Case No: 200904097 A7

Neutral Citation Number: [2010] EWCA Crim 369
IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT NORTHAMPTON
HIS HONOUR JUDGE WIDE QC
T20087238

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/03/2010

Before :

LORD JUSTICE AIKENS
MR JUSTICE FIELD
and
HIS HONOUR JUDGE STEPHENS QC

- -

Between :

	R	**Respondent**
	- and -	
	STEPHEN GORE	**Appellant**

- -
- -

Mr Will Noble (instructed by **Noble Solicitors, Shefford**) for the **Appellant**
Mr Matthew Brookes-Baker (instructed by **CPS**) for the **Respondent**

Hearing dates : 18 December 2009 and 2 February 2010

- -

Judgment**Lord Justice Aikens :**

1. This is an appeal against a sentence for manslaughter that was imposed by HHJ Wide QC on 2 March 2009 in the Crown Court at Northampton. The sentence was one of imprisonment for public protection ("IPP") pursuant to section 225of the Criminal Justice Act 2003 ("the CJA 2003") as amended by section 13 of the Criminal Justice and Immigration Act 2008. The judge set the minimum term of imprisonment at 18 months, less 169 days for time spent in custody on remand. He assessed the notional determinate sentence at 3 years.

2. This appeal has caused difficulties because of the unusual circumstances which gave rise to the single judge granting leave in the first case. The case was originally listed before this court, sitting in the present constitution, on 18 December 2009. At that hearing Mr Noble represented the appellant, who had waived his right to be present. The Crown

was not represented. Mr Noble was not counsel who had appeared for the appellant at the sentencing hearing before Judge Wide in March 2009. As will be clear from our recital of relevant matters, issues arose before us as to (i) the basis on which Judge Wide passed sentence on 2 March 2009, and (ii) the basis on which a sentence for robbery, committed on 4 January 1996, had been passed by the Crown Court at Harrow on 19 July 1996. We were satisfied that further enquiries ought to be made about both those issues and that the Crown must be represented by counsel on this appeal. We therefore decided to adjourn the hearing and we gave various directions about enquiries that should be made. In particular, we invited leading counsel for the appellant at the hearing before Judge Wide (Miss Anne Cotcher QC) to consider and, if so advised, to send a note to the court of her recollection of events at the hearing before Judge Wide on 2 March 2009. We emphasised the need to obtain the appellant's permission to waive privilege, if necessary. We also directed that the Crown must be represented at the further hearing.

3. After such enquiries as could be made about the 1996 sentence had been made, the matter came back before the same constitution on 2 February 2010. We are very grateful to Mr Alistair Evans, the District Crown Prosecutor for the Northamptonshire CPS, who has made those investigations and who has prepared a report for the Court on the issue of the basis on which the sentence for robbery was passed by the Crown Court at Harrow in July 1996. We also had a note, dated 21 January 2010, from Miss Cotcher QC, who had represented the appellant at the hearing before Judge Wide, dealing with her recollection of that hearing and instructions given to her. (Privilege was waived for that to be put before the court).

4. At the hearing on 2 February 2010, the Crown was represented by Mr Brookes-Baker and the appellant was again represented by Mr Noble. Both had submitted Outline Arguments for that hearing, as directed by the court. However, neither counsel had referred to a number of authorities which this court considered were highly relevant to the issues that were by now clearly raised on this appeal. Accordingly, we gave counsel the references to those cases and directed that any further submissions, in writing, on those cases (and any other relevant cases counsel might discover) must be made within 48 hours.

5. Those cases are: ***Attorney General's Reference No 71 of 1999 [1999] 2 Cr App R (S) 369; R v Eubank [2002] 1 Cr App R (S) 4; R v Flamson [2002] 2 Cr App R (S) 48; R v Murphy [2003] 1 Cr App R (S) 39; R v Townsend [2004] 1 Cr App R(S) 47; R v Benfield and Sobers [2004] 1 Cr App R 8; R v Hylands [2005] 2 Cr app R (S) 25.***

6. We received the further submissions of counsel. However, to our surprise, (because no mention of this was made at the hearing on 2 February 2010), we were also sent by counsel for the appellant an affidavit of Mr Matthew Kirk of counsel. He was junior counsel for the appellant at the hearing before Judge Wide. His affidavit put in question various statements made by Miss Cotcher QC in her note of 21 January 2010. We therefore thought it only fair to Miss Cotcher to give her the right to comment on that affidavit. She responded promptly to our request, on 11 February 2010.

The facts of the manslaughter offence

7. The appellant had had a relationship with a 27 year old woman, Ms AC. She was friendly with Mr Terence Hooper, the deceased, who was 67 at the time. The appellant did not like the deceased having any kind of contact or relationship with Ms AC and he said so to Mr Hooper in blunt terms on more than one occasion. On the evening of 10 September 2008 the appellant was on the stairs outside Mr Hooper's flat. Witness statements described him as "fired up". There was a scuffle between the appellant and another man. Mr Hooper came out of his flat and asked what was going on. The appellant reacted by shouting at the deceased "fucking pervert" and he warned Mr Hooper to keep away from Ms AC. The deceased replied "go on then if you are going to take a pop at me". The appellant punched Mr Hooper once in the face and Mr Hooper fell unconscious. The emergency services took him to hospital where he underwent neurosurgery to relieve intracranial pressure. However, he died at 1.20 am on 11 September 2008. The cause of death was given as severe head injury with subdural haemorrhage.

