PUBLIC ANNEX B

Choi v The Queen

New South Wales Court of Criminal Appeal | June 1, 2007 | [2007] NSWCCA 150

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Opinions

Beazley JA

Hulme J

Hislop J

Appeal against conviction

Application for leave to appeal against sentence

Crown Case

Conviction Ground 1

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“Transcript 557

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Conviction Ground 3

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Conviction Ground 5

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“On 8 September 2004

On 13 September 2004

Sentence Ground 1

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Sentence Ground 3

“Hyeon Joon Choi

Matters of fact admitted by the Accused

Importation of narcotic goods

CJ Trade Consultants Pty Ltd

CJ Capital Pty Ltd

Departure from and return to Australia

Sentence - Ground 4

Sentence - Ground 1

Hyeon Joon Choi

Regina

Docket Number(s):2006/718

New South Wales Court of Criminal Appeal

4 August 2006

1 June 2007

Beazley JA HulmeHislop JJ

Crown: Mr R Sutherland SC
Appellant: Mr P Byrne SC
Crown: Michal Poberezny Comm DPP
Appellant: Giddy & Crittenden

Beazley JA
1 I agree with Hulme J.

Hulme J

2 On 13 September 2004 the abovenamed Hyeon Joon Choi (sometimes referred to as "John") was convicted of an offence under Section 233B(1)(d) of the *Customs Act 1901* (C'th) that:—

> "Between about 23 March 2001 and 5 December 2001 (he) … was knowingly concerned in the importation into Australia of prohibited imports… namely narcotic goods consisting of a quantity of 3, 4 methylenedioxymethamphetamine being not less than the commercial quantity applicable to methylenedioxymeth-amphetamine."

3 On 3 August 2005 he was sentenced by Judge Solomon to imprisonment for 20 years including a non-parole period of 13 years, both periods commencing on 8 May 2003.

4 He has appealed against his conviction and seeks leave to appeal against sentence. The grounds in these respects are:—

Appeal against conviction

1. The learned trial judge erred in admitting into evidence recordings of certain telephone conversations conducted in the absence of the appellant between persons who were alleged to be acting in concert with him: see the separate judgment of his Honour on the admissibility of the recorded conversations given on 18 August 2004.
2. The trial proceedings miscarried by reason of the manner in which the appellant was cross-examined by the learned Crown Prosecutor about the terms of the conversations referred to in ground one above, that is to say conversations to which the appellant was not a party, and in particular cross examination directed towards inferences that might be drawn from the things said in those conversations, and also inferences that might be drawn from things that were not said.
3. The trial proceedings miscarried by reason of the manner in which the learned Crown Prosecutor invited the jury, both in his cross examination of the appellant and in his closing address, to use in an impermissible way the evidence of the intercepted telephone conversations not involving the appellant.
4. The learned trial judge misdirected the jury as to the use which it could legitimately make of the content of the telephone conversations admitted into evidence, that is conversations to which the appellant was not a party, and in the warnings given to the jury about the manner in which that evidence should be scrutinised.

5. The trial proceedings miscarried by reason of the learned Crown Prosecutor misinforming the jury in the course of his closing address that they could rely on the fact of the plea of guilty by the witness Shepherd as corroboration of the truth of the evidence that he had given in the appellant's trial: see T30.35, 7 September 2004 and T33.7, 7 September 2004 and by reason of the fact that the learned trial judge apparently endorsed the submission made by the prosecutor that the evidence of the plea of guilty by Shepherd was available for this purpose.

6. The learned trial judge misdirected the jury as to the matters of which they had to be satisfied beyond reasonable doubt in order to convict the appellant of the offence charged against him, in particular the basis on which the jury might reach a conclusion of guilty by reference to the appellant's knowledge, acquired on 24 November 2001, of the presence of the prohibited drugs in the goods imported, and the appellant's actions on and subsequent to the events of 24 November 2001: see the directions given at SU22.4, 8 September 2004 and SU12.2, 13 September 2004.

7. The directions given by the learned trial judge on the meaning of the element of "importation" were, in the circumstances of the appellant's case, erroneous and inadequate: see summing up SU9.4, 8 September 2004 and SU 4.7, 13 September 2004.

Application for leave to appeal against sentence

1. The sentence imposed on the Applicant is manifestly excessive having regard to the objective facts and circumstances of the case, and the personal factors affecting the applicant that are relevant for the purpose of determining an appropriate sentence.

2. The learned judge erred in applying the principles of parity of sentencing by considering that the relative and relevant circumstances of the applicant and Loui Sukkar were approximately equivalent, thereby apparently failing to have regard to a serious additional charge relating to the distribution of drugs for which the offender Loui Sukkar was sentenced.

3. The learned judge erred in the assessment of an appropriate sentence by apparently failing to have regard to the fact that the applicant had saved a considerable amount of court time by making admissions in relation to various matters, which effectively relieved the prosecution of the burden of having to prove those matters, and demonstrated a willingness on the applicant's part to facilitate the course of justice: *Cameron v The Queen* [2002] HCA 6; (2002) CLR 339.

4. The learned judge erred in failing to give the applicant any benefit for the time spent in custody in Korea following his arrest on the charge on which he was ultimately tried in New South Wales: *Mill v The Queen* (1988) 166 CLR 59; and for the fact of his co-operation with authorities by not raising any challenge to his extradition: *AB v The Queen* (1999) 198 CLR 111.

5 During the Appellant's trial, no point was taken in respect of the issues raised by part of the 2nd, the 4th, 5th, 6th and 7th grounds of appeal against conviction and accordingly the Appellant needs leave under rule 4 of the Criminal Appeal Rules to rely on them. No leave was sought except to the extent to which the Court raised the issue and even then counsel contented himself with a bald submission, in the case of grounds 5, 6 and 7 that they were matters of fundamental importance and, in the case of the other grounds that, if they had merit, leave should be granted.

Crown Case

6 On 17 November 2001 a 40ft container arrived at Brisbane on the ship "Tauranga". It had been shipped from Antwerp on 15 October 2001 on the "Rotterdam Express". It was transferred to the Tauranga in Singapore.

7 On 20 November 2001 the container was searched by customs officers and found to contain the component parts of a deep freezer unit. Included within those parts were some 48 plastic columns containing some 408,000 tablets containing methylenedioxymethamphetamine, commonly and hereinafter referred to as "MDMA" or "ecstasy". The gross weight of the tablets was 123 kilograms and they contained 34.4 kilograms (pure) of MDMA. The commercial quantity prescribed under the Customs Act for that drug is 0.5 kilograms.

8 Customs officers removed most of the ecstasy tablets and replaced them with other tablets. However some 70 grams of the original tablets were left in each column. Delivery under surveillance was then permitted. From 21 November the authorities began to monitor telephone calls of those who were believed to be involved. Recordings and transcripts of something over 80 calls, in many but not all of which the Appellant was a participant, were admitted into evidence.

9 Still in Brisbane, the container was first moved to an organisation known as "Intergroup Shipping" who had been engaged by a Mr Shepherd. In turn the container was delivered to Mr Shepherd's warehouse on 23 November 2001. There it was opened by Mr Shepherd and a Mr Bourke.

10 The columns containing the tablets were removed and placed on the back of a truck that had been rented and which was then driven by Mr Bourke towards Sydney. Undisputed evidence showed that the truck effectively travelled in convoy with a rented Ford Sedan occupied by the Appellant and Loui Sukkar. At Kempsey Mr Sukkar assumed the role of driving the truck and the Appellant and Mr Bourke continued south

in the Ford Sedan. The truck went to premises at 84 Consett Street, Concord West, arriving there in the early morning of 24 November and the Appellant drove to his home in Monterey, a suburb of Botany Bay.

11 During the course of Saturday 24 November Loui Sukkar and his brothers Joseph and Steven unloaded the columns from the truck and placed them into a shed or garage at the rear of 84 Consett St. The Appellant visited those premises that day although there was no evidence he went into the shed.

12 Mr Shepherd gave evidence. He said that he had been running an import/export business; he had been approached by a Simon Prasad who informed him that he was involved with the Appellant in the import of drugs and asked for Mr Shepherd's assistance in the importation. Mr Shepherd said he agreed. On one occasion he flew to Sydney with Mr Prasad with a view to meeting with the Appellant. Mr Shepherd saw Mr Prasad meet the Appellant at the airport but Mr Prasad then told Mr Shepherd that the Appellant did not wish to meet him. Mr Shepherd detailed a number of discussions with Mr Prasad wherein mechanics of the importation were implemented and in the course of which Mr Prasad referred to the Appellant in terms indicating the latter's participation. A number of the documents incidental to the shipping and delivery of the freezer unit were directed to the Appellant or CJ Trade Consultants, a business operated by the Appellant, or indicated an interest of the Appellant or that organisation in the goods.

13 Mr Shepherd stated that he had pleaded guilty to being knowingly concerned in the relevant drug importation and been sentenced for that offence, receiving a discount for agreeing to assist the Crown.

14 The Appellant also gave evidence. It included the following. He said that in the second half of 2001 he was approached by Mr Loui Sukkar who sought and then received the Appellant's help in importing some industrial cool-rooms. In the course of discussions dealing with this proposal Mr Sukkar told the Appellant that there was another agenda and that it was to import diamonds that would be concealed in parts of the cool-rooms. He offered the Appellant $100,000 for bringing the shipment in successfully, payment to be made after a nominated jeweller had sold the diamonds. According to the Appellant he then spoke to Mr Steven Sukkar, asked if there was any possibility that drugs were involved and was assured that if that was the case Loui would say so. The Appellant said that his suspicions ceased at that time.

15 The Appellant decided that the importation should occur in Brisbane, contacted a Mr Simon Prasad, told him that someone he knew wanted to import something “a bit dodgy” and asked if he would be willing to accept it. The Appellant told Mr Prasad that

he could not tell him the nature of the goods but that they were definitely not drugs and offered to pay Mr Prasad $50,000 for the latter's help. In due course Mr Prasad said he would do as requested if it was not drugs. Some time later Mr Prasad told the Appellant he was to be working in Sydney, the Appellant asked what was to happen with the import and was informed that Mr Prasad had a partner who would be handling it. Subsequently quotes were obtained and there were discussions in that regard. At a time the Appellant placed as towards the end of September the Appellant advised Mr Loui Sukkar that he would require funds to send to Belgium for the purchase of the cool-rooms. The money was provided and in due course the Appellant transmitted funds overseas.

16 The Appellant was advised when the cool-rooms would be arriving and passed this information on to Mr Simon Prasad. He also asked Mr Loui Sukkar for funds for Customs payments and received these together with a mobile phone. In response to a query from the Appellant Mr Sukkar told him the phone was because Mr Sukkar was being cautious and it was to be used for the specific job.

17 When Mr Loiu Sukkar asked the Appellant for the names of the people in Brisbane or where to collect the goods, the Appellant gave him Mr Shepherd's phone number although the Appellant's evidence was that he had never had phone contact with Mr Shepherd or contacted him directly.

18 At Mr Sukkar's insistence the Appellant went to Brisbane to assist in the collection of the goods and at Mr Sukkar's request also engaged Mr Bourke to go to Brisbane to help in that regard. The Appellant informed the latter that Mr Loui Sukkar was doing something a bit dodgy. Mr Sukkar also provided Mr Bourke with a mobile phone.

19 As has been said, in Brisbane Mr Bourke was involved in unloading and then loading into the truck in which it was transported to Sydney the contents of the relevant crate. Recorded telephone conversations, contemporaneous with the unloading and in some of which the Appellant participated, indicate that some importance was placed on Mr Bourke ensuring that he obtained the “right one”.

20 According to the Appellant, on 24 November he received a phone call from Mr Loui Sukkar who said he had something important to tell the Appellant. The Appellant attended at 84 Consett St, where Mr Sukkar informed the Appellant that there was a big problem and that someone in Europe had ripped him off; Mr Sukkar said that he had opened the columns - later evidence made clear that it was only some of the columns that were opened at that time - in which the drugs were expected to be and that there was nothing but duds inside; Mr Sukkar also informed the Appellant that he had found out that morning that because diamonds had been unavailable ecstasy tablets had been

put inside the columns. According to the Appellant that was the first time he had heard about drugs.

21 A little later in the day Mr Joe Sukkar informed the Appellant that he was in a big mess with his partners in Europe and he needed the Appellant's help to prove that the Australian side was not responsible for events. Joe wanted the Appellant to obtain all of the documents and details of the movement of the container in Brisbane, a request to which the Appellant said he agreed conditional on the people in Brisbane being paid.

22 There was then conversation between the Appellant, Loui, Joe and Steven Sukkar. In the course of this the Appellant asked Joe if he knew it was drugs all along. Joe said he didn't but the Appellant did not believe him at that time. Asked by Joe if there was any chance that the people in Brisbane were responsible for taking the goods, the Appellant replied that that was impossible because Loui and the Appellant were there all the time.

23 In the period that followed, there were numerous conversations between one or other of the Sukkar brothers and the Appellant relating to the obtaining of paperwork showing in as much detail as possible the movement of the container in which the cool-room had been shipped. The Appellant was asked and agreed to obtain or assist in obtaining the documentation. There were a number of conversations in which the Appellant sought from Mr Prasad these documents.

24 The Appellant said in evidence that he had provided at least some of the documentation referred to but asserted that his only motivation was to get himself out of the situation he was in. He was concerned that he would be blamed by the people in Europe as he was the only person outside of the group that was involved that knew something dodgy was coming. He maintained that he had no intention of getting the drugs back.

25 By 24 November, the authorities had installed a number of listening devices and much of the evidence as to events of that day and later is contained in the recordings and transcripts of recordings made with the use of these devices and in the Appellant's evidence in respect of these conversations. That evidence has particular relevance to the 7th ground of appeal and its detail and other evidence of events after 24 November can be left for the moment.

26 The principal way in which the Crown advanced its case was that the Appellant was, if not the principal, at least a major player in the importation from the outset. Particularly after the Appellant asserted that he had believed that what was being imported was diamonds, the Crown contended that it could succeed upon an alternate basis, viz. that

the Appellant was made aware on 24 November that drugs had been imported and his actions thereafter amounted to concern in the importation.

Conviction Ground 1

The learned trial judge erred in admitting into evidence recordings of certain telephone conversations conducted in the absence of the appellant between persons who were alleged to be acting in concert with him: see the separate judgment of his Honour on the admissibility of the recorded conversations given on 18 August 2004.

27 In support of this ground for the Appellant referred the Court to *Ahern v R* (1988) 165 CLR 87 at 100 and contended that his Honour had failed to apply part of the test there laid down, viz. to initially determine the existence or otherwise of reasonable independent evidence of the participation of the accused in the alleged conspiracy and had also failed to take into account what was described as the fact of unfair prejudice in that the parties to the conversations could not be cross-examined and the conversations were conducted in Arabic of which the Appellant had no knowledge.

28 It is the fact that his Honour's reasons do not deal with the first of these matters. It was not raised by counsel then appearing for the Appellant, no doubt because there was a wealth of evidence of his involvement with the other participants in the conversations in the importation of the refrigeration components containing the drugs and which the Appellant, when he gave evidence, said he understood to contain diamonds.

29 The principal objection taken at trial to the admission of the evidence the subject of this ground was that the conversations occurred at a time after it became apparent that the drugs, or at least most of them, were missing, that any importation and any conspiracy or common enterprise in that regard had then ceased, and that what the parties were concerned with in the latter part of 24 November and subsequently was not importation but simply ascertainment of where things had gone awry or possibly merely the obtaining of the relevant documents in order to show the European suppliers that this had not occurred in Australia. Referring to remarks of Gleeson CJ in *Ruth Joy Leff* (1996) 86 A Crim R 212 and *Phil Kim Phieu Lam* (1990) 46 A Crim R 402 as to the breadth of the concept of importation, the trial judge took the view that requests for documentation were part of a process undertaken to locate the missing drugs and the Appellant's actions in obtaining the shipping documents were directly related to the importation into Australia of the drugs and thus relevant. See also *R v Courtney-Smith (No 2)* (1990) 48 A Crim R 49 at 65, *R v Su* (1997) 1 VR 1 at 43.

30 It will be necessary later in these reasons to consider the correctness of these views. However, whether a common purpose of importation was then on foot or not, there can be no doubt that at the time of the conversations there was a common purpose in those participating in the relevant conversations to obtain at least the paperwork and information relating to the importation. Section 87(1) of the Evidence Act provides:—

> "For the purpose of determining whether a previous representation made by a person is also taken to be an admission by a party, the court is to admit the representation if it is reasonably open to find that:—
>
> (a) when the representation was made, the person had authority to make statements on behalf of the party in relation to the matter with respect to which the representation was made; or
> (b) when the representation was made, the person was an employee of the party, or had authority otherwise to act for the party, and the representation related to a matter within the scope of the person's employment or authority; or
> (c) the representation was made by the person in furtherance of a common purpose (whether lawful or not) that the person had with the party or one or more persons including the party."

31 Given the evidence of pre-concert and common purpose, the recordings were admissible under this statutory provision.

32 Furthermore, there could be no reasonable basis for excluding the evidence under ss 135 or 137 of the Evidence Act. The evidence was material towards proving the Appellant's active involvement - a fortiori if account is taken of his own evidence that it was only on or about 24 November that he discovered the subject of the importation was drugs; there was nothing of a nature unfairly prejudicial about the evidence and the principal objection applies in most if not all cases where evidence of the nature here is sought to be tendered. Nor is there any substance in a further objection, viz. that the conversations were in a foreign language.

Conviction Ground 2

The trial proceedings miscarried by reason of the manner in which the appellant was cross-examined by the learned Crown Prosecutor about the terms of the conversations referred to in ground one above, that is to say conversations to which the appellant was not a party, and in particular cross examination directed towards inferences that might be drawn from the things said in those conversations, and also inferences that might be drawn from things that were not said.

33 When objection was first taken his Honour ruled that the cross-examiner could not put what was in the speaker's mind but could ask the Appellant to draw a conclusion from what he heard and later that the prosecutor could ask the Appellant whether he had any idea why Joseph (whose recorded remarks were at that time the subject of questioning) said something. Nevertheless, there were a number of further questions (generally not individually objected to) as to the speaker's meaning. Some invited a concession that when the speaker referred to "the Chinese" he was referring to the Appellant (who is Korean), but others were wider. In all there were something of the order of 12 telephone calls to which the Appellant was not a party about which he was cross-examined.

34 Examples of the questions to which exception is taken under this ground include the following:—

> **"Transcript 557**
> Q. Mr El-Hani says 'Calm him down this week… I mean he has a payment that he needs to make to the company'. I suggest to you that (sic) Mr Choi that what's being referred to there is part of your role in the importation of drugs?
>
> A. No sir, that's incorrect.
>
> **Transcript 591**
> Q. (After referring to an extract from a recording wherein Joseph is heard to say "But now I'm in a bad situation. Now I don't know what I even got to do with this, ah, the person who got the things inside.) Why would Joseph say that you were the person who got the things inside?
>
> A. I don't know why Joseph said that sir.

Transcript 593-4

Q. And you know from reading over the calls, don't you, that Joseph had made it clear that (sic) the people in Europe, that he didn't believe you had done it, because his brother Loui had been there with you?

A. Yes sir, …

Q. And I suppose you would say that Joseph is just lying or forgetting to say: 'Well look, he didn't even know about the drugs. I didn't tell him until last Saturday'?

A. I don't know why he didn't say that.

Q. There's no reference to that, is there?

A. As I said, I wasn't a participant in this conversation.

Q. Can you offer any explanation as to why the Europeans think you might have taken the drugs if you didn't know anything about the drugs?

A. I don't know sir.

Q. They seem, don't they, to regard you as being part of the deal, don't they?

A. If that's what Joseph told him, I'm not sure, sir.

Transcript 709

> Q. Do you have any explanation as to why on page 5 Loui said, 'he knew what was coming' if it's the fact that you didn't know what was going?
>
> A. I don't know he said that. I don't know why he said no information and then he changed it, I don't know.
>
> Q. Do you have any explanation as to why Loui didn't say I just told John a whole lot of stuff about diamonds, he didn't know what was coming?
>
> A. I don't know."

35 In support of this ground for the Appellant submitted that the form of questioning was akin to putting to one witness that his evidence was contrary to that of another, so as to in effect invite the former to express an opinion as to the truthfulness of the second - a course prohibited by, for example, *R v Enrico Praturion* (unreported, NSWCCA, 29 November 1985), and *North Australian Territory Company v Goldsborough Mort & Company* (1893) 2 Ch 381 at 385 - and likewise to asking an accused charged with some sexual assault, "Why would the complainant in the case lie?". The latter form of questioning has been criticised in a number of cases of which a recent one is *Palmer v R* (1998) 193 CLR 1.

36 The first of the Appellant's submissions fails to recognise the differences in the situations. Thus while it was said in *R v Enrico Praturion*:—

> "(There is) a comparatively elementary rule of cross-examination, namely that it is not permissible to put to one witness that proposition that the evidence of that witness is to the contrary of the evidence of other witnesses, so as in effect to invite a witness to express an opinion as to whether other witnesses are telling the truth."

in the situation here the Appellant was being cross-examined not about oral evidence given during the course of proceedings but about statements made by apparent co-offenders during the course of what prima facie were the common purpose activities with which the Appellant was charged and recordings of which had been admitted into evidence.

37 Furthermore, s 44 of the Evidence Act expressly contemplates that there may be cross-examination on previous representations - defined in the dictionary to the Act to mean "a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced" - made by persons other than the witness being cross-examined, so long as evidence of the representation has been admitted or the court is satisfied that it will be.

38 It must also be borne in mind that a party to proceedings is entitled to make admissions about matters of which he has no, or little, personal knowledge. Furthermore, although s 184 of the Evidence Act provides that:—

> "In or before criminal proceeding, a defendant may, if advised to do so by his or her lawyer:
>
> (a) admit matters of fact …"

the section is not directed to the circumstances of an Accused while giving evidence.

