Neutral Citation Number: [2020] EWCA Crim 176

Case No: 201900428 A3
& 201901790 A1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM WOOD GREEN CROWN COURT
& CANTERBURY CROWN COURT
HHJ J GREENBERG & HH CHRISTOPHER CRITCHLOW
T20187289 & T20167265

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/02/2020

Before :

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD

MRS JUSTICE CHEEMA-GRUBB DBE
and
MRS JUSTICE FOSTER DBE

- -

Between :

Robert Baker	**1st Appellant**
Michael Richards	**2nd Appellant**
- and –	
The Queen	**Respondent**

- -

Mr Hugh Southey QC (instructed by **Registrar**) for the **1st Appellant & 2nd Appellant**
Mr Jake Rylatt for the 1st Appellant
Mr Mark Dacey for the 2nd Appellant
Mr Duncan Atkinson QC (instructed by **CPS Appeals & review Unit**) for the **Respondent**
Hearing dates: 30th January 2020

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Approved Judgment

Lord Justice Fulford:

Introduction

1. On 3 January 2017, Robert Baker pleaded guilty at Canterbury Crown Court to an offence of robbery, contrary to section 8(1), Theft Act 1968. On 30 May 2017, he was sentenced to an extended sentence, pursuant to section 226A, Criminal Justice Act 2003 ('CJA 2003'), of 10 years 4 months, comprising a sentence of 5 years and 4 months' imprisonment with an extended licence period of 5 years.

2. At the time this sentence was imposed, the appellant had already been recalled to prison, following his release on licence from an indeterminate sentence – a sentence of imprisonment for public protection (an 'IPP') – which had been imposed at the Crown Court at Woolwich on 26 September 2011 for an offence of robbery, and from which he had been released on licence on 1 August 2016. The present offence of robbery was committed on 27 November 2016.

3. The Registrar referred the application by Baker (1 year 10 ½ months out of time) for leave to appeal his sentence to the full court. We have been provided with a detailed explanation for the delay, which addresses the circumstances in which the applicant sought advice on appeal from fresh representatives, along with the subsequent progression of the case. Given the real element of uncertainty that has existed in the jurisprudence on the issue summarised in [7] and considered in [36] – [39], we are satisfied with the explanation for the delay. Accordingly, we grant leave to Baker.

4. On 29 October 2018, Michael Richards pleaded guilty to an offence of robbery at Wood Green Crown Court. On 6 December 2018, he was sentenced to an extended sentence of 11 years, pursuant to section 226A, CJA 2003, comprising a sentence of 8 years' imprisonment with an extended licence period of 3 years.

5. At the time that this sentence was imposed, the appellant had already been recalled to prison having been released on licence from a life sentence imposed at the Central Criminal Court on 15 November 2002 for an offence of murder, and from which he had been released on life licence on 14 June 2017. The present offence of robbery was committed on 27 September 2018.

6. The single judge granted leave to Richards to appeal his sentence.

The Main Issue: outline

7. The central contention on behalf of both appellants is that it was wrong in principle or manifestly excessive to impose an extended sentence, pursuant to section 226A CJA 2003, when the appellants had already been recalled to prison on licence, because the future assessment of risk that would be undertaken by the Parole Board was sufficient to protect the public.

The Facts

<u>Robert Baker</u>

8. On the afternoon of 27 November 2016, the appellant entered a convenience store in Victoria Road in Deal and asked the shop assistant, Mohammed Harrou, if he could use the lavatory. He was refused and left the shop. He returned shortly thereafter, selected a can of beer and approached the counter. Instead of paying, he grabbed Mr Harrou by his scarf and other clothing and pushed him back into the staff area of the shop, telling him to shut up. Mr Harrou sustained small cuts to his forearms in the process.

9. The appellant dragged Mr Harrou upstairs to the kitchen area of the premises and produced a hammer with a large black head. He told Mr Harrou to sit down and demanded "where's the money". There was a till drawer from which Mr Harrou took notes and bags of coins, and he put them in the appellant's pockets. The appellant demanded more money and argued with Mr Harrou as to where it might be located. Mr Harrou, however, was able to break free, and he summoned assistance. The appellant left the shop but was apprehended nearby. He said "I'll take the money back, just let me go". The appellant was found to be in possession of £108 in bags of coins.