8. The appellant pleaded guilty to the manslaughter of Mr Hooper on 2 March 2009, ie. the same day he was sentenced.

9. The appellant is 38. He has a bad record, having appeared in the courts 16 times for 60 offences between 1985 and November 2002. The offences include offences of violence as well as offences against property and motoring offences.

The robbery offence of 4 January 1996

10. For the present the most important of those offences is one of robbery carried out on 4 January 1996, for which the appellant was sentenced to 7 years imprisonment in the Harrow Crown Court on 19 July 1996. The precise facts of that robbery are central to this appeal.

11. The robbery was one of a series that had been committed by the appellant and an accomplice. We have now seen (as a result of Mr Evans' enquiries) a copy of an indictment (T960235) which contained six counts, all of which are directed only against the appellant. Five of the counts are of robbery and one is a count of affray. It appears that the appellant pleaded not guilty to one count of robbery and the count of affray. He pleaded guilty to the other four counts of robbery. The particulars of Count 2, which is the relevant offence for present purposes, state: "Stephen Patrick Gore on the 4 day of January 1006 robbed Adesoji Sanni of a leather jacket, a mobile phone and a leather wallet containing driving licence, Barclaycard Mastercard, Connect Card, ID card and £90 in money". There is a manuscript "G" by those particulars and it is not in dispute that the appellant pleaded guilty to that offence. It should be noted that there is no mention of any weapon in the particulars and there is no separate count on the indictment alleging any firearms offence by the appellant on 4 January 1996 or in

relation to any of the other robbery counts.

12. A police case summary which appears to have been prepared for the purposes of the hearing before Harrow Crown Court gives details of the offence as follows:

> "*At about 9pm that same night two males have ordered a Mini Cab to take them from the Royal Oak Public House in Golders Green. A Mr Adesojo Sanni who was working as a mini cab driver attended the venue and asked a barmaid a Miss Rhoades who the fare name James was. She called the name and the two suspects acknowledged this and left. The victim was directed to Warnet Close, NW9, where he was asked to give the two males a hand to carry a TV from an address. He did this but no one answered the door of a house that was in darkness. As they walked back to the cab he was touched on the shoulder. He turned round and found the smaller suspect (O'Connor) pointing a hand gun at him. Gore then hit him in the face and produced an extendible truncheon. He was then robbed of various correspondence, cash, his jacket and a mobile telephone.*
>
> *Miss Rhoades did not pick Gore out, however the victim did.*"

13. The same report gave brief details of other robberies which it says are the subject of charges. In the narrative of three of those incidents there is reference to the use of a knife

14. A report which appears to have been prepared in connection with the manslaughter charge that was before Judge Wide in 2009 gives a similar account of the robbery, viz. that the complainant was threatened with a handgun which was held by the appellant's accomplice and that it was the appellant who wielded an extendable truncheon or baton.

15. However, we have also seen a Post Trial Report dated 8 November 1996, which was prepared by the Metropolitan Police for the purposes of the Prison Service. That report refers to the fact that the appellant had been sentenced to 7 years imprisonment in respect of four robberies. Under a heading entitled "Weapons/firearms- show types/if loaded or used", there is the single entry: "knife".

The sentencing hearing before HHJ Wide QC on 2 March 2009

16. When Judge Wide sentenced the appellant he had before him a Pre-Sentence Report ("PSR") and three psychiatric reports, two from Dr Shapero and one from Dr Davies. The PSR assessed the risk of harm by the appellant as high. The psychiatric reports said that he was not suffering from any form of mental disorder. The supplementary report of Dr Shapero said that, from a psychiatric point of view there were no major factors which suggested that the appellant was a dangerous person within the meaning of the

relevant provisions of the ***CJA 2003***.

17. At the hearing before Judge Wide the question of the precise facts concerning the robbery offence on 4 January 1996 was raised because it was relevant to the issue of whether the judge had jurisdiction to pass a sentence of IPP under the terms of ***section 225*** of the ***CJA 2003*** as amended by ***section 13*** of the ***Criminal Justice and Immigration Act 2008***.

18. The amended ***section 225*** provides:

> "*225 Life sentence or imprisonment for public protection for serious offences*
>
> *(1) This section applies where—*
>
> *(a) a person aged 18 or over is convicted of a serious offence committed after the commencement of this section, and*
>
> *(b) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences.*
>
> *(2) If—*
>
> *(a) the offence is one in respect of which the offender would apart from this section be liable to imprisonment for life, and*
>
> *(b) the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life,*
>
> *the court must impose a sentence of imprisonment for life.*
>
> *(3) In a case not falling within subsection (2), the court must impose a sentence of imprisonment for public protection if the condition in subsection (3A) or the condition in section (3B) is met.*
>
> *(3A) The condition in this subsection is that, at the time the offence was committed, the offender had been convicted of an offence specified in Schedule 15A.*
>
> *(3B) The condition in this subsection is that the notional minimum term is at least two years.*
>
> *(3C) The notional minimum term is the part of the sentence that the court would specify under section 82A(2) of the Sentencing Act (determination of tariff) if it imposed a sentence of*

imprisonment for public protection but was required to disregard the matter mentioned in section 82A(3)(b) of that Act (crediting periods of remand).