39 An element in the case which the Crown had to prove was knowledge in the Accused that the goods being imported were drugs. Ignorance on the part of the Appellant of the nature of the goods or, as he maintained when giving evidence, that he had been informed by Loui Sukkar they were diamonds, would clearly have been a relevant matter to raise in the course of the discussions between the Sukkars on the one hand and the Europeans on the other as to who may have been responsible for the disappearance of the drugs and, one may add, their replacement by thousands of innocuous substitute tablets that someone expecting diamonds would be unlikely to have to hand - particularly when the Appellant was being considered to be a suspect.

40 The absence of any reference by the Sukkars in these discussions to the Appellant having been told that the contents of the imported containers were diamonds and to him never having been told that drugs were being imported was also clearly a matter that could be raised in argument to the jury as a reason why they should not accept his evidence as to his ignorance of drugs.

41 I turn to the comparison with the asking of an accused in a sexual assault case as to "Why would the complainant lie?". The principal reason for excluding such questions appears in the following passage from the reasons of Brennan CJ, Gaudron and Gummow JJ in *Palmer v R* at 7:—

> "But the fact that an accused has no knowledge of any fact from which a motive of the kind imputed to a complainant in cross examination might be inferred is generally irrelevant. In general, an accused's lack of knowledge simply means that his evidence cannot assist in determining

> whether the complainant has a motive to lie, but if the facts from which an inference of motive might be drawn are facts that the accused would know if they existed, his lack of knowledge could be elicited to disprove those facts.
>
> If it were permissible generally to cross examine an accused to show that he has no knowledge of any fact from which to infer that the complainant has a motive to lie, the cross examination would focus the jury's attention on irrelevancies, especially when the case is 'oath against oath'. In such a case, to ask an accused the question: 'Why would the complainant lie?' is to invite the jury to accept the complainant's evidence unless some positive answer to that question is given by the accused."

42 The substance of those remarks applies to the circumstances here. The Appellant had denied having, prior to 24 November, any knowledge of the drugs. It was certain that he would not give, to take the questions at transcript 593-4 as an example, as an explanation for the absence of any statement by Joseph that the Appellant did not know about drugs or as an explanation for the Europeans thinking he might have taken the drugs, that he had in fact known about them and in the circumstances it is difficult to see how any inability or failure to explain why those persons did or omitted to do what the questions referred to could have assisted in the determination of the case.

43 The Crown submitted that "A failure to invite the accused to advance any explanation for the absence of any reference to the 'innocent' explanation in those conversations - namely that he did not have any knowledge of the presence of the drugs and had believed that diamonds were being smuggled - may have left the Crown open to criticism pursuant to *Browne v Dunn* (1893) 6 Rep 67." The submission must be rejected. Before the Accused's evidence in chief the recordings of the telephone conversations were in evidence. His own counsel thus had the opportunity to obtain from the Accused any explanation he was able to advance and his failure to do so enabled the Crown to submit that the absence of any explanation led to the inference the Appellant had none.

44 I can accept that it was legitimate for the Crown prosecutor to seek to have available to the jury not only the argument that the Appellant did not provide any innocent explanation for the conversations and thus it should be inferred he could not, but also admissions by the Appellant to the latter effect and accordingly I do not regard all of the questioning as illegitimate. Nor, given the extent of the other issues in the case and the ambit of the Appellant's evidence, do I take the view that there was any risk that this questioning became or was close to becoming the "central theme" in the case or

would focus the jury's attention on irrelevancies. Nevertheless, when regard is had to the limited probative value repetition of the theme had, the questioning the subject of this ground should have been much less extensive than it was and, had objection been taken to its continuation, the questioning should have been excluded under s 135 of the Evidence Act.

45 However, no such objection was taken. The objection taken earlier had properly been overruled and did not extend to the topic of repetition. The error was a minor matter in the context of the trial and I would refuse leave for it to be raised.

Conviction Ground 3

The trial proceedings miscarried by reason of the manner in which the learned Crown Prosecutor invited the jury, both in his cross examination of the appellant and in his closing address, to use in an impermissible way the evidence of the intercepted telephone conversations not involving the appellant.

46 The substance of the complaint the subject of this ground was that on numerous occasions, and in terms that provided a deal of emphasis of the point, the Crown Prosecutor had, in his closing address, submitted to the jury that the actions and words of the participants in the recorded telephone calls were consistent with the Appellant being knowingly involved and inconsistent with him being an innocent dupe. Repeatedly it was pointed out that there was not mention in those conversations of the Appellant not knowing about the drugs or thinking that the objects involved were diamonds. It was submitted that “the strength of the Crown case is thus said to be in what was not said by other parties regarding the knowledge of the Appellant”.

47 However, the documents relied on in the Crown's submissions were in evidence and thus could be used as a basis for any argument they reasonably supported. I have already indicated that the absence of any reference in the recorded conversations to ignorance on the part of the Appellant that what was being imported was drugs and to the Appellant having been informed or believing that the items were diamonds is a legitimate argument against the Appellant and accordingly this ground of appeal fails.

Conviction Ground 4

The learned trial judge misdirected the jury as to the use which it could legitimately make of the content of the telephone conversations admitted into evidence, that is conversations to which the appellant was not a party, and in the warnings given to the jury about the manner in which that evidence should be scrutinised.

48 The remarks of his Honour to which exception is taken were:—

> "The Crown submitted that the actions and words of others are consistent with the accused being knowingly involved in the importation of narcotic drugs.
>
> The Crown submitted that the telephone calls not involving the accused also indicate the accused's involvement in the drug importation and his knowledge that it was drugs.
>
> The Crown suggested to you that you consider his (the accused's) evidence in the light of the following:
>
> (1) Why was there no mention of diamonds by anyone else in this case?
> (2) Why has there been no mention by anyone, apart from the accused, of the accused being duped?
>
> Finally the Crown submitted that the diamond story is not mentioned by anyone at any time in the evidence in this case and that you should dismiss it …."

49 It was submitted that in directing the jury as to how they may use evidence of what other people had said in the absence of the accused, the learned judge failed to give the jury appropriate caution about the difficulties associated with evidence of that kind; none of the parties to the conversations in question were called as witnesses in the case; and some of them were people whose identity was vague and uncertain, people who had never come to Australia and with whom there was not direct association established with the appellant. It was further submitted that the difficulty faced by the appellant in dealing with the cross-examination was not made sufficiently clear to the jury.

50 In fact, after directing the jury as to the need for caution before accepting the evidence of Shepherd, in terms about which no complaint is or could be made, the trial judge

made the following remarks:- (Here, and elsewhere in these reasons, I quote in the terms appearing in the appeal books.)

> "I now wish to give you a direction regarding how you deal with the conversations contained in the telephone intercepts which were made in the absence of the accused. In this regard the Crown relies on conversations recorded in the intercepts in which the accused was not a party. I direct you that as with the evidence of Shepherd, this evidence is admissible in the proceedings and you should carefully scrutinise this evidence before you accept it in supporting the guilt of the accused.
>
> That evidence may be unreliable and there are a number of reasons for this. First, there has been no opportunity for the accused to cross-examine participants to the conversations including Louis Sukkar, Joseph Sukkar, Steven Sukkar, Simon Prasad, and Antoun El-Hani. Second, even if you accept that the statements the parties recorded on the telephone intercepts implicate the accused, this still does not necessarily follow that these persons are telling the truth.
>
> Thirdly, those persons are persons who are criminally involved in the matter and may have a motive to lie. Their motives could not be tested in cross-examination. Fourthly, conversations recorded in telephone intercepts take place in an environment in which there had been a controlled operation in substituting ecstasy pills and there are clear attempts by various parties to avoid blame and to shift blame onto other parties. These people may have motives to lie. One motive may be that perhaps the fear of recrimination. Fifthly, there was no opportunity for you to see those persons to have their evidence tested in cross-examination. Sixthly, some of the intercepts were spoken in Arabic and what you have is a transcript of the conversations. That being the case, you are denied the opportunity to assess the intonation, phrasing and tone of the words used.
>
> I warn you of the need for caution in determining whether to accept the evidence of the telephone intercepts in which the accused did not participate and the weight to be given to that evidence."

51 There was a delay in the completion of the summing-up due to the illness and ultimate discharge of a juror and when the summing up continued some 5 days later, his Honour added the following:—

> "I gave you the weaknesses of hearsay evidence which may also be considered in relation to the telephone calls which the Crown relies upon between the Sukkar brothers and the Europeans. I say to you, again, as I said before, that the need for caution to determine whether you accept that evidence. Again, those persons were not called as witnesses and their evidence could not be tested. In addition to that, they were obviously criminally involved in the importation and for the reasons I gave you on Thursday, their evidence may not be reliable evidence.…
>
> So, again I warn you of the need for caution in determining whether to accept the evidence of Shepherd. I warn you of the need for caution in determining whether to accept the evidence of the telephone conversations, and I say to you before you do accept it, if you decide to accept it, you should scrutinise the evidence of Shepherd with great care and you should also scrutinise the evidence of the telephone intercepts with great care."

52 There was no complaint about these directions and no request for anything further. There is no substance in the ground and leave to raise it should be refused.

Conviction Ground 5

The trial proceedings miscarried by reason of the learned Crown Prosecutor misinforming the jury in the course of his closing address that they could rely on the fact of the plea of guilty by the witness Shepherd as corroboration of the truth of the evidence that he had given in the appellant's trial: see T30.35, 7 September 2004 and T33.7, 7 September 2004 and by reason of the fact that the learned trial judge apparently endorsed the submission made by the prosecutor that the evidence of the plea of guilty by Shepherd was available for this purpose.

53 The passages in the Crown Prosecutor's address that inspire this ground are in the following terms:—

> "It follows, I suppose that according to him (the Appellant), Mr Prasad and Mr Shepherd are innocent people and obviously Mr Shepherd's credibility is something that you have to assess as well, but one would have thought that there's one thing you can be pretty sure about and that's

> that Mr Shepherd believes he's guilty, because he pleaded guilty to the offence.
>
> Mr Shepherd's credit was challenged to some degree and obviously you will be told by his Honour that when a witness like Mr Shepherd gives evidence… you need to take some caution… but when you look at Mr Shepherd's evidence, apart from the fact that he was such a, almost painfully precise witness, he is really corroborated right up to the hilt, by the documents, by the calls and importantly by his plea of guilty on 7 August 2002."

54 When, towards the end of his summing up, the trial judge came to summarise the Crown submissions he said:—

> "The Crown submitted that whilst Shepherd is a person who has been convicted for his involvement in the events for which the accused is charged, you should still accept his evidence because his evidence is corroborated by documents, telephone calls and his pleas of guilty."

55 It was submitted that Shepherd's plea of guilty could not be used as evidence against the Appellant and it could not be used as corroboration of the truth of the version of events given by Shepherd.

56 As has been indicated, evidence that Shepherd had pleaded guilty to a charge of being knowingly concerned in the importation had been admitted. Such evidence was clearly relevant as bearing on his credibility as a witness who had received a benefit in the form of a lower sentence for his own criminality for giving evidence against the Appellant. Although I am prepared to assume that but for this, evidence Shepherd had pleaded guilty would not have been admissible, once the evidence was admitted, the evidence could be used for all purposes to which it was relevant - see *Horton* (1998) 104 A Crim R 306 at 312; *Walker v Walker* (1937) 57 CLR 630 at 634-5, 636, 638; *B v The Queen* (1992) 175 CLR 599 at 607, 610. That statement is subject of course to any prohibitions on the use of the evidence imposed by the Evidence Act or directions under s 136 of that Act but none were drawn to the Court's attention and I am aware of none.

57 In argument counsel for the Appellant was forced to concede the self-evident proposition that the fact that Shepherd pleaded guilty was a very good reason for believing him when he said that he himself was dealing in drugs. The plea has a similar impact on the issue inherent in Mr Shepherd's offence, of contemporaneous knowledge

that it was drugs in which he was dealing. Given that the plea emanated from Mr Shepherd himself it may well be that it was not "corroboration" in the sense normally used by lawyers but it clearly strengthened or supported - expressions used in the OED definition of the term - his evidence of his own involvement in the importation. Not many persons plead guilty to offences of the seriousness of that with which Mr Shepherd was charged unless they are guilty.

58 By itself, Mr Shepherd's plea provided no support for his evidence that it was Mr Prasad who had invited him to participate; that he was doing so at the request of the Appellant; and that the importation involved drugs and to this extent the observation of the Crown Prosecutor that "he's (Mr Shepherd's) really corroborated, right up to the hilt, by the documents, by the calls and importantly by his plea of guilty on 7 August 2002" may overstate the position. However even that proposition depends on the way the Crown Prosecutor's remarks are interpreted and to the extent to which they may overstate the position - and the statement was not that every aspect of Shepherd's evidence was corroborated by his plea - they fall well within an advocate's, even a Crown Prosecutor's, licence for imprecision. The trial judge's somewhat more restrained repetition of the argument, quoted above, does not suffer from any defect in this regard.

59 Although, as I have said, by itself Mr Shepherd's plea provided no support for his evidence that it was Mr Prasad who had invited Mr Shepherd to participate, and had said that he was doing so at the request of the Appellant, and that the importation involved drugs, it must also be borne in mind that the Appellant's own evidence effectively conceded the first 2 of these matters. The only material point of difference was that the Appellant maintained he had told Prasad that the importation was "dodgy" but did not involve drugs while Shepherd maintained that he had been told by Prasad that it did involve drugs.

60 It was not suggested, whether to Shepherd in cross-examination or elsewhere that Shepherd might have acquired his knowledge of the presence of drugs from anyone but Prasad and, although it must be acknowledged that he was not called, nothing to suggest that Prasad had any relevant dealings with anyone but Shepherd and the Appellant. In these circumstances it is entirely reasonable to infer that Shepherd's knowledge of the presence of drugs came from Prasad and indirectly from the Appellant.

61 But whether that inference be justified or not, Shepherd's plea does provide a great deal of support for such parts of his significant evidence as were not common ground.

62 In the circumstances leave to rely on this ground also should be refused.

Conviction Ground 6

The learned trial judge misdirected the jury as to the matters of which they had to be satisfied beyond reasonable doubt in order to convict the appellant of the offence charged against him, in particular the basis on which the jury might reach a conclusion of guilty by reference to the appellant's knowledge, acquired on 24 November 2001, of the presence of the prohibited drugs in the goods imported, and the appellant's actions on and subsequent to the events of 24 November 2001: see the directions given at SU22.4, 8 September 2004 and SU12.2, 13 September 2004.

63 The first of the directions the subject of this ground, and which direction his Honour repeated, was in the following terms:—

> "I direct you that even if you are not satisfied of the accused's knowledge that the container contained narcotic goods prior to 24 November 2001, you still may find the accused guilty if you are satisfied beyond a reasonable doubt of his concern in the importation from 24 November 2001 provided you are satisfied beyond a reasonable doubt that on or subsequent to 24 November 2001 he had knowledge that some drugs had been imported into Australia."

64 The second direction, which it is unnecessary for me to repeat, was in substantially similar terms.

65 The transcript makes it clear that counsel for the Appellant was concerned about the direction and what he saw as emphasis on knowledge after 24 November with little attention to the issue of concern. He raised the matter 3 times. On the first his Honour re-read, in the absence of the jury, what he had said. When counsel raised the matter again after the judge had for all practical purposes completed his summing up, the following discussion, in the presence of the jury occurred:—

> "JOHNSTON: Your Honour, I think I raised a matter on Thursday, it's the same point in relation to after the 24th, the link between knowledge and concern that it was essential---
>
> HIS HONOUR: I gave that direction on Thursday and I gave the same direction again today. I gave it again today. I read from exactly the same. I'll read the direction again if you'd like to hear it. I'll read it again.

> JOHNSON: Your Honour, it's not necessary. I think, the main evidence was simply that the link between knowledge to the acts at the later point in time after the 24th. That knowledge alone is not enough after the 24th, that—
>
> HIS HONOUR: No, connection, yes. Concern is, I've given that direction. I gave it on Friday or Thursday and I gave it again today. But I'll hear what you say in the absence of the jury."

66 In the absence of the jury his Honour asked what counsel wanted him to do and whether counsel wanted the jury brought in and his Honour to go through all the actions after 24 November that the Crown relied on. Counsel ultimately declined to ask for further directions. Thus the Appellant needs leave to raise this ground also.

67 The first submission in support of this ground was that "the entire focus of the attention of the jury is directed towards the question of knowledge alone". His Honour's direction has only to be read for that submission to be rejected. While it may be that in the way the passage is couched "knowledge" receives more attention than does "concern", the direction "you still may find the accused guilty if you are satisfied beyond a reasonable doubt of his concern in the importation from 24 November 2001 provided …" makes perfectly clear that satisfaction about "concern" was essential to a conviction.

68 The second criticism was that the passage spoke of knowledge that some drugs "*had been* imported" (my emphasis), it being submitted that if the importation was complete, the Appellant was, after 24 November, concerned about something else. However, it is clear that in his use of that phrase in the passage the subject of this complaint his Honour was directing attention to the mere physical movement of the drugs. It was elsewhere that that his Honour dealt with the overall concept of importation.

69 The third criticism was that his Honour had not specifically identified the need for:—

> "(i) Knowledge in the accused that there was a process of importation of prohibited drugs on foot.
> (ii) Some action by the accused which indicated his knowing concern in that process of importation, and not some other process or some future importation.
> (iii) The fact that the importation was ongoing at the time the appellant did the acts disclosing his knowing concern in that importation."

70 I have said enough to demonstrate that, subject to the question of when the particular importation came to an end, it was common ground that at all material times prior to 24 November the Appellant had known there was a process of importation on foot and that from at least 24 November the Appellant knew that it concerned drugs. Subject to that same question and the issue of whether prior to 24 November the Appellant knew that drugs were involved, it was also common ground that the Appellant was knowingly concerned in that process of importation. The particular matters relied on by the Crown and to which I refer in considering ground 7 make it clear that no "other process or some future importation" were in contemplation in the trial such that a distinction between them and the importation relied on by the Crown had to be expressly adverted to.

71 The issue of whether "the importation was ongoing at the time the Appellant did the acts disclosing his knowing concern in that importation" or, as may more precisely define the issue, whether the importation was ongoing at the time the Appellant did the acts relied on as amounting to or demonstrating concern was also the subject of remark in the summing-up. At the cost of repetition of passages I also quote in dealing with ground 7, his Honour's remarks include the following:—

> "Now it is for you the jury to decide the scope of the importation. The Crown submits that the act of importation giving it its broad definition continued up until 5 December 2001 and included …"

and later,

> "It is a question for you to decide where the importation stopped and finished. The Crown suggests and submits to you that the importation went on until 5 December 2001.
>
> The question to be answered by you is did the importation carry on until that date. I gave you a direction about the extended definition of importation in the law. I said to be concerned in an offence means to do something which involves a practical connection with the offence and all that is involved in the offence, so a practical connection. The part played by a person accused of being knowingly concerned in the importation must be played before or during the importation."

72 Although inadequacy or error in important legal directions provides a strong basis for contending that leave should be given under rule 4, when regard is had to what were the issues in the trial and the directions to which I have referred, I would not grant the

Appellant leave to rely on this ground. Were leave given, the ground would fail in any event.

Conviction Ground 7

The directions given by the learned trial judge on the meaning of the element of “importation”, were, in the circumstances of the appellant's case, erroneous and inadequate: see summing up SU9.4, 8 September 2004 and SU 4.7, 13 September 2004.

73 What the judge said that is the subject of this complaint was:—

> **“On 8 September 2004**
> The term ‘importation’ involves a measure of flexibility. The venture of the importation does not finish the moment the goods are landed, but it extends to all matters and events which are directly related or approximate (sic) to or incidental to the importation.
>
> Now it is for you the jury to decide the scope of the importation. The Crown submits that the act of importation giving it its broad definition continued up until 5 December 2001 and included the following.
>
> 1. The obtaining of documentation concerning the importation.
> 2. Discussions and explanations of the documentation connected with the importation.
> 3. The transportation and storage and opening of the imported columns.
> 4. The discussion of the transportation, the storage and opening of the columns.
> 5. The discussions concerning the condition and appearance of the columns.
> 6. The discussions concerning the whereabouts of the missing drugs and those responsible for their disappearance.
> 7. The discussion regarding the payment of money to persons engaged of (sic) acts involved with the importation.
> 8. Payment of moneys to a person engaged in acts associated with the importation including the payment of moneys to the man Bourke.

The question to be answered by you as to the acts relied upon by the Crown is, do the (sic) go to the ultimate purpose of bringing the narcotic drugs into Australia.

On 13 September 2004
The issue in this case is was the accused knowingly concerned in that importation? The Crown must prove that the accused was knowingly concerned in the venture centred on the importation. It is a question for you to decide where the importation stopped and finished. The Crown suggests and submits to you that the importation went on until 5 December 2001.

The question to be answered by you is did the importation carry on until that date. I gave you a direction about the extended definition of importation in the law. I said to be concerned in an offence means to do something which involves a practical connection with the offence and all that is involved in the offence, so a practical connection. The part played by a person accused of being knowingly concerned in the importation must be played before or during the importation. Here the Crown says the importation continued until 5 December and it is the actions of the accused up until that date which the Crown relies upon.

The person must be implicated or involved in the sense of having something to do with the importation and the importation includes all that is incidental or proximate to the act of importation. I went through the acts which the Crown relied upon."