10. In interview, the appellant admitted the offence, but denied that he had been carrying a hammer. Ultimately, the appellant pleaded guilty without a basis of plea, thereby accepting that he had carried and threatened Mr Harrou with this weapon.

11. Mr Harrou in an impact statement said that "I am in complete shock. I feel like I can't really put it into words but I feel like it's the worst thing that ever happened to me. I really thought at one point this guy is going to kill me".

12. The appellant is now 40 years old. He was 37 years old at the time of sentence. He has been convicted on 12 occasions of a total of 24 offences. We note in particular:

    (a) On 5 June 2000, he was sentenced to 18 months' imprisonment at the Crown Court at Maidstone for an offence of robbery, in which he punched a male in the street and demanded money from him. He walked off but then returned to demand more money, accompanied by further threats.
    (b) On 6 August 2003, he was sentenced for a number of offences of dishonesty and an offence of manslaughter at the Crown Court at Maidstone. The appellant with another individual confronted a 44-year-old male after he left a party at which the appellant had been present, and inflicted blunt force trauma to his mouth and nose, fracturing his skull and causing damage to his brain. The appellant was sentenced, after a trial, to 3 years' imprisonment for the manslaughter.
    (c) On 27 February 2009, he was sentenced to 3 years' imprisonment at the Crown Court of Maidstone for an offence of robbery, in which he pushed a 79-year-old man to the floor of his home, making off with a wallet and cards.
    (d) On 26 September 2011, he received an IPP, with a minimum term of 30 months' custody, at the Crown Court at Woolwich for an offence of robbery in which he demanded money of a 75-year-old, pushing his victim to the ground and taking £1,600.

Michael Richards

13. At 11.30am on 27 September 2018, Ashwin Peshavaria, aged 66 and employed as a cash-in-transit custodian for the Post Office, stopped to make a delivery to the post office on Tottenham High Road. The street was busy. The appellant got out of a black Ford Kuga car, dressed in black and wearing a motorcycle crash helmet, and approached Mr Peshavaria, who was carrying £26,000 in a cash box. The appellant pushed him to the floor and stole the cash box. Mr Peshavaria suffered from a grazed knee and pain to the left side of his face and ribs as a result.

14. Members of the public intervened and restrained the appellant in his car until the police arrived. He fought with them, biting one of those who had apprehended him on the hand and a second on the arm. The police found a screwdriver, balaclava, and gloves in the Ford Kuga, which had been stolen 3 weeks earlier and which bore false number plates.

15. After initial hesitation, the appellant admitted the offence in interview, saying he needed money to pay for cancer treatment.

16. The victim reported he had difficulty sleeping and continued to suffer physical discomfort. He said "I've been badly affected as a result of this incident." He had given serious consideration to not returning to work. He had ceased going out alone, was nervous, jumpy and paranoid at work, but the financial repercussions for his family if he stopped working would be considerable.

17. The appellant is 52 years old, having been born on 21 July 1967. He was 51 years old at the time of sentence. He has been convicted on 9 occasions on a total of 18 offences. Of particular relevance:

    (a) On 8 October 1985, he received 36 hours in an attendance centre at the Waltham Forest Magistrates' Court for the possession of an offensive weapon, which related to his possession of a knife.
    (b) On 24 January 1986, he was sentenced to 4 years detention in a Young Offenders' Institution, at the Crown Court at Snaresbrook, with a concurrent sentence of 6 months' detention for going equipped for burglary, in which a group of young people including the appellant robbed a petrol station, stabbing an employee.
    (c) On 15 November 2002, he received a sentence of life imprisonment at the Central Criminal Court for murder, and concurrent sentences of 12 years' custody for two offences of wounding with intent to do grievous bodily harm and 4 years' custody for two offences of assault occasioning actual bodily harm. The appellant went to an address in Hackney and demanded money from the occupants. He shot three of the occupants, one fatally, one to the chest and one to the shoulder.
    (d) On 10 April 2003, he received a sentence of 10 years' imprisonment at the same court for an offence of robbery. This related to the robbery of a cash-in-transit custodian of £25,000 by punching him to the upper body and grabbing

the cash box. He received a consecutive term of 4 months' imprisonment for taking a motor vehicle without authority, having taken the keys from a female driver by assaulting her. This sentence was ordered to run concurrently with the life sentence imposed on 15 November 2002.

