Trinity Term
[2011] UKSC 37
On appeal from: [2010] EWCA Crim 530

JUDGMENT

R *v* Smith (Appellant)

before

Lord Phillips, President
Lord Walker
Lady Hale
Lord Collins
Lord Wilson

JUDGMENT GIVEN ON

20 July 2011

Heard on 16 June 2011

Appellant	*Respondent*
Tim Barnes QC Sean Sullivan (Instructed by Darryl Ingram & Co)	Aftab Jafferjee QC Duncan Penny (Instructed by Crown Prosecution Service Special Crime Division)

LORD PHILLIPS, DELIVERING THE JUDGMENT OF THE COURT

Introduction

1. Imprisonment for public protection ("IPP") is a sentence which condemns a defendant to indeterminate detention. Section 225(3) of the Criminal Justice Act 2003 ("the 2003 Act"), as substituted by section 13(1) of the Criminal Justice and Immigration Act 2008, permits a judge to impose a sentence of IPP on a defendant who has been convicted of a serious offence where the judge finds that there is a significant risk that he will commit further offences that will cause serious harm to members of the public. Can or should a judge impose a sentence of IPP on a defendant who is already serving a sentence of life imprisonment under which he will not be released from prison until he can satisfy the Parole Board that he no longer poses a danger to the public? Although this question has been certified by the Court of Appeal as being a point of general public importance, its significance lies in the issue of law, rather than the practical implications of imposing a sentence of IPP in place of a determinate sentence in such circumstances.

2. An indeterminate sentence is one designed not merely to imprison a defendant for a minimum period that properly reflects the gravity of his offence, but to ensure that he is not released thereafter unless and until he has ceased to be a danger to the public. There are two types of indeterminate sentence. One is a sentence of life imprisonment, for a prisoner sentenced to life imprisonment is entitled to be considered by the Parole Board for release on licence once he has served a fixed term of imprisonment specified by the sentencing judge. The other indeterminate sentence is the IPP. Once again the sentencing judge will specify a minimum term to be served after which the prisoner will be entitled to be considered by the Parole Board for release on licence. The test applied by the Parole Board is the same, whether the defendant has been sentenced to life imprisonment or to IPP. Release will be ordered if, but only if, the Parole Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined – see sections 28(6)(b) and 34(2) of the Crime (Sentences) Act 1997, as amended by section 230 of, and Schedule 18 to, the 2003 Act.

3. The 2003 Act makes the following provisions in relation to the imposition of indeterminate sentences:

> "225. – (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 the commission by him of further specified offences.

2) If –

(c) the offence is one in respect of which the offender would apart from this section be liable to imprisonment for life, and

(d) 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 *may* impose a sentence of imprisonment for public protection if the condition in subsection (3A) or the condition in subsection (3B) is met.

(3A) The condition in this subsection is that, at the time the offence was committed, the offender had been convicted of an offence specified in Schedule 15A.

(3B) The condition in this subsection is that the notional minimum term is at least two years."

The word "may" which I have emphasised was substituted for "must" by the Criminal Justice and Immigration Act 2008.

The Facts

4. The appellant was born on 25 February 1950. He has been in and out of prison all his adult life – much more in than out, for on each release from prison he has almost immediately returned to crime and been fairly swiftly apprehended and re-convicted. His more recent convictions prior to that which resulted in the sentence which is the subject of the present appeal were as follows:

> "(i) On 21 November 1975, at the Central Criminal Court, he was sentenced to a total of ten years' imprisonment for two offences of robbery, contrary to section 8 of the Theft Act 1968, two offences of conspiracy to rob contrary to section 1(1) of the Criminal Law Act 1977 and one offence of wounding with intent to cause grievous bodily harm, contrary to section 18 of the Offences Against the Person Act 1861.
>
> (ii) On 29 September 1982, at the Central Criminal Court, he was sentenced to a total of 12 years' imprisonment for one offence of conspiracy to rob contrary to section 1(1) of the Criminal Law Act 1977, one offence of having an imitation firearm with intent to commit an indictable offence contrary to section 18 of the Firearms Act 1968, one offence of taking a conveyance without authority contrary to section 12 of the Theft Act 1968 and one offence of criminal damage contrary to section 1(1) of the Criminal Damage Act 1971.
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> (iii) On 28 October 1994, at the Central Criminal Court, he was sentenced to a total of nine years' imprisonment for three offences of robbery, contrary to section 8 of the Theft Act 1968 and three associated offences of carrying a firearm with intent to commit an indictable offence contrary to section 18 of the Firearms Act 1968.
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> (iv) On 24 January 2000, in the Crown Court at Kingston, he was sentenced to imprisonment for life for one offence of attempted robbery, contrary to section 1(1) of the Criminal Attempts Act 1981 and one offence of having a firearm with intent, contrary to section 18 of the Firearms Act 1968. The minimum term to be served prior to consideration of release was fixed at four years."

