoured the appellant's interpretation of

section 226. Although this was understandable whilst it remained unclear as to the age of the offender when he was convicted of the offences with which the court was concerned, since it has been clarified that the offender was still only 17 when he was convicted of the offences, the case ceases to be of such assistance to the appellant. In that although the court in that case stated that different considerations would have applied if the offender had been an adult

> "when he committed the offence under consideration"

this now has to be considered in the context of the fact that the court knew that it was dealing with an offender who remained under 17 at the date of his conviction for the offences under consideration. Therefore, not only were the circumstances factually different from the case with which we are dealing, but it also explains why the court only referred to the age of the offender when he committed the offence as opposed to dealing with the issue of his age at the date of his conviction. We consider that this is also likely to be the reason for the court's lack of focus on the age of the offender when he was convicted of the offence under consideration in *R v W* [2009] EWCA Crim 2858. In that regard, we anticipate that it should be viewed as another case which was dealing with a similar set of circumstances to *Venables* and which the court was explicitly dealing with in *R v Waseem P* [2016] EWCA Crim 923.

Conclusion

67. Although the sentencing judge in the present case did not state in terms that he was dealing with the appellant under section 225 of the CJA 2003, we consider that it was not only clear from the remainder of his sentencing remarks that he was doing so, but given the appellant's age at the date of his conviction for the offence of arson and the clear wording of these provisions, that this was the only section under which the judge was able to sentence him. Therefore to the extent that the Record Sheet suggests that the appellant was dealt with under section 226 it is incorrect and should be amended.

68. In these circumstances and having determined that the appellant was a dangerous offender, not only was the judge entitled to impose an indeterminate sentence of detention for public protection but he was obliged under the terms of section 225 to do so. The consequence of this is that as the indeterminate sentence of detention was lawfully imposed upon the appellant in accordance with section 225, this court is unable to revisit the sentence and the appeal must be dismissed.

69. However, before leaving the case we are concerned that a situation has arisen whereby an individual, aged 17 at the date of the commission of the offence of arson and 18 at the date of his conviction, remains in secure conditions some 12 years later, despite his tariff having expired many years ago. This is particularly so in the present case in which the risk of institutionalisation, which is likely to arise during any prolonged period of incarceration, appears to have become counterproductive to the appellant's ultimate rehabilitation. As the President observed during argument, it is not, perhaps, surprising that continued failure to make progress through the prison system has caused his behaviour to deteriorate which itself has generated concern about risk for the future. It may be that he needs to be given the chance to prove that he can behave in conditions of reduced security and so be encouraged to progress to ultimate release. We recognise, however, that this is not for us to decide.

70. Alternatively, the position of those so substantially passed tariff as this appellant needs to be addressed in some other way. However, as Lord Thomas CJ stated in *Roberts,* unless the Parole Board sanction the appellant's release,

> "The remedy, if any, is one that the Executive and Parliament must address."