74 The acts to which his Honour had referred were:—

1. Using his name, company name, CJ Trade Consultants Pty Limited as the consignee.

2. Corresponding with persons in Europe in connection with the proposed importation of cool rooms.

3. Recruiting Simon Prasad and through him Shepherd to help facilitate the importation.

4. Providing funds to Simon Prasad to pay for the shipping and Customs charges.
6. Providing documents to Simon Prasad so as to facilitate the creation by Shepherd of a set of bogus shipping documents.
7. Recruiting Bourke to assist in the unpacking of the imported goods and driving them to Sydney.
8. Attending at Pendry Court, Woodridge to oversee the unloading of the container.
9. Giving directions to Bourke during the unloading of the container and during the trip back to Sydney.
10. Escorting the Balmain Rentals truck back to Kempsey.
11. Attending 84 Consett Street, Concord on 24 November 2001 in order to discuss the importation.
12. Providing advice to Louis Sukkar and Steven Sukkar concerning how to handle problems over the lost and missing drugs.
13. Obtaining documentation for the Sukkar brothers connected with the importation.
14. Arranging for payment of the man Bourke.

75 (There was no mention by his Honour of a fifth act.)

76 It was submitted that the concepts of “directly related”, “approximate to” and “incidental to” were too broad as an exposition of “importation” and would include distribution of the goods after importation had been concluded. Secondly, it was submitted that the direction on 13 September 2004 was also too wide and left it open to the jury to conclude that the process of importation was continuing when it had been completed and the directions extended so as to include conduct which could not amount to involvement in the process of importation. Thirdly, it was submitted that acts relied on by the Crown, for example in obtaining payment for Bourke and in seeking payment for Simon Prasad, occurred after any importation had for practical purposes been effected and thus did not constitute acts amounting to concern in the importation.

77 Counsel for the Appellant conceded that the authorities - *Tannous* (1986) 32 A Crim R 301 at 304 et seq.; *Lam* (1990) 46 A Crim R 402 at 403 et seq.; *Courtney-Smith (No 2)* (1990) 48 A Crim R 49 at 63 et seq.; and *Leff* (1996) 86 A Crim R 212 at 222 et seq. - establish that there must be a degree of flexibility in the meaning and application of the word “importation”. However, the submission proceeded, that flexibility did not extend to the circumstances relied on here.

78 In *Lam*, where the offender, equipped with an enema, had arrived at a hotel to meet international couriers who had swallowed capsules of heroin, approval had been

given to a direction that "the venture (of importation) does not finish the moment that goods are landed but extends to all matters and events which are directly related or proximate or incidental to the importation" - words which the first direction quoted under this ground clearly echoed. (I would infer that instead of the word "approximate" in that paragraph, the word his Honour used was "proximate".) In *Leff* (at p223) this approval was implicitly endorsed. Accordingly, the first of the criticisms of the direction the subject of this ground should be rejected.

79 In considering the second criticism of the directions the subject of this ground it is useful to bear in mind that in *Leff* itself it was held that importation had not ceased when telephone calls were made between a courier and Leff or her son directed to obtaining delivery of drugs some hours after the courier had been intercepted at the airport and the drugs seized. At p214 Gleeson CJ, with whom Allen J agreed, observed that "importation is a process, or a venture, not a physical act which occurs or ceases at the moment of import". At p223 James J, with the concurrence of the other members of the Court remarked:—

> "I do not consider that the intervention of the authorities prevented the process or venture of importation from continuing so that a person might subsequently become concerned in the importation."

80 In *Courtney-Smith (No 2)* it was held that a venture of importation had not ceased at a point of time when goods, having been brought into Australia by sea, were still in a shipping container in a factory 2 weeks after having been landed and the offenders were endeavouring, by cutting open the container, to obtain access to those goods.

81 These cases make it clear that efforts directed to obtaining possession of, or to making available, goods imported, from a body or container in which the goods at that time of actual entry into Australia were contained, forms part of the importation process. In *R v Sukkar* [2005] NSWCCA 54, a case involving one of the Appellant's suggested co-offenders Steven Sukkar, Wood CJ at CL, with the concurrence of at least Hidden J, observed, at [121], that the process of importation included:—

> "Anything which is done having a direct proximity to the bringing of the goods into the country, and making them available including their clearance and transfer into storage, unpacking, and arranging for payment of those involved in the process, that is the suppliers, shippers, custom agents, freight forwarders, and so on."

82 Whether or not the latter part of that passage is correct in the generality in which it is expressed, I have said enough to demonstrate that the mere passage of time is not enough to demonstrate error in the trial judge leaving to the jury the question of how long the importation continued and the Crown contention that it went on until 5 December. The decisions referred to also make it clear that the importation extended up to and including the opening of columns on 24 November shortly after which the Appellant, on his version, first knew that the subject of the shipment was drugs and not diamonds and that "duds" had been substituted for what had been expected.

83 As indicated early in these reasons, in large part the evidence relied on by the Crown as to events on and subsequent to 24 November is contained in records of telephone intercepts. The transcripts of those tendered extend for some hundreds of pages but it is desirable to attempt to summarise briefly their more salient features.

84 I have referred to the fact that in the period there were numerous conversations between one or other of the Sukkar brothers or Mr Prasad and the Appellant relating to the obtaining of paperwork showing in as much detail as possible the movement of the container in which the cool-room had been shipped and that the Appellant agreed to assist in that regard. Other matters apparent in conversations in which the Appellant participated included the following.

85 On 24 November the Appellant was heard advising Loui Sukkar to "get rid of that shit anyway in your house". It is reasonable to infer that the "shit" extended to embrace all of the non-drug elements and residue of the shipment. There is no evidence that the Appellant knew at that time that there were any useful drugs there. On 25 November the Appellant asked Mr Bourke to return a car for him. One might infer the car was that that had travelled in convoy from Queensland. Mr Bourke asked for some money and the Appellant indicated that he anticipated receiving some off "Louis" who, it might be inferred, was Loui Sukkar. On 26 November there was another conversation between the Appellant and Mr Bourke in which the former said that he needed to return the car.

86 During the period between 26 November and 30 November a number of discussions between one or more of the Sukkar brothers and members of the European group that had sent the shipment were intercepted. Each group was contending that the problem had arisen in the other's country. It was contemplated that one or more of the Europeans would come to Australia to look at the shipment with a view to seeing if it had been tampered with since leaving Europe and the Sukkars were advised on a number of occasions to leave the balance of the shipment alone. The calls suggest and other evidence makes clear that a number of the columns had not been opened. An intercepted call between Loui Sukkar and the Appellant on 4 December indicates that

there had been communication between the Europeans and the Sukkar brothers later than 30 November.

87 Other matters apparent from the calls include the following. In a call of 26 November between Joseph Sukkar and a European, El Hani, Joseph Sukkar indicates that there were some "satisfactory" tablets. The movement of the container was the subject of enquiries made to P & O by Loui Sukkar on 29 November and to a Max Messina of Intergroup Shipping by Steven Sukkar on 1 December.

88 In a conversation of 27 November Loui Sukkar told the Appellant that people thought it was the Appellant who was responsible for what had occurred. Later in the conversation Loui also said, "We are trying to pay you guys." On the other hand, in a call with Loui Sukkar on 30 November arrangements were made for Steven Prasad, Simon Prasad's brother, to pay to Mr Sukkar on behalf of the Appellant $6000 of $9,500 owed.

89 In a conversation of 1 December in which the Appellant talked to Loui and Steven Sukkar there is discussion about documentation and the Appellant expressed views about its adequacy and what would be likely to have occurred in that respect. He advised that he had told someone that that person could not get paid until the group had all the documentation and gave advice as to steps the Sukkars should take to obtain documentation or confirmation of events.

90 The recording shows that when asked if "these people (in Brisbane) didn't know the nature of the goods or anything like that?", the Appellant said "No no I never told them the nature of the goods is - (Overtalk) - they don't know". The Appellant went on to say that he had got his friend to import the goods. Pressed to ask the friend for more information, the Appellant said that he had already done so and if he did so again "we no longer can deal with my friend ever again" as he would think that something funny was going on. The Appellant said also that his friend was waiting for his money.

91 In another conversation on the same day between the Appellant and Steven Sukkar, about the contents and significance of a number of the documents, the Appellant made suggestions clearly intended to assist Steven Sukkar's understanding of the documents and of the course of events. In a third conversation Steven Sukkar informs the Appellant of a call just made to Max Messina and again the Appellant provides information and advice on a variety of matters and as to the course events probably took.

92 In a fourth conversation of 1 December, Steven Sukkar again raised with the Appellant the topics of his conversation with Max Messina and the contents of the documents, suggesting that the container's movements for 40 hours were unaccounted

for and Mr Messina may have obtained access during this period. Again the Appellant makes suggestions as to the course of events that had, or could or must have, occurred.

93 In that same conversation Steven Sukkar suggested to the Appellant that the Appellant did not know what Mr Messina knew because the Appellant did not know what his friend may have told Mr Messina. In a conversation later that day with Loui Sukkar, Steven Sukkar said that “John's friends knew he told me” - an interesting contrast with the statement of the Appellant in an earlier conversation that day to the effect that he had not told those in Brisbane the nature of the goods.

94 On 2 December there was a lengthy conversation between the Appellant and Simon Prasad discussing the content of the documents and in which the Appellant sought information as to their implications and otherwise. Prasad says he would contact Steve (who the Appellant's evidence seemed to suggest was Mr Shepherd) but the latter was not going to do anything until he got paid. There was discussion about difficulties ringing or dealing with Intergroup Shipping who, Prasad said, could not have had access in the P & O yard. During the conversation Prasad asked that five grand out of twenty-five be kept aside for him and that some of the other money be given to a “Robbie”, a payment which, according to the Appellant's evidence, would have been on behalf of Mr Prasad.

95 Later that day there was conversation between the Appellant and Loui Sukkar. The Appellant suggests that Loui ring P & O but not the Customs Broker who was already suspicious. The Appellant said he had confirmed that no one could have access to the ship yard beside P & O employees. The Appellant said he would be back from overseas by the 8th but indicated some reluctance at returning to speak to the Europeans.

96 In a conversation between Loui Sukar and the Appellant on 4 December, the Appellant promised to pay money that afternoon to his girlfriend apparently to be passed on to Loui. Loui also said that Joseph (Sukkar) had no money at that time and needed to sell some goods to obtain any. Loui asserted that they, who one might infer were the Europeans, believed that the Appellant had ripped off the drugs. Loui complained also that the paperwork was still not in order.

97 In response to a question by the Appellant as to what he was to say to “these people”, Loui replied that he should tell them that they would have to wait. He went on to indicate that “We'll” pay the Appellant and the Appellant could pay those people. Both said that they were probably not going to “do it again”. Loui tells the Appellant that “they” were thinking that the Appellant ripped it off and complains about still trying to get paperwork.

98 The money to be paid to Loui via the girlfriend merits further mention. Loui Sukkar mentioned an amount of 3½ thousand. The transcript then records the following:—

> "Choi. Yeah what the three and a half for I don't have to pay Burkie a thousand. (sic)
>
> Loui Well then it's two and a half."

99 In a later call on 4 December Loui Sukkar told the Appellant that the Europeans were delaying their trip and advised that he still needs "that last bit of documents". The Appellant advised that although they have all the paperwork there would still be gaps because there is not paperwork for every hour. Loui said that he could not pay people at the moment and was trying to get some money and "we are going to sell all this shit out now and try to sell some of that stuff and will have the money" by Monday. Arrangements are made for each to see the other on Sunday morning.

100 Later again on 4 December the Appellant indicated to Loui Sukkar that some people were upset and asked what he should tell them. Loui said that realistically it would not be until next week that he would have any money. Loui said things looked as if "it" or "they" had been re-packed. The Appellant is recorded as saying it would be better if Loui or Joseph rang some unspecified people up and:—

> "'Just tell them … we only started selling them when we received the other documents…because we didn't want to open anything up until we got all the documents right' and '… we got it open early last er late last week, we gave it to somebody and er he's going to pay us ninety a hundred but we have to give the majority of that to to EUROPE right and we're going to give you guys twenty five straight away.' (sic)"

101 In evidence the Appellant said that he had been suggesting this was what Prasad should be told.

102 On 5 December in the last of the recorded calls the Appellant spoke to Simon Prasad, gave him a telephone number for Loui Sukkar and said that the latter was expecting a call.

103 The topic of payment to various people was raised in a number of conversations to which the Appellant was not a party. In the conversation of 26 November between El Hani and Joseph Sukkar, Joseph asked what he was going to do with the "Chinese man", a name given to the Appellant, who apparently wanted "300". In a conversation

between these same 2 people on 28 November Joseph said that the Chinese man wanted some payment by the end of the week to "make a payment to them".

104 Some other matters should also be referred to. The officer in charge of the investigation gave unchallenged evidence that the listening devices indicated that on 2 December 2001 some more of the columns then at the premises at 84 Consett Street were broken open, tablets found, poured into plastic bags and then stored inside the house, these activities being carried out by Joseph, Loui, Steven and Paul Sukkar. On 5 December many of those involved in the importation were arrested and those premises searched. Found there were plastic bags of tablets and fragments of the columns. Another police officer gave evidence that almost all of the tablets in these bags were the tablets that had been substituted by the authorities prior to 23 November. However, some actual ecstasy tablets similar in marking to those left in the columns were also found at 24 Consett St, (as were some from a different source).

105 Police surveillance also observed that on 2 December parts of the cool-rooms were transported from Consett Street to Granville where they were also found on 5 December.

106 What conclusions should be drawn from this account of events? In their terms none of the conversations were directed to finding or obtaining the drugs that had gone missing and none were directed to dealing with the drugs that remained beyond the indications that the unopened columns should remain that way and Loui Sukkar's telling the Appellant that he was going to sell some of, what one may infer were the non-"dud" drugs by that time held, to get money to pay people who had assisted in the importation.

107 It is of course not unlikely that had the location of the drugs been found in consequence of any of the events to which reference has been made the offenders would have taken additional steps, but as things stood during the period 24 November to 5 December, it seems that the concern of the Appellant and, to the extent that the evidence demonstrates, that of the other offenders, was to be able to persuade the suppliers of the drugs that the drugs had not been lost in Australia. There is indeed no evidence that the provision of advice or the obtaining of documentation was directed to recovery of the drugs.

108 I have already indicated that there was concern on the part of the Sukkars and the Appellant that persons in Europe from where the drugs had originated would blame one or more of the Australian participants for the loss and that documents should be obtained with a view to rebutting any such suggestion. I do not regard activities directed solely to those ends as part of importation. Such activities would certainly not be directed to the actual landing of the goods nor, without more, to making the goods available.

Thus I do not regard the first 2 of the 8 matters relied on by the Crown as constituting or demonstrating the continuation of the importation to 5 December or as capable of doing so.

109 I take a similar view in respect of many of the discussions falling within the fourth, fifth and sixth of the eight matters relied on which, in their breadth of expression, would be apt to describe discussions occurring today between participants in the enterprise - discussions that would hardly demonstrate that the importation is still continuing.

110 Of course, following his reference to the 8 groups of acts relied on by the Crown, his Honour's instructions went on to direct the jury to the question of whether the acts relied upon “go to the ultimate purpose of bringing the narcotic goods into Australia”. Thus it can be said that to the extent to which the acts relied on were not directed to the importation, the jury would not have been led into error. However, once one concludes, as I do, that 5 of the 8 categories of matters relied on by the Crown were not capable of constituting or demonstrating the continuation of the importation, it is impossible to conclude other than that the directions were calculated to mislead.

111 On the other hand, in light of the authorities to which reference has been made, it is clear that the importation extended up to the time on 2 December when, according to the unchallenged evidence of the officer in charge, columns were broken open to make their contents available.

112 Furthermore, I take the view that the presence of some of the imported tablets in the premises on 5 December is, within the words in *Lam*, “directly related or proximate or incidental to the importation” and, within the words of Wood CJ at CL in *R v Sukkar*, something “having a direct proximity to the bringing of the goods into the country, and making them available”. After all, some presence of goods at the place of receipt or unpacking is a necessary incident of physical importation and the fact that 3 days had elapsed since unpacking of part of the consignment had occurred is not enough to justify the conclusion that the venture of importation had come to an end.

113 Thus whatever errors there may have been in his Honour's directions to the jury as to the duration of the importation, the conclusion that it continued until 5 December was inevitable.

114 Turning then to the topic of the Appellant's involvement after the time when he acknowledged he had become aware of the subject of the importation, it is only the last 4 of the 14 acts relied on by the Crown that are relevant. So far as the first of these, his “attending at 84 Consett St, Concord on 24 November 2001 in order to discuss the

importation" is concerned, on this second way in which the Crown put its case, it was only after the Appellant arrived there that he found out about the drugs so that his mere attendance could not have been, or demonstrated, knowing involvement.

115 The only arguably significant activity the Appellant is shown to have indulged in on that occasion was to advise Loui Sukkar to "get rid of that shit anyway in your house". However, such advice was not directed to bringing the drugs into the country or making them available here but rather to eliminating evidence that such activities had occurred and does not amount to involvement in the importation. This conclusion derives support from remarks of Wood CJ at CL in *R v Sukkar* where his Honour said, at [105] and [130]:—

> "105 It may be accepted that evidence, arising from these various events and exchanges, of mere knowledge by the Appellant of the importation and of his brothers' involvement in it, or of any concern or anxiety that he had in relation to their financial loss, or in relation to any risk of them being harmed by anyone else involved in it, or even in relation to their arrest, in connection with it, would not suffice to make good the offence charged.
> 130 I would accept that if the evidence as to his (Steven Sukkar's) involvement, after being informed of the importation, revealed nothing more than a commitment to secure the removal from his premises of any evidence concerning it, then the offence charged, as distinct from one of being an accessory after the fact, would not have been made good."

116 Accordingly, the eleventh of the Crown's 14 acts or groups of acts could not have helped establish that part of the Crown's case for which it was advanced.

117 It follows from what I have said above that the same conclusion follows in respect of the 12th and 13th acts or groups of acts. There is nothing to indicate that those actions of the Appellant were directed to bringing the drugs into the country or making them available here or finding or recovering those that had apparently disappeared as distinct from being able to persuade the suppliers of the drugs that the drugs had not been lost in Australia.

118 There remains the topic of "arranging for payment of the man Bourke". I have referred to the fact that in one of the telephone calls Mr Bourke asked the Appellant for money and in another conversation between Loui Sukkar and the Appellant it appears to have been agreed that an amount the Appellant paid Mr Sukkar would be reduced by

$1,000 associated in some way with Mr Bourke. In evidence the Appellant denied there was an arrangement for paying Mr Bourke. The evidence continued:—

> "A I think Mr Bourke asked me when he'd get paid and I deducted some money that Loui Sukkar was supposed to pick up or something and gave it to Mr Bourke instead - or not me specifically, someone in my office.
>
> Q You were going to pay some of Mr Bourke's fees and Loui was going to pay the other part?
>
> A That's incorrect, sir, because Loui Sukkar was paying the full amount. On the telephone transcripts there I tell Loui that I'm paying $1,000 of his money to Mr Bourke.
>
> Q Well, there is one of the calls, and I will take you there in a minute, where you say 'I don't have to pay Bourkie a thousand'?
>
> A 'I have to pay Bourkie a thousand', I think that's what it says.
>
> Q No, you say 'I don't have to pay Bourkie a thousand', meaning he's already been paid correct?
>
> A I'll have to look at the transcript, sir.
>
> Q Well, you will agree wouldn't you at least that you were going to pass on some money from Loui to Mr Bourke?
>
> A Yes I agreed with Mr Sukkar I just took $1,000 of his money that was in my office and paid Mr Bourke."

119 The Appellant also agreed that he knew in giving Mr Bourke the money that it was payment for his part in driving down from Queensland and the work he did at the warehouse.

120 Later, the Appellant adhered to the account that he was - in one answer he said "had to pay" - taking $1000 of Mr Sukkar's money to pay Mr Bourke.

121 In my view the actions of the Appellant in paying Mr Bourke did amount to concern and, given that they were after 24 November, knowing concern in the importation. Of course the actions were not in themselves directed to effecting the importation or

making the drugs imported available but they did amount to carrying out part of the arrangements for, or incidents of, the importation venture. The payment to Mr Bourke was for his assistance in effecting that part of the importation as was directed to making the goods available. But for the possible effect of the illegality in the venture, Mr Bourke was entitled to reasonable remuneration for his time and effort, it would appear from Mr Sukkar. In making payment on behalf of Mr Sukkar the Appellant was aiding the performance of the importation venture and was doing so at a time when he knew that the subject of the importation was drugs.

122 Furthermore, although it is not critical to my conclusion, this occurred while the venture was continuing.

123 It may perhaps be noted that his Honour's directions as to the 14 (or 13) acts or groups of acts relied on by the Crown as amounting to or demonstrating the Appellant's concern in the importation do refer to the Appellant's efforts to effect remuneration to Mr Prasad and through him Mr Shepherd. Given arrangements had been made for this remuneration at a time when, according to the Appellant, he had no knowledge of drugs, it may be possible to argue that these efforts were affected by somewhat different considerations. However, in the circumstances it is unnecessary to decide.

124 In summary, a consideration of this ground has revealed a number of errors in the summing-up, both on the topic of importation and the topic of involvement. No complaint was made at the trial about these errors but they are of such a fundamental nature that leave under rule 4 should be given to raise them. However, in respect of both topics, there was evidence either unchallenged or from the Appellant which demonstrates that the relevant elements of the offence charged were made out.

125 Accordingly the appeal is one to which the proviso to s 6(1) of the Criminal Appeal Act should be applied and the appeal against conviction dismissed.

Sentence Ground 1

The sentence imposed on the Applicant is manifestly excessive having regard to the objective facts and circumstances of the case, and the personal factors affecting the applicant that are relevant for the purpose of determining an appropriate sentence.

126 Having regard to the submissions advanced in respect of this ground, consideration of it may be deferred until the other grounds are dealt with.

