

Criminal Justice Act 2003

Dangerous Offenders

Sections 224 - 229

Overview

1. On 14th July 2008, with little ceremony, the much hyped dangerous offender provisions of the Criminal Justice Act 2003 were completely overhauled. For those familiar with the old system, the mandatory presumption of dangerousness (somewhat neutered by Lord Rose in the case of Lang) has been abolished, and it is the judges sitting in the Crown Court who now have the fairly wide discretion to find dangerousness only where they believe it lurks. However, the discretion is not complete. Before a judge can proceed to look at dangerousness, he must **either** find that the instant offence merits at least a four year determinate sentence (after any discount for plea and mitigation), **or** (for adults only) that the defendant has a previous conviction for an offence listed in the new schedule 15a (very serious offences such as murder, rape, section 18 or robbery with a firearm – see appendix 3). Even when they do find dangerousness, they are not bound to pass sentences of imprisonment for public protection (IPPs) for those convicted of serious specified offences as they were before, but have the freedom to pass Extended Sentences (ESs) or even ordinary determinate sentences, as the mood and the case takes them. The new provisions apply to all cases that come for sentence after 14th July 2008 and they have no retrospective affect on those currently serving either IPPs or ESs. Undoubtedly the situation is an improvement, but the minefield that was the old legislation has not been cleared; the mines have simply been replanted.

Basics

2. When it came into force on 4th April 2005 Chapter 5 of the Criminal Justice Act 2003 introduced the novel concept of dangerous offenders, and creates two new types of sentence for those convicted of a “*specified offence*” - the extended sentences (ES) and the indefinite sentence of imprisonment for public protection (IPP). Both sentences were, and are, unashamedly aimed at future risk, and require an assessment by the court as to whether a defendant poses a “*significant risk*” of causing “*serious harm*”. The sentences are designed to protect the public, not to punish the malefactor – although the distinction may be lost on many.
3. The list of “*specified offence*” is laid out in schedule 15 of the act (see appendixes 2) and is a comprehensive tally of 153 violent and sexual offences. Within it is a sub category of what are called “*serious (specified) offences*”. These are defined as any of 153 specified offences whose maximum sentence is either life imprisonment or a determinate sentence of 10 years or over. The new legislation applies to all offences committed after 4th April 2005. Anyone convicted of a “*serious (specified) offence*” is at risk of an IPP or an ES. Anyone convicted of an (ordinary) “*specified offence*” is at risk of an ES.
4. The amended provisions introduced two new gateways through which a defendant convicted of specified, or serious specified, offence must pass before the court can consider dangerousness. It is important to note that a defendant can pass through either of them. For the first route, the court must be satisfied that the instant offence warrants a determinate sentence of at least 4 years – after taking into account mitigation and guilty pleas. The

second route simply requires that the defendant has a previous conviction for an offence on the new schedule 15(a) – really serious offences. If a defendant qualifies through this second route, there is no requirement for a minimum custodial period for an IPP, although bizarrely it appears that there must still be a minimum term of 12 months for an ES.

5. Once a defendant has passed through either of above gateways the court has to assess whether he is dangerous. The test is laid out in section 229, and is essentially this, does the defendant pose,

A significant risk to member of the public of serious harm occasioned by the commission by him of further such offences 229(1)b.

The test raises two questions. What is a “*significant risk*”? What is “*serious harm*”? Before considering these two questions, it is worth noting at this stage that even if the judge does find a defendant dangerous, there is no mandatory requirement for him to pass either a IPP (for a serious specified offence) or an ES – both simply become sentencing options available to him.

Serious Harm

6. Thankfully the definition of serious harm has been pretty well settled by Lord Rose in the case of R v Lang & Others [2006] 1 WLR 2509 – serious harm means “*death or serious harm, whether physical or psychological*”. Anecdotally, the case law on serious physical harm sets the bar reassuringly high. In R v Lang & Others, the “others” whose offending patterns showed a predisposition to low level violence and even sexual offending, were not sufficient for the court to find a risk of the serious harm in the future (see

below with Abdi & Carasco). However, the case law has thrown up some problems with the concept of psychological harm, with the potential future psychological harm caused to those featuring in a paedophile's collection of photographs (by knowing the photos are still circulating) being sufficient to justify an IPP for a man of previous good character with a significant store of images – most level 1 (R v Duncan CLW 2006 16 13 2006 2 Cr App R (S)189(28)). Mercifully the potential psychological harm to the families of those suffering sexual abuse was deemed a little too remote.