The Main Issue: detail

18. The central issue that arises on these conjoined appeals is whether it was lawful for the judges to pass extended sentences, given both men were serving indeterminate sentences in relation to unrelated criminal proceedings, having been recalled to prison (Baker under an IPP and Richards under a life sentence). Both men were subject to provisions prohibiting their release until the Parole Board is satisfied they pose no risk to the public. Mr Southey Q.C., on behalf of both appellants, argues that either the statutory test was not met for an extended sentence or it would have served no legitimate purpose. He contends, therefore, that there was either no power to impose an extended sentence or that it involved an impermissible exercise of discretion. In summary, he submits that the purpose of the extension period is to provide protection when the licence period that would result from a determinate sentence is inadequate, and given the appellants had been recalled to prison, it is difficult – indeed, impossible – to conjecture how the extension period would provide additional protection.

19. Section 226A CJA 2003, in so far as is relevant, sets out:

> *(1) This section applies where—*
>
> (a) *a person aged 18 or over is convicted of a specified offence (whether the offence was committed before or after this section comes into force),*
>
> (b) *the court considers 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,*
>
> (c) *the court is not required by section 224A or 225(2) to impose a sentence of imprisonment for life, and*
>
> (d) *condition A or B is met.*
>
> *(2) Condition A is that, at the time the offence was committed, the offender had been convicted of an offence listed in Schedule 15B.*
>
> *(3) Condition B is that, if the court were to impose an extended sentence of imprisonment, the term that it would specify as the appropriate custodial term would be at least 4 years.*
>
> *(4) The court may impose an extended sentence of imprisonment on the offender.*
>
> *(5) An extended sentence of imprisonment is a sentence of imprisonment the term of which is equal to the aggregate of—(a) the appropriate*

custodial term, and (b) a further period (the "extension period") for which the offender is to be subject to a licence.

(6) The appropriate custodial term is the term of imprisonment that would (apart from this section) be imposed in compliance with section 153(2).

(7) The extension period must be a period of such length as the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the commission by the offender of further specified offences, subject to [subsections (7A) to (9)] .

(7A) The extension period must be at least 1 year.

(8) The extension period must not exceed— (a) 5 years in the case of a specified violent offence…

(9) The term of an extended sentence of imprisonment imposed under this section in respect of an offence must not exceed the term that, at the time the offence was committed, was the maximum term permitted for the offence.

20. Robbery is a serious specified offence (section 226A(1)(a)). Both murder and manslaughter are offences that qualify for condition A (section 226A(2)). For the purposes of section 226A(1)(c), robbery without a firearm (real or imitation) is **not** an offence listed in Schedule 15B (para.7) and therefore does not come within the requirements of section 224A and the application of section 225(2) depends on whether "the seriousness of the offence […] is such to justify the imposition of a sentence of imprisonment for life" (section 225(2)(b)) which was not the position in either of these cases. Accordingly, save for the arguments raised by Mr Southey, the criteria for an extended sentence were met, depending in each case on the determination of the judge. Both sentencing judges concluded that the appellants satisfied the criteria for dangerousness, as set out in section 229 CJA 2003. In the case of Baker, His Honour Christopher Critchlow (sitting as a deputy circuit judge) concluded "having read what I have about you, you are somebody who poses a significant risk to members of the public, in particular men who are alone, and this is something of an escalation, the fact that you produced the hammer in the course of this offence." In the case of Richards, Judge Greenberg Q.C. concluded: "This robbery is a serious specified offence, and having considered the nature of the offence, and your criminal history of violent offending I am in no doubt that you present a significant risk of causing harm to members of the public by the commission of further specified offences. Your history of committing violent crimes, together with the speed with which you returned to committing a violent crime following your release from prison leaves me in no doubt that you fall squarely into the category of offender required to be sentenced under the dangerousness provisions for the protection of the public from serious harm". Although certain subsidiary issues are argued by both appellants at [41] – [44], neither appellant challenges the finding of dangerousness.