…..”

19. ***Schedule 5 of the 2008 Act,*** which creates a new ***Schedule 15A*** to the ***2003 Act***, states at paragraph 10:

> *“…..*
>
> *10 An offence of robbery under section 8 of the Theft Act 1968 (c. 60) where, at some time during the commission of the offence, the offender had in his possession a firearm or an imitation firearm within the meaning of the Firearms Act 1968.*
>
> *…..”*

20. The wording of paragraph 10 is materially the same as that of ***section 109(5)(h)*** of the ***Powers of the Criminal Courts (Sentencing)Act 2000 (“PCC(S)A 2000”).*** That section, which was itself a re-enactment of ***section 2(5)(h)*** of the ***Crime (Sentences) Act 1997***, made provision for the imposition of automatic life sentences for a second “serious” offence, save in exceptional circumstances. Amongst the “serious” offences listed in ***section 109(5)*** of the ***PCC(S)A 2000*** was that identified in para (h), ie. “robbery, where, at some time during the commission of the offence, the offender had in his possession a firearm or imitation firearm within the meaning of the Firearms Act 1968.” The difficulties created by the application of that provision became notorious and had given rise to a number of cases to which we will have to refer later.

21. During the sentencing hearing before the judge, Mr Pini QC, for the prosecution, described the 1996 robberies as follows:

> “*Essentially, all five follow the same pattern: this defendant plus one other, targeting mini-cab drivers, all occurred in the Golders Green area, Middlesex area of London. On one occasion, a mini-cab driver was threatened with having his throat cut if he did not hand over his wallet, Another mini-cab driver had a handgun pointed to his temple and told to hand over his wallet, £415 stolen from him. Another mini-cab driver had a wine bottle smashed over his head, resulting in a two centimetre cut near his left eye and cuts to his head and chin, before he was relieved of his money. Another mini-cab driver was grabbed from behind around the neck, money was demanded off him and he was punched, receiving a fractured cheekbone, eye socket and a bite to the left forearm. Another individual working as a part-time mini-cab driver was taken down an alleyway, a knife was put to his neck and he took was threatened wit being cut unless he*

handed over all of his property, £160 stolen from him…...".

The judge asked Mr Pini if that compendious description included an offence within ***Schedule 15A*** of the ***2003 Act*** as amended and he said yes: see page 7D of the transcript of the sentencing hearing**.**

22. Miss Cotcher QC, leading Mr M Kirk, represented the appellant. When she made her submissions in mitigation, she said about the 1996 robbery offences (at page 8E-F of the transcript of the sentencing hearing):

> "*Your Honour has heard about at Harrow, including the robbery where there was a handgun. All I may say about those five offences, is I am instructed that there was a co-defendant, I know the Crown agree with that, and the basis of the plea entered, because there were pleas of guilty entered to those matters, was that he Mr Gore was not the person who held either the knife or the firearm. …"*

Later on at page 36E-G of the transcript there was this further exchange between the judge and Miss Cotcher QC:

> *"Judge Wide: Can you help me about this? If I were to come to the conclusion that he is dangerous within the meaning of Section 225 and Section 229 as amended of the Criminal Justice Act 2003; I am right in thinking, because I did not detect any dissent that the robbery at which a firearm was used, I recognise he says that he himself did not have the firearm, it was a joint enterprise in which a firearm was used, he is then within Schedule 15(a) and so the sub-section 3(b) does not apply?*
>
> *Ms Cotcher: No.*
>
> *Judge Wide: Yes.*
>
> *Ms Cotcher: That's correct..*"

23. When the judge sentenced the appellant to IPP, he referred to the PSR and the risk assessment in it. He then said:

> *"I am quite clear that you are dangerous, and I am of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by you of further specified offences. Because you have committed robbery in the past in which a firearm was used, Sub Section 3A of Section 225 applies. As a result of those conclusions the sentence that I pass on you is*

imprisonment for public protection."

24. The judge then dealt with the question of the minimum term and said:

> *"…It is not this sentence, it simply means the very earliest that you can be considered for release and in your case it may be some time after this time has passed before the authorities consider it safe to release you. I have to decide what conventional determinate sentence would have been passed and I have regard to the relevant authorities, in particular the well-known case of R v Coleman, the case of R v Furby [2006] 1. Cr.App.R.(S.) referred to in the current sentencing practice of B1-33A51, the case of R v Warwood [2006] 2 Cr.App.R.(S.) summarised in the current sentencing practice of B1-33A52, and the very recent case of R v Wyatt [2009] EWCA Crim 88.*
>
> *Given full credit for your plea, in my judgment the appropriate determinate sentence would have been three years; the minimum term therefore is eighteen months. Has there been time spent on remand?"*

