

A dangerous presumption for risk-based sentencing?

Sentencing for a criminal offence entails an assessment of the harm the offence caused and the culpability of the offender in the commission of the offence, alongside an assessment of any aggravating and mitigating factors. Appropriate consideration of these factors ought to lead to the imposition of a sentence that is proportionate to the seriousness of the offence committed. The assessment is backward-looking. In certain circumstances, courts may also undertake a forward-looking assessment of whether an offender is “dangerous” and whether there is a need to impose a sentence combining the aims of punishment with public protection.

But when should a sentencing court be satisfied an offender is “dangerous”, permitting an extended or life sentence to be imposed for the purposes of public protection? Only when there is evidence of dangerousness, or also when there is no evidence that the offender is not dangerous? In *Attorney General’s Reference (Smith) [2017] EWCA Crim 252; [2017] 2 Cr. App. R. (S.) 2*, the Court of Appeal was tasked with deciding whether the offender, who had no previous convictions, satisfied the statutory test for dangerousness in section 229(1)(b) of the Criminal Justice Act 2003 (CJA 2003). The judgment brings to light problems with the assessment of dangerousness which suggest that there has been a move towards a presumption of dangerousness in certain cases. In this commentary, we explore the issues and caution against such a move.

In 2010, Smith, armed with a Stanley knife, grabbed the victim, who was a 14-year old girl with no previous sexual experience. He threatened to “slit her open”, and forced her into a nearby wooded area. He proceeded to touch her breasts, pull down her skirt and insert his fingers, and then his penis, into her vagina. He then inserted his semi-erect penis into her mouth, moving back and forward to achieve an erection. He then re-inserted his erect penis into her vagina before ejaculating inside her. Throughout the attack, Smith made threats to cut V with the knife. After further threats, he instructed the victim to turn around, and he then fled.

Some six years later, Smith was arrested for an unrelated matter. In consequence, a DNA sample was taken from him. The sample matched DNA taken from the victim in 2010. Smith pleaded guilty to two offences of rape—one vaginal and one oral—and one offence of assault by penetration. The victim had suffered severe psychological harm and her life had been “badly affected” by the offence. Data from the tracker located in Smith’s vehicle showed that he had been in an area near a parade of shops, where children regularly congregated, for a period of around an hour before the attack. A pre-sentence report noted that Smith was unable to offer an explanation for the offence but did accept that his actions were fully intended. In particular, the report noted that Smith “... [remained] unable or unwilling to identify the triggers and motives for the offence ...”.

When sentencing, the judge noted that the pre-sentence report suggested that Smith satisfied the “dangerousness” criteria but stated that, in light of the lack of previous convictions and the absence of similar offences in the intervening period, a determinate sentence without an

extension for dangerousness would be imposed. That sentence was of 12 years: concurrent sentences of 12 years' imprisonment for each of the rape offences, with two years' imprisonment, also concurrent, for the assault by penetration. Both a restraining order and a sexual harm prevention order were granted for an indefinite duration.

The Attorney General sought leave to refer the sentence imposed to the Court of Appeal (Criminal Division) under the unduly lenient sentencing scheme in sections 35-36 of the Criminal Justice Act 1998. At the oral hearing, counsel for the Attorney General submitted that the sentence imposed was unduly lenient in respect only of the failure to impose an extended sentence, on the basis that a lengthy determinate sentence could not meet the risk posed by Smith. The Attorney did not seek to challenge the assessment of the seriousness of the offence, namely the 12-year determinate term and this commentary does not question the appropriateness of the length of that sentence for what was unquestionably a very serious offence.

Before examining the Court of Appeal's judgment on dangerousness, it is important to explain the functioning and effect of extended determinate sentences. Four requirements have to be met before a court can impose an extended determinate sentence on a person over 18 (CJA 2003 s.226(A)).

1. The offender has been convicted of a specified offence, i.e. one listed in Sch.15 to the CJA 2003. The specified offences are divided into two categories - (a) sexual offences and (b) violent offences.
2. The offender is "dangerous": i.e. they present a significant risk of serious harm occasioned by the commission of further specified offences.
3. The court is not required to impose a sentence of life imprisonment.
4. Either (A): The offender had a prior conviction for an offence in Sch. 15B to the Act when they committed the specified offence (recidivist) or (B): the court would specify at least a four-year custodial period if it imposed an extended sentence (seriousness).

An example will help to explain the effect of a finding of dangerousness. Offender X is sentenced for rape, a specified offence, but is not found to be dangerous, and is given a sentence of 10 years' imprisonment. Five years of the sentence would be spent in custody and five would then be spent on licence (CJA 2003 s.244). By comparison, if X had been found to be dangerous and sentenced to an extended determinate sentence, he or she may be kept in custody for the full ten years, and would not be eligible for release on licence until two-thirds of that period had been completed (CJA 2003 s.246A(3)-(7)). X would then be subject to an extended period on licence, of between one and eight years (CJA 2003 s.226A(7A) and (8)). An extended determinate sentence is thus more coercive than a determinate sentence in two respects: the length of the custodial term to be served and the imposition of the extended licence period. The impact on the offender can therefore be significant.