21. Prisoners serving a life sentence remain on licence for life (section 31(1) Crime (Sentences) Act 1997 ("1997 Act")). When a prisoner is serving an IPP, under section 31A(2) 1997 Act the Parole Board has a discretion to order that the licence shall no longer have effect after the prisoner has been at liberty for ten years. The Parole Board must not make such an order unless it is satisfied that it is no longer necessary for the protection of the public that the licence should remain in force (section 31A(4)(a) 1997 Act).

22. Section 32 1997 Act seemingly gives the Secretary of State a broad discretion to recall prisoners serving a sentence of life imprisonment and an IPP (by section 34 (2)(d) 1997 Act, references to life imprisonment in this context include an IPP). The section does not describe the test to be applied for recall, but this will lawfully occur when i) there are reasonable grounds for concluding that there has been a breach of the licence conditions and ii) in all the circumstances, recall is necessary for the protection of the public, because of the dangers posed by the prisoner when out on licence (see *R v Parole Board ex parte Watson* [1996] 1 WLR 906 and *R (Jorgensen) v Secretary of State for Justice* [2011] EWHC 977 Admin). The Parole Board will direct release of those recalled while on licence if it is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined (section 28(6)(b) 1997 Act, but see also Article 5 of the European Convention on Human Rights and *Stafford v UK* (2002) 35 EHJRR 32 at [83]). As far as prisoners serving an IPP are concerned, the same release provisions apply (section 34(2)(d)1997 Act, as above, and *R(Sturnham) v Parole Board (Nos 1 and 2)* [2013] UKSC 23; [2013] 2 AC 254, at page 334 [41]), save that once there has been a direction that an IPP licence should no longer remain in force, the recall provisions fall away.

23. Section 254 (1) CJA 2003 gives a similar broad discretion to the Secretary of State to recall prisoners serving an extended sentence ("[t]he Secretary of State may, in the case of any prisoner who has been released on licence under this Chapter, revoke his licence and recall him to prison"). The Secretary of State must have concluded that that the safety of the public makes it necessary to recall the prisoner because the risk to the public cannot be contained in any other way (*R (Jorgensen) v Secretary of State for Justice* at [47]).

24. It follows, therefore, that the recall provisions are essentially the same whether under an extended sentence, an IPP or a life sentence, and there is no greater power of recall in the case of prisoners serving an extended sentence, as compared with those under an IPP or a life sentence. In considering whether there is any purpose in imposing an extended sentence in these circumstances, it is emphasised that a prisoner serving a life sentence or an IPP can only be released if detention is no longer necessary for the protection of the public. As a result, such a prisoner will only be at liberty if it is concluded that the individual can be safely managed within the community. Mr Southey highlights that the sole circumstance when the licence following an indefinite sentence can end is when the Parole Board orders, after 10 years at liberty, that for an IPP prisoner the licence has ceased being necessary. Mr Southey contends that by that time an extended sentence in all, or nearly all, cases would have no utility. Accordingly, it is argued for the appellants that an extended sentence serves no useful purpose.

25. In contrast, by imposing an extended sentence in these circumstances, the release of the accused is potentially delayed to his or her disadvantage because of the two-thirds release provisions in section 266A(4) (see above). Although release on licence will always depend on the Parole Board making a decision that the offender can be safely managed in the community, an extended sentence in Mr Southey's submission may have an unjustified consequence of delaying the offender's release.

26. In order to succeed in these submissions, Mr Southey must, *inter alia*, seek to distinguish the present case from *R v Smith* [2011] UKSC 37; [2012] 1 Cr App R (S) 83. In that case a defendant was released on licence from a life sentence but was recalled when suspected of committing eight robberies and eight firearms offences. Following his guilty plea to those offences, he was sentenced to an IPP, the judge having reached the opinion that "there was a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences" (section 225(1)(b) CJA 2003). Strongly echoing the submissions in the present appeal, it was argued in that case that the sentencing judge could not properly have formed the opinion that there was a significant risk to the public because the appellant had been recalled to prison under the earlier life sentence and would not be released until the Parole Board was satisfied that it was no longer necessary for the protection of the public that he should be confined. Alternatively, it was submitted that the sentencing judge had erred in principle in imposing a sentence of imprisonment for public protection even though the statutory criteria for the imposition of such a sentence were satisfied. It was argued that when the defendant was already serving a life sentence, nothing was achieved by an additional sentence of imprisonment for public protection.