The hearing before HHJ Wide QC on 8 May 2009

25. There was a further hearing before the judge on 8 May 2009. Another leading counsel, Mr Jeffries QC, was instructed on behalf of the appellant. Mr Kirk was junior counsel again. Concern was raised on whether the sentence of IPP passed on 2 March had been a lawful sentence. That turned on the question of whether the 1996 robbery offence fulfilled the requirements of paragraph 10 of the new ***Schedule 15A*** of the amended ***CJA 2003***. The judge heard further submissions from different prosecution counsel and from Mr Jeffries QC. The latter made the submission that the condition in ***section 225(3A)*** of the ***2003 Act*** had not been fulfilled because the facts of the 1996 robbery did not fall within the ambit of ***paragraph 10*** of ***Schedule 15A*** of the ***2003 Act***. Mr Jeffries submitted that when, at the 2 March hearing, the judge put to Miss Cotcher QC the proposition: "it was a joint enterprise in which a firearm was used", she should have replied: "on the evidence before the court we don't know; on instructions, no". (See transcript of hearing of 8 May 2009 page 5H). The judge challenged that assertion by Mr Jeffries. After some discussion, Judge Wide said (transcript page 6F) that the answer given by leading counsel (Miss Cotcher QC) to his question of whether the matter came within Schedule 15A "…was yes, given by leading counsel having taken instructions".

26. There was further discussion about what had happened at the hearing on 2 March 2009. The judge pointed out that the appellant did not contradict the statement of Miss Cotcher given in answer to the judge's question at page 36 of the transcript of 2 March 2009. He also pointed out that, after he had sentenced the appellant, no one came back into court to say that the judge had been given wrong information in relation to the facts of the 1996 robbery: see transcript for 8 May hearing at page 10.

27. At the end of the discussion the judge gave a judgment in which he reviewed what had happened before him on the previous occasion by reference to the transcript of that day. The judge described the present situation as "deep waters" (transcript page 17B) and said that he would have found it difficult to resolve the issue on the basis of the material that was now before him, which included the first report of the police to which we referred earlier.

28. The judge then adverted to a further problem, which was that it was now more than 56 days after the sentence had been passed and so he had no power to alter the sentence under the amended provisions of ***section 155*** of the ***PCC(S)A 2000.*** Thus he concluded that if the matter was to be reviewed it had to be done by the Court of Appeal.

Further material concerning the sentencing hearing of 2 March 2009

29. An affidavit of Ms Amanda Francis, dated 7 August 2009, was prepared for the present appeal. Ms Frances is the Head of the Crown Court Litigation Department of First Defence Solicitors, who represented the appellant in relation to the current matter when it was before the Crown Court at Northampton. She was present at the hearings of 2 March and 8 May 2009. Paragraphs 3 to 6 of the affidavit state:

> *"3. Shortly before the hearing [of 2 March] was due [to] start, I was asked by Ann Cotcher QC to take full instructions on the facts of Mr Gore's convictions; in particular the 5 robberies for which he received 7 years imprisonment at Harrow Crown Court on the n18th July 1996.*
>
> *4. He quite clearly instructed me that in relation to the alleged robbery with a firearm that there was no gun. He was quite clear in his instructions to me and has maintained those instructions ever since. He could not specifically remember whether there was a basis of plea in relation to this count.*
>
> *5. His clear instructions were relayed to Ann Cotcher QC.*
>
> *6. I have been asked specifically to comment on contact I had with Mr Gore's previous solicitors in relation to details of the relevant offence. I contacted Darryl Ingram & Co on the 9th March 2009, and they responded in correspondence dated the 11th March 2009 stating that their file would have been destroyed and that they were unable to assist further.*"

30. Paragraph 7 of Miss Cotcher QC's note of 21 January 2010 states that paragraph 5 of the affidavit does not accord with her recollection. Then in paragraph 7 of her note, she sets out six points in numbered sub – paragraphs (i) to (vi). These state:

> "*7. Paragraph 5 of the affidavit does not accord with my*

recollection.

(i) had I received such instructions, I would have mitigated on that basis.

(ii) I note from the transcript of the sentencing hearing that no complaint about this important matter was made either from the dock or from any member of my legal team during the hearing.

(iii) At 8F [of the transcript], I made a concession about the gun that I believed to be accurate.

(iv) Later, at 21E, the Learned Judge intervened to invite me to take instructions upon the necessity for a Newton hearing as to the manslaughter. The Court rose, I took instructions from the dock.

(v)At 36F, The Court repeated the earlier observation I had made at 8F.

(vi) At 37F, the Appellant interrupted the Learned Judge's sentencing remarks to specifically complain as to omissions in the mitigation relevant only to the manslaughter facts."

Paragraph 8 of her note states:

"8. It follows that when the Learned Judge passed sentence:

(i) according to my recollection I had not received instructions to say there was <u>NO</u> gun.

(ii) Neither the Appellant, nor my junior, nor my solicitor had ever sought to correct me. If I had indeed misunderstood my instructions.".