Returning to *AG's Ref (Smith)*, the Court of Appeal, allowing the reference, held that the judge was incorrect to find that Smith was not dangerous. Having made that finding, the appropriate

sentence was a 17-year extended determinate sentence (12 years' custody, plus five-years extended licence). The sentence would be increased accordingly. While it was important to pay due deference to the decision of the original sentencing judge, Treacy LJ, giving judgment, held that the instant case contained concerning elements, particularly the fact that the offences were committed apparently "totally out of the blue" by a man of relatively mature years and without any explanation. The Court held that the judge had not given enough weight to the absence of an explanation and had given too much weight to the isolated nature of the offending.

Moving toward a presumption?

The Court of Appeal did not base their finding of dangerousness on a pattern of offending, the people with whom Smith associated, or his wider characteristics (such as alcohol abuse or education) all of which are factors listed in *Lang* [2005] EWCA Crim 2864; [2006] 1 WLR 2509 at [17], the guideline case on the dangerousness regime. Instead the Court found the test for dangerousness to be satisfied because of the absence of information to explain why Smith had committed such a serious sexual offence. It is important to emphasise that the Court, as *per* the section 226(A) of the CJA 2003, did not just find the respondent to be more likely to be dangerous than not, but that he presented a significant risk of serious harm occasioned by rape of adults or teenagers. This is a high standard to be met in the absence of an evidence-based explanation. It is noteworthy that the Court in *Lang* had commented that "significant" was a "higher threshold than a mere possibility of occurrence...and [meant, as in the Oxford English Dictionary] 'noteworthy, of considerable amount or importance'". (at [17])

To allow the lack of an explanation to satisfy the test for dangerousness would appear to move towards a *de facto* presumption of dangerousness. It is worth looking more closely at the Court's language in *AG's Ref (Smith)* here:

"In circumstances where the court has no idea as to why these very serious offences were committed or what triggered them there cannot be confidence that another serious event might not occur in the future." (at [26])

The quotation indicates that sentencing courts should abstain from a finding of dangerousness only if confident another specified offence will not occur. When assessing dangerousness, sentencing courts can be faced with three types of case: (1) cases where the information available to the court weighs in favour a finding of dangerousness; (2) cases where the information weighs against such a finding, and (3) cases where there is no information relevant to the assessment of dangerousness. The effect of a finding of dangerousness for cases that fall in category (3) is comparable to a presumption of dangerousness; only in cases where there is positive information *against* a finding of dangerousness will the offender not be liable to receive an extended determinate sentence or life sentence (assuming the other requirements are satisfied).

The move in *AG's Ref (Smith)*, to find offenders in category (3) dangerous, may be understood as an application of the precautionary principle, which requires, at least, that a lack of certainty over whether a serious harm will occur is not reason for inaction. (See further Ashworth and Zedner *Preventive Justice* (OUP 2014) ch 6). We suggest this move towards a *de facto* presumption of dangerousness must be resisted.

Problems with moving toward a presumption

There are three principal reasons why such a move must be avoided. First, a presumption of dangerousness is hard to reconcile with the statutory test in the CJA 2003. Section 229 of the Act requires the Court to be satisfied that the defendant is dangerous, rather than to be unsatisfied that they are safe. What is more, in earlier incarnations of the dangerousness regime under the CJA 2003, there was a limited presumption of dangerousness where the offender had a previous conviction for certain violent or sexual offences (CJA 2003 s.229(3), in force 4/4/2005 (see SI 2005/950) until 13/7/2008, see SI 2008/1586). The presumption was repealed in 2008 following serious concerns regarding the over-use of the regime. (For critical comment on the presumption see *AG's Reference (No 55 of 2008) (C)* [2008] EWCA Crim 2790; [2009] 1 W.L.R. 2158 and Thomas (2008) 5 Arch. News 7-9, 8.) A move towards a presumption would thus now appear to be contrary to the will of Parliament.