27. The Supreme Court rejected this submission. It held that the question in 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" [15]. Accordingly, the recall on licence did not and could not operate to invalidate the imposition of an IPP. As to the exercise of discretion, and whether an IPP would provide any benefit, Lord Phillips PSC observed "[…] (t)he 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" [19].

28. The implications of this aspect of the decision in *R v Smith* were explained by Lord Judge in *R v J(M)* [2012] EWCA Crim 132; [2012] 2 Cr App R (S) 73, as follows:

> "26. […] As a matter of principle and practice *Smith* underlines that the decision whether IPP should be ordered is made, and can only be made, at the date of the sentencing hearing. That is the date when the sentencing court is required to form its opinion whether, in the language of s.225(1)(b) , there is a significant risk to members of the public (who, we observe in passing, include police custody officers, prison officers, and fellow prisoners, […]) of serious harm occasioned by the offender committing any further specified offences.
>
> 27. On the issue of public safety, the decision made at the sentencing hearing is required to address the future. This involves an assessment of the risk to the

> public posed by the commission of further offences by the offender, that is, offences which the offender would or might commit subsequent to the current sentencing hearing. Lord Phillips' observations underline that the judge must decide whether the defendant "poses" the risk envisaged by the statute, not on the basis that he is already in custody at the date of sentence (which was the foundation for the argument on behalf of Nicholas Smith rejected by this Court) but on the basis that he is not. Subject to that amplification, the observations are entirely consistent with the decision of the House of Lords in *R. (on the application of James) v Secretary of State for Justice* ; R. (on the application of Lee) v Secretary of State for Justice ; *R. (on the application of Wells) v Parole Board [2009] UKHL 22; [2010] 1 A.C. 553* which was not cited in *Smith*) which endorsed the principles established in this Court. These are conveniently summarised in *Johnson* . The question whether a discretionary indeterminate sentence is appropriate in an individual case is "predictive"."

29. *Smith* and *J(M)* are binding on this court and the impact of those two authorities is that i) it is neither necessarily unlawful nor wrong in principle for an indeterminate sentence to be imposed on an offender who is already serving an earlier indeterminate sentence, and ii) the judge must decide whether the defendant poses the risk envisaged by the statute, not on the basis that he or she is already in custody at the date of the sentence but on the basis that the defendant is not.

30. Mr Southey's argument distinguishing the present case from those two binding authorities is based on the following main factors. First, he suggests that the Supreme Court in *Brown v Parole Board for Scotland and others* [2017] UKSC 69; [2018] AC 1 when considering markedly similar provisions for extended sentences (section 210A Criminal Procedure (Scotland) Act 1995) signposted the approach for which he contends, namely that the court should assess whether any period of extension is necessary to protect the public when a separate recall on licence is already providing that protection. The sole passage from the judgment of Lord Reid on which he relies, with which the other members of the court agreed, is as follows:

> "53. The court which fixes the custodial term of an extended sentence is, of course, aware of the statutory provisions governing early release. But those provisions do not influence the length of the custodial term. The court does not, for example, impose a custodial term of six years because it judges four years to be the appropriate period in custody. The provisions governing early release are, however, relevant to the imposition of an extended sentence. As explained earlier, in terms of section 210A(1)(b) of the 1995 Act it is only where "the period (if any) for which the offender would, apart from this section, be subject to a licence would not be adequate for the purpose of protecting the public from serious harm from the offender" that an extended sentence can be imposed. The court therefore has to consider the period for which the offender would be on licence under early release provisions, and therefore subject to supervision with the possibility of being recalled to custody, if an ordinary sentence of imprisonment were imposed, and assess whether that period would be adequate to protect the public from serious harm. If not, the court can ensure that the offender is on licence for a further period, fixed as the extension period."