31. Mr Kirk's affidavit states that there were conferences between the appellant and Miss Cotcher QC, Miss Francis and himself and Miss Frances before the sentencing hearing on 2 March 2009. At that stage no instructions were taken from the appellant on the facts of the previous convictions. Miss Frances took instructions when the court had assembled. Mr Kirk says that there was a brief discussion in which Miss Frances informed him and Miss Cotcher of the client's instructions. Miss Frances handed to Miss Cotcher the schedule of facts that the prosecution had produced annotated with "NO GUN". Miss Cotcher added the word "BASIS?" and returned the document to Miss Frances. During Miss Cotcher's mitigation Mr Kirk passed to Miss Cotcher a note from Miss Frances saying "there was <u>no</u> gun". Mr Kirk accepts that he did not thereafter interrupt Miss Cotcher or otherwise try and bring to the court's attention any problems on this issue. There was a conference after the hearing between him and Miss Frances at which it was agreed that the court should not be asked to reconsider the matter

then and that it could be swiftly dealt with on another occasion. In fact it was not reconsidered until 8 May, over two months later.

32. Miss Cotcher's responses to this note are that: (i) she has not seen these annotations (and nor have we); (ii) she did not receive any instructions that there was "no gun". If she had done she would have told the court that there was no gun. She also says that she finds it inexplicable why, if there had been an important error by her, Mr Kirk, as her junior did not tell her so. Also, if she had been informed of it she would have immediately asked the court to sit again to deal with the point.

The submissions on behalf of the appellant.

33. The submissions of Mr Noble, on behalf of the appellant, are as follows: first, it is clear from all the documents to hand that the appellant himself did not have possession of a handgun during the Adesoji Sanni robbery. He submitted, on instructions, that there had in fact been no gun at all at that robbery on 4 January 1996. Secondly, although he contended initially that, on the correct construction of ***paragraph 10*** of ***Schedule 15A*** of the ***CJA 2003*** as amended by the ***Criminal Justice and Immigration Act 2008***, the terms of that paragraph were only satisfied if the offender had personal possession of the firearm in the course of the commission of the offence; he subsequently accepted that is not the correct construction. He concedes, having been referred by the court to the decision in ***Attorney General's Reference No 71 of 1999 [1999] 2 Cr App R (S) 369 at 372 – 3,*** that, under ***section 109(5)(h)*** of the ***PCC(S)A 2000***, if the offender was a party to a robbery which to his knowledge involved the possession of a firearm by one or more of those involved, it comes within paragraph (h) of that section. We understand him to accept that the same principles will apply with regard to ***paragraph 10*** of ***Schedule 15A*** of the ***2003 Act.*** Thirdly, Mr Noble argued that it has to be demonstrated that when the judge passed sentence for the Adesoji Sanni robbery in 1996, he clearly did so on the basis that there was a joint enterprise and that therefore the appellant knew that the 1996 robbery involved possession of a firearm by his accomplice. Mr Noble submitted that fact could not be demonstrated in this case. Fourthly, Judge Wide had to be satisfied of that basis for sentence on the 1996 robbery before he could sentence the appellant to IPP under ***section 225(3A)*** of the ***2003 Act***. That could not be established on the facts. Fifthly, therefore, the judge should not have passed a sentence of IPP pursuant to ***section 225(3A)*** of the ***CJA 2003***. Sixthly, given the judge's conclusion that the determinate sentence that he would have passed would have been 3 years, ***section 225(3B)*** of the ***CJA 2003*** could not apply. Therefore, the judge should have passed such a determinate sentence as he said he would have done if it had not imposed IPP case: viz. 3 years. Accordingly, on Mr Noble's submission, the appeal must be allowed.

The submissions of the Crown

34. Mr Brookes-Baker accepts that it cannot be established conclusively on the records of the 1996 conviction that the court sentenced the appellant then on the basis that he participated in the Adesoji Sanni robbery knowing that his accomplice was in possession of a firearm for the purposes of that robbery. But he submits that this does not matter,

because Miss Cotcher, on behalf of the appellant, made an unequivocal admission before Judge Wide that this was the case. That was sufficient to give Judge Wide the power to pass an IPP pursuant to ***section 225(3A)*** of the ***2003 Act*** and he was right to do so.

The issues for decision

35. It seems to us that the following issues arise: first, what is the correct construction of ***paragraph 10*** of ***Schedule 15A*** of the ***2003 Act*** as amended. In particular, do the words, "the offender had in his possession a firearm or an imitation firearm…" encompass a situation where there is a joint enterprise robbery and it is an accomplice, but not the offender, who has actual physical possession of the firearm, but the offender knows that the accomplice is in possession of the firearm for the purposes of the robbery? The second issue arises if the answer to that question is "yes". It is: can we determine, with certainty, the basis on which the judge sentenced the appellant to the Adesoji Sanni robbery in 1996. In relation to that, is it relevant that (a) there is now no recorded admission by this appellant in the course of the 1996 proceedings that he knew his accomplice was in possession of a firearm for the purposes of the robbery; or (b) that there was no separate firearms offence on the indictment against him. The third issue, which arises whether or not we are satisfied that that the basis for sentence in 1996 was clear and the lack of admission or a separate firearms offence is relevant, is: what is the factual basis, in relation to the Adesoji Sanni robbery in 1996 on which HHJ Wide sentenced the appellant for the present offence of manslaughter? In this context, we will have to consider the effect of the exchanges between Judge Wide and Miss Cotcher QC in the course of her mitigation before sentence. Depending on the outcome of all those questions, we have to consider, finally, whether the sentence of IPP imposed by the judge was lawful or not and if it was not, what the consequences must be.