Assessing Dangerousness: where is the bar set?

“There is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences”

7. The essence of the legislation is predictive, and must by its nature require a substantial degree of speculation, or actuarial assessment, as to likely future conduct. Unsurprisingly there have been a vast number of cases finding their way to the Court of Appeal – but sadly very little by way of clarity has emerged beyond the cases of R v Lang & Others and R v Johnson [2007] 1 Cr App R (S) 674. In Lang Lord Justice Rose considered significant risk in the following terms;

This is a higher threshold than mere possibility of occurrence and in our view can be taken to mean (as in the Oxford Dictionary) "noteworthy, of considerable amount or importance."

It is however not clear whether this test denotes a likelihood, or “*better than evens chance*”, or simply more than a minimal chance. It is difficult to prise the notion of “*significant*” away from the seriousness of the harm

being envisaged. A one in an hundred chance of winning the world cup is not significant, but a one in an hundred chance of being maimed or killed clearly is. Although the individual cases in Lang & others offers some succour to the prospective dangerous offender, the individual judgments principally deal with the prospective “*serious harm*” envisaged. In the case of Abdi the risk of petty street robberies with minimal force was deemed insufficient to amount to serious harm, and in the case of Carasco repetitive minor sexual offending, without evidence of harm caused to his victims, was similarly deemed insufficient.

8. Worryingly, the case of Johnson has highlighted the “*what if*” question in assessing risk, suggesting a test closer to the “*more than negligible*” ;

When the facts of the instant offence, or indeed any specified offences are examined, it may emerge that no harm actually occurred. That may be advantageous to the offender, and some of the cases examined in Lang (2006) 1 WLR 2509, exemplify the point. Another such example is Isa (2006) Crim L R 356. On the other hand the absence of harm may be entirely fortuitous. A victim cowering away from an armed assailant may avoid psychological harm. Faced with such a case the sentencer considering dangerousness may wish reflect, for example, on the likely response of the offender if his victim, instead of surrendering, resolutely defends himself. It does not automatically follow from the absence of actual harm caused by the offender to date, that the risk that he will cause serious harm in the future is negligible.

The “*what if*” argument is very alarming for anyone dealing with a potential IPP or ES – but it is the point of a predictive sentence. Any pub brawler is only a slip away from being a potential murderer.

9. Bearing in mind the serious implication of an IPP, it must be hoped that the “*significant risk*” bar is higher than the speculative “*what if*”. Certainly in his paper on the subject, Edward Fitzgerald QC argues that the position should be closest that espouses by the case of Offen (dealing with section 2 of Crime (Sentencing) Act 1997 – dealing with second strikers). But the answer is far from clear. The overriding message being set out from the Court of Appeal in Johnson and subsequent cases is that where the judge at first instance has gone through the legislative check list and seemingly touched base with the case of Lang they will not interfere. It seems that the bar for “*significant risk*” is entirely dependant upon the individual tribunal.

Facts upon which the Court can rely.

10. Section 229 (2) lays out the matters the court should have regard to when making an assessment of dangerousness. It **must** take account of the facts of the instant offence, and **may** take account of the facts of previous convictions (in the UK and abroad); information as to a pattern of behaviour, and most worryingly “*any information about the offender which is before it*” 229(2)c.

11. The case of Johnson laid out the general principle that the court should not rely upon disputed facts in a finding of dangerousness, unless the dispute could be settled fairly. The crucial word in the legislation is “*information*”, which is not the same as evidence – a point stressed in the case of R v Considine & Davies [2007] ALL E R 621. Comments made by a defendant to his doctor in a psychiatric report regarding previous sexual desires (R v Farrar [2006] EWCA Crim 3261) was proper information on which to base dangerousness. Similarly comments made in a PSR, and facts adduced from

non conviction bad character (R v Considine & Davies) were found to be proper sources of information. Even information used to obtain an ASBO where the specific matters relied upon had not been adjudicated was found sufficient (R v Hillman 2006 Crim L R 663).