31. In our view, Mr Southey is attempting to derive far more from this passage than analysis permits. Lord Reid did not undertake a review of the decisions in *Smith* or *J(M)*, and in particular he did not address the present issues, namely whether it was unlawful or wrong in principle for an indeterminate sentence to be imposed on an offender who is already serving an earlier indeterminate sentence or whether it was wrong for a judge to determine the risk posed by the defendant on the basis that he or she is not in custody at the date of sentence, even if the individual had been recalled on licence for other offending. Indeed, neither *Smith* or *J(M)* were referred to in argument or in the judgment. Instead, Lord Reid in [53] summarised the relevant statutory provisions, in the context of a case which was focussed on the requirement that an individual who received an extended sentence (or who had been recalled on licence during an extended sentence) should be given a real opportunity to achieve rehabilitation and whether immediate release should result if there were no available courses. The essential point made by Lord Reid in [53] was that the judge needed to assess whether the licence period under a determinate sentence was adequate to protect the public. Relevant to the issue addressed in [34] below, Lord Reid expressly emphasised that the statutory provisions governing early release **should not** influence the length of the custodial term. Notwithstanding Mr Southey's able submissions, we do not consider that *Brown* provides any assistance on the questions that arise on this appeal.

32. Second, Mr Southey contends that an extended sentence is to be distinguished from other sentences because of the potential disadvantage to the defendant of the restriction on possible release until two-thirds of the custodial element of the extended sentence has been served (section 246A CJA 2003). This is in contrast to the entitlement to be released after serving half of a determinate sentence which does not have an extension period (section 244(1) CJA 2003). Similarly, a prisoner serving a life sentence or an IPP is potentially eligible for release at the end of the minimum term, which for a discretionary life sentence or an IPP is usually set at a half of the determinate term that would otherwise have been imposed (*R v Szczerba* [2002] EWCA Crim 440; [2002] 2 Cr App R (S) 86 at [33] and *Smith* at [15]).

33. In our judgment, this argument fails, not least because of a fundamental element of the decision in *Smith* (as endorsed in *J(M)*), namely that the decision as to risk must be made on the basis that the defendant is "at large" and has not been recalled. Given this is the approach to be followed, any argument that the two-thirds release conditions may delay what would otherwise have constituted his first opportunity for consideration by the Parole Board for release would be an impermissible consideration. It is irrelevant for the exercise that the judge must conduct that the offender has been recalled on licence.

34. But the argument also contravenes an important principle of sentencing, namely that in fixing the appropriate sentence of imprisonment of a convicted person, the judge does not, save exceptionally, take account of the statutory provisions for early release (see *R (Stott) v Justice Secretary* [2018] UKSC 59; [2019] 1 Cr App R (S) 47, *per* Lord Hodge at [188] generally and at [191] as regards discretionary life sentences). Parliament in implementing the provisions for extended sentences deliberately created a regime that was more onerous than the version originally created by the CJA 2003, when release from the sentence was at the half-way point of the custodial term. In *Stott*, the Supreme Court held, looking at the extended sentencing regime as a whole,

that the early release provisions were justified as a proportionate means of achieving the government's legitimate aims. Mr Southey's submissions would have the result that, in circumstances such as the present, a judge would never pass an extended sentence, even if the criteria are met, thereby avoiding the "delayed" early release provisions which Parliament intended should apply if the judge considered it appropriate to protect the public by increasing the usual licence period by passing an extended sentence. In focussing solely on the role of the Parole Board in determining whether continued detention is no longer necessary to protect the public, Mr Southey's approach would impermissibly restrict a judge's discretion. Contrary to Mr Southey's submission that "there is no point" in imposing an extended sentence, by implementing the delayed early release provisions Parliament provided a discrete form of public protection by way of the enhanced period of time that must be served before the individual can be released (two-thirds rather than at the half-way stage). It will always be for the judge to decide whether an extended sentence is appropriate, given this option is discretionary (*Attorney General's Reference No. 27 of 2013 (Burinskas)* [2014] EWCA Crim 334). The judge will need to focus on the protection that can be provided to the public by way of an additional period for which the offender is to be on licence, whilst ignoring the consequences of the new early release regime as regards release from the custodial term (*Burinskas* at [40]).