Issue one: the correct construction of paragraph 10 of Schedule 15A of the 2003 Act

36. We note first that the wording is not exactly the same as that in ***section 109(5)(h)*** of the ***2000 Act***. But, in our view, it is not materially different. Considering first the words of the paragraph, our clear view is that the words "the offender had in his possession a firearm" must be construed in the context of a criminal statute, so that the concepts of joint enterprise and joint possession would have been familiar to the draftsman. The words "his possession" are not qualified, as they would be if the paragraph had said "his sole possession" or "his actual possession". The words are sufficiently broad to cover the concept of joint possession in the course of a joint enterprise.

37. In the case of ***R v Flamson [2002] 2 Cr App R (S) 48 at page 208,*** a similar issue to the present one arose, only in the context of ***section 109(5)(h)*** of the ***2000 Act***. There the first of the two qualifying offences was a robbery in which the accomplice had an imitation firearm. The appellant pleaded guilty to that offence on the basis that he only became aware of the firearm, at the latest, when it was produced by his accomplice in the shop that they were both engaged in robbing.

38. It was argued before this court in that case that paragraph (h) of ***section 109(5)*** must be construed narrowly and that it did not encompass cases where there was a joint enterprise robbery and the other robber had the firearm. That submission was rejected. The judgment of the court was given by Mance LJ. The court adopted the reasoning in ***Attorney General's Reference No 71 of 1999 [1999] 2 Cr App R (S) 369 at page 372-3.***

39. In ***Attorney General's Reference No 71 of 1999 [1999] 2 Cr App R (S) 369*** at ***372 – 3,*** Judge LJ said in relation to section 2(5)(h) of the Crime (Sentencing) Act 1997:

> "*Looking at section 2 as a whole we reject the suggestion that there is any basis for treating it as excluding any offence committed as part of the joint enterprise. It follows from the tabulation of qualifying offences that an offence committed as part of a joint enterprise may fall within the definition. If it had been intended to exclude* ****373*** *criminal activity in the form of a joint enterprise the statute would not have been drafted as it was. In a joint enterprise the question whether the offence falls within section 2(5)(h) depends on the basis of the offender's participation. If he was party to a robbery which to his knowledge involved the possession of a firearm, or imitation firearm, by one or more of those involved, then in our judgment he was convicted of a qualifying "serious" offence. If on the other hand, the offender was a joint participant in a robbery in which others produced or used a firearm or imitation firearm, contrary to his own understanding and belief about the nature of the robbery in which he had agreed to participate, we very much doubt whether his offence would have qualified for the purposes of paragraph (h). He would not have participated in the possession of the firearm*."

40. In ***Flamson***, this court held that the effect of this, as applied to ***section 109(5)(h)***, was that joint possession of a firearm in the course of a robbery was sufficient to come within its terms, provided that the offender was a party to a robbery which to his knowledge involved the possession of a firearm or imitation firearm by one or more of those involved. That decision was not doubted when considered by this court in the subsequent case of ***R v Townsend [2004] 1 Cr App R (S) 47*** at ***page 281.***

41. ***Flamson*** (but not ***Townsend)*** was also considered by this court in the case of ***R v Benfield and Sobers [2004] 1 Cr App R (S) 8 at page 109,*** where the judgment of the court was given by Lord Woolf CJ. Although the Lord Chief Justice made comments about aspects of ***Flamson*** on the facts (and noted that a previous House of Lords decision, ***R v Courtie [1984] AC 463,*** and a decision of the Court of Appeal (Criminal Division) in ***R v D (1993) 14 Cr App R (S) 776)*** had not been cited to the court in ***Flamson),*** it was not suggested that the construction of ***section 109(5)(h)*** adopted by the court in ***Flamson*** was wrong.

42. So far as we are aware (and counsel have not drawn our attention to any) there are no

Court of Appeal decisions on the construction of ***paragraph 10*** of ***Schedule 15A*** under the amended ***CJA 2003***. Given our view on its construction (in principle) and the uniform view of this court on the construction of the very similar wording of previous statutes, we conclude that paragraph 10 is wide enough to embrace joint possession in the course of a joint enterprise robbery, even if the offender being sentenced under the provisions of section 225(3A) of the ***CJA 2003*** had not had actual possession of the firearm in the course of the robbery in issue. However, it must be established or admitted that the offender was a party to the robbery which to his knowledge involved the possession of a firearm or an imitation firearm by one or more of those involved in the robbery.

Issue two: what was the basis for conviction and sentence by the Crown Court in relation to the Adesoji robbery in 1996?

43. There is no transcript of the prosecution opening of the facts; nor is there one of the sentencing remarks of the judge. There is no record of any basis of plea by this appellant. The Crown Court judge sentenced the appellant to 7 years on all four robbery counts. There was no separate firearms offence count on the Indictment and so there was no conviction or sentence on such a count. All we have is the various summaries that we have referred to above.