12. The question of how the court should resolve any disputed facts is far from clear. In his judgment in the case of Considine, The President of the Queen's Bench Division, Lord Gage, indicated that a Newton hearing was inappropriate, but offered little by way of guidance as to how such problems should be resolved, simply saying,

We have deliberately declined to lay down any hard and fast rules about how the court should approach the resolution of disputed facts when making the section 229 assessment. In reality, there will be very few cases in which a fair analysis of all the information in the papers prepared by the prosecution, events at the trial, if there has been one, the judicial assessment of the defendant's character and personality (always a critical feature in the assessment), the material in mitigation drawn to the attention of the court by the defendant's advocate, the contents of the pre-sentence report, and any psychiatric or psychological assessment prepared on behalf of the defendant, or at the behest of the court itself, should not provide the judge with sufficient appropriate information on which to form the necessary judgment in relation to dangerousness.

Clearly the defence and defendants need to be very wary of own goals! It is also worth noting that a defendant's inadequacy, vulnerability and suggestibility are all matter that, although possibly mitigating for the instant offence, can properly be used by the court as a foundation for dangerousness (Johnson). Of particular concern to the court are personality disorders – untreatable and often highly indicative of recidivism.

13. The Probation Service has of course dived in to assessing dangerousness with great gusto. All defendants facing possible findings of dangerousness are assessed according to the its scale of risk. These, according to the National Offender Management Service OASys manual v2, translate as follows:

Low: Current evidence does not indicate any likelihood of causing serious harm

Medium: Some risk of harm has been identified but the offender is unlikely to cause serious harm unless circumstances change

High: A risk has been identified. The potential event could occur at any time and the impact would be serious

Very High: There is an immediate risk of serious harm. The potential event is more likely than not to happen imminently and the impact would be serious.

14. So far as previous convictions are concerned, the prosecution are under a duty to provide the court with details (Johnson). However, even when they fail to produce them, the Court of Appeal have directed that the defence should have taken instructions on them, and be in position to give details to the court.

R v Goodyear

15. Although previously frowned upon, the new guidelines make it clear that it is not inappropriate to seek Goodyear indications merely because a defendant is charged with a specified offence. Judges should not pre-judge the issue of dangerousness before they have PSRs and psychiatric reports and the like, but of course an indication of less than 4 years to anyone

without a schedule 15a offence on his record, is by definition an indication of a non dangerous sentence. The guidelines stress that any indication should be couched in terms that indicate to the defendant that the issue of dangerousness will have to be considered separately after sentence (if appropriate).

Youths – Venue for Trial

16. As currently framed there is a serious lacuna in the legislation for determining venue for youths. Section 24(1) of the Magistrates' Act 1980 stipulates that all youths should be tried in the youth court, with the limited exceptions of those jointly charged with an adult and those who the court believe fall foul of the grave crimes provisions laid out in section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 (restricted to offences which carry a sentence of 14 years or more). Whereas section 51A of Crime and Disorder Act 1998 (as amended) stipulates that the magistrates should send any youth charged with a specified offence to the Crown Court if it appears to the court that if convicted "*the criteria for the imposition*" of either an IPP or an ES "*would be met*" (section 51A(3)d). The problem was highlighted in the case of CPS v South East Surrey Youth Court [2006] 2 Cr App R (S) 26. In that case a youth appeared charged with ABH following closely on the heels of a robbery. He was sent under section 51A(3)d for the robbery (dangerousness), but when he appeared before the bench on the ABH, as it was not a grave crime, (they were barred from so finding by the maximum sentence of 5 years) and believing, on advice from their clerk, that they were thereby also barred from sending him via the section 51A(3)d route by section 24(1) MCA, they declined to consider dangerousness and retained jurisdiction. In his judgment, Lord Justice Rose stated;

So, yet again, the courts are faced with a sample of the deeply confusing provisions of the Criminal Justice Act 2003, and the satellite Statutory Instruments to which it has given stuttering birth. The most inviting course for this court to follow, would be for its members, having shaken their heads in despair to hold up their hands and say “the Holy Grail of rational interpretation is impossible to find”. But it is not for us to desert our judicial duty, however lamentably others have legislated. But, we find little comfort or assistance in the historic canons of construction for determining the will of parliament which were fashioned in a more leisurely age and at a time when elegance and clarity of thought and language were to be found in legislation as a matter of course rather than exception.