The life sentence was mandatory by reason of the appellant's previous convictions and the provisions of section 2 of the Crime (Sentences) Act 1997.

5. Having served the minimum term under the sentence passed on 24 January 2000, the appellant persuaded the Parole Board that he qualified for release on licence and was released on 25 September 2004. On 11 January 2008 he was arrested again on this occasion on suspicion of having committed eight armed robberies of bookmakers' premises between 4 March 2006 and 28 May 2007. In accordance with the provisions of section 32 of the Crime (Sentences) Act 1997 his arrest resulted in his recall under life sentence for breach of the terms of the licence under which he had been released. On 2 September 2008 in the Crown Court at Harrow he pleaded guilty to eight offences of robbery, contrary to section 8 of the Theft Act 1968 and eight linked offences of possession of a firearm at the time of committing a specified offence, contrary to section 17(2) of the Firearms Act 1968.

The Sentence

6. The appellant was sentenced on 10 October 2008 by His Honour Judge Greenwood. In the course of passing sentence the judge made the following remarks:

> "Nicholas Smith, I have to sentence you for a total of eight offences of robbery and eight offences of possessing a firearm at the time of committing robberies. What you did was to select premises where you expected large sums of money to be kept. You were armed with an imitation firearm and disguised and you threatened members of staff with that imitation firearm.
>
> I have no doubt at all that on each occasion those threatened were terrified and it was for this reason that you managed to rob the victims of a total of £13,338.74; none of which has been recovered. As I discussed earlier with your counsel, there are a number of aggravating features in cases such as this.
>
> There is the pre-planning; the disguise; the targeting of large sums and, of course, the fact that the victims are vulnerable for that very reason; that they have to look after large sums of money. You have a dreadful record which includes robberies; an offence of wounding with intent to cause grievous bodily harm, and the use on a previous occasion of a real firearm.
>
> I agree with the conclusion expressed in the pre-sentence report that you are a career criminal. You present without any doubt a

> significant risk to the public of serious personal injury caused by your committing further specified offences.
>
> I have taken into account everything that I have heard and read about you. But, in the result, I have no alternative whatsoever but to pass upon you a sentence of imprisonment for public protection. That is because the offences for which you are now to be sentenced are offences specified in Schedule 15 to the Criminal Justice Act 2003.
>
> Your offences; the offences to which you have pleaded guilty, are punishable by a life sentence, but I do not consider these matters sufficiently serious to justify such a sentence. On the other hand, in my opinion, there is a significant risk to the public of serious personal injury caused by your committing further offences specified in Schedule 15.
>
> I reach that conclusion, having taken into account the nature and circumstances of your current offences; the pattern of behaviour of which your current offences form a part, and everything else that I know about you from what I have heard and read.
>
> In these circumstances, as I have said already, I will impose a sentence of imprisonment for public protection, which will be concurrent on each of the counts that you face."

7. The judge went on to specify a minimum term to be served of six years – on the basis that, had he not imposed a sentence of IPP, he would have imposed a determinate sentence of 12 years' imprisonment, of which the appellant would have had to serve at least half.

8. Mr Tim Barnes QC for the appellant has submitted that the sentencing remarks suggest that the judge was unaware of the amendment of "must" to "may" to which I have referred at para 3 above. I am not persuaded that this is so. What does seem clear is that the objections of principle to the sentence imposed which were raised on appeal and which have been pursued before this court were not raised before the judge.

The Appellant's Case

9. Mr Barnes advanced the appellant's grounds of appeal with admirable clarity, and they can be shortly summarised. They were advanced on an alternative basis. The primary submission was that the imposition of a sentence of IPP was unlawful because the requirement of section 225(1) (b) of the 2003 Act was not satisfied. Judge Greenwood could not properly have formed the opinion that there was a "significant risk to members of the public of serious harm occasioned by the commission by [the appellant] of further specified offences". This was because the appellant had been recalled to prison under his life sentence. He would not be released unless and until the Parole Board was satisfied that it was no longer necessary for the protection of the public that he should be confined. It followed that the "significant risk" specified in section 225(1)(b) did not exist.

10. In the alternative, Mr Barnes submitted that Judge Greenwood had erred in principle in imposing a sentence of IPP. By amending "must" to "may" Parliament had conferred a discretion on the sentencing judge, even though the statutory criteria for the imposition of IPP were satisfied. Where a defendant was already serving a life sentence, nothing was achieved by an additional sentence of IPP, rather than a determinate sentence, and it was wrong to impose one.