35. In summary, therefore, it is necessary in these circumstances for a judge to consider whether it is appropriate to impose an extended sentence, without taking into account the fact that the defendant has been recalled on licence and ignoring the delayed early release provisions.

36. Given their prominence in Mr Southey's submissions, we need to address two other matters that were raised during the appeal. First, Lord Mance at [36] and [37] in *R Sturnham) v Parole Board (Nos 1 and 2)*, in certain *obiter* remarks, expressed reservations as to part of Lord Philips's reasoning at [15] in *Smith*, which it is unnecessary to rehearse. His concerns were founded, certainly in the main, on his view that the assessment of risk should be "predictive". This was resolved conclusively by Lord Judge in *J(M)* at [26] and [27] (as set out above), in a manner which reflected the approach favoured by Lord Mance and which was, on analysis, consistent with the approach of Lord Philips. In the result, there is no decision of the Supreme Court which is contrary to the approach that the assessment is predictive and the offender should be treated for this purpose as being at liberty.

37. Second, there have been individual sentencing decisions of the Court of Appeal which have addressed the lawfulness of an extended sentence which has been imposed during the currency of an indeterminate sentence. Without being in any sense critical, in those cases the court did not necessarily receive the kind of assistance which has been afforded on this appeal by way of detailed submissions, and the decisions are not entirely consistent. On one side of the line, in *R v Ceolin* [2014] EWCA Crim 526 this court, having considered *Smith*, observed that an extended sentence can be justified notwithstanding the recall of the appellant under the terms of an IPP "by the need to emphasise to the Parole Board both the risk that the appellant still presents and that he offended while subject to licence" [16]. In *R v C* [2019] EWCA Crim 643 an extended sentence was upheld notwithstanding the fact that the appellant was serving a life sentence. The court concluded that the Parole Board had been significantly

misled in a way revealed by the offences then under consideration, and it was observed that:

> "21. […] In our judgment, the fact that he has served in excess of twelve years more than the tariff period under the life sentence cannot avail him. It does no more than reflect the fact that throughout this time the Parole Board have not regarded the risk that he continued to pose as capable of being safely managed in the community."

38. On the other side of the line, in *R v Turner and Stevenson* [2019] EWCA Crim 1529, the court concluded at [42]:

> "[…] We consider that although the judge was fully entitled to make a finding of dangerousness on the material before her, the decision to impose an extended sentence cannot be justified as necessary for the protection of the public. The judge had a discretion notwithstanding the finding of dangerousness as to what kind of sentence to impose. The critical factor here was that the second appellant was already serving, was still serving and was still subject to an IPP. We consider that the imposition of an extended sentence in these circumstances, could serve no sensible purpose as regards the protection of the public, and was wholly unnecessary."

39. Lord Phillips observed in *Smith* that the IPP imposed in that case served to demonstrate to the Parole Board the risk the offender posed, contrary to their decision when releasing him on licence [19]. Insofar as the decisions in this court are in conflict, *Smith* is to be followed.

40. The conditions of section 226A were met as regards the present appellants, and, in the result, applying *Smith* and *J(M)* it was neither manifestly excessive nor wrong in principle nor an inappropriate exercise of discretion to impose an extended sentence despite the recall on licence of both accused in relation to other offending.

Two Subsidiary Issues

41. There are two subsidiary issues that fall for consideration, in that both appellants challenge the length of their extended sentences. There is no challenge to the finding of dangerousness in either case.