The court found that the Youth Court could not ignore section 51A(3)d simply because it was incompatible but should bear in mind the following when assessing venue: that the policy of the legislation, confirmed in the case law, was that wherever possible youths should be tried in the Youth Court. That so far as dangerousness in youths was concerned, particular caution should be exercised before making any such finding. That such findings would be unlikely to be appropriate without the assistance of a PSR, and that certainly in relation to non serious specified offences, such an assessment would be inappropriate until after conviction. If following

conviction dangerousness became an issue, the power existed to commit to the Crown Court in any event. With the new minimum requirement for a 4 year sentence, cases of youths being sent under section 51A(3)d should now be very rare.

Youths - Assessment

17. In assessing the dangerousness of youths the court should bare in mind levels of maturity, and that he or she may change and develop in a shorter time frame than an adult (Lang). The Youth Justice Board have indicated that they anticipate that the courts would not find youths dangerous unless the relevant PSR assess them as posing a “Very High” risk of serious harm, or in a very small number of cases a “High” risk. However, whatever the Board thinks, no judge is bound by their view.

Human Rights

18. The European Court of Human Rights does not in principle object to the idea of indeterminate sentences for public protection or preventative sentences (see hospital orders in X v UK (1982) 4 EHRR) – but of course the rules of proportionality apply. In his paper, Edward Fitzgerald QC identifies three safeguards that the convention requires;

Firstly that the imposition of the sentence is governed by clear criteria, and is not disproportionate in the widest sense. (Offen found the life sentence

imposed in that case to be disproportionate because of the absence of a significant risk of further serious offending).

Secondly, that there is a judicialised review of the continuing dangerousness of the offender at appropriate intervals to ensure that the supposed dangerousness of the offender that justified the original preventative sentence is still there. A law that allows indeterminate detention must allow for peoples capacity to change, and provide for a judicialised review of the continuing dangerousness of the offender.

Thirdly, there must be a rational relationship between the type of risk that justified the original imposition of the sentence and the type of risk that continues to exist in order to be continued lawful detention (see Stafford v UK). It is to this last principle that recourse can be had in order to insist that the parole board should not be permit continuing detention unless there is a continuing significant risk of offences involving serious harm.

19. The wriggle room identified in this final safeguard is the disparity between the parole board's test (section 28 of the Criminal Justice Act 1997) to only release prisoners;

If they are satisfied that that it [the sentence] is no longer necessary for the protection of the public that he should be so confined

and the requirement that a defendant poses a “significant” risk of serious harm for IPPs. In dealing with old fashioned lifers, the parole board's test has been set very low. They need only to see a “more than minimal risk” of offences involving serious harm to refuse to release (Ex Parte Bradley 1991 1 WLR 134; Ex Parte Lodomez (1994) 26 BMLR 162 and Ex Parte

Watson). On this basis, Mr Fitzgerald QC argues that the test for parole in the case of IPPs is disproportionate, and thereby potentially incompatible with the European Convention. This proposition is yet to be tested, but with the number of IPP prisoners beginning to back up, it will undoubtedly become the subject of future challenges.

Miscellaneous Authorities

Lucky

20. Isa 2006 Crim L R 356. 39 year old drunk indecently assaulted a 13 year old girl on Oxford Street by grabbing her breast. He had previous convictions for similar behaviour, and was sentenced to an IPP, with a 6 months tariff. Following LJ Rose in Lang, his repetitive low level offending did not of itself provide a basis for inferring a future significant risk of harm ESPECIALLY where there was no evidence that any victim had suffered. IPP removed, 12 months determinate substituted.
21. Johnson 2006 Crim L R 559. 22 year old robber – 14 convictions including battery and ABH. Instant offences included mobile phone robberies (threats of violence, but none used) and brandishing a reproduction handgun. An IPP was inappropriate bearing in mind the nature of the offences, the previous convictions and the age of the defendant. 6 years determinate.
22. R v Monks 2006 Crim L R 447 – 47 year old with no previous. He befriended a 15 year old boy whom he then paid for oral and anal sex. He was introduced to another 15 year old whose professional services he also engaged. He entered guilty pleas to 9 counts of sexual activity with a child. The IPP quashed on the basis that he made full admissions and that the PSR

said he had no sexual preference for children, was not predatory, and would undergo courses in prison.