44. Counsel has not found any cases which give guidance on the proper approach of the courts to ***section 225(3A)*** and ***paragraph 10*** of ***Schedule 15A*** of the ***CJA 2003*** as amended in circumstances where there may be doubt on whether a previous robbery offence was committed when the offender had a firearm or imitation firearm in his possession at some time during he commission of the offence. However, as we informed counsel, there are a number of cases where this issue was considered in relation to ***section 109(5)(h)*** of the ***2000 Act.***

45. In ***Benfield and Sobers (supra),*** Lord Woolf CJ emphasised that, under section 109 of the 2000 Act, the serious consequence of a conviction for two "serious" offences was that the offender would be liable to an automatic life sentence (absent exceptional circumstances). Therefore, for the purposes of deciding whether the court considering a sentence under ***section 109*** had the power to do so, Lord Woolf CJ said it was imperative that the position about the possession of a firearm in the course of a robbery be "abundantly clear" from what happened in the court dealing with that offence. It did not matter whether the robbery (with a firearm) was the later offence or the earlier offence, great care had to be taken: see paragraph 14 of the judgment. Lord Woolf CJ also said: "If there is doubt about the position, whether it is the subsequent or the prior offence which is in issue, the matter must be resolved in favour of the defendant": see paragraph 15. The Lord Chief Justice noted that new legislation would do away with this problem. Well, as a result of the ***2008 Act*** it appears that the problem has now returned.

46. This issue was reconsidered in the subsequent decision of ***R v Hylands [2005] 2 Cr App R (S) 25*** at page 135. Rix LJ gave the judgment of the court. He reviewed the cases of:

R v Eubank [2002] 1 Cr App R (S) 4 at page 11; ***R v Murphy [2003] 1 Cr App R (S) 39*** at page 181; ***R v Flamson [2002] 2 Cr App R (S) 48*** at page 208; and ***R v Benfield and Sobers[2004] 1 Cr App R 8*** at page 109. At paragraph 24 Rix LJ summed up the effect of all those cases on when ***section 109(5)(h)*** of the ***2000 Act*** was effective in these terms:

> "….
>
> *24. On this basis, s.109(5)(h) will only be held to apply if the defendant has admitted before the Court that he had a firearm in his possession during the robbery, or if the jury return a specific verdict establishing that fact. Neither occurred in this case*."

47. In our view the facts of the case of ***Flamson*** are important, because they have similarities with the present case. In March 1999 the appellant pleaded guilty to one count of causing grievous bodily harm with intent to do grievous bodily harm. In July 1997 he had been convicted of the robbery of a chemist's shop where his accomplice produced a "gun" (which was an imitation firearm in fact) in the course of the robbery.

48. Before the sentencing judge in 1999 the Crown outlined the facts of the robbery offence. Counsel said that the appellant had said that he did not know that his accomplice had the imitation firearm until it was produced but when it was he carried on with the robbery, thus knowing at the time of the offence that his accomplice had an imitation firearm. Counsel for the appellant at that hearing said he could not argue against that; the basis of his plea was specific. So the judge concluded that the circumstances were within ***section 2*** of the ***1997 Act*** and that there were no exceptional circumstances. He therefore sentenced the defendant to life imprisonment with a minimum term of 2½ years.

49. In the Court of Appeal a transcript of what occurred at the sentence in July 1997 was produced and analysed. This court concluded that the effect of the various exchanges between the sentencing judge in 1997, counsel for the Crown and counsel for the appellant and his co-accused was that counsel for Flamson clearly acknowledged that Flamson knew that his co-accused was carrying an imitation firearm before the robbery commenced, although he did not know that violence was likely to be used in the robbery other than threatening with the sight of the gun.

50. Now, two things are clear from the facts of ***Flamson*** that are relevant to the present case. First, at the time of sentence of the first offence, ie. the robbery offence, the appellant, through his counsel, accepted that an imitation firearm was used by his co-accused in the robbery and that the appellant knew that it was being used before the robbery started. Secondly, that at the time of the second offence, when the sentencing judge was considering whether he had power to sentence under ***section 2*** of the ***1997 Act***, counsel for the appellant also accepted that the facts of the robbery offence brought the situation within ***section 2(5)(h)*** of the ***1997 Act***.

51. When we consider the facts of the present case, we think that it may well be a legitimate

inference from the materials that we have that the judge sentencing the appellant for the robbery offence in 1996 must have done so on the basis that this was a joint enterprise robbery in which the appellant knew that his accomplice had a handgun in his possession before the robbery started and was carrying it for the purposes of the Adesoji Sanni robbery. However, we accept that this is not "abundantly clear" from the material, to use Lord Woolf's phrase in ***Benfield and Sobers.***

Issue Three: what is the factual basis on which HHJ Wide QC passed sentence for the present offence of manslaughter?

52. The effect of the exchanges with Miss Cotcher QC which we have set out above is, we are satisfied, that she and through her, the appellant, was accepting that the Adesoji Sanni robbery in 1996 was a joint enterprise robbery with the use of a handgun. It is implicit in that acceptance that the appellant also accepted that he knew his accomplice had in his possession the handgun for use in the robbery. Although the appellant attempted to interrupt Judge Wide whilst he was passing sentence, it is clear that the objections that the appellant was making were directed to issues concerning the manslaughter offence. They did not relate to the question of whether or not he knew about his accomplice having the handgun before and during the 1996 robbery.