42. For Baker, it is argued that there was no sufficient basis for the judge's conclusion that there had been psychological harm, and that in the circumstances the sentence should have been in a different category under the guideline (2B rather than 1B). Mr Southey argues that Mr Harrou's assertion in his impact statement that "I am in complete shock. I feel like I can't really put it into words but I feel like it's the worst thing that ever happened to me. I really thought at one point this guy is going to kill me" was insufficient. The judge described what happened as "very frightening". Under the guideline for offences of less sophisticated commercial robbery, the judge was entitled to conclude that this was an offence falling within category B, given the production by the appellant of the hammer to threaten the victim. There is no complaint as to that determination. The sole question raised by Mr Southey is whether there was sufficient evidence of serious psychological harm to the victim, given the

evidence was limited to the short statement set out above. Whether more detail, evidence or expert assistance is required beyond the victim impact statement will depend on the particular facts of the case, and often significant detail, evidence or expert assistance will be wholly unnecessary. That said, we are of the view that although this must have been extremely frightening, it is impossible to say that the incident caused serious psychological harm on the basis of what is set out in the impact statement. However, there were notable aggravating features, not least the prolonged nature of the incident, the restraint of Mr Harrou, the terror and distress that the appellant caused him and the appellant's highly notable criminal record for offences of violence. The difference in the starting point between category 1B and 2B is 1 year (5 years and 4 years, respectively) and in our judgment even if the requirement of serious psychological harm was insufficiently made out, the judge was entitled to go outside the category range for 2B (3 to 6 years) on account of the aggravating features just rehearsed, and to decide that prior to credit for plea, the sentence would have been eight years' imprisonment. It follows that having given 1/3 credit for the appellant's guilty plea, we do not accept that the sentence as regards the length of the determinate element of the extended sentence (5 years 4 months) was manifestly excessive.

43. For Richards, it is submitted that the judge, in identifying the correct sentencing bracket, should not have taken the violence shown to those who intervened into account. Mr Southey argues that for these purposes, it was only the violence shown to Mr Peshavaria that was relevant. Offences involving a professionally planned commercial robbery are divided into three categories of culpability and harm. An offence is to be treated as involving high culpability (category A) when very significant force is used in the commission of an offence or a bladed weapon is produced to threaten violence. An offence falls within the medium category of culpability (category B) where some other form of weapon is produced to threaten and where there is more than a minimal use of force (category C). An offence falls into category 1 of harm where there is serious physical or psychological harm to the victim, or a very high value of goods are obtained, and into category 2 where this is not the case but there is more than minimal harm. For an offence falling within category 1A, the starting point is 16 years' custody, with a range of 12 to 20 years. For an offence falling within either category 1B or 2A, the starting point is 9 years' custody, with a range of 7 to 14 years. For an offence falling within category 2B the starting point is 5 years' custody, with a range of 4 to 8 years.

44. It is not disputed that the judge was entitled to conclude that this was a professionally planned commercial robbery because, *inter alia*, a car had been stolen for the purpose and false plates used; a Post Office cash in transit custodian carrying a large sum of money was targeted; reconnaissance had been undertaken; a motorcycle crash helmet was used to conceal the appellant's identity; and there were other items in the vehicle for use in a robbery. Similarly, there is no dispute that the judge was entitled to conclude that this offence fell within category 1 as regards harm, given that a very high value of goods was targeted and the victim had suffered more than minimal psychological harm. The sole dispute was whether the judge was entitled to conclude that the culpability level fell between categories A and B, given the degree of violence used not only against Mr Peshavaria but also against the members of the public who sought to intervene. We note that although the appellant had brought a weapon to the scene it was not used. Mr Southey is correct to identify, as did the judge, that the

violence utilised to carry out the robbery was not "very significant" for the purposes of establishing high culpability (the victim was pushed to the floor). However, there were a number of notable aggravating factors. Richards had a number of relevant previous convictions, including a previous robbery from a cash in transit custodian; the offence was committed in breach of licence; the offender attempted to conceal his identity by wearing a crash helmet; and (applying the Overarching Principles: Seriousness Guideline) the offence was committed against someone providing a public service and others were put at risk of harm by the offending, as demonstrated by the deliberate and gratuitous violence by Richards immediately afterwards once he was apprehended by members of the public. These factors undoubtedly positioned the offence between categories A and B, as identified by the judge. The judge's starting point of 8 years' imprisonment (one year less than the starting point for a category 1B offence), increased to 12 years' imprisonment to reflect the aggravating factors and reduced to 8 years when full credit was given for the appellant's plea was undoubtedly appropriate; indeed, the sentence could have been significantly higher.

45. For all of these reasons these appeals against sentence are dismissed.