Sentence Ground 2

The learned judge erred in applying the principles of parity of sentencing by considering that the relative and relevant circumstances of the applicant and Loui Sukkar were approximately equivalent, thereby apparently failing to have regard to a serious additional charge relating to the distribution of drugs for which the offender Loui Sukkar was sentenced.

127 On 11 March 2004 Loui Sukkar was sentenced by Acting Judge Andrew in respect of two offences, the first identical to that of which the Appellant was convicted and the second a charge that between 23 November and 6 December 2001 he offered to supply a large commercial quantity of ecstasy. The offence common to the offenders rendered each liable to a maximum penalty of imprisonment for life and a fine not exceeding $750,000. The second carried a maximum penalty of 20 years imprisonment.

128 The sentence imposed on Loui Sukkar in respect of the first offence was imprisonment for 18 years including a non-parole period of 12 years, both such periods to date from 5 December 2001. For the second offence the sentence imposed was imprisonment for a period of 6 years including a non-parole period of 3 years. Again these periods were directed to commence on 5 December 2001.

129 In arriving at the sentences he imposed, Acting Judge Andrew took into account a further offence of possession of not less than the trafficable quantity of MDMA that may reasonably be suspected of being imported. This offence related to a quantity of tablets containing 52.1 grams of MDMA found in the garage at 84 Consett Street on 5 December 2001 and which were of a different composition than those the subject of the principal offence.

130 His Honour adopted as a starting point a period of 36 years from which he deducted 12 years following a concession by the Crown that Mr Sukkar should have the benefit of the discount contemplated by s 16G of the Crimes Act. His Honour reduced the resulting 24 years to 18 years by allowing a further discount of 25% on account of Loui Sukkar's plea and willingness to assist the authorities.

131 Acting Judge Andrew found that Loui Sukkar was a co-principal in partnership with his brother Joseph in the importation and a joint owner with Joseph of the imported drugs. His Honour found the only distinguishing factor between himself and Joseph was

that Joseph had the overseas connections. His Honour found that Loui was genuinely contrite and may well be rehabilitated. He had no prior convictions.

132 The second offence under the Drug (Misuse and Trafficking) Act arose from an offer to supply some 14,000 remaining genuine tablets from the control delivery. The offer was presumably accepted and implemented because the tablets were never recovered. The apparent purchaser of the tablets, who had prior convictions for drug related offences and was in breach of a bond, received a sentence of 6 years with a non-parole period of 3 years. Taking the view that Loui Sukkar's role was greater than the purchaser's but having regard to his remorse and that he pleaded guilty to this offence at the earliest opportunity, his Honour imposed the same sentence as had been imposed on the purchaser. Observing that "there is some overlapping of the two offences because, in considering his role in the importation, it has been taken into account that he was a principal offender who was to supply the narcotics and to share in the profits" his Honour decided to make the two sentences concurrent.

133 An appeal by Loui Sukkar to this Court against the length of the principal sentence was dismissed - [2005] NSWCCA 55.

134 As has been said, the sentence imposed on the Appellant here was of imprisonment for 20 years including a non-parole period of 13 years both such periods to date from 8 May 2003. Judge Solomon indicated that in arriving at the sentence he had afforded the Appellant a reduction by one third as each of the Appellant's co-offenders had received the traditional discount flowing from s 16G of the Crimes Act.

135 In the course of his remarks on sentence, his Honour addressed the topic of parity and the relative position and activities of those involved in the importation. Having regard to the limited issues canvassed in the appeal, it is unnecessary that I detail all of what was said in that regard. His Honour found that the Appellant was subordinate to Loui and Joseph Sukkar and was not satisfied that the Appellant was a financial partner or was to share in the profits. However, he found the Prisoner's initial role was to import the tablets for a reward and he played a vital and senior role.

136 His Honour found that the Appellant's role was senior to that of each of Steven Sukkar, Prasad, Shepherd and El-Hani whose circumstances were as follows:—

> "El Hani had pleaded guilty and been sentenced to imprisonment for 15 years including a non-parole period of 10 years;
>
> Steven Sukkar had been found guilty and sentenced to imprisonment for 14 years including a non-parole period of 9 years;

> Prasad had been found guilty and sentenced to imprisonment of 14 years including a non-parole period of 8 years and 8 months. A Crown appeal against that sentence had been dismissed although this Court had held that a proper sentence would have been of the order of 17 years including a non-parole period of 11 years and 2 months.
>
> Shepherd had pleaded guilty and on an appeal by him sentenced to imprisonment for 11 years 6 months including a non-parole period of 7 years 4 months, after an allowance of 45% had been made for his plea and assistance."

137 Each of these offenders had faced the same charge as that for which the Appellant was convicted. Each had received the benefit of a s 16G discount.

138 Judge Solomon took into account that the tablets the subject of the controlled delivery had in large part not been recovered and had presumably been disseminated into the community with the potential to cause harm. His Honour recognised that Loui Sukkar's sentence had been reduced on account of his plea and assistance and that whereas Loui Sukkar had no criminal antecedents, the Appellant had in November 1994 pleaded guilty to two counts of attempted robbery in company. His Honour found that the Appellant showed no remorse.

139 It was submitted that Judge Solomon erred in not having regard to the fact that in sentencing Loui Sukkar, Acting Judge Andrew had had regard to the fact that Loui Sukkar was not only the principal offender but one who was to supply the narcotics and share in their profits; that this was taken into account in determining the sentence imposed for the importation offence; and because of that the sentence for the supply offence was made wholly concurrent. It was submitted that when regard was had to these matters, there was insufficient difference between the 24 years (before the plea and assistance discount) used in sentencing Loui Sukkar and the 20 years of the Appellant's head sentence.

140 I do not regard the concurrency of the second sentence imposed on Loui Sukkar for an offence which has no parallel in the sentencing of the Appellant as relevant. Considered in isolation, the difference in roles between that of the Appellant and Loui Sukkar did require a significantly higher sentence on the latter. The fact that in the sentencing of the latter an additional offence was taken into account argues in the same

direction although it must be recognised that, while serious, that offence paled greatly by comparison with the offence of which both offenders are guilty.

141 Operating in the opposite direction is the fact that the Appellant had, by his re-offending, shown a continuing attitude of disobedience to the law and had shown no remorse. Both of these circumstances meant that the demands of personal deterrence, the protection of the community and rehabilitation argued for a significantly higher sentence than would otherwise have been appropriate. To what extent these matters tend to offset those referred to in the immediately preceding paragraph is very much a matter of judgment on which minds may differ but I am not satisfied that when allowance is made for them, the Appellant has a justifiable sense of grievance that his head sentence was only 4 years lower than the sentence imposed on Loui Sukkar. I take a similar view of any comparison between the Appellant's 13 years non-parole period and the 16 years one may deduce would have been imposed on Loui Sukkar but for his plea.

Sentence Ground 3

The learned judge erred in the assessment of an appropriate sentence by apparently failing to have regard to the fact that the applicant had saved a considerable amount of court time by making admissions in relation to various matters, which effectively relieved the prosecution of the burden of having to prove those matters, and demonstrated a willingness on the applicant's part to facilitate the course of justice: *Cameron v The Queen* [2002] HCA 6; (2002) CLR 339.

142 It is the fact that Judge Solomon did not advert to the subject of this ground in his remarks on sentence. It was not mentioned in submissions to him.

143 At the conclusion of the Crown case the Appellant made a series of admissions pursuant to Section 184 of the Evidence Act, these becoming Exhibit AE. In the course of his summing up Judge Solomon remarked to the jury that the admissions "were made in relation to matters which were not in dispute, and they saved us a considerable amount of time, and you should look at them in that light". Relying on this Court's decision in *R v Doff* [2005] NSWCCA 119 at 58 it was submitted that the Appellant should have been given credit for these admissions in reduction of the sentence that would otherwise have been imposed upon him.

144 Exhibit AE was in the following terms:—

“Hyeon Joon Choi

Matters of fact admitted by the Accused

I, Hyeon Joon Choi, with advice from my counsel, and pursuant to section 184 of the *Evidence Act 1995*, admit for the purposes of my trial the following matters of fact:—

Importation of narcotic goods

1. That on 17 November 2001, there was imported into Australia, at Brisbane, Queensland, a shipment of prohibited imports, being narcotic goods;
2. That the narcotic goods which were imported consisted of a quantity of tablets containing the drug 3.4 methylenedioxymethamphetamine (ecstacy);
3. That chemical analysis conducted by the Australian Forensic Drug Laboratory showed the tablets to contain an average pure content of 27.8% ecstasy;
4. That the gross weight of tablets amounted to approximately 123.675kgs;
5. That the total net weight of ecstasy within the tablets (calculated at an average purity of 27.8%) amounted to approximately 34.38kgs.

CJ Trade Consultants Pty Ltd

6. That on 28 April, 1999, CJ Trade Consultants Pty Ltd was registered in New South Wales as a company. The company Directors at that time were:—
    * Hyeon Joon CHOI
    * Steven SUKKAR
    * Loui SUKKAR
    * Wonjai KIM
7. That on 26 January 2000 Steven SUKKAR, Loui SUKKAR and Wonjai KIM ceased to be Directors. On that date, Stephen PRASAD was appointed as a Director, and Hyeon Joon CHOI continued as a Director.
8. That from 1 February 2000 until 30 June 2000 the principal place of business of the Company was 22 Colson Crescent, Monterey NSW 2217.
9. That on about 1 June 2000 CJ Trade Consultants Pty Ltd entered into a lease of premises at Suite 1, Level 1, 552 Princes

Highway, Rockdale, NSW. That from 1 July, 2000 the principal place of business of the Company was Level 1, 552 Princes Highway, Rockdale NSW 2217.

10. That from 25 June 2001 CJ Trade Consultant Pty Ltd changed its name to CJ Trade Group Pty Ltd retaining its principal place of business as Level 1, 552 Princes Highway, Rockdale, NSW 2217.

CJ Capital Pty Ltd

11. That on 19 March 2001, I arranged for the registration of a company in the name of CJ Capital Pty Ltd.

12. That at all relevant times, I was the sole Director and Secretary of CJ Capital Pty Ltd.

13. That on 24 August 2001 I entered into a contract on behalf of CJ Capital Pty Ltd to purchase an office unit at Unit 34, 17 Henderson Street, Turella.

Departure from and return to Australia

14. That on the morning of 28 November 2001, I departed Australia on Cathay Pacific flight CX 110, for the purposes of a business trip to South Korea via Hong Kong.

15. That on 13 May 2003 I was arrested in South Korea in relation to a warrant issued in Australia in respect of the charge for which I am currently standing trial.

16. That on 1 September 2003 I was extradited in respect of that charge from South Korea and returned to Australia on 2 September 2003, in the custody of officers attached to the National Crime Authority (Australian Crime Commission).

Hyeon Joon CHOI

24 August 2004

Date"

145 I am not persuaded that his Honour did not overstate the saving of time in his remarks to the jury. Witnesses who were called gave evidence as to the finding of the

drugs and both common experience and the particularity apparent in the admission as to weight and quantity provide convincing evidence that that information was readily available and at least in part probably the subject of a certificate the tendering of which would have involved but moments of time.

146 The matters referred to in paragraphs 6-12 are the sort of matters which would in the ordinary course be provable by documents emanating from ASIC and admissible on their production and there is nothing to persuade me that that was not so in this case.

147 Business records likely to be readily available to the Crown could have been expected to prove the matters the subject of paragraphs 14 to 16.

148 That leaves only paragraph 13. This Court has not been directed to any evidence which bears on the topic of the ease or difficulty proving the matters the subject of that paragraph but again, in the normal course, one would not have expected any particular difficulty.

149 In *R v Doff* the Court remarked that it could see no reason why there should not be taken into account for the purposes of sentencing “the efficient way in which the Appellant's trial was conducted, including the making of extensive admissions, which, while not demonstrating contrition or remorse, did show a willingness to facilitate the course of justice by refraining from resort to dilatory and technical objections of no merit.” In this case the Crown did not seek to argue against the approach apparent in that extract but submitted that some qualitative assessment needed to be made of any such admissions before some quantifiable discount is applicable. I agree.

150 Had the Appellant pleaded guilty at about the time of the commencement of his trial he could have expected a discount of the order of 10%. The trial took something of the order of 5 weeks plus a number of further days in sentencing proceedings. It is not apparent to me that the Appellant's admissions saved more than an hour or so at the most.

151 I do not for one moment suggest that any credit that the Appellant is given for his admissions should be worked out on any proportionate basis from the figures referred to in the immediately preceding paragraph and this at least for the reason that the 10% figure is not fixed and so many matters affect the duration of a trial that its length could not be used as any appropriate component of a mathematical calculation. However, the data does tend to demonstrate that any benefits to the administration of justice from the admissions or co-operation in this case are marginal at most. Indeed, compared with the other factors bearing on sentence, I regard the benefits here as insignificant.

152 Before I leave this ground I would add that data of the nature of that to which I have referred provides a compelling reason why the Court should not seek to quantify, except in the most unusual case, any discount or allowance for admissions of the nature of those here. In many cases, the weight to be given to admissions such as those made here will, as in this case, be none or insignificant.

Sentence - Ground 4

The learned judge erred in failing to give the applicant any benefit for the time spent in custody in Korea following his arrest on the charge on which he was ultimately tried in New South Wales: *Mill v The Queen* (1988) 166 CLR 59; and for the fact of his cooperation with authorities by not raising any challenge to his extradition: *AB v The Queen* (1999) 198 CLR 111.

153 According to a statement of the Appellant that was placed before his Honour on sentence, the Appellant was arrested in Korea on 7 May 2002 and sentenced to imprisonment for 3 months for smoking cannabis and an additional 9 months for possession of cannabis. He said that after he should have been released in respect of these matters he was held in custody in Korea pending his extradition. He said that he made no effort to object or fight his extradition and on 1 September 2003 returned to Australia.

154 His Honour recognised that the Appellant was detained in South Korea on 8 May 2003 by virtue of a provisional arrest warrant and then extradited to Australia on 2 September 2003 and ordered that the Appellant's sentence date from 8 May 2003. His Honour did not otherwise refer to the matters mentioned in the immediately preceding paragraph. The relevant parts of his Honour's remarks on sentence are in the following terms:—

> "Counsel for the prisoner submitted that the prisoner prior to being extradited to Australia spent 12 months in prison in South Korea for the offence of cannabis possession and that I should give the prisoner some credit for time spent in custody in respect of that offence in accordance with the principles set out in *Mill v R* (1998) 166 CLR 59.
>
> I am not conversant with any of the facts around the prisoner's conviction in South Korea nor am I conversant with the South Korean sentencing principles. I cannot therefore estimate what effective head sentence would

> have been imposed had the prisoner committed the South Korean offence and the Commonwealth offence in the same jurisdiction and I reject the submission."

155 In *Mill v R* the High Court makes clear that in circumstances where an offender is sentenced and serves a term of imprisonment in one jurisdiction before being sentenced in a second, a number of factors arise for consideration. One is the delay with the uncertainty and other disadvantages that are liable to flow from that - see the reference at p 64 to *R v Todd* (1982) 2 NSWLR 517 and the High Court's endorsement, at p65-6, of that decision. I would not give that factor any significant weight here. The delay was not particularly long and I would not be persuaded that the Appellant's absence from Australia was not with a view to avoiding arrest for the importation. The evidence makes it clear that he was reluctant to return to face questioning from the Europeans and I have no doubt that he came to know of the arrest of his co-offenders with whom, as a group, he had been in regular contact. He was not arrested in Korea until a number of months after that occurred.

156 A second factor to which *Mill v R* in its approval of *R v Todd* invites attention is any close relationship in time or character of the offences. I regard this factor as also of no weight here.

157 A third factor is the cumulative effect of the sentences in Korea and that here. Commonly, when a series of offences merits a series of penalties by way of incarceration, sentences are either made wholly or partly concurrent or some reduction is made to one or more of the sentences so that the totality of the punishment does no more than reflect the totality of criminality. In failing to consider this aspect of the Appellant's total incarceration Judge Solomon erred.

158 It is not indeed clear whether his Honour in fact accepted any appreciable portion of the Appellant's statement as to his convictions in Korea beyond the fact of a "conviction". However in light of the terms of the reference to that last matter, it seems to me that on balance one should proceed on the basis that his Honour accepted those parts of the statement to which I have referred.

159 It was not necessary for his Honour to know what effective head sentence would have been imposed had the Appellant committed all of his offences in one jurisdiction. He could readily, and in my view should, have proceeded upon the basis that the sentence in Korea properly reflected Korean law and standards and gone on to consider whether,

by simply accumulating the sentence he imposed, the principle of totality was being breached. This Court accordingly should do so.

160 Although minds might reasonably differ on the topic, my view is that there was no such breach. The sentence(s) in Korea were, by comparison with that imposed by Judge Solomon, of short duration. Any amelioration of the local sentence would have been, at most, minor. It is reasonably to be inferred that the sentences in Korea did not reflect the fact that the Appellant had committed the offence with which this Court is concerned and that the conduct for which he was sentenced in Korea demonstrated yet another disregard of the law additional to the Australian offence. Accordingly while I regard his Honour as having erred in one of the respects covered by this ground, I regard that error as of no consequence.

161 The next question that arises is whether recognition should have been afforded to the assertion of cooperation with authorities by not raising any challenge to his extradition. Apart from the bald statement of the Appellant to which I have referred the matter does not seem to have been the subject of any consideration during the sentencing proceedings, but more importantly, there is no evidence upon which any judgment could be made as to the Appellant's motivation for that course or as to whether he had any possibility of successfully making any such challenge. Accordingly there was no material before his Honour upon which he could make any assessment as to whether weight should have been given to the topic or not.

162 Accordingly, this ground of challenge to the sentence imposed also fails.

Sentence - Ground 1

The sentence imposed on the Applicant is manifestly excessive having regard to the objective facts and circumstances of the case, and the personal factors affecting the applicant that are relevant for the purpose of determining an appropriate sentence.

163 The submission in support of this ground was a statement that the Applicant relied on the matters specifically raised in the other grounds. They have been dealt with and do not support the claim that the sentence was manifestly excessive. By comparison with the statutory provision it demonstrably was not. The maximum penalty provided for is life imprisonment and the quantity of MDMA which renders an offender liable to that penalty is 0.5 of a kilogram. The quantity the subject of the Appellant's offence was 34.4 kilograms, consisting of some 480,000 tablets with a wholesale value of between

$7.2M and $12M and a retail value of between $9.6 and $33.6M. The Appellant's sole motivation would seem to have been for the reward he would receive for his efforts.

164 By comparison with the sentence imposed on offenders other than Loui Sukkar the sentence was also well within, if not below, the appropriate range. If one added back the 45% discount reflected in Shepherd's sentence the result would be a sentence of 20 years and almost 11 months, and this for an offender whose criminality was found to be below that of the Appellant, and in my view, very much below.

165 Furthermore, in the determination of the Appellant's sentence, he was allowed a discount of one-third, that being the discount commonly applied pursuant to the provisions of s 16G of the Crimes Act (C'th). The Crown conceded that, as a matter of discretion, this should occur because Mr Shepherd had received the discount and notwithstanding that the section had since been repealed.

166 That concession should not have been made. Judge Solomon should not have acted upon it and had I not come to the conclusion that the appeal against sentence should be dismissed on other grounds I would have relied on this error in the Appellant's favour as quite enough to demonstrate that the sentence imposed was not manifestly, or indeed at all, excessive. I drew counsel's attention to this possibility during the hearing of the appeal.

167 Because in light of my other conclusions it is unnecessary to decide this issue I shall indicate my reasoning but briefly.

168 The repeal of s 16G occurred on 16 January 2003 by virtue of the *Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and other Measures) Act 2002* which, by s 4, provided that the repeal applied to any sentence imposed on or after the Act's commencement, whether or not the offence was committed before its commencement.

169 Mr Shepherd had been sentenced on 8 November 2002. It is not clear when he first pleaded guilty although it was said by the judge who sentenced him that it was before a magistrate and at the first opportunity. Despite the repeal, when his sentence was decreased by this Court on 16 October 2003 upon the ground that insufficient allowance had been made for his assistance to authorities, he was again given the benefit of the section although without the Court expressly adverting to its repeal or the consequences thereof. It may be that this was but a reflection of the Court's view of the principle referred to in *Radenkovic v R* (1990) 170 CLR 623 at 632 but it matters not.

170 Mr El-Hani was also given the benefit of the section when he was sentenced on 6 March 2003, Judge Shadbolt taking the view that as El-Hani had entered his plea prior to the section's repeal he had an accrued right to the discount which the amending act did not abolish. El Hani's appeal to this Court, [2004] NSWCCA 162, was dismissed without any reference being made to s 16G.

171 In the case of Simon Prasad, Steven Sukkar, Loui Sukkar and Joseph Sukkar, the Crown also conceded that because Shepherd had received the s 16G discount these offenders should, as an incident of the sentencing discretion, also receive that discount. Simon Prasad and Steven Sukkar were sentenced respectively on 18 and 19 December 2003 after a trial. Loui Sukkar was sentenced on 11 March 2004 after pleading guilty. It would seem that his plea occurred no earlier than 28 March 2003. Joseph Sukkar was sentenced on 2 September 2005 after pleading guilty on 2 August 2002.

172 The propriety of that course has not been the subject of examination in the various Courts of Criminal Appeal that have had to consider appeals in relation to any of these offenders except in the case of a Crown Appeal against the sentence imposed on Joseph Sukkar. In that case, after referring to decisions of this Court in *R v Speer* [2004] NSWCCA 118 and *R v Schofield* [2003] NSWCCA 3, Latham J, with whose reasons McClellan CJ at CL and Howie J agreed observed, at [65]:—

> "In light of (the Crown) concession, I have not found it necessary to reach any concluded view on this issue. I am by no means persuaded that parity arguments alone justify the application of section 16G to a co-offender who pleads guilty before its repeal, but is sentenced after repeal, much less where both the plea and sentence occur after repeal. The particular circumstances may enliven general discretionary considerations in one case but not in another."