The Decision of the Court of Appeal

11. Counsel who represented the appellant in the Court of Appeal did not submit that it was unlawful to impose a sentence of IPP on a prisoner who was already serving a life sentence. He simply submitted that it was wrong in principle to do so – advancing Mr Barnes' alternative case. Giving the judgment of the Court [2010] EWCA Crim 246 Maurice Kay LJ rejected this submission. He observed, at paras 8-9:

> "The discretion conferred by the statute was not expressly constrained in a case such as this where there is an existing indeterminate sentence. It was for the judge to decide upon the punishment for these robberies and associated firearms offences, having regard to the provisions of the 2003 Act. Moreover, there is nothing anomalous or unusual about two indeterminate sentences being imposed on different occasions, or even in different forms. Section 34 of the Crime (Sentences) Act 1997 expressly addresses the position of a life prisoner, which expression means, 'a person serving one or more life sentences'. For this purpose, 'life sentence' is defined in section 34(2) as embracing both a sentence of

imprisonment for life and a sentence of imprisonment for public protection. Section 34(4) then provides:

> 'Where a person has been sentenced to one or more life sentences and to one or more terms of imprisonment, nothing in this Chapter shall require the Secretary of State to release the person in respect of any of the life sentence unless and until the Secretary of State is required to release him in respect of each of the terms'.

It seems to us that that is a statutory provision designed to ensure that, where more than one indeterminate sentence exists, release is not required until the last of the minimum terms has been completed."

Discussion: The Lawfulness Issue

12. It is true that section 34 of the Crime (Sentences) Act 1997 expressly contemplates that two indeterminate sentences may be imposed on a defendant, but that is not, of itself, fatal to Mr Barnes' primary submission. Section 34 might simply be addressing the case of a defendant convicted of two murders, each carrying a mandatory life sentence.

13. Mr Jafferjee QC for the Crown referred the court to a number of cases where the Court of Appeal had considered the problems associated with the imposition of a sentence of IPP together with another determinate or indeterminate sentence. The most pertinent was *R v Delucca* [2010] EWCA Crim 710; [2011] 1 WLR 1148, where Thomas LJ, in giving the judgment of the court, referred to the earlier decision of *R v O'Brien (Practice Note)* [2007] 1 WLR 833. He approved, at para 11, the practice of imposing two concurrent sentences of IPP, one having a longer minimum term than the other. If Mr Barnes' primary submission were sound, this practice would not be lawful, for the imposition of the sentence with the longer minimum term would have the effect that the requirement of section 225(1)(b) could not be satisfied in relation to the other sentence. Once again, however, the argument relied upon by Mr Barnes in this court does not appear to have been advanced.

14. Section 225(1)(b) is in the present tense. The sentencing judge is permitted to impose a sentence of IPP if "there *is* a significant risk" that members of the public will suffer serious harm as a result of the commission by the defendant of further offences. The construction for which Mr Barnes contends requires the

sentencing judge to factor in, when considering the question of risk, the fact that the defendant is and will remain detained in prison for a significant period, regardless of the type of sentence imposed. Plainly the defendant will pose no risk to the public so long as he remains in custody. Mr Barnes submits that the judge must consider whether he *will* pose a significant risk when he has served his sentence.

15. If this is the correct construction of section 225(1)(b) it places an unrealistic burden on the sentencing judge. Imagine, as in this case, that the defendant's conduct calls for a determinate sentence of 12 years. It is asking a lot of a judge to expect him to form a view as to whether the defendant will pose a significant risk to the public when he has served six years. We do not consider that section 225(1)(b) requires such an exercise. Rather it is implicit that the question posed by section 225(1)(b) must be answered on the premise that the defendant is at large. It is at the moment that he imposes the sentence that the judge must decide whether, on that premise, the defendant poses a significant risk of causing serious harm to members of the public.

16. For those reasons we reject the primary case advanced by Mr Barnes on behalf of the appellant.

Discretion

17. It was originally the appellant's case that to impose an IPP sentence on a prisoner who was already serving a life sentence would not merely have no benefit, but would have adverse procedural consequences. These would result from a perceived conflict between, or overlap of, the Parole Board's review requirements in respect of a life sentence and in respect of an IPP. Mr Barnes now accepts that there will be no such conflict or overlap as a result of the sentence imposed on the appellant. The procedural position is exactly the same as if the appellant had been given a determinate sentence of 12 years' imprisonment. He will have to serve a minimum term of six years and, thereafter, will have to satisfy the Parole Board that he does not pose a risk to the public in order to secure his release from prison.

18. In these circumstances Mr Barnes' case on discretion is simply that the IPP sentence achieved no benefit. The result is the same as if a determinate sentence of 12 years had been imposed. There was thus no point in exercising the power to impose a sentence of IPP and, as a matter of good sentencing practice, a determinate sentence should have been imposed.

19. We have some sympathy with this submission. It is not sensible to impose a sentence of IPP in circumstances where it will achieve no benefit. We would not, however, condemn the sentence imposed in this case. Maurice Kay LJ remarked at para 11 of his judgment that a determinate sentence would not

> "contain within its terms the finding of the sentencing judge on the most recent occasion, that the appellant does in fact satisfy the dangerousness provisions of the 2003 Act as at 10 October 2008."

The Parole Board had released the appellant on licence having been persuaded that he did not pose a risk of serious harm to the public. The judge cannot be criticised for imposing a sentence that demonstrated that the contrary was the case.

20. For these reasons we would dismiss this appeal.