53. At the subsequent hearing on 8 May 2009, Mr Jeffries QC, appearing for the appellant, accepted that the effect of Miss Cotcher's answers to the judge on 2 March 2009 was such that she was admitting, on behalf of the appellant, that the 1996 robbery was "a joint enterprise robbery in which a firearm was used": see transcript at page 5H. It seems to us that, on the basis of the decision of this court in ***R v Flamson,*** the appellant must be bound by that admission and that is enough for the purposes of ***section 225(3A)*** and ***paragraph 10*** of the ***CJA 2003,*** unless there is some basis on which we can go behind the admission.

54. There is a degree of conflict between the affidavit of Amanda Francis, the affidavit of Mr Kirk and the two notes of Miss Cotcher QC. However, we note (as did the judge at the hearing on 8 May 2009) that at no stage during the sentencing exercise on 2 March 2009 did either the appellant, or Mr Kirk or Miss Francis try to interrupt Miss Cotcher's exchanges with the judge.

55. We have looked very carefully at the affidavits of Miss Francis and Mr Kirk. There was no suggestion at the time that Miss Cotcher misunderstood the position or her instructions or that what she was agreeing to about the facts of the Adesoji Sanni robbery was incorrect. What are now said to have been the instructions of the appellant at the time are not, in our view, inconsistent with a situation where the appellant had no gun himself but his accomplice did have one, but the appellant knew he did before and during the robbery. It is instructive to note that when Mr Jeffries QC appeared for the appellant before the judge on 8 May 2009, he told the judge that the appellant did not remember whether there had been a basis of plea at the time of sentence in 1996: see transcript page 9B. Mr Jeffries also said that the appellant "can't remember and he can go no further than that". Judge Wide then asked the very pertinent question: "…

leading counsel on instructions told me that this was a joint enterprise robbery with a firearm. Why shouldn't I accept what leading counsel told me on instructions?". Mr Jeffries replied: "I appreciate that is a difficulty".

56. In our view, although we cannot conclude, on the material available in this case, that the basis on which the judge passed the sentence for robbery in 1996 is "abundantly clear", the basis on which Judge Wide passed sentence in 2009 is "abundantly clear". It was based firmly on what leading counsel for the appellant told him, based on instructions. We have considered most carefully the affidavits of Miss Francis and Mr Kirk, the notes of Miss Cotcher QC and the transcript of the hearing of 8 May 2009 and the statements made by Mr Jeffries QC to Judge Wide in that hearing. We have concluded that there is no proper basis on which we can hold that Miss Cotcher did not correctly represent her instructions, or that she misunderstood them in some way. Nor, on all the material we now have, can we see any legal basis on which we can go behind Miss Cotcher's acceptance that the 1996 robbery was a joint enterprise with the use of a firearm, ie. with the knowledge of the appellant that his accomplice had a firearm for the purposes of the robbery. We think that we could only do so if her actions were so unreasonable that no counsel in her position would have acted as she did or that her actions were such that the appellant was denied "due process" and so had not had a fair sentencing hearing: see ***Blackstone's Criminal Practice (2010): para D 25.19.*** On the material we have seen, we are quite satisfied that those tests are not fulfilled; far from it.

57. Therefore, we conclude that the factual basis on which Judge Wide passed sentence was that the appellant admitted, through his counsel, that he was convicted in 1996 of a robbery, which was a joint enterprise in which his accomplice had a gun in his possession and that the appellant knew that fact before and during the robbery.

Issue Four: in the light of the conclusions on issue 1 -3, was the sentence of IPP passed by HHJ Wide QC lawful?

58. It is important for this purpose to go back to the precise wording of ***section 225(3A)*** and ***paragraph 10*** of ***Schedule 15A*** of the ***CJA 2003.*** A sentence of IPP can only be passed by the judge on the bases of those provisions if, at the time that the second "serious" offence was committed, the offender had been convicted of an offence as set out in ***paragraph 10*** of ***Schedule 15A.*** It is clear, on the authority of ***R v Flamson (supra)*** and ***R v Benfield and Sobers (supra),*** that the fact that an offender has been convicted of an offence that is within the wording of ***paragraph 10*** can be established by the admission of the offender in the sentencing proceedings concerning that robbery. In our view there is no legal bar to an offender admitting in the sentencing proceedings at the time of the second "serious" offence that the facts of the earlier offence fall within the terms of ***paragraph 10*** of ***Schedule 15A*** of the ***2003 Act.*** If the sentencing judge is satisfied that the offender has clearly made that admission (which will almost invariably be through counsel), then provided that all the other pre-conditions of ***section 225(1)*** have been fulfilled, the judge must be entitled to sentence the offender to IPP.

59. We are satisfied that was the position before Judge Wide. Therefore, the pre-conditions for him being entitled to exercise the power to pass an IPP pursuant to ***section 225(3A)*** did exist. He was entitled to exercise that power.

Conclusion

60. HHJ Wide QC lawfully passed a sentence of IPP. This appeal is therefore dismissed.