173 I share their Honours' reservations. Indeed I would go further. Sentencing is not the exercise of an unbridled discretion in accordance with what the Crown or a judge thinks is "fair", irrespective of the law or the will of Parliament. To give, in determining a sentence, the discount which s 16G required when it was in force, after that section is repealed and Parliament has expressly said that the repeal applies to any sentence imposed after the repeal, is to deny that will and not act in accordance with law - See *R v Studenikin* (2004) 60 NSWLR 1 at [62].

174 Neither does a concession by the Crown alter the position. Although the circumstances were different, the point was made in *Gas v R* [2004] 217 CLR 198 at [31 - 32]:—

> "It is for the judge, assisted by the submissions of counsel, to decide and apply the law. There may be an understanding between counsel as to the submissions of law that they will make, but that does not bind the judge in any sense. The judge's responsibility to find and apply the law is not circumscribed by the conduct of counsel.
>
> Fifthly, an erroneous submission of law may lead a judge into error and, if that occurs, the usual means of correcting the error is through the appeal process. It is the responsibility of the appeal court to apply the law. If a sentencing judge has been led into error by an erroneous legal submission by counsel, that may be a matter to be taken into account in the application of the statutory provisions and principles which govern the exercise of the appeal court's jurisdiction."

175 See also *Malvaso v R* (1989) 168 CLR 227 at 233 and *R v Ahmad* [2006] NSWCCA 177.

176 Nor do considerations of parity justify the stance which the Crown has conceded should be taken in this case and in the case of the other offenders to whom reference has been made. That principle reflects the desirability "that persons who have been parties to the commission of the same offence should, if other things are equal, receive the same sentence, but other things are not always equal, such matters as the age, background, criminal history and general character of the offender and the part which he or she played in the commission of the offence have to be taken into account" - see *Lowe v R* (1984) 154 CLR 606 at 609.

177 To similar effect were the observations of Dawson and Gaudron JJ in *Postiglione v R* (1997) 189 CLR 295 at 301:—

> "The parity principle upon which the argument in this court was mainly based is an aspect of equal justice. Equal justice requires that like should be treated alike but that, if there are relevant differences, due allowance should be made for them."

178 The change in the law effected by the repeal of s 16G and the accompanying statement by Parliament that the repeal should apply to all sentences imposed thereafter meant that the situation of Shepherd on the one hand and the other offenders (with the possible exception of El Hani) on the other were not alike. They were indeed very different.

179 Furthermore, the decision of the other offenders not to plead guilty when Shepherd did, meant that they took the risk of changes to the law, whether to make the penalty higher or lower, that might occur thereafter.

180 I do not ignore the fact that in *R v Schofield*, to which I was a party, what was effectively a s 16G discount was allowed in the determination of a sentence imposed after the section was repealed. However that occurred in the course of an appeal, and in circumstances that do not apply at first instance. That is clear from the terms of the Court's reasons. At [69] I said:—

> "Because of the element of double jeopardy in Crown appeals, this court has a discretion even where a sentence under appeal is manifestly inadequate, to dismiss the appeal or to impose a sentence which is lower than otherwise appropriate. In the particular circumstances of this case, I would exercise that discretion so as to, in effect, give the Respondent the benefit of Section 16G."

181 Carruthers AJ with whom Heydon JA agreed, at [164] said:—

> "I agree with Hulme J that although S 16G of the *Crimes Act 1914* has been repealed as from 16 January 2003, the Respondent should nevertheless be given the benefit of a deduction of one-third from that figure: see *Radenkovic v R* (1990) 170 CLR 623 at 632."

182 In the passage from *Radenkovic v R* referred to, Mason CJ and McHugh J said:—

> "In the context of an appeal against sentence, when a court of criminal appeal is called upon to re-sentence because it has quashed the sentence initially imposed, considerations of justice and equity ordinarily require that the convicted person be re-sentenced according to the law as it stood at the time when he was initially sentenced, particularly when that law was more favourable to him than the law as it existed at the hearing of the appeal. The convicted person had an entitlement when he was sentenced by the sentencing judge to a sentence imposed in conformity with the requirements of the law as it then stood. He should not be denied that entitlement simply because the sentencing judge made a mistake, whether that mistake resulted in a sentence that was too harsh or too lenient. In our view it would require a very clear indication of statutory intention to displace that entitlement."

183 In *R v Speer* [2004] NSWCCA 118 this Court took a wider approach. The correctness of that decision was not the subject of argument before us and accordingly, it is preferable that I express no concluded view about it. However it is appropriate to point out that the Court relied, inter alia, on extracts from what had been said in *R v Schofield*, extracts which were incomplete and in their incompleteness, inaccurate, and on a passage from the remarks of the Court in *R v Maclay* (1990) 19 NSWLR 113 at 127 which does no more than raise the possibility that "fairness", particularly in the circumstances of co-offenders, might be invoked to overcome the apparent effect of a statutory change.

184 While in light of the length of the Appellant's sentence I would grant leave to appeal, the appeal against sentence should be dismissed.

185 Accordingly, I propose the following orders:—

(i) Dismiss the appeal against conviction;

(ii) Grant leave to appeal against sentence;

(iii) Dismiss the appeal against sentence.

Hislop J

186 I agree with Hulme J.

[2007] NSWCCA 150

R. (on the application of Galiazia) v Governor of Hewell Prison

High Court of Justice Queen's Bench Division Administrative Court | October 23, 2014 | 2014 WL 5312005

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The Queen on the Application of Liberato Galiazia v. Governor of HMP Hewell, Secretary of State for Justice, The Crown Court Sitting At Warwick
Case No: CO/1622/2013
High Court of Justice Queen's Bench Division Administrative Court
23 October 2014

[2014] EWHC 3427 (Admin)

2014 WL 5312005

Before: Lord Justice Elias –and– Mr Justice Hickinbottom
Date: Thursday 23rd October 2014

Analysis

Hearing date: 8 October 2014

Representation

- Ms Judith Farbey QC and Mr Ian Brownhill (instructed by GQS Solicitors) for the Claimant.
- Mr Stephen Whale (instructed by The Treasury Solicitor) for the Defendants.

Judgment
Lord Justice Elias:

This case raises an important question concerning the way in which a defendant imprisoned for a criminal offence should be given credit for time served on remand. The argument originally advanced depended upon the proper construction of domestic legislation. Permission to apply for judicial review was granted by Mr Justice Green after an oral hearing. Of his own motion he amplified the grant of permission to allow Convention arguments to be run. The claimant has as a consequence raised an alternative argument based on Article 5 .

The relevant facts can be summarised very briefly. The claimant was sentenced to a period of 12 months' imprisonment by Cox J in the Crown Court at Warwick on the 10 April 2013. He had pleaded guilty to a charge of handling stolen goods. He had already been in custody on remand for 411 days, a period which thus exceeded the sentence. The understanding of the defendant (and apparently of the judge too) was that the effect of having served that period on remand was wholly to extinguish the sentence: there was no more of his sentence to serve. The Secretary of State disagreed. He considered that the effect of the relevant statutory provisions was that whilst the period on remand was, by virtue of section 240ZA of the Criminal Justice Act 2003 , to be set off against any time actually served in prison, it could not be set off against time spent on licence. Accordingly the claimant was put on licence. He refused to co-operate on the grounds that this was unjust and he was recalled to prison for breach of his licence on the 28 May. This was what is termed “fixed term recall” pursuant to section 255B of the Criminal Justice Act 2003 . He was then recalled again under that section for 28 days on the 8 October. The issue is whether he was lawfully detained when on recall or whether he ought never to have been on licence in which case he could not lawfully be recalled at all.

The relevant legislation

The relevant provisions are found in chapter 6, part 12 of the Criminal Justice Act 2003 . They have been subsequently amended in various ways and at various times, most recently by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 .

Section 237 defines a fixed term prisoner as one serving a sentence of imprisonment for a determinate term. The claimant falls into that category.

Section 244 sets out the principles for determining when a fixed term prisoner must be released on licence. So far as is material, it is as follows:

> “(1) As soon as a fixed-term prisoner … has served the requisite custodial period … it is the duty of the Secretary of State to release him on licence under this section.
>
> …
>
> (3) For the purposes of this section “the requisite custodial period” means–

> (a) in relation to a person serving a sentence of imprisonment for a term of twelve months or more … one-half of his sentence"

Section 241 sets out the principle that time spent on remand shall count when assessing what proportion of the custodial term has been served:

> "In determining for the purposes of this Chapter….whether a person to whom section 240ZA applies …"
>
> (a) has served, or would (but for his release) have served, a particular proportion of his sentence, or
>
> (b) has served a particular period,
>
> the number of days specified in section 240ZA or in the direction under section 240A are to be treated as having been served by him as part of that sentence or period."

Section 240A concerns time spent by those on bail but subject to the qualifying curfew and electronic monitoring provisions. Part of that time can count towards the custodial term in the same way as time on remand does.

Section 240ZA overlaps with section 241 . It requires days spent on remand to be taken into account not merely in determining a relevant period under section 241 , but more generally:

> "This section applies where –
>
> (a) an offender is serving a term of imprisonment in respect of an offence, and
>
> (b) the offender has been remanded in custody (within the meaning given by section 242) in connection with the offence or a related offence….

(3) The number of days for which the offender was remanded in custody in connection with the offence or a related offence is to count as time served by the offender as part of the sentence."

It is to be noted that the obligation to give credit for the time served on remand is mandatory, save where one of the express statutory exceptions applies.

Section 240ZA(6) provides one such exception to the principle that days spent on remand will count, and is pertinent to this case:

"(6) A day is not to count as time served as part of any period of 28 days served by the offender before automatic release (see section 255B(1))."

There are in fact two different kinds of recall. "Fixed term recall" is where a defendant is recalled but will be automatically released after detention for 28 days, unless released earlier by the Secretary of State or on the direction of the Parole Board: section 255B . "Standard recall" is where the Secretary of State (and the Parole Board if there is a review) considers that automatic release is not appropriate because it is in the public interest to keep the offender in prison: section 255C . Section 240ZA(6) does not allow credit to be given in respect of time on remand (if any is left) when there is an automatic recall but it does for a standard recall. This distinction provides the basis of the Article 5 challenge in this case, to which I will return.

Subsection 7 deals with the application of the principles to a suspended sentence:

"(7) For the purposes of this section a suspended sentence –

(a) is to be treated as a sentence of imprisonment when it takes effect under paragraph 8(2)(a) or (b) of Schedule 12, and

(b) is to be treated as being imposed by the order under which it takes effect."

The effect of the reference to schedule 12 is that a suspended sentence only counts as a sentence of imprisonment once the sentence is activated by the commission of a further offence during the period of suspension. It is only at that point that credit is given for time spent on remand; there is no set-off against the period of suspension itself.

The critical phrase

The critical phrase in issue in this case is found in section 240AZ(3) . What does it mean to say that the period on remand "is to count as time served by the offender as part of the sentence"? The claimant says that whatever its meaning in other contexts, in the case of an offender who has been on remand for longer than the total sentence, he must be treated as having served the whole sentence. Anything less than that would be absurd and unfair.

However, the proper construction of the relevant statutory provisions cannot vary depending upon the period of time served on remand. So the logic of the claimant's case, as ultimately accepted by his counsel, Ms. Farbey QC, is that the period on remand (and the same would apply to section 240A bail) should be set off against the whole period of the sentence promulgated by the judge at the time of sentence. Where the remand time is shorter than the custody period, it will reduce *pro tanto* the time a defendant has to spend in prison before release on licence. Where it is longer than the custodial period but shorter than the whole sentence, it will reduce the licence period by the excess unused credit. The defendant will be on licence in the usual way for the remainder of the sentence and if recalled for breach of the licence condition, he could not thereafter be given further credit for time on remand because it is well established that credit can only be given once and there should be no double counting: see R v Home Secretary ex parte Naughton [1997] 1 W.L.R. 118 ; R v Gordon [2007] EWCA Crim 165; [2007] 1 W.L.R. 2117 para. 31 per Lord Judge CJ. Where time on remand exceeds the sentence promulgated by the judge, as here, it extinguishes the sentence altogether and requires the immediate unconditional release of the offender.

The contrary view espoused by the Secretary of State is that section 240ZA(3) allows time on remand to be counted only against time spent in custody. It cannot be credited to reduce time spent on licence. However, subject to section 240ZA(6) , it will count towards time in custody spent (or due to be spent) on recall.

To illustrate by an example. Suppose a defendant receives a twelve month prison sentence and had been remanded in custody for 9 months. As he has served half the sentence in prison he will not be subject to any further custodial period and must be released on licence. On the claimant's case he would be subject to a three month licence period. The 9 months is simply deducted from the period of the sentence fixed by the judge. By contrast, the Secretary of State's case is that the 6 month licence period remains because the period on remand can be credited only against time spent in custody. However, if the defendant is recalled for any reason, credit will be given for the unused period of time spent on remand unless the exception in section 240ZA(6) applies.

Neither construction is necessarily more or less favourable to an offender in all circumstances. No doubt many offenders on licence would prefer to be given credit for time actually spent in prison if and when subject to recall than to have a reduction in the licence period. But where, as in this case, the time spent on remand exceeds the sentence imposed by the judge, the claimant's construction will necessarily be more favourable because it brings the sentence to an end.

I have considerable sympathy for the claimant's submission particularly in the context of this case. I can well understand why the claimant feels aggrieved at having to remain liable to the risk of recall after having served time in prison which exceeds the sentence imposed. But I have come to the clear conclusion that the proper construction of section 240ZA(3) is that advanced by the Secretary of State.

I say this for four reasons in particular. First, I think that the more natural meaning of the phrase “time served … as part of the sentence” is that it is concerned with time actually spent in custody. One might naturally talk about *the sentence* being served at every point; but I do not think that one would talk about *time* being served at every point of the sentence including during the period when the defendant is on licence.

Second, if the claimant is right I can see no circumstance in which section 240ZA(6) would bite. The premise of that subsection is that but for the exclusion, time spent would count with respect to automatic recall under section 255B . This in turn presupposes that there may in some cases be unused remand time still available as credit. But if it is all used up by shortening the licence period immediately after sentence is given, as the claimant contends, there never will be any period left to credit on recall. In my judgment this is a very powerful indication that the claimant's submission is wrong.

Third, the way in which credit is given with respect to suspended sentences in subsection (7) is consistent with the Secretary of State's view. The effect of that provision is that credit is given only if and when a later conviction leads to imprisonment. No credit is given with respect to the length of the period of suspension itself even though during that period the offender may be subject to requirements imposed which could be more onerous than those applying to prisoners out on licence.

Fourth, section 241 , when dealing with the question whether a person has served a particular proportion of the sentence such as the custodial term, refers to time which "he has served or would (but for his release) have served". The reference to someone who has been released is to the situation where the release on licence occurs before the end of the custodial period pursuant to section 246 . The language envisages that the time spent on licence after release would not naturally count as time served; section 241 in effect deems it to be time served for the purpose of the calculation. "Time served" refers only to time actually served in prison.

Although there is no case directly in point on the proper construction of section 240ZA , there is an authority of this court relating to a similarly worded predecessor. In R v The Governor of HM Prison, Haverigg ex parte McMahon (The Times, September 24, 1997) the facts were that McMahon was charged with two acts of assault on a woman in June and a further two assaults in October the same year. He was remanded in custody after the final assault in relation to all of the charges. Unfortunately he was not tried for these offences together. The first two were tried before the St Helen's Justices and he was sentenced to 4 months' imprisonment. Because of the time spent on remand, he was entitled to be released immediately and he still had 45 unused days spent on remand. He was not in fact released following the sentence by the Justices, but was kept in prison on remand pending the second trial. He was sentenced to 15 months on that occasion by a judge at the Liverpool Crown Court. Full credit was given for the time spent on remand solely in respect of those latter offences. However, he submitted that he should in addition be given credit for the 45 days which he alleged had not been credited and should have been.

The unusual feature of the case was the split sentencing: he was initially remanded in relation to the four offences but they were tried separately. Had there been a single sentencing exercise, full credit would have been given to all days spent on remand. In the circumstances the Divisional Court (Sedley and Astill JJ) held that credit should be given.

The relevance of McMahon to this case is that in the course of argument in that case the Secretary of State contended that credit for the 45 days had been given. It should be set off against the full sentence, thereby reducing the notional time for which the offender was on licence in relation to the first set of offences. The effect was simply to shorten the licence period. (The fact that he was remanded in custody because of the pending second trial was irrelevant). Thereafter no additional unused credit remained to be set off against the 15 month sentence.

There were two statutory provisions in issue in that case. Section 67(1) of the Criminal Justice Act 1967 provided:

> "The length of any sentence for imprisonment imposed on an offender by a court shall be treated as reduced by any relevant period".

"Relevant Period" included time spent on remand.

Section 67(4) added this:

> "Any reference in this Act or any other enactment (whether passed before or after the commencement of this Act) to the length of any sentence of imprisonment shall, unless the context otherwise requires, be construed as a reference to the sentence pronounced by the court and not the sentence as reduced by this section."

The second provision was section 41 of the Criminal Justice Act 1991 which dealt with the setting-off of time spent on remand in these terms:

> (1). This section applies to any person whose sentence falls to be reduced under section 67 of the Criminal Justice Act 1967 … by any relevant period within the meaning of that section ("the relevant period").
>
> (2). For the purpose of determining for the purposes of this Part
>
> (a) Whether a person to whom this section applies has served one half or two thirds of his sentence … the relevant period shall … be treated as having been served by him as part of that sentence. "

The current provision equivalent to section 67 is section 240ZA(3) . However, whereas section 67 unambiguously made it plain that the effect of remand time was to reduce the sentence actually imposed by the court, section 240ZA(3) is drafted in a different and more obscure manner. The claimant's argument, in effect, submits that the two provisions are in fact saying the same thing.

The court in McMahon accepted that reading section 67 alone would undoubtedly require time in custody to be subtracted from the sentence as pronounced by the judge, as the Secretary of State was claiming (and as the claimant submits is the position here with respect to section 240ZA(3)). The court rejected that analysis only because it did not accept that section 67 was the material provision in play. Section 41 was contained in the later statute and in the court's view that section governed the situation. With respect to that provision, Mr Justice Sedley said this:

> "[Section 41], it seems to us, focuses the exercise upon time actually served. It does not seek to take into account time which, though included in the length of the sentence pronounced, will not be served except as a consequence of re-offending during its currency."

Mr Justice Astill agreed.

Section 41(2) is cast in almost identical terms to section 240ZA(3) and therefore this authority supports the construction I have favoured.

Article 5

The alternative submission was that the procedures adopted in this case involved a breach of Article 5 which, so far as is relevant, is as follows:

> "(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court.
>
> …

> (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

In the course of argument my understanding was that there were two distinct threads in this submission. First, I understood the claimant to allege that there was a breach of Article 5(4) with respect to the decision to recall. There are practical consequences, depending on whether there is an automatic recall or a standard recall. As I have said, the effect of section 240ZA(6) is that the time spent on remand counts against the latter but not the former. It was said that since the decision as to the nature of the recall was taken by the Secretary of State and it affected the time actually spent in custody, the claimant had been deprived of his liberty without a proper determination by a competent court.

This argument is misconceived. The procedure under section 255B , which is concerned with automatic recall, allows the defendant to make representations in writing with respect to the revocation of the licence and in those circumstances the Secretary of State must refer the case to the Parole Board, who may order the defendant's immediate release. It is well established that the Parole Board is a judicial body and that review by the Board in principle constitutes compliance with Article 5(4) : see R (West) v Parole Board [2005] UKHL 1; [2005] 1 WLR 350

In any event, in R (Whiston) v Secretary of State for Justice [2014] UKSC 39' [2014] 3 W.L.R. 436 para. 25 Lord Neuberger (with whose speech Lords Kerr, Carnwath and Hughes all agreed) expressed the view, albeit obiter, that Article 5(4) was not engaged at all "in circumstances when the recall to prison occurred during the period of a determinate sentence imposed for the purpose of punishment". That was a case of recall following release prior to the custodial period being completed under section 246 of the 2003 Act, and in those circumstances there is no review by the Parole Board. But the observation of Lord Neuberger was not limited to such cases. It suggests that any recall for any reason which occurs during the period of the sentence will be outside Article 5 .

The claimant places emphasis on the judgment of Baroness Hale in that case. She expressed reservations with Lord Neuberger's speech on that particular point (although not on the result in the case). She considered that where a prisoner is entitled to be released as a matter of right after a particular period, as fixed term prisoners are under UK law once they have served the custodial term, then Article 5(4) would bite on any decision thereafter to recall the defendant to prison.

The claimant suggests that the decision of the Strasbourg Court in Del Rio Prada v Spain (2014) 58 EHRR 37 , a case decided before the Whiston case but not apparently drawn to the attention of the Supreme Court, supports the provisional view of Baroness Hale. That was a case where the applicant was initially sentenced to 3,000 years' imprisonment which was later reduced to 30 years. She was told in February 2001 that she would fully discharge her sentence in June 2017 in accordance with the rules then in place which gave credit for work done in prison. Subsequently, following a decision in the Spanish Supreme Court, the rules were changed and this led to her being required to remain in prison for an additional period amounting to almost 9 years. The Strasbourg Court held, amongst other matters, that this was a breach of Article 5(1) on the grounds that the application of rules which were not in place at the time of her original sentence and could not have been foreseen meant that her detention was not "lawful" within the meaning of that provision.

In my judgment, this case has no bearing on the issues discussed in Whiston . Furthermore, Baroness Hale at paragraph 59 confirmed the principle that where the Parole Board has the power to decide on continued detention that provides the necessary judicial element consistent with Article 5(4) .

