

Life in crime

The Lord Chief Justice is right to ask judges to consider prison as a last resort only, as David Rhodes explains



PRISON DOESN'T WORK. POLITICIANS ARE

too afraid to admit it. The Lord Chief Justice, however, has had the courage to spell out what many in the criminal justice system have known for some time. In *R v Seed; R v Stark* [2007] EWCA Crim 254, Lord Phillips examined the effects of prison overcrowding and sent out a clarion call to judges not to send people to prison unless it is absolutely necessary.

"When considering the length of a custodial sentence, judges should bear in mind the fact that, at present, the prison regime was likely to be more punitive because of prison overcrowding... particular care should be exercised before imposing a custodial sentence on a first offender since association with seasoned criminals might make re-offending more likely rather than deter it, particularly where the offender was young."

Just common sense

Just read those words again: simple, straightforward, common sense. The message is obvious. If you cram three prisoners into a cell designed for one, it is a greater punishment than intended by the sentencing regime. If you have 900 prisoners in a jail designed for 600, there will be a shortage of places on education workshops and drugs courses. Thus the prospects of rehabilitation are dramatically reduced. If you lock up a first-time offender with hardened criminals, he is likely to learn to become a more dangerous person when he is released. It is not the message that is new. It is the fact that the messenger is the Lord Chief Justice and he wants judges, and one suspects a wider audience, to sit up and listen.

In a pointed remark, perhaps aimed at encouraging the government to think before it enacts, Lord Phillips notes that some of the sentencing requirements of the Criminal Justice Act (CJA) 2003 – mandatory life sentences, indeterminate sentences of

imprisonment or detention for public protection – have already significantly contributed to the rise of the prison population.

Lord Phillips is not saying that prison is never appropriate. There are some offences that by their very nature mean there can be no alternative but prison. Yet for a vast array of offences and offenders, there is a real decision to be made. "Unless imprisonment was necessary for the protection of the public, the court should always give consideration to the question of whether the aims of rehabilitation and thus the reduction of crime could not be better achieved by a fine or a community sentence rather than by imprisonment and whether punishment could not adequately be achieved by such a sentence."

Custodial thresholds

The Lord Chief Justice urges sentencing judges to always remember the important, first principles enshrined in the CJA 2003. Under s 152, the court is required, when looking at the particulars of any offence, to decide whether the custodial threshold had been passed. If it had not, then no custodial sentence could be passed. If it had, it did not automatically follow that a custodial sentence must be passed. That was only a starting point. A guilty plea or personal mitigation might make it appropriate for a non-custodial sentence to be imposed. Indeed, an otherwise clean record might make a custodial sentence inappropriate notwithstanding the fact that the custody threshold had been passed.

Moreover, s 153 provides that, where a custodial sentence is imposed, it must be for the shortest term that, in the opinion of the court, is commensurate with the seriousness of the offence. Again, this might be obvious in principle, but in practice it is worth highlighting. The reality of prison overcrowding means that the effect of a custodial sentence will be all the more punitive.

In other words, the current prison regime is so harsh that six months will feel like a year so a shorter sentence can be justified to mitigate that effect.

In applying this logic, the Court of Appeal allowed both instant appeals against the sentence. Mr Seed saw his custodial sentence of six months for assault actual bodily harm (ABH) reduced to one of just seven days. Mr Stark had his sentence of nine months for bigamy and failing to surrender reduced to three months.

Rethink financial penalties

The judgment also urged us to rethink our attitudes towards financial penalties. Their Lordships believed that there was a reluctance on the part of sentencing judges to impose fines, because they were often not enforced. Lord Phillips said that enforcement was now rigorous and effective and, where an offender had the means, a heavy fine could often be an adequate and appropriate punishment. If that was so, then the 2003 Act required a financial penalty to be imposed rather than a community penalty.

This is a powerful, enlightened and refreshing judgment. It challenges judges to think anew about the spectrum of sentencing options available. The sentencer must begin from first principles and ask: "What aims do I seek to achieve in passing sentence on this individual?" The aims of rehabilitation, reform and the prevention of reoffending are unlikely to be served by passing a custodial sentence. The aims of punishment can be met through much shorter custodial sentences or indeed outside the prison walls. Ultimately, therefore, prison should be reserved for the truly dangerous offender who, in much less crowded conditions, might actually get some help. One can only hope.

David Rhodes is a barrister specialising in criminal law at Doughty Street Chambers