Not So Lucky

23. Price & Stephenson 2007 1 Cr App R (S) 110. Couple on a robbery spree (single evening) during which they attacked 3 taxis drivers. The female party was of effective good character (40's?) with long standing alcohol problems. She struck one of the drivers on the head with a bottle and stabbed at another with a knife. The sentencing judge was said to have gone through all the relevant matters in Lang, and despite the PSR assessment of a low to medium risk, concluded she was dangerous. Court indicated that as the judge had followed the correct process, they would not interfere, and the IPP was upheld.

24. R v Duncan CLW 2006 16 13 2006 2 Cr App R (S)189(28). A 47 year old man with no previous convictions pleaded guilty to having 45,000 images on his computer – most level 1 some level 5. He demonstrated considerable remorse and his family were now aware and alerted. 6 months & IPP upheld, much to the annoyance of Dr Thomas in his commentary in the Criminal Law Week.

25. R V Islam 2007 1 Crim App R (S) 224. For the purposes of determining whether an offender poses a significant risk of serious harm, there was no general requirement that he had caused serious harm in the course of the instant offence or indeed before. However the court found there was a risk of future harm, and followed the Johnson line on predictive “what if” assessments.

General & Administrative

26. Pluck [2007] Crim App R (S) 43. Following the line in Johnson, the court of appeal will only interfere with sentences that are manifestly excessive or wrong in principle and will not simply reconsider dangerousness. Crown Court Judges are not bound to follow what is written in any PSR, but they should warn counsel if they intend to depart from any recommendations. However, the behaviour of other offenders in other cases was an insufficient basis for concluding that in the instant case, the offender posed a significant risk of serious harm in the future. Although experience and common sense would always have an appropriate part to play - any assessment of risk should be based on the facts of the individual case.
27. R v Bryan & Bryan [2006] Crim L R 942. It is incumbent upon the prosecution to furnish the court with the facts of previous offending. A judge should not make a finding of dangerousness with the intention of using the slip rule should further facts come to light. However, see Johnson on the duty of defence counsel to take instructions on previous offences.
28. R v Hillman 2006 Crim L R 663. The court was entitled to use material used for the purposes of obtaining an ASBO even though the distinct allegations relied upon had not been specifically adjudicated upon. It would seem that this would be in line with Johnson provided the defendant had been given the opportunity to challenge these facts, and tribunal had been able to fairly resolve the disputed issue adversely to him.
29. R v Barley & Others CLW 2007 15/3. There was nothing unlawful in passing consecutive ES, nor was it unlawful to make an ES consecutive to a non extended sentence (or vice versa). The Court of Appeal will not

interfere unless the total sentence was manifestly excessive or the sentence caused real administrative problems. However, best practice suggested that judges should try and use concurrent sentences adjusted to reflect the overall criminality. Where consecutive sentences were required, the court suggested that the non extended determinate sentence should go first with the extended sentence to follow. Judges should remember there was no obligation to make sentences run in chronological order of offending.

30. R v Costello 2007 1 Cr App R (S) 286 Life sentences should be reserved for cases where the facts demanded them. If a life sentence would not have been passed before the 2003 act came into force, it should not be passed now. Reiterating the statutory requirements and the observations in Lang.
31. R v Carter Att-Gen Ref No 145 of 2006 Times 20th March 2007. In many cases it would be obvious when a case fell at one of the extremes of the spectrum of sexual offending that an offender posed a significant risk. However, in most cases the answer was less obvious and the court should seek the assistance of reports (as required by section 156(3)7(4) unless the court was of the opinion that it was “unnecessary to obtain”.
32. R v Reynolds CLW 2007 10/7. It was appropriate to use the slip rule where the court had not appreciated that it was dealing with a specified offence. If the mistake is identified inside the 28 days, the court can rescind the sentence and adjourn the case outside the 28 day period to obtain whatever reports or further information it required. If, however, the 28 days had expired, then the matter would have to proceed to the Court of Appeal. It was noted however that the Att-Gen appeal was not to be used for general prosecution appeal, and if the sentence passed did not fall within the ambit of the Att-Gen principles, the Court of Appeal would not interfere with the

sentence. The court re-affirmed Counsel's duty (both prosecution and defence) to assist the court fully at sentence.

Henry James

13 King's Bench Walk