The second strand in this argument was that the distinction drawn in the law between automatic and standard recalls, with time on remand counting as credit in relation only to the latter, rendered the claimant's recall arbitrary. It means that the offender who can safely be returned to the community is treated less favourably than the offender who cannot, precisely the reverse of what one would expect. Reliance is placed on the speech of Lord Hope of Craighead in R (Giles) v Parole Board [2004] 1 A.C.1 , para. 40, where he said that, in the light of the Strasbourg jurisprudence, in order for a detention to be lawful within the meaning of Article 5(1) , it must be "in accordance with domestic law and not arbitrary". He said that detention would be arbitrary if it was resorted to in bad faith or if it was disproportionate (para. 25). The submission is that even although the initial sentence was not arbitrary, the recall was precisely because of the different rules relating to credit given for time spent on remand. They operate in a disproportionate way.

Even assuming that Article 5(1) can in principle apply to the subsequent recall (which is inconsistent with the majority view in Whiston) I do not accept that applying a different principle as regards credit to the two forms of recall is arbitrary. There are a number of differences and a comparison cannot simply focus on that one difference without regard to the others. In practice a defendant on automatic recall is far more likely to be released earlier than those on standard recall. He is automatically released after 28 days, whereas someone on standard recall will remain in prison until the release date unless the Secretary of State (or the Parole Board, if the case is referred to the Board) is satisfied that it is not necessary for the protection of the public that he should remain in prison.

I accept that it is not entirely clear why section 240ZA(6) does distinguish between automatic recall and standard recall so far as credit for time on remand is concerned (and the diligence of counsel has not unearthed any explanation given in the debates in Parliament). It may be a concern that without some period of imprisonment which could not be reduced by time spent on remand there would be too many cases where the remand time would swallow up the short period of recall with the consequence that there would be no effective sanction for breach of licence. But whether that is the rationale or not, I am satisfied that the distinction is not arbitrary so as to justify the conclusion that implementing an automatic recall would mean that it was not a lawful recall within the meaning of Article 5(1) .

There is possibly a further reason why this ground fails. It relates to the way in which the recall provisions are applied in practice. We were helpfully given a full explanation of this following the hearing.

Where an offender is recalled under the automatic recall provisions, he must serve 28 days (unless released earlier). In fact, however, notwithstanding section 240ZA(6) , he is in practice given credit for time spent on remand, although not directly against time spent in prison. This is because the period he serves on recall, or the unused time spent on remand, whichever is the less, is used to bring forward the sentence end date, at which point he is entitled to be released. The effect, therefore, is in fact to give credit for days spent on remand (up to the number of days actually spent in prison) against what would otherwise be days spent on licence. I am told that there is no specific statutory provision permitting this, and I confess to some doubts as to what its legal basis may be, although we heard no argument about that. But it does have the merit of giving effect to section 240ZA whilst at the same time recognising that it might be thought unjust and disproportionate to give an offender subject to fixed term recall no allowance at all for days spent on remand.

For those offenders recalled pursuant to section 255C , the giving of credit must perforce operate in a different way to its application to the custodial period. The recall is for an indeterminate length of time, although the end date for someone not released earlier is known since it is the date when the sentence fixed by the judge is completed. So the offender is liable to be recalled until that date although he may be released earlier. It would not be possible to give credit at the time of recall for days spent on remand since it is not known for how long the recall will be. So what is done is to bring forward the date of release by the number of unused days spent on remand. For those offenders who would in fact have remained in prison for the duration of their sentence, there is a direct correlation between the time actually served in custody and the time which the offender is liable to serve in custody on recall.

It follows that in both cases there is credit given by bringing forward the sentence end date and hence the date of release. The practical application of the principles brings them very close together. There is nothing arbitrary so as to attract the operation of Article 5 .

Disposal

For these reasons I would reject this application for judicial review.

Mr Justice Hickinbottom:

I agree — and would only say that, for my own part, I would not rely upon the alternative ground upon which my Lord Elias LJ considers that the Article 5 basis of challenge might fail (paragraphs 41-44 above). In my view, there is nothing arbitrary in the statutory scheme for the reasons put forward cogently by Elias LJ earlier in his judgment, and, in the absence of argument as to the legal basis upon which the Secretary of State brings forward the sentence end date of a prisoner on automatic recall, I would prefer to reserve my position on the alternative he postulates.

2014 WL 5312005

R. v Archer (Jeffrey Howard)

Court of Appeal | July 22, 2002 | [2003] 1 Cr. App. R. (S.) 86

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Court of Appeal
22 July 2002

[2002] EWCA Crim 1996

[2003] 1 Cr. App. R. (S.) 86

(Lord Justice Rose (Vice President , Court of Appeal Criminal Division), Mr Justice Colman and Mr. Justice Stanley Burnton):
July 22, 2002

Analysis

H1 Perjury—perjury by plaintiff in civil proceedings—length of sentence

Four years' imprisonment upheld for perjury and doing acts tending and intended to pervert the course of public justice, in civil proceedings.

The appellant was convicted of two counts of doing an act tending and intended to pervert the course of public justice, and two counts of perjury. The appellant was concerned in civil proceedings for libel as plaintiff. A newspaper made allegations that the appellant had had sexual intercourse with a prostitute. The appellant gave evidence in the trial to the effect that on the night when he was alleged to have had intercourse with the prostitute, he had had dinner at a restaurant with friends and later met a political aide, whom he drove home. Prior to the trial the appellant asked another man to confirm that they had dined together at a restaurant on another night, and had later had a telephone conversation. The other man wrote letters to the appellant's solicitor confirming that he had dined with the appellant on that night, but his evidence became irrelevant when the defendants amended their defence to allege that the incident had taken place on the previous night. The appellant persuaded his personal assistant to fill in a blank diary for the relevant period a list of names, which was copied into the diary. Photocopies of these entries were subsequently sent to the defence solicitors. Sentenced to four years' imprisonment for one offence of doing an act tending to pervert the course of public justice, two years' imprisonment concurrent for the other such offence, and four years' imprisonment on each count of perjury, all concurrent, with an order to pay the costs of the prosecution.

(considering Vianna (1994) 15 Cr.App.R.(S.) 758 , Taggart (1995) 16 Cr.App.R.(S.) 789 , Williams (1995) 16 Cr.App.R.(S.) 191 , Walsh and Nightingale (1993) 14 Cr.App.R.(S.) 671 , Blakemore [1997] 2 Cr.App.R.(S.) 255 , Bowen [1996] 1 Cr.App.R.(S.) 63 , Attorney General's Reference No. 44 of 1994 (Steven Peter Middleton) [1996] 1 Cr.App.R.(S.) 256 , Boodhoo [2002] 1 Cr.App.R.(S.) 9 (p.33), and Dunlop [2001] 2 Cr.App.R.(S.) 27 (p.133)) it was submitted that the sentence was outside the range of any reported case in relation to perjury in civil proceedings. It was submitted that the authorities suggested that a distinction was to be drawn between perjury in civil proceedings and perjury in criminal proceedings. The Court could find no such principle in the ***447** authorities. The offence had been committed 14 years before the trial, and it was submitted that the sentencing judge had taken too little account of the lapse of time.There were many factors to be considered when determining the appropriate level of sentence for perjury and related offences. In the Court's judgment there was no distinction as to the level of sentence to be drawn according to whether the proceedings contaminated were of a civil or a criminal nature. Perjury might be comparatively trivial in relation to criminal proceedings or very serious in relation to civil proceedings. Whether the proceedings were civil or criminal was one of the factors properly to be considered; there were many others. They included the number of offences committed, the time scale over which they were committed, whether they were planned or spontaneous, whether they were persisted in, whether the lies which were told or the fabrications which were embarked upon had had any actual impact upon the proceedings in question; whether the activities of the defendant drew in others; what the relationship was between others who were drawn in and the defendant. The Court had to bear in mind those factors in the context of previous decisions of the Court. It was true that there was no reported authority precisely similar to the present. The fundamental question was whether a total sentence of four years' imprisonment could be regarded as manifestly excessive for this criminality. In the Court's judgment, it could not. Having regard to the length of time over which the offences were committed, the perceived involvement of others, and the persistence in dishonest conduct, it could not be said that the sentence was manifestly excessive. The appeal would be dismissed.

H5 Cases cited:

- Vianna (1994) 15 Cr.App.R.(S.) 758 , Taggart (1995) 16 Cr.App.R.(S.) 789 , Williams (1995) 16 Cr.App.R.(S.) 191 , Walsh and Nightingale (1993) 14 Cr.App.R.(S.) 671 , Blakemore [1997] 2 Cr.App.R.(S.) 255 , Bowen [1996] 1 Cr.App.R.(S.) 63 , Attorney General's Reference No. 44 of 1994 (Steven Peter Middleton) [1996] 1 Cr.App.R.(S.) 256 , Boodhoo [2002] 1 Cr.App.R.(S.) 9 (p.33), Dunlop [2001] 2 Cr.App.R.(S.) 27 (p.133)

References: perjury, *Current Sentencing Practice* B 8–1

H7 Representation

- N. Purnell Q.C. and A. Cameron for the appellant.

Judgment

Rose L.J.:

On July 19, 2001, following a seven week trial at the Central Criminal Court, before Potts J., the appellant as he is in relation to sentence, was convicted by the jury on four counts in the indictment. Count 1 was doing an act, namely procuring Edward Francis to provide a false alibi for September 9 1986, tending and intended to pervert ***448** the course of public justice. He was sentenced to two years' imprisonment. On count 3, for doing a series of acts, namely concealing the existence of an A 53 diary, providing his secretary Mrs Peppiatt with a blank A4 diary and details to fill in, and falsely using that diary in litigation as a genuine 1986 diary, those acts tending and being intended to pervert the course of public justice, he was sentenced to four years' imprisonment. Count 5 alleged perjury, in falsely swearing an affidavit on June 23, 1987 about the documents in his possession. For that he was sentenced to three years' imprisonment. Count 6 was perjury on July 8, 1987, that the A4 diary produced in libel proceedings, in which he was then giving evidence, was in existence and contained entries in relation to September 8 and 9, 1986, prior to October 26, 1986. On that count he was sentenced to four years' imprisonment; all the sentences were ordered to run concurrently. He was also ordered to pay a sum towards the prosecution costs, with a further period in default.

There were other counts in the indictment: count 2 related to Edward Francis, a co-accused who was acquitted on a charge which was the mirror of count 1 in relation to the appellant. There were also counts 4, 7 and 8, in relation to which it is not necessary, for present purposes, to refer.

It is convenient, first, to rehearse, in outline, the events leading to the appellant's trial, as this sets the evidence given at his trial in context. We should say that he appeals to this Court against sentence by leave of the single judge. His application for leave to appeal against conviction was refused by the single judge and the renewed application was this morning dismissed by this Court for reasons which will appear in the course of this judgment.

In 1986 the appellant was a successful writer, ambitious politician and deputy chairman of the Conservative party. His co-accused, Francis, was a casual friend who was involved in film production, advertising and screen writing. On October 26, 1986, the News of the World published articles asserting an association between the appellant and a prostitute, involving sexual intercourse between them, on the night of September 8/9, 1986, and the handing over of monies to her at Victoria Station, on the appellant's behalf, on the October 24, 1986, with a view to procuring her silence.

The appellant resigned as deputy chairman of the Conservative party. On October 26, he issued a statement in which he denied that he had ever met the prostitute. He also claimed the money had been paid in response to a telephone call from her, in which she claimed that the press were pursuing her. Recognising that publicity would be harmful to him, he foolishly arranged the payment of money, and this displayed a lack of judgment which caused him, he said, to resign.

On November 1, 1986 the Star newspaper effectively repeated the News of the World allegation with added details: in particular, that sexual intercourse had occurred in a hotel near Victoria Station at 1.00 a.m. on Tuesday September 9. The appellant sued both papers for libel.

The Star newspaper's defence, served on December 23, 1986, mistakenly identified the crucial night as September 9/10, instead of September 8/9. Mishcons, the appellant's solicitors, were not told by Lovells, the newspaper's solicitors, of the mistake until March 27, 1987. It was during the period between those dates, that is to say between the end of December when the defence was served and the beginning of April when the defence was amended, that the events occurred which involved the co-accused, Francis. These led to the creation of a false alibi for the appellant for the night of September 9/10, which gave rise to the ***449** first and second counts in the indictment. Thereafter there were dealings with the appellant's diaries by the appellant and his secretary Mrs Peppiatt, which gave rise to the other counts in the indictment. To those events we shall return in a moment.

At the libel trial against the Star newspaper, in July 1987, the appellant gave evidence that, on the evening of September 8, he had had dinner at the Caprice restaurant with friends from the publishing world. At the end of the meal, by chance, he met his political aide, Terence Baker, and at 12.45 a.m. at the earliest, on September 9, he drove Baker home to south London. Baker, who has since died, gave evidence confirming this. If this was right, the appellant could not have been with the prostitute. The jury found for the appellant, and awarded him £500,000 in damages.

It was common ground, at the appellant's criminal trial, that by 1990 the relationship between him and Francis had cooled. In the mid 1990s Francis was approached by a man called Crick who was writing a book about the appellant. Francis eventually showed Crick two letters he had written to Mishcons in January and March 1987. To those letters we shall return.

In 1999 Francis approached Max Clifford, a public relations man, who introduced him to the chief crime reporter of the News of the World, Mr Thurlbeck. At the time the appellant was a candidate to be Mayor of London. Francis thought him an inappropriate choice. He told Thurlbeck that, at the appellant's request, he had manufactured a false alibi for the appellant, for the night of September 9.

Prompted and in part scripted by Thurlbeck, and with a view to obtaining admissions from the appellant about what he had done with Francis in early 1987, Francis telephoned the appellant. There were several conversations on the telephone between them, one at least of which was instituted by the appellant himself. Those conversations were tape recorded. The tapes, in due course, were played at the appellant's criminal trial.

The appellant, in the course of those conversations, effectively admitted asking Francis to write letters to his solicitors, saying that they had dined together at the Sambucca restaurant on September 9 and he, Francis, had spoken to the appellant on the telephone later that night. The appellant told Francis in the course of the conversations on the telephone that his, Francis's, name had not been mentioned in the libel trial because, when the defence changed the date to the September 8/9 from September 9/10, what Francis had said about the night of September 9/10, became an irrelevance.

On November 19, 1999 the appellant was told by the editor and news editor of the News of the World of the substance of the tape recorded telephone conversations. On November 20, the appellant issued a statement to the media in which he admitted soliciting a false alibi from Francis. He claimed that on September 9 he had been dining with a close female friend, whom he was seeking to protect. He withdrew his candidature for Mayor of London. On November 21, the News of the World said a woman called Andrina Colquhoun was the friend the appellant had supposedly been dining with on September 9. On November 30, the News of the World handed the tapes to the police. Expert examination showed that they had not been tampered with. It was at that stage that the police ***450** began the investigation which led to the appellant's appearance at the Central Criminal Court.

We turn to the evidence at that trial. It had many twists and turns. For present purposes, it is sufficient to identify the more important matters. It was common ground, as recorded in a genuine A 53 diary, produced at the criminal trial, that, after the appellant's libel writ had been issued, the appellant and Francis met on November 20 and December 3, 1986. Francis was looking for film finance with which he hoped the appellant might assist, but at that stage the appellant said his funds for such purposes were exhausted for that year. In January 1987, after the newspaper's defence had identified September 10, as the crucial date, at the appellant's invitation Francis dined with him at the Sambucca restaurant. The appellant asked if it was possible that they had dined there the previous September. Francis said that it was. The appellant said that he wanted that to be so, because he was worried his wife would find out he had been dining with Andrina Colquhoun and that might lead to the break-up of his marriage. The libel action, according to Francis, was not discussed. Francis agreed to say that he had dined with the appellant on a particular night which the appellant identified as September 9.

On January 22, 1987 Francis wrote accordingly to Mischons saying that he had returned home on September 9 at 11.20 p.m., had then taken a call from the United States and had then telephoned and spoken to the appellant. In somewhat bizarre circumstances, which the appellant, according to Francis, attributed to his tax affairs, Francis visited two banks, one of them with the appellant, and received £12,000 in cash. The appellant said that he would look at Francis's film script.

On March 12, 1987 Mischons wrote to Francis enquiring as to the exact time of his telephone call to the appellant. Francis replied giving an approximate time. Francis accepted, and the appellant did not challenge, that the terms of both those letters, written by Francis to the solicitors, were false. He had not seen the appellant on the evening of the 9th, or telephoned and spoken to him thereafter.

Andrina Colquhoun gave evidence of an affair with the appellant between 1979 and 1984 and said that this intermittently continued in secret between 1985 and 1987. She said she could not have had dinner with the appellant on September 9. She was in Greece. These matters gave rise to count 1.

As to count 3: the appellant's personal assistant from January 1985 to December 1987, Mrs Peppiatt, gave evidence that only two diaries were kept in relation to the appellant's engagements in 1986: hers, an A 53 diary, and an Economist diary kept by the appellant and by an aide of his. There had been an A4 diary for 1985, but she, Mrs Peppiatt, had chosen the smaller A 53 diary for 1986 because it was more convenient to carry between the two offices where she worked for the appellant. When she left the appellant's employment, she kept her 1985, 1986 and 1987 diaries. In April 1987, which, it will be recalled, was after the date when the libel defendants had corrected the date in their defence to September 8/9, the appellant produced to Mrs Peppiatt a blank A4 diary for 1987 and a piece of paper on which was a list of names and times, in ***451** handwriting which, it was unchallenged, was the appellant's. Mrs Peppiatt said that he told her to fill in the diary from the list because the paper's lawyers wanted to see his diaries.

Photocopies were sent to the paper's solicitors in May. Mrs Peppiatt also took photocopies, and she kept the list in the appellant's handwriting because, she said, she was concerned about what she was being asked do. On May 26 the appellant asked Mrs Peppiatt to photocopy the A4 diary entries between September 5 and 12, including entries transferred to it from the Economist diary, and he asked her to take the diary, with the new entries, to Mishcons. She did so. Lovells were only permitted to see the entries relating to September 8 and 9 . She also, for herself, took two photocopies of the Economist diary, which she did not subsequently discover until May 11, 2001 when she was preparing to give evidence at the Central Criminal Court.

On June 15, 1987 Mischons sent photocopies of the Economist diary to Lovells. There were entries in the appellant's writing which were not on the photocopies Mrs Peppiatt had taken previously. On June 23 the appellant swore the affidavit giving rise to count 5. It referred to the A4 diary but made no reference to Mrs Peppiatt's A 53 diary, which she said was at Central Office from April 1987 up to the time she left the appellant's employment in December of that year. Not until she was recalled and gave further evidence was it suggested to Mrs Peppiatt, on the appellant's behalf, that there was a genuine 1986 A4 diary. She said she was unaware of it: "absolutely not".

Caroline Norman confirmed that Mrs Peppiatt kept the A 53 diary for 1987, and she was aware of no other. Her evidence was not challenged.

Later, Lady Archer gave evidence for the appellant that she had never seen the A 53 diary, and there was an A4 diary in 1986. It appeared, however, that although she claimed to have said, in August or September 2000, that she had seen the A4 diary, she had made no written statement about that until a day or two before she gave evidence at the criminal trial.

As to count 6, the appellant gave evidence at the libel trial that the A4 diary, which was bogus if Mrs Peppiatt was right, was in existence and contained 8th and 9th September entries prior to the News of the World story of October 26, 1986. The newspaper leading counsel and junior counsel, gave evidence for the prosecution at the Central Criminal Court, that at the libel trial they did not see pages in the A4 diary other than for September 8 and 9, because they were masked.

The appellant did not give evidence at the Central Criminal Court.

The defence to count 1 was that, as September 9/10 ceased to be relevant in the libel proceedings, whatever passed between the appellant and Francis could not have had a tendency to pervert the course of justice and there was no proved intention to pervert on the appellant's behalf.

As to count 3, it was said that the appellant was too busy to have done what Mrs Peppiatt claimed. She had a purpose of her own to serve by bringing a bogus diary into existence, if there was one, in order to conceal her own dishonesty in using the appellant's money to pay for some of her own expenditure. The defence ***452** statement asserted that the appellant believed the diaries produced were genuine but there was, of course, no evidence from the appellant called as to that.

As to count 6, it was said that if the A 53 diary had been produced at the libel trial it would have provided no more information than the Economist A4 diary, namely, a reference in the former to "Baker 8 o' clock Sambucca" and in the latter a reference to "Baker", with no time or place.

The defence statement asserted that the appellant's evidence at his libel trial was true, to the best of his knowledge and belief, but there was, as we have said, no evidence to support that before the jury.

(*Paragraphs 29–49 are omitted.*)

It was for these reasons that, at the short adjournment, we indicated that leave to appeal against conviction was refused.

We turn now to sentence. Mr Purnell submitted that a sentence of four years, a long-term sentence, was wholly outside the range of any reported case in relation to perjury in civil proceedings. He advanced the proposition that the authorities suggest that a distinction is to be drawn between whether the proceedings in relation to which lies are told are civil or criminal. For our part, although the nature of the proceedings is clearly a relevant factor, we find no enunciation in the authorities of any principle of distinction determinative of the appropriate level of sentence. Mr Purnell accepted that there is no enunciation of any such principle in any of the authorities to which he referred. But he took us to a number of authorities, in order to seek to make good his submission that the sentence passed upon the appellant was excessive.

