infringed by proceedings of this kind so long as the individual has access to the domestic courts to assert his right to liberty. Doubtless these conclusions will be challenged, but there are more fundamental points to question: is the Parole Board really "an independent and impartial tribunal"? Who should bear the burden of proof before the Parole Board? (And is the Parole Board adequately resourced for the inevitable flood of applications?)

The statutory provisions and subordinate rules governing the release, licensing and recall of prisoners have, as Lord Bingham points out, been the subject of "ceaseless change" over the past 10–15 years. Under sections 254 and 255 of the Criminal Justice Act 2003, in force for all prisoners subject to licence conditions on or after 4 April 2005 irrespective of the date of their offence, recall becomes more obviously an executive decision. This removes the previous anomaly whereby the Parole Board both advised on recalls and acted as an appeal body against those same recalls. It is time that lawyers, both academic and practising, paid much closer attention to the fairness (or otherwise) of these "back door sentencing" decisions.

NICOLA PADFIELD

CONSPIRACY AND RECKLESSNESS

IN 1977, Parliament tried to codify conspiracy, and made a hash of it. (For the unedifying tale of how this happened, see Sir Derek Hodgson in *Reshaping the Criminal Law* (essays in honour of Glanville Williams, edited by Peter Glazebrook, 1978).)

One of the doubtful points the Criminal Law Act 1977 leaves open concerns the mental element for the offence. It arises where the offence D allegedly conspired to commit can be committed recklessly: in particular, with recklessness as to some circumstance, like the absence of consent, or the fact that money handled represents the proceeds of a crime. In such a case, is D guilty of conspiracy if he was reckless, as he is for the completed offence? Or for conspiracy must the prosecution go further, and prove he was intentional (*i.e.*, that he did not just suspect, but knew)? In two recent cases, two differently constituted divisions of the Court of Appeal have reached opposite conclusions on this point.

In *R.* v. *Sakavickas and another* [2004] EWCA Crim 2686, [2005] 1 W.L.R. 857 the defendants were prosecuted for conspiring to commit an offence of money-laundering under section 93A of the Criminal Justice Act. This provision (now replaced by the Proceeds

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of Crime Act 2002) created an offence where a person "enters or is otherwise concerned in an arrangement" enabling another person to retain control of money, "knowing or suspecting that" this person has been engaged in criminal conduct. Convicted after a two-and-a-half month trial, the defendants appealed because the judge had directed the jury that the defendants were guilty if they knew "or suspected" that the money in question was "hot". The prosecution, they said, had chosen to charge them not with the substantive offence, but with conspiracy to commit it (obtusely, by the way—since making an agreement was in fact the actus reus of the complete offence). And for conspiracy, unlike the completed offence, suspicion was not enough and actual knowledge must be proved. This argument the Court of Appeal rejected: if recklessness would do for the completed offence, it would for conspiracy as well.

In *R.* v. *Harmer* [2005] EWCA Crim 1 the defendant had been tried and convicted for conspiracy to commit some different money-laundering offences—all, like those in *Sakavickas*, now superseded by the 2002 Act. For these offences, the defendant was guilty if he stored or handled money "knowing or having reasonable grounds to suspect" that it derived from crime.

The Court of Appeal quashed the conviction for a number of reasons. The one that concerns us here was that the prosecution had put its case, not on the basis that the defendants knew the money they were handling derived from crime, but on the explicit basis that they had "reasonable grounds to suspect". Put on this basis, said the Court of Appeal, the prosecution for conspiracy was bound to fail, because for conspiracy to commit an offence nothing less than intention (*i.e.*, knowledge) of the facts that make the conduct criminal will do: and this is so even where, as here, some lesser mental element, such as recklessness or negligence, is enough to make the defendant liable for completed offence. This they held without reference to *Sakavickas*—a case by then decided, but not yet reported.

So which court got it right?

Central to this question is section 1(2) of the Criminal Law Act 1977, which is as follows:

> Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of subsection (1) above unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will

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> exist at the time when the conduct constituting the offence is to take place.

The main purpose of this inelegant provision was, as every criminal lawyer knows, to make sure that where A and B agree to commit an offence of strict liability, their agreement constitutes a conspiracy only where they have mens rea: thereby preserving the position that the common law had reached, after some hesitation, in *R.* v. *Churchill (No. 2)* [1967] 2 A.C. 224. The effect of this subsection is, at the very least, to provide that where the substantive offence is one of strict liability, conspiracy is committed only where the alleged conspirators "intend or know" the relevant facts. In such a case, not only is strict liability excluded: even recklessness is not enough. But if this is so here, then (as Sir John Smith and other commentators have pointed out) intention or knowledge should be required *a fortiori* if the offence in question is not a strict liability offence, but one where negligence or recklessness is required. This common sense result needs no straining of the language, because the opening words of the subsection can be read as covering not only strict liability offences, but all offences where the defendant can be convicted on the basis of a mental state that falls short of actual knowledge. In the light of this, *Harmer* is to be preferred to *Sakavickas*.

In favour of the view that recklessness should be enough, it is possible to argue an analogy with attempt. Here, the courts decided long ago that where the completed offence can be committed with recklessness as to some surrounding circumstance, like absence of consent, a reckless defendant can be convicted of attempt: *R.* v. *Khan* [1990] 1 W.L.R. 813. It would be neat and tidy, it could be said, if the rule were uniform across all the inchoate offences.

But the analogy is not a good one. Conspiracy, unlike attempt, is an offence that risks stretching the long arm of the law a bit too far. The actus reus is minimal: a defendant is guilty merely because he agreed with someone to commit an offence, irrespective of whether anything was later done to implement it. If such a potentially oppressive offence can be justified at all, it is only where the acts agreed to are particularly dangerous and the persons involved are particularly wicked. For this reason, there is a strong case for restricting the offence of conspiracy to cases where the alleged conspirator is fully aware of all the facts that go to make his intended conduct criminal.

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