Criminal Law Review

2016

## Case Comment

# Sentencing: R. v Roberts (Mark) et al

## Court of Appeal (Criminal Division): Lord Thomas of Cwmgiedd CJ, Openshaw and William Davis JJ: 18 March 2016; [2016] EWCA Crim 71

Andrew Ashworth

**Subject:** Sentencing

**Keywords:** Dangerous offenders; Extensions of time; Imprisonment for public protection; Inhuman or degrading treatment or punishment; Permission to appeal; Right to liberty and security;

**Legislation:**

Criminal Appeal Act 1968 (c.19)

**Cases:**

R. v Roberts (Mark) [2016] EWCA Crim 71 (CA (Crim Div))

R. v Lang (Stephen Howard) [2005] EWCA Crim 2864; [2006] 1 W.L.R. 2509 (CA (Crim Div))

***Crim. L.R. 510** The case involved 13 conjoined applications for an extension of time in which to apply for leave to appeal against sentences of imprisonment or detention for public protection under the Criminal Justice Act 2003 (CJA 2003). Twelve of the sentences were imposed between 2005 and 2008, when there was little judicial discretion in the matter. The sentencer did have to set a minimum term, and in all 13 cases that minimum term had long expired. All applicants were still in prison awaiting release ***Crim. L.R. 511** by the Parole Board: the sentence of Imprisonment for Public Protection (IPP) was abolished in 2012, but there are some 4,000 IPP prisoners still detained.

It was argued that the court should now use its powers under the Criminal Appeal Act 1968 to review these sentences in the light of subsequent events; that the court should reconsider the sentencing decisions in the light of *Lang [2005] EWCA Crim 2864; [2006] 1 W.L.R. 2509; [2006] 2 Cr. App. R. (S.) 3* (p.13); and that the court should consider whether the length of the applicants' detention was so excessive as to amount to a breach of ECHR art.3 and/or art.5.

*Held*, (1) that the Criminal Appeal Act 1968 s.11 has always been interpreted so as to enable the court to review the decision of the sentencing court in the light of the material before that court and material admitted on established principles subsequently. It does not enable the court to review the sentence years later, on the basis of changes in the penal system. Such changes can be taken into account by the Parole Board, or by the Secretary of State in exercising his power to alter the threshold for release in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.128. Ultimately it is for Parliament to resolve the problems to which the IPP sentence has given rise, not for the courts.

(2) The court has reconsidered each of the applications in the light of the legislation and the guidance laid down in decisions such as *Lang*. The 2003 Act left the sentencer with no discretion in some respects, and the court has satisfied itself that all the sentences were passed in accordance with the statutory criteria as interpreted in the court's case law. The court will not now revisit IPP sentences on the bases argued in these applications.

(3) That the continued detention of the applicants many years after their IPP sentence was passed could not be said to render the original sentencing decision contrary to art.3 or art.5. Insofar as there was any argument that continued detention was arbitrary and thus contrary to the ECHR, that is a matter for judicial review of the Parole Board or the Secretary of State.

*J. Bennathan QC* and *E. Coverley* for Roberts.

*J. Bennathan QC* and *B. Keith* for Precado.

*J. Bennathan QC* and *N. Beechey* for Quaglia and Byrne.

*P. Rule* for Woodward.

*J. Bennathan QC* and *R. Banks* for Gittens.

*J. Bennathan QC* and *C. Ashcroft* for Powney.

*J. Bennathan QC* and *K. Thorne* for Garbutt and Dowe.

*J. Bennathan QC* and *S. Field* for Warwick.

*J. Bennathan QC* and *C. Hawley* for Fay.

*J. Bennathan QC* and *C. Patrick* for Diveney.

*J. Bennathan QC* and *T. Dyke* for Wakeling.

*J. McGuinness QC* and *S. Heptonstall* for the respondent.

## Commentary

These applications constitute another attempt to deal with the scandal that the Imprisonment for Public Protection (IPP) sentence has been since its inception. The abolition of the IPP sentence in 2012 does not eliminate the scandal, because some 4,000 IPP prisoners remain subject to the sentence, and most of them have ***Crim. L.R. 512** long passed the end of the minimum term imposed at trial. The Lord Chief Justice suggested three ways of ameliorating the present situation: (i) putting significant resources into the rehabilitative measures needed to prepare IPP prisoners for release; (ii) altering the threshold for release by exercising the power in s.128 of the 2012 Act; or (iii) creating a legislative scheme for the re-sentencing of all IPP prisoners. Lord Thomas was surely correct to state that the proper and democratic institution for dealing with the IPP problems is Parliament. Applications for leave to appeal out of time have never been used to give the appellate courts this kind of power, and the human rights arguments under ECHR arts 3 and 5 would be much more suitable engines for an action by way of judicial review.

Report and commentary by Andrew Ashworth

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