The first was Vianna (1994) 15 Cr.App.R.(S.) 758 , where a sentence of 30 months was reduced to 18 months, following a conviction for subornation of perjury. In the course of giving the Court's judgment in that case, Cazalet J. drew attention to a number of unusual features of the facts. The appellant's offence was committed in the context of a bitterly contested divorce proceedings between him and his wife. The witness who was suborned did not give evidence, as he had agreed to do as a result of the subornation; indeed he gave evidence on the other side in the divorce proceedings. The matter about which the witness was suborned related the observations kept on the appellant's wife. There was no doubt that the observations had, as purportedly described, been kept on the appellant's wife; but they had not been kept by the witness whom the appellant suborned. There were a number of circumstances of special mitigation in relation to the appellant they included his mental condition, which was the subject of a psychiatrist's report before the Court . His company had gone into liquidation and the offence was committed in the context of what Cazalet J. described as “desperate strains imposed upon him by the divorce”. In concluding that the sentence should be reduced, Cazalet J. referred to the unusual facts of the case.

In Taggart (1995) 16 Cr.App.R.(S.) 789 a sentence of five years' imprisonment was upheld, following a conviction for doing an act tending to pervert the course of justice, by threatening a witness with serious violence. The sentencing judge had ordered a two year sentence, for assault occasioning actual bodily harm and ***453** inflicting grievous bodily harm, to run consecutively with the five years which he imposed for the perversion of justice offence. The Court of Appeal reduced that sentence by ordering those two sentences to run concurrently. In giving the judgment of the Court, Smith J. endorsed the sentence of five years passed for “a determined attack on the rule of law”.

In Williams (1995) 16 Cr.App.R.(S.) 191 a sentence of four years was upheld following conviction for an attempt to intimidate a witness in civil proceedings. Bell J., in the course of giving the judgment said this at p.192:

> “People who are tempted to involve themselves in seeking to deter witnesses from giving evidence, or true evidence, must realise that a prison sentence is inevitable, whatever their own personal mitigation and good character might be.”

He went on to the refer to the absence of mitigation in that case of any plea of guilty. In Walsh and Nightingale (1993) 14 Cr.App.R.(S.) 671 , a sentence of five years' imprisonment for conspiring to pervert the course of justice by concocting a false story, was reduced to three years' imprisonment, following a plea of guilty.

In Blakemore [1997] 2 Cr.App.R.(S.) 255 , a total sentence of 12 years consisting of seven for manslaughter, with five consecutively for doing an act tending to pervert the course of justice, was reduced to a total of eight years, consisting of five for manslaughter and three for doing an act tending to pervert the course of justice.

In Bowen [1996] 1 Cr.App.R.(S.) 63 , a sentence of three years' imprisonment was upheld, following conviction, for conspiracy to pervert the course of justice. That sentence had been imposed consecutively to a sentence of nine years' imprisonment, for other offences. Mr Purnell referred to a number of other cases, which it is not necessary to identify, involving comparatively minor offences of perjury, consequential upon driving offences.

He also referred to Attorney-General's Reference No 44 of 1994 (Middleton) [1996] 1 Cr.App.R.(S.) 256 , where, a probation order having been made following a plea of guilty to four offences of doing an act tending to pervert the course of justice by threatening witnesses, was varied, on an Attorney-General's reference to a sentence of two years' imprisonment. Lord Taylor C.J., in the course of giving judgment, and that, in the ordinary way a sentence of three years would have been the minimum appropriate total sentence for the course of conduct committed by the offender in that case.

Penultimately in Boodhoo [2002] 1 Cr.App.R.(S.) 9 (p.33), a juror who had accepted a bribe of £1,000 from a defendant in a criminal trial pleaded guilty to doing acts tending and intended to pervert the course of justice. Having accepted the bribe, he was party to the conviction of the defendant who had paid the bribe. A sentence of four years was upheld.

In Dunlop [2001] 2 Cr.App.R.(S.) 27 (p.133), concurrent sentences of six years' imprisonment were imposed on an appellant who had given false evidence in his own defence in a murder trial and repeated it at a retrial. This Court declined to interfere with those sentences, which had been imposed, it is to be noted, ***454** following a guilty plea. Mr Purnell also referred to the case of Aitken , which has not been the subject of legal reporting when a sentence of 18 months was passed, following a plea of guilty by the defendant to suborning his daughter as a witness in civil proceedings.

Mr Purnell drew attention to the fact that 14 years had elapsed between the commission of these offences and the time when the appellant was sentenced. He submitted that the learned judge, in passing sentence, had taken too little account of that lapse of time. Mr Purnell also submitted that the judge appeared to regard it as an aggravating feature, having regard to something that passed between him and counsel in the course of submissions, that the appellant had prospered in life since the offences were committed. It does not seem to us that the judge was regarding that as an aggravating feature. He referred to that fact in the context of counsel's reliance upon the period of time which had relapsed since the offences were committed.

Mr Purnell invited our attention to the invasive press attention, in breach of the appellant's right to privacy, while serving his prison sentence, to which attention is drawn in a letter from the prison governor dated July 15, 2002, which is before this Court. Mr Purnell also drew attention to a large number of newspaper cuttings in relation to the appellant since trial and he drew our attention also to the views of the doctors in the prison hospital where the appellant has served, unsurprisingly, with considerable distinction as a hospital orderly.

In our judgment, there are many factors to be considered when determining the appropriate level of sentence for perjury and related offences. We have already indicated that there is not, in our judgment, any distinction as to the level of sentence to be drawn according to whether the proceedings contaminated were of a civil or criminal nature. Perjury may be comparatively trivial in relation to criminal proceedings or very serious in relation to civil proceedings. No doubt whether the proceedings were civil or criminal is one of the factors proper to be considered. There are many others. We do not purport to give an exhaustive list. They include the number of offences committed; the timescale over which they are committed; whether they are planned or spontaneous; whether they are persisted in; whether the lies which are told or the fabrications which are embarked upon have any actual impact on the proceedings in question; whether the activities of the defendant draw in others; what the relationship is between others who are drawn in and the defendant. In the present case, Mrs Peppiatt was an employee and therefore, in some respects, vulnerable to suggestions made by her employer. Mr Francis was, as the judge found, and Mr Purnell did not seek to submit to the contrary, corrupted by money to do what he did. All of these factors, as it seems to us, no doubt with others, have to be borne in mind. The judge made no secret of the fact, in the course of submissions made to him by Mr Purnell, that he regarded it as his duty to deal with the whole course of conduct between January and July 1987, which had the various aspects identified in the different counts in the indictment on which the appellant was convicted.

All of those factors this Court has to bear in mind; and it has to bear them in mind in the context of earlier decisions of this Court. We have referred in a little ***455** detail to each of the relevant authorities to which Mr Purnell drew our attention. It is perfectly true that, as the judge said and as Mr Purnell submitted, there is not to be found, in the authorities, a case precisely similar to the present. The fundamental question is whether a total sentence of four years, for this criminality, can be regarded as manifestly excessive. In our judgment it cannot. Having regard to the length of time over which these offences were committed, the perceived involvement of others, and the persistence in dishonest conduct which we have identified, it cannot, in our judgment, be said that, following a trial, a sentence of four years was excessive. Accordingly, despite Mr Purnell's able submissions, this appeal against sentence is dismissed.

[2003] 1 Cr. App. R. (S.) 86

R. v Barrett (Daniel)

Court of Appeal (Criminal Division) | February 12, 2010 | [2010] 2 Cr. App. R. (S.) 86

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***551 R. v. Daniel William Barrett**

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Court of Appeal (Criminal Division)
12 February 2010

[2010] EWCA Crim 365

[2010] 2 Cr. App. R. (S.) 86

Mr Justice Mackay and Mr Justice Keith
February 12, 2010

Analysis

Credit for time served; Maximum sentences; Remand; Suspended sentences;

H1 Suspended sentence—defendant spending more time in custody on remand than he would be required to serve under maximum possible sentence of imprisonment—whether appropriate to impose term of imprisonment with suspended sentence order

Suspended sentences of 12 weeks' imprisonment, suspended for 12 months, varied to a conditional discharge, where the appellant had spent almost four months in custody on remand by the date of sentence, and the total maximum aggregate sentence which could have been imposed on him was six months' imprisonment.

The appellant pleaded guilty to one count of threatening behaviour, three counts of damaging property and one offence of assaulting a police officer in the execution of his duty. Sentenced to a total of 12 weeks' imprisonment, suspended for 12 months.

Held: the maximum total sentence available to the court for the offences concerned could not exceed six months' imprisonment. By the time of sentence, the appellant had been in custody on remand for almost four months and there was no reason why, if he was sentenced to terms of imprisonment, the time he had spent on remand would not count towards his sentence. It followed that even if the judge had passed the maximum sentence on the appellant, he would have been released immediately. By sentencing the appellant to a suspended sentence, the sentencing judge was in practical terms passing a sentence which was more severe in its impact on the appellant than the maximum sentence would have been. That was a course which should have been avoided and it could have been avoided only by passing sentences of imprisonment of immediate effect. Suspending the sentence in those circumstances was wrong in principle. That approach was in line with the approach adopted by the Court in Hemmings [2007] EWCA Crim 2413; [2008] 1 Cr. App. R. (S.) 106 (p.623) where it was said to be wrong in principle to impose a community order on a defendant who had spent more time in custody on remand than he would have spent had he received the maximum sentence. That case followed the reasoning in the earlier cases of McCabe (1988) 10 Cr. App. R. (S.) 134 and Peppard (1990-91) 12 Cr. App. R. (S.) 88 . Accordingly the suspended sentence would be quashed and the Court would substitute orders of conditional discharge for each of the offences for a period of four months. ***552**

H5 Cases cited:

- McCabe (1988) 10 Cr. App. R. (S.) 134
- Peppard (1990-91) 12 Cr. App. R. (S.) 88
- Hemmings [2007] EWCA Crim 2413; [2008] 1 Cr. App. R. (S.) 106 (p.623)

References : time on remand, Current Sentencing Practice A6A-2C

H7 Representation

- Miss N. Hornby for the appellant.

JUDGMENT
KEITH J.:

On August 28, 2009 at Nottingham Crown Court, the appellant pleaded guilty to five offences: threatening behaviour (count 1), three offences of damaging property (counts 2, 3 and 4) and assaulting a police officer in the execution of his duty (count 5), a summary offence for which he had been committed to the Crown Court for trial under s.41 of the Criminal Justice Act 1988 . On October 2, 2009 he was sentenced by H.H. Judge Butler QC to what the court record records as four weeks' imprisonment for the offence of threatening behaviour (count 1); four weeks' imprisonment on each of the first two offences of damaging property (counts 2 and 3), to be served concurrently with each other but consecutively to the sentence on count 1; four weeks' imprisonment on the third offence of damaging property (count 4), to be served consecutively to the sentences on counts 1, 2 and 3; and four weeks' imprisonment for the offence of assaulting a police officer, to be served concurrently with the other sentences. All these sentences were ordered to be suspended for 12 months with a supervision requirement for 12 months. The total sentence was therefore 12 weeks' imprisonment suspended for 12 months. It is fair to say that the transcript of the judge's sentencing remarks refers to the sentence as being three months' imprisonment suspended for 12 months without any breakdown of the sentences passed on each count. We take it that the judge must have been asked subsequently what the breakdown of her sentences was, which is how the breakdown got into the court record. The appellant now appeals against his sentence with the leave of the single judge.

The facts were these. On June 3, 2009 the appellant and his girlfriend had been arguing. When she got back to their flat, she found the appellant in the communal hallway. He threw bags of shopping at her, waved a Stanley knife around and threatened her. That was the behaviour to which count 1 related. She went into a neighbour's flat to get away from him, and it was later discovered that he had carved abuse on the communal doors. That was damage to which counts 2 and 3 related. The police were called. They found the appellant on a balcony. He appeared to be drunk, and he threatened to jump off the balcony. He was angry and aggressive with one officer in particular whom he spat at and threw a beer can at. He then pulled out a Stanley knife and punched the balcony door with his fist breaking a glass panel. This was the damage to which count 4 related. Shards of glass fell on a police officer on the other side of the door cutting his ear. That was what the assault consisted of.

The appellant is 28 years old. He has many previous convictions, his record being dominated by offences of dishonesty and failing to surrender to bail. He claimed to the author of the pre-sentence report on him that he could not recall ***553** what he had done as he had been drunk at the time. He had a long history of drug and alcohol abuse, although in recent times his drug use was said to have reduced. His offending had for the most part been to fund his drug habit. There was said to be a very high risk of further offending, and a high risk that some of those offences would involve violence. There was a medium risk of harm to others.

The maximum sentence for the offences of threatening behaviour and assaulting a police officer was six months' imprisonment. The maximum sentence for the offences of criminal damage was three months' imprisonment. The total sentence could not exceed six months' imprisonment. However, he had been in custody on remand for almost four months by the date on which he was sentenced. There was no reason why if he was sentenced to terms of imprisonment the time he had spent on remand would not count towards his sentence. Thus, even if the judge passed the maximum sentences on him, he would have been released immediately.

The appellant was aware of that. That was why, when he first appeared at the Crown Court on August 28, 2009, his counsel asked H.H. Judge Butler to sentence him there and then. Even if he had been sentenced on that occasion to the maximum term, he would have been released within a few days. Her Honour Judge Butler refused to do this. She remanded him in custody for a pre-sentence report because, as she said, she wanted to see whether there was an alternative to a custodial sentence. The appellant next appeared at the Crown Court on September 30, 2009. The pre-sentence report on him did not address whether a community sentence was appropriate because the appellant had said that he would not engage with a community order since he had already served the maximum sentence. Her Honour Judge Butler was asked once again to sentence the appellant there and then, but she said that she had in mind a suspended sentence with conditions which included an unpaid work requirement. She therefore adjourned sentencing so that a further report could be prepared which addressed the appellant's suitability for such a requirement. It was when the appellant next returned to court on October 2, 2009 that H.H. Judge Butler eventually sentenced him.

We can understand why the judge wanted to impose a suspended sentence of imprisonment rather than one of immediate effect. The judge wanted to ensure that the public had a measure of protection from the appellant, and that the appellant himself had the support he needed. That might be better achieved if he had the threat of imprisonment hanging over him, and if he was under the supervision of a probation officer. However, by sentencing him as she did, she was in practical terms passing a sentence which was more severe in its impact on the appellant than the maximum sentence would have been. That was something which in our view the judge had to avoid. It could only have been avoided by passing sentences of imprisonment of immediate effect. Suspending those sentences was, in the circumstances, wrong in principle.

That is entirely in line with the approach adopted by the Court of Appeal in Hemmings [2007] EWCA Crim 2413; [2008] 1 Cr. App. R. (S.) 106 (p.623). In that case a community order was imposed after the appellant had spent more time in custody on remand than he would have spent had he received the maximum sentence. In stating that the sentence was wrong in principle, Underhill J. said at [6]:

> "A sentence of a community order, and all the more so one coupled with requirements which have a real impact on the offender's liberty, is a form of ***554** punishment. It does not seem to us to be right that the appellant should receive a substantial further punishment in circumstances where he

has already received what was in practice the maximum punishment by way of imprisonment which the law could have imposed. That reasoning seems to us to be in line with the reasoning in the cases of McCabe and Peppard to which we and the judge were referred."

The cases of McCabe and Peppard were cases in which the court had deprecated the passing of a suspended sentence on a defendant who had already served on remand a period equivalent to the suspended term. They were therefore directly applicable to the present case.

So what should we do now? In McCabe (1988) 10 Cr. App. R. (S.) 134 , McKinnon J. said:

> "Under section 11(3) of the Criminal Appeal Act 1968 : 'The court shall so exercise their powers under this subsection that, taking the case as a whole, the appellant is not more severely dealt with on appeal than he was dealt with by the court below.' As can be seen in the case of *Mah-Wing* , the effect of that subsection in relation to a suspended sentence was considered by this court in *Thompson* (1977) 66 Cr.App.R (S) 130. In that case the Court held that they had no power to order an immediate imprisonment when the court below had ordered that the imprisonment should be suspended, the reason being, as Griffiths LJ said in *Mah-Wing* - 'that any ordinary person would consider themselves more severely dealt with on appeal if they were sent into prison albeit for a shorter period than if they were given the opportunity of a suspended sentence.'"

In those circumstances, the Court substituted a conditional discharge for the suspended sentence of imprisonment. That was also what was done in Hemmings , as well as in Peppard (1990-91) 12 Cr. App. R. (S.) 88 CA (Crim Div) . Indeed, in Hemmings , Underhill J. added at [7]:

> "We do not see how a sentence of conditional discharge can be described as more severe than a community order. Nevertheless, insofar as there is a potential problem of the sort identified by [counsel], it can be guarded against by making the term of the conditional discharge such that it will have expired by today's date. With that in mind we make an order of conditional discharge with a term of four months."

We propose to take the same course so as to ensure that there are no doctrinal problems of the kind which the Court in Hemmings sought to guard against. Accordingly, we allow the appeal, we set aside the suspended sentences of imprisonment which the judge imposed, and instead we order that the appellant be conditionally discharged for each of the five offences for a period of four months. ***555**

[2010] 2 Cr. App. R. (S.) 86

End of Document

R. v Governor of Haverigg Prison Ex p. McMahon

Divisional Court | August 22, 1997 | 1997 WL 1105951

Search Details

Jurisdiction: United Kingdom

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Date: June 11, 2018 at 4:25 AM
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R. v Governor of Haverigg Prison Ex p. McMahon
Divisional Court
22 August 1997

Case Analysis

Where Reported

(1997) 94(37) L.S.G. 41; (1997) 147 N.L.J. 1458; (1997) 141 S.J.L.B. 195; Times, September 24, 1997

Case Digest

Subject: Sentencing

Keywords: Custodial sentences; Release; Remand

Summary: remand; calculation of release date; credit for time spent on remand for related offences subsequently tried and sentenced separately

Abstract: M was remanded in custody for 105 days in respect of two sets of related offences which were later tried and sentenced separately. For the first set of offences, the magistrates imposed a sentence of 120 days' imprisonment. Under the Criminal Justice Act 1991 s.33, M was entitled to unconditional release after half that period, 60 days, and was thus immediately released. M was later sentenced by the Crown Court to 457 days' imprisonment for the second set of offences, with s.33 of the 1991 Act allowing him to be released after 229 days. M contended that he was entitled to a further reduction of 45 days, being the unused balance of time spent on remand before the initial trial. The prison governor argued that the 45 days were used up in reducing to 15 days the period for which M remained at risk of being returned to prison to serve the remainder of his initial sentence should he reoffend.

Held, granting a writ of habeas corpus, that the purpose of s.33 of the 1991 Act was to produce a suspended sentence during which an offender was at risk of being returned to prison should he reoffend. It was therefore not appropriate to use the unused remand days to reduce this period artificially, and M was entitled to have his second term of imprisonment reduced by the 45 days in question. Related offences should not be the subject of split sentencing since this was capable of creating injustice to defendants as well as increasing public expenditure. In the instant case the problem could have been avoided if the justices had referred the initial offences to the Crown Court for sentence along with trial of the remaining charges.

Judge: Sedley J; Astill J;

Counsel: For M: Martin Soorjoo. For the prison governor: Eleanor Grey

Solicitor: For M: Quinn Melville (Liverpool). For the prison governor: Treasury Solicitor

Cases Citing This Case

Applied
R. (on the application of Galiazia) v Governor of Hewell Prison
[2014] EWHC 3427 (Admin); [2015] 1 W.L.R. 2767; [2016] 1 All E.R. 660; [2015] 1 Cr. App. R. (S.) 13; [2015] A.C.D. 18
DC

McAfee's Application for Judicial Review, Re
[2008] NIQB 142; [2009] N.I. 216
QBD (NI)

Legislation Cited

Criminal Justice Act 1991 (c.53) s.33

1997 WL 1105951

End of Document

R. v Kerrigan (David Joseph)

Court of Appeal (Criminal Division) | October 28, 2014 | [2015] 1 Cr. App. R. (S.) 29

Search Details

Search Query: time remand custody threshold punishment
Jurisdiction: United Kingdom

Delivery Details

Date: June 27, 2018 at 6:15 AM
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***221 R. v. Kerrigan**

Image 1 within document in PDF format.

Court of Appeal (Criminal Division)
28 October 2014

[2014] EWCA Crim 2348

[2015] 1 Cr. App. R. (S.) 29

Hallett LJ , Spencer and Patterson JJ :
28 October 2014

Analysis

Credit for time served; Delay; Release on licence; Remand; Return to custody; Sentence length;

H1 Credit for time served on remand—recall to custody from release on licence—whether or not reduction in sentence warranted arising from remand time coinciding with recall to custody

Where the appellants had been released on licence from custodial sentences and subsequently recalled due to the commission of new offences, each having spent a lengthy period on remand whilst also subject to recall, no reduction in sentence was due. It was clear that the appellants had been detained pursuant to a custodial sentence for most, if not all, of the time that they were on remand in relation to the subsequent offences and statute prohibited days on remand counting against more ***222** than one sentence; the periods spent on remand that coincided with time spent in custody on recall would therefore not be counted twice.

The court considered two otherwise unconnected cases in which the issue was whether or not the appellants, K and W, were entitled to credit for time spent in custody awaiting sentence which coincided with time spent in custody having been recalled on licence.

K and W had been imprisoned and released on licence. During the currency of their licences, both committed additional offences and been recalled to prison. The periods of recall coincided with all or most of the period spent on remand for the new offences. In each case, there was a period of delay which was said to have arisen through no fault of each appellant.

On appeal against sentence, K and W submitted that a reduction in sentence should be made to reflect the period spent on remand whilst subject to recall, relying upon the potentially arbitrary results of an approach requiring judges to ignore the period spent in custody whilst effectively serving two sentences. They also submitted that a reduction in sentence was appropriate, relying upon the delay in each case.

