Sentencing: 40 years back, 40 years on

Judge John Samuels looks at the development of sentencing and its potential to contribute to improved outcomes.

'Borstal training, Borstal training, Borstal training'. That repeated litany, uttered less than 180 seconds apart (interspersed with 'three years imprisonment' in the case of the adults), in Court 1 of Inner London Sessions, is etched into my conscious memory of my formative years at the Bar, over 40 years ago. By happy coincidence I recently discovered in a second-hand bookshop in Hay-on-Wye an essay on *Sentencing in Transition*, published under the auspices of the ISTD (the former CCJS). That essay drew attention to the then recent trend of social enquiry reports which provided invaluable background information to the court on the offender; but commented gloomily that in the magistrates' court the use of probation reports being requested was the exception rather than the rule. "The standard source of information is the police officer's statement" (Jarvis 1964).

In 2006 the use of such reports (now the Pre-Sentence Report) has gone to the other end of the spectrum. A problem for the hard-pressed Probation Service has become the over frequent recourse to requesting such reports, particularly in the magistrates' courts, when objectively such reports are unnecessary, and the offence can appropriately be dealt with by way of fine or discharge. Probation Officers similarly criticise, with justification, the "all options" requests for reports, where objectively the case does not pass the custody threshold; and, but for this request, a fast-delivery report could have been supplied at minimal expense of time and effort. (A recent useful initiative by the Justices' Clerks Society, the Magistrates' Association and the National Probation Directorate has obliged sentencers in the magistrates' court to complete a pro forma when requesting a PSR, which identifies the focus of the report and compels the magistrates to identify with precision why such a report is required. The form is not in use in the Crown Court.)

My theme, however, is to comment on the still far too limited extent to which sentencers, particularly in the Crown Court (where my experience lies), devote the necessary judicial resources to addressing both the appropriate sentence for the offender; and the supervision which that sentence requires. Unless a step-change can be introduced in sentencing practice, attempts to address re-offending, which is a current Home Office strategy, will fail. This is particularly true for persistent offenders, mainly young males aged between 16 and 25, who find themselves regularly serving short custodial sentences and are reconvicted and re-sentenced to similar short sentences until they are seen to grow out of it. Furthermore the imposition of such short sentences will prove to be self-defeating as those who receive them will be prime candidates for executive release should prison overcrowding demand such a step.

Judges at all levels, particularly those who sit routinely in the Crown Court, tend to be fascinated by the trial process, and will devote as many days, weeks or months to the determination of guilt as the allegation requires. Should the defendant be convicted, the judge will devote considerable care and attention to his sentencing observations, to ensure that he has correctly navigated the labyrinthine paths of current sentencing structure and has avoided the elephant traps which so many criminal justice statutes have installed along that route. But despite all this professional judicial care bestowed on the trial process, and sentencing when required at its conclusion, few judges are as involved as they should be in sentencing 'outcomes'. By 'outcomes' the following non-exhaustive list of desiderata are to be included:

- If the offence was motivated by some problem issue – drug or alcohol addiction, mental ill-health or a domestic background – to what extent if any will the sentence of the Court make it more likely that the issue will be addressed?
- Will a custodial sentence of the given length, coupled with a period of supervision on licence (if available) make it more likely that the offender will refrain from future similar patterns of offending?
- Would appropriate alternatives to custody be more likely to address the causes of this person's offending behaviour than mere temporary deprivation of liberty?
- How far does the sentence comply with the statutory purposes of sentencing?
  (Section 142, *Criminal Justice Act 2003.*)

Only since the introduction of Drug Treatment and Testing Orders which came generally into force in October 2000 have sentencers had the advantage of discovering how those whom they have sentenced have in fact responded to the orders which they have made. (This was under Section 61 *Crime and Disorder Act 1998*; now a Community Order

with a Drug Rehabilitation Requirement: Section 177, *Criminal Justice Act 2003*.) The use made of these orders in the Crown Court could generously be described as at best patchy. The majority of Crown Court sentencers still regard such an order as unlikely to succeed and the conduct of the reviewing role as an imposition. It is suggested that this is an enormous error and a missed opportunity. Drug treatment courts in other common law jurisdictions (there are over 1200 such courts in the United States alone, and the author has direct experience of those in Glasgow, Dublin, Toronto and Vancouver, as well as the Dedicated Drug Court in West London and the Liverpool Community Justice Centre), show affirmatively that in a significant number of cases such orders are effective and wean those subject to them off drugs. Even if they do not do so in the long term, they reduce to a marked and significant extent the commission of acquisitive offences to support a drug habit. The judges who sit in such courts speak with a single voice about the high importance which they attach to the regular review by the same sentencer of such an order. The periodic review permits the establishment of a bond of support between sentencer and offender which reinforces the offender's determination to overcome the addiction.

However, the community order with a drug rehabilitation requirement is but one of the available interventions which are alternatives to custody under the *Criminal Justice Act 2003*. The beneficial advantages of periodic review of such orders could be achieved if only Government were prepared to implement Section 178 of the *Criminal Justice Act 2003*. This provides that a community order may be reviewed periodically by that or another court, may enable a court to amend a community order by including or removing a provision for review by the court, and makes provision for the timing and conduct of reviews and the powers of the court on a review. It is to be emphasised that this Section has to be introduced by Order made by the Secretary of State. The government has no current plans to do so. Thus far the only order made relates to the Liverpool Community Justice Centre.

In the long-term similar beneficial advantages could be achieved were sentencers given the responsibility, as now occurs in Germany, to identify the licence requirements to be expected of those being released from determinate and indeterminate sentences of imprisonment and to exercise the powers of licence revocation and recall which are currently vested in the Probation Service, subject to review by the Parole Board.

Despite all this professional judicial care bestowed on the trial process, and sentencing when required at its conclusion, few judges are as involved as they should be in sentencing 'outcomes'.

In the space of a short piece it is impossible to do more than flag up ways in which the practice of sentencing could appropriately be modified and improved. That there is a current crisis in relation to sentencing practice is accepted, but the focus of attention is based primarily on the sentence pronounced on conviction and the extent to which it fails to match the expectations (and the comprehension) of the general public. If that focus shifted to bring into sharp relief the outcomes of such sentences, and how sentencers can contribute to outcomes which would both tackle re-offending and address the problems which led to the offending in the first place, we would begin to have a sentencing regime which looked 'fit for purpose'.

■

John Samuels *is a retired Circuit Judge. He was until his retirement Chairman of the Criminal Sub-Committee of the Council of Circuit Judges. He is a judicial member of the Parole Board; and has recently been appointed Community Justice Judicial Adviser for London.*

References

Jarvis, F.V. (1964) Inquiry before Sentence, Criminology in Transition, Essays in Honour of Hermann Mannheim. London: ISTD.