Secondly, a move towards a presumption risks coercive state action against individuals without good reason because of the problems with evidencing dangerousness. At present, there are clear limitations on our ability to assess whether a person will, or will not, commit offences in the future: Zedner, "Erring on the side of safety: Risk assessment, expert knowledge, and the criminal court" in Dennis & Sullivan (eds) *Seeking Security: Pre-empting the Commission of Criminal Harms* (Hart Publishing, 2012). These limitations informed the Coalition Government's decision to reform the Imprisonment for Public Protection regime once again in 2012. The Ministry of Justice stated as much in a Command Paper that preceded reform:

"The limitations in our ability to predict future serious offending also calls into question the whole basis on which many offenders are sentenced to IPPs and, among those who are already serving these sentences, which of them are suitable for release." (*Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (2010) at [186])

These empirical issues exist alongside the conceptual uncertainty of what "dangerousness" means. According to Lord Lloyd of Berwick in the Lords' debate on CJIA 2008 regarding amendments to s.229: "The Government's attempt in 2003 to define dangerousness has failed and they should recognise that fact." (Hansard (HL) 2 Apr 2008 Col 1125) The harder it is to evidence either dangerousness or safeness (be it due to conceptual or empirical issues), the more important presumptions become because they are less likely to be rebutted. After *AG's Ref (Smith)*, we are left to question what sort of explanation for committing a serious offence will be sufficient to show that an offender is not dangerous?

Thirdly, the issue with presumptions needs to be placed in the context of a changing probation service. Robinson has argued that there is now a “culture of speed” in the production of pre-sentence reports: (2017) 64(4) Probation Journal 337. As an example, Robinson found that interviews with offenders are now shorter, and used as means to confirm information gathered from other sources, as opposed to an opportunity to gather new information. A plausible consequence of this current focus on speed is that there is less opportunity to understand why an offender has committed the offence. The risk is thus that a culture of speed in probation when combined with the Court of Appeal’s approach to dangerousness in *AG’s Ref (Smith)* could result in more people being found to be dangerous due to a lack of understanding of why they have offended.

Looking forward

Some context on the sentencing guidelines is needed here. The Sentencing Council has produced a *Definitive Guideline on Sexual Offences* (2014); as with other guidelines, it sets out a process by which the seriousness of the offence committed is assessed through reference to harm and culpability to set an appropriate starting point, and then it provides guidance on aggravating and mitigating factors. The sexual offences guideline includes both rape and assault by penetration. It makes explicit reference to many of the factors present in *AG’s Ref (Smith)*. To give some examples in relation to the rape offences, the total level of harm of the offence would be increased by the psychological harm caused to the victim and the particular vulnerability of the victim as a 14-year old; the offence would be aggravated by the use of a weapon; and mitigation would be provided by the absence of previous convictions. The guideline assists greatly in determining the appropriate length of the custodial sentence, but provides no guidance as to the determination of whether or not the offender is dangerous in accordance with the statutory test.

The comparative lack of guidance for judicial assessments of dangerousness is, at first glance, odd. The decision to impose an extended determinate sentence as opposed to a determinate sentence, has serious consequences for the offender. Extended determinate sentences do not only apply to very serious offending such as in *AG’s Ref (Smith)*. There are currently—as at 23 February 2018—176 violent and sexual offences listed in Schedule 15 that range in seriousness from voyeurism which has a maximum sentence of two years’ imprisonment (s.67 Sexual Offences Act 2003) at the lower end (CJA 2003 Sch.15 para.150), to manslaughter (common law) which has a maximum sentence of life imprisonment at the higher end (CJA 2003 Sch.15 para.1).

Perhaps a specific guideline for dangerousness could conceivably be drafted and signalled in offence guidelines in the same manner as the *Reduction in Sentence for a Guilty Plea Definitive Guideline* (2017). Such a dangerousness guideline could draw on the work of the predecessor body to the Sentencing Council: the Sentencing Guidelines Council (SGC). The SGC produced a guide on dangerousness: *Dangerous Offenders - Guide for Sentencers and Practitioners* (2008). Yet the troubling irony is that the very reasons a dangerousness guideline is needed are

also reasons why it would be extremely difficult to create: uncertainty over what factors to include and what effect they should have. Does a criminal record and/or the absence of one make an offender more likely to be dangerous? How should that be assessed? With respect, it is difficult to see how the Sentencing Council could draft an effective dangerousness guideline given the paucity of guidance and understanding about what it means to be “dangerous” and the difficulties in assessing risk.

A bolder recommendation would be to remove altogether sentencing powers which are reliant on an assessment of dangerousness given the limitations on our capacity to predict future offending. Such a recommendation would, of course, be unlikely to gain any traction in practice. A natural response from Government to such an abolitionist argument would be that dangerousness may be hard to conceptualise and evidence, but there will no doubt be cases where an offender is clearly dangerous and the option to employ an extended sentence is needed. Perhaps then what we need is a presumption against a finding of dangerousness (See further Ashworth and Zedner *Preventive Justice* ch 7). Such a presumption would move us in the opposite direction to *AG’s Ref (Smith)*. It would still allow prosecutors to evidence dangerousness, whilst at the same time limiting the excessive use of coercive state power based on uncertainties.

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