Held: that (1) a helpful analysis of the complex statutory provisions governing this area of the law was to be found in the decision in R. v Costello [2010] EWCA Crim 371; [2011] 1 W.L.R. 638; [2010] 2 Cr. App. R. (S.) 94 (p.608) in which the court concluded that judges did not have the power to ensure that an offender received additional punishment for an offence committed during a period of release on licence. A judge could no longer order that a sentence for an offence committed on licence was to run consecutively to the original sentence. Furthermore, any attempt to inflate the sentence for a later offence would circumvent the effect of the enactment of Criminal Justice Act 2003 s.256 and the repeal of Powers of Criminal Courts (Sentencing) Act 2000 s.116 , and would therefore be wrong. The court in Costello had reached that conclusion unenthusiastically and suggested that consideration be given to re-instating the power formerly contained in s.116 but was, in the meantime, forced to accept what it described as an unjust statutory anomaly ([31]–[32]).

(2) From a review of the relevant statutory provisions and the case law, the following principles could be identified:

- (i) a custodial sentence had to be for the shortest term commensurate with the offence committed;
- (ii) a custodial sentence could be ordered to run consecutively to an existing sentence only if the offender had not been released on licence from the existing sentence. If the sentence was ordered to run consecutively, the two terms would then be treated as a single term;
- (iii) if the offender had been released on licence from the existing sentence, the judge may not order the subsequent sentence to be served consecutively to the existing sentence;
- (iv) a judge was not entitled to inflate a subsequent sentence to ensure that a defendant received additional punishment for the new offence;

• (v) the only power of recalling a prisoner on licence was held by the secretary of state;
• (vi) it was the task of the Prison Service to calculate the number of days spent on remand for which credit should be given to an offender; it was not the ***223** duty of the judge. The Prison Service's calculations were open to challenge by way of judicial review;
• (vii) a day spent in custody counted as time served in relation to only one sentence; and
• (viii) a judge retained the discretion to do justice on the particular facts of a case, for example in the case of excessive delay, and could therefore reduce an otherwise appropriate sentence accordingly ([40]).

(3) Applying those principles to the instant cases, neither appellant qualified for any automatic reduction in their sentences. They had breached their licences, were recalled to serve the balance, or part of the balance, of an existing sentence and were, therefore, detained pursuant to a custodial sentence for most, if not all, the time that they were on remand in relation to the subsequent offence. In those circumstances Parliament's intention was clear: a day counted as time served in relation to only one sentence and s.240ZA prohibited double counting. Unless, therefore, the appellants could bring themselves within the judge's general discretion to do justice, the periods they spent on remand which coincided with time spent in custody on recall should not be counted twice ([41]).

(4) The court went on to consider the issue of delay, concluding that there was no injustice requiring interference with the original sentences. Accordingly, the sentences were not excessive and the appeals would be dismissed ([42]–[49]).

H10 Cases cited:

• Archer v Governor of HMP Low Newton [2014] EWHC 2407 (Admin)
• Attorney General's Reference (No.79 of 2009) [2010] EWCA Crim 338
• Dyer v Watson [2002] UKPC D 1; [2004] 1 A.C. 379
• Mills v HM Advocate (No.2) [2002] UKPCD 2; [2004] 1 A.C. 441
• R. v Costello [2010] EWCA Crim 371; [2011] 1 W.L.R. 638; [2010] 2 Cr. App. R. (S.) 94 (p.608)

References: Current Sentencing Practice , A7A.

H12 Representation

- C. Blatchford for K.
- J. Dyer for W.
- P. Lodato for the Crown.

Judgment

The Vice President:

These two otherwise unconnected appeals have been heard together this morning because they raise the same issue. The appellants have leave to argue whether they were entitled to credit for time spent in custody awaiting sentence which coincided with time spent in custody having been recalled on licence.

Walker

Walker was born on 29 August 1992. He was aged 20 on conviction, he is now 22. He had one previous conviction for aggravated burglary. In 2010 he committed an extremely serious offence of burglary of an isolated farmhouse occupied by an elderly couple. This offence was committed jointly with Stephen Killip. In April 2011 he was sentenced to 44 months' detention. On 30 July 2012 he was released ***224** on licence with a condition of non-association with Killip. On 24 February 2013 Killip committed an unrelated offence of grievous bodily harm. On 26 February 2013 both the appellant and Killip committed the instant offence of attempted robbery.

The facts are that the appellant provided Killip with a large hunting knife and drove him to a petrol station on the A590 in Cumbria, where he waited for him to commit a robbery in the station shop. At around 13.30 Killip entered the shop, wearing ski gloves and a full stocking-type head covering, and holding the knife. He stood five feet from Michelle Rawlinson, the only member of staff present. He threatened her with the knife and demanded cash. Terrified, she screamed. This drew the attention of a mechanic working nearby. Killip ran off and was driven away from the scene by the appellant Walker.

Following the attempted robbery police were able to locate Walker quite quickly and arrest him. His vehicle was searched and various items recovered, but at that time not the knife. Messages on Walker's phone implicated Killip. Walker was charged and remanded in custody. He was then recalled to prison on 28 February 2013.

Efforts were made to trace Killip, and after several days he was located and arrested for the robbery and another matter. He denied both offences put to him but he too was recalled to prison on licence.

The investigation continued in relation to forensic examination of the items that had been found, as well as analysis of telephone traffic and cell site data. At the same time another police force was investigating Killip for a serious assault. This all caused some difficulties for the officers investigating the attempted robbery in gaining access to Killip in prison.

On 21 May 2013 the appellant pleaded guilty to the offence of attempted robbery. That summer the knife was recovered from the vehicle in which it had been hidden and police gained access to Killip in prison at last to interview him. He too was charged with the robbery.

On 17 February 2014 Killip pleaded guilty to the attempted robbery. On 19 February 2014 he pleaded guilty to the separate offence of grievous bodily harm and was committed for sentence.

On 3 April 2014 both Walker and Killip appeared for sentence before HH Judge Beech. During the course of submissions the judge was invited to allow the appellant credit for the time he had spent in custody. In rejecting those submissions she observed:

> "In respect of both of you it has been submitted that the court should take into account the time that you have spent in custody on recall on licence. The court rejects any suggestion that your sentences should be reduced to reflect that fact. The reason that the court rejects it is because the requirement to spend that part of a sentence outstanding at the time when you commit a further offence is an inevitable consequence of offending which is spelled out clearly to offenders when they are sentenced. Being released from custody and remaining on licence is not a right. It is a permission which is a qualified permission and continues to be earned providing you continue to be of good behaviour, which neither of you were."

She also concluded that both Walker and Killip met the criteria for dangerousness. ***225**

The appellant received an extended sentence of 98 months: 50 months with an extension of 48 months. Killip received an extended sentence of 11 years six months and a five-year extension for the offences of grievous bodily harm and attempted robbery.

10 October 2014 would have been the sentence expiry date for the original offence of aggravated burglary. The appellant Walker now has a conditional release date for the attempted robbery offence of 10 January 2017 and an expiry date for that sentence of 1 June 2022.

Grounds of appeal for Walker

Mr Dyer's grounds on behalf of Walker fell into three categories. First, he argued that the sentence was manifestly excessive in that it failed to give sufficient weight to the mitigating factors. In particular the judge should have placed greater emphasis on the facts:

- i) this was an attempt, not the full offence;
- ii) despite the aggravating features in this case, it was not one which came towards the top of Category 2 in the sentencing guidelines;
- iii) although there was some planning, there was no sophistication in the execution of the plan;
- iv) there was no additional aggravation in the fact that two offenders were involved because only one of them went into the shop;
- v) the co-accused was in the shop for seconds only;
- vi) the appellant pleaded guilty at the plea and case management hearing; and
- vii) he expressed his remorse.

The second category consisted of a challenge to the finding of dangerousness. Mr Dyer argued that the finding and the imposition of an extended sentence were not justified because:

- (i) in contrast to his co-accused, there was no established pattern of violent offending;
- (ii) the appellant had never caused serious harm to anyone;
- (iii) the appellant was involved only as an accessory to the attempted robbery,
- (iv) no actual violence was used; and
- (v) it could not be said, therefore, that there was a substantial risk of serious harm as a result of further specified offences.

In his third category Mr Dyer focussed on the effect of recall. Mr Dyer observed that the appellant Walker had served approximately 10-and-a-half months in custody for breach of his licence prior to sentence. There was a significant delay between his plea of guilty and his sentence which was not his fault.

The basic principle of sentencing offenders to custody is that a custodial sentence shall be for the shortest term which in the opinion of the court is commensurate with the offence committed (see s.153(2) of the Criminal Justice Act 2003). A court should always consider the total period of time that a defendant will spend in custody from the date of recall and decide whether any adjustment should be made to the sentence. This was said to be particularly important where it is only the new offence which has put the offender in breach of his licence, the delay is ***226** outside his control and the breach of licence has been treated as an aggravating feature of the new offence.

Mr Dyer foresaw entirely arbitrary results if judges simply ignore the length of time that an offender spends in custody while effectively serving two sentences. Some defendants may effectively serve little or nothing by way of an additional punishment for the new offence; others may serve many months which will not count towards the sentence for the new offence as the appellant did.

Mr Dyer criticised the judge for failing to understand that the appellant was not bound to serve the whole of the balance of his original sentence. He submitted the judge was obliged to take account not only of the fact that the new offence was committed in breach of licence, but also of the effect of the delay before he was sentenced. He rejected the notion that Walker brought the delay upon himself by continuing to associate and offend with his co-accused. He contended the delay was all to do with the proceedings against the co-accused and totally outside his control.

In summary, he complained that the appellant Walker has been suffered undue prejudice the remedy for which is to make some reduction in the sentence.

The single judge was impressed by only one of those grounds, the last. He observed:

> "I have considered the papers in your case and your grounds of appeal. You pleaded guilty at the first opportunity to a serious offence of attempted robbery. In my view, the aggravating factors identified by the judge amply justified a sentence, after trial, of six and a half years. You received 25% credit for your guilty plea at the [plea and case management hearing] and a further 10% reduction because it was an attempt rather than the full offence. In my view, the judge was also fully entitled to

> conclude that you were a 'dangerous' offender, for the purpose of the relevant provisions, and that an extended sentence was called for."

With those observations we whole-heartedly agree and we can dispose of the grounds rejected by the single judge swiftly. Compared to some, the appellant Walker's criminal record may have been relatively short, but the offences were serious and suggested a very worrying trend. Having considered all relevant aspects of the appellant's life, the author of the pre-sentence report concluded that Walker posed a high risk of serious harm to the general public. There was ample material to support that assessment and the judge cannot be criticised for reaching the same conclusion.

Thereafter the judge followed the guidance of the Sentencing Council to the letter. This was an attempted robbery that involved planning, the use of face covering and a lethal weapon to ensure the compliance of a vulnerable victim. The facts that the offence was committed when on licence for an earlier offence also committed with Killip, and which also involved the use of face covering, weapons and violence towards vulnerable victims, were significant aggravating features. They provided ample justification for the sentence passed, subject only to the issue of time spent in custody to which we shall return. ***227**

Kerrigan

We turn to the facts in Kerrigan. Kerrigan was born on 5 May 1988, he is now 26. He had 17 previous convictions. Most recently, on 20 March 2011 was sentenced to three years' imprisonment for an offence of domestic burglary. He was released on licence at the halfway point on 19 September 2012. He committed an offence of robbery on 28 July 2013.

The facts of that robbery that are that the complainant, Matthew Starnes, was walking home at about 04.15 from a nightclub in York. He became aware of two men on the opposite pavement walking slightly ahead of him. He overtook them and a few seconds later, Male 2 appeared at his shoulder, asking for a cigarette. The complainant said he did not smoke. The complainant then felt an arm around his neck from behind and he felt the grip tighten. This was Male 1. Male 2 said, "Put him to sleep, put him to sleep." As the complainant sank to the ground, he heard Male 1 say, "Punch him, punch him" and then felt several blows to his face from Male 1. Male 2 then said, "Tell us where your stuff is." The complainant lost consciousness for a few seconds. When he came round he could still see and hear the men. He checked his pockets and realised his belongings were missing.

He reported the robbery at the police station and the loss of a £250 mobile phone, a set of keys and his wallet containing cash and bank cards.

At 04.52 his girlfriend was woken by a missed call from his mobile phone. She called the number and a male voice said, "We have your boyfriend. If you want to see him again you will have to pay." She hung up. Shortly afterwards she called the number again on two occasions and, in response to her request to speak to the complainant, she was told by the person at the other end that they had him in the back of a car and if she wanted to see him again she would have to pay money, otherwise they would shoot him. At this stage she wisely called the police.

The appellant was identified from CCTV footage as one of the suspects. When officers attended his home they seized a SIM card which came from the complainant's phone. He was arrested and made no comment in interview. His suspected accomplice in the robbery was a young man called Shaun Chapman.

After being charged, Kerrigan was recalled on licence on 29 July 2013 to serve part or the remainder of the sentence for the burglary, with an expiry date of 20 March 2014.

On 12 August 2013 he indicated a plea of guilty to the robbery but still faced trial on two further counts of robbery allegedly committed in July 2013. On 25 November he appeared at York Crown Court for a preliminary hearing in relation to those other counts. Chapman also faced a trial on the charge of robbery. Following good sentencing practice, the judge adjourned all matters so that all offences and all co-accused could be dealt with together.

On 27 November 2013 the prosecution offered no evidence against Chapman. On 30 January 2014, at the plea and case management hearing for the two other counts of robbery Kerrigan faced, the prosecution did not oppose an application to dismiss one of them. Fresh prosecuting counsel was instructed to advise. On the basis of that advice, on 21 March 2014, the Friday before the trial of the remaining count, the prosecution formally offered no evidence.

The judge, the Recorder of York, HH Judge Ashurst, then proceeded to sentence on the Starnes robbery to which the appellant had pleaded guilty some months ***228** before. He sentenced the appellant to four years' imprisonment. His conditional release date is 20 March 2016, with a sentence expiry date of 20 March 2018.

Grounds of appeal: Kerrigan

On Kerrigan's behalf, Mr Blatchford submitted that the sentence is manifestly in all the circumstances, particularly the return to prison. He complains that the sentencing judge failed to give Kerrigan any reduction in sentence for the time that Kerrigan had served between pleading guilty and being sentenced, some seven months later. This would equate to a 14-month custodial sentence. The delay in sentencing, Mr Blatchford argued, was entirely the fault of the prosecution and caused unfair prejudice to the appellant. The Crown Prosecution Service should have reviewed the two outstanding robbery counts at an earlier stage. Had they done so they would have offered no evidence significantly earlier. The appellant would have been sentenced earlier and he would have begun serving his sentence earlier. The sentence would have run concurrently with his recall to prison and he would have received limited additional punishment. Because of the delay the appellant has served a significant period of time on licence recall. His remand that has not counted towards his new sentence. The timing of events means that, but for one week of remand time, the court has effectively passed a consecutive sentence. This, Mr Blatchford reminded us, is unlawful, pursuant to s.265(1) of the Criminal Justice Act 2003 .

Legal framework

We turn to the legal framework. A helpful analysis of the complex statutory provisions governing this area of the law is to be found in the decision in R. v Costello [2011] 1 W.L.R. 638 and the judgment of Hughes LJ, Vice President of the Court of Appeal (Criminal Division). The court considered the problem presented by the cumulative effect of ss.255A – 255D , 256 and 265 of the Criminal Justice Act 2003 and the repeal of s.116 of the Powers of Criminal Courts (Sentencing) Act 2000 . We do not propose treading the same complicated ground in unnecessary detail.

In summary, the court concluded that judges do not have the power to ensure that an offender receives additional punishment for an offence committed during a period of release on licence. A judge may no longer order that a defendant be returned to prison to serve such remaining part of an existing sentence the court considers appropriate and a judge may not order that a sentence for an offence committed on licence should run consecutively to the original sentence. Further, any attempt to inflate the sentence for a later offence, as the judge did in Costello , would circumvent the effect of the enactment of s.265 and the repeal of s.116 and would be wrong. The court reached this conclusion unenthusiastically and suggested that consideration be given to reinstating the power formerly contained in s.116 . In the meantime the court was forced to accept what it described as an unjust statutory anomaly.

Next, to calculate time spent remanded in custody as time served we must turn to the provisions of s.240ZA of the Criminal Justice Act as amended by the Legal Aid, Sentencing and Punishment of Offenders act 2012 . Where relevant, it provides:

> "(1) This section applies where – ***229**
> (a) an offender is serving a term of imprisonment in respect of an offence, and
> (b) the offender has been remanded in custody (within the meaning given by section 242) in connection with the offence or a related offence.
> (2) It is immaterial for that purpose whether, for all or part of the period during which the offender was remanded in custody, the offender was also remanded in custody in connection with other offences (but see subsection (5)).
> (3) The number of days for which the offender was remanded in custody in connection with the offence or a related offence is to count as time served by the offender as part of the sentence. But this is subject to subsections (4) to (6).
> (4) If, on any day on which the offender was remanded in custody, the offender was also detained in connection with any other matter, that day is not to count as time served.
> (5) A day counts as time served –
> (a) in relation to only one sentence, and
> (b) only once in relation to that sentence.
> (6) A day is not to count as time served as part of any period of 28 days served by the offender before automatic release (see section 255B(1)).
> (7) For the purposes of this section a suspended sentence –
> (a) is to be treated as a sentence of imprisonment when it takes effect under paragraph 8(2)(a) or (b) of Schedule 12 , and
> (b) is to be treated as being imposed by the order under which it takes effect.
> (8) In this section 'related offence' means an offence, other than the offence for which the sentence is imposed ('offence A'), with which the offender was charged and the charge for which was founded on the same facts or evidence as offence A.
> (9) For the purposes of the references in subsections (3) and (5) to the term of imprisonment to which a person has been sentenced (that is to say, the reference to the offender's 'sentence'), consecutive terms and terms which are wholly or partly concurrent are to be treated as a single term if –
> (a) the sentences were passed on the same occasion, or

> (b) where they were passed on different occasions, the person has not been released at any time during the period beginning with the first and ending with the last of those occasions.
> (10) The reference in subsection (4) to detention in connection with any other matter does not include remand in custody in connection with another offence but includes –
> (a) detention pursuant to any custodial sentence;
> (b) committal in default of payment of any sum of money;
> (c) committal for want of sufficient distress to satisfy any sum of money;
> (d) committal for failure to do or abstain from doing anything required to be done or left undone. ***230**
> (11) This section applies to a determinate sentence of detention under section 91 or 96 of the Sentencing Act or section 227 or 228 of this Act as it applies to an equivalent sentence of imprisonment."

These provisions were considered by the Divisional Court in Archer v Governor of HMP Low Newton [2014] EWHC 2407 (Admin) . At [8] of the judgment Treacy LJ described the provisions in this way:

> "Section 240ZA retains the system that time spent on remand will continue to be credited but it removes the exercise of calculation from the sentencing court. What it does is to convert what was previously a task delegated to the sentencing judge into an administrative task to be carried out by the Prison Service as a calculation."

He added at [10]:

> "The position now is that there should be a clear cut, straightforward administrative calculation, not admitting of elements of discretion or judgment to be exercised by the Prison Service … it [is] accepted that this is an automatic process."

Much to their relief, judges are therefore no longer responsible for calculating and announcing how many days spent on remand should count towards sentence.

Mr Lodato for the respondent, in his extremely helpful submissions, described the grounds of appeal in both cases as a call to return to the system whereby the judges did just that. He argued the appellants are asking in some form or another for judicial directions that time spent on remand for offences committed on licence should be counted as time served, notwithstanding that the time coincides with serving another sentence on recall. This, he submitted, would be in clear breach of the provisions. Section 260ZA could not be clearer: offenders have no right to receive double credit for time spent in custody in relation to two different matters.

Mr Lodato conceded that there may be circumstances where a sentencing judge may reduce the sentence she would otherwise impose to do justice on the particular facts and to reflect exceptional factors, such as lengthy delay. He took us to the provisions of art.6 of the European Convention on Human Rights , which provides that proceedings must be concluded within a reasonable time and delay may count as a mitigating factor in some circumstances. However, he rightly pointed out that the reasonable time requirement is designed to protect against prolonged and unreasonable periods of delay that cause an accused person to remain too long in a state of uncertainty about their fate. The threshold is a high one. Accordingly, Mr Lodato asserted, with little or no dissent from the appellants' counsel, that it cannot be said that delay alone here breached the appellant's rights under art.6 .

In Dyer v Watson; K v HM Advocate [2004] 1 A.C. 379 , Lord Bingham of Cornhill set out at [52]–[55] the key principles to be applied. He observed:

> "In any case in which it is said that the reasonable time requirement … has been or will be violated, the first step is to consider the period of time which has elapsed. Unless that period is one which, on its face and without more, gives grounds for real concern it is almost certainly unnecessary to go further, since the Convention is directed not to departures from the ideal but to infringements of basic human rights. The threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed." ***231**

We emphasise the words: "gives grounds for real concern".

However, that does not mean delay is irrelevant. In Mills v HM Advocate [2004] 1 A.C. 441 , Lord Hope described at [54] that delay related grounds may justify an adjustment to sentence. He observed that one of the grounds would be the anxiety resulting from prolongation of the proceedings. The other "that (a defendant's) life had changed during the period of the delay".

In the Attorney General's Reference No.79 of 2009 [2010] EWCA Crim 338 , the Court of Appeal considered the effect of delay on sentence. At [19], Hughes LJ (Vice President) held that delay

> "… is of relevance if not to a formal assessment of Article 6 then undoubtedly to the broader question of what a just sentence is when eventually and belatedly conviction occurs" .

However, he emphasised that applications for reductions in sentence would be unusual.

Relevant principles

We extract from these decisions and the statutory provisions themselves the following principles relevant to these appeals:

- (i) a custodial sentence should be for the shortest term commensurate with the offence committed;
- (ii) a custodial sentence may be ordered to run consecutively to an existing sentence only if the offender has not been released on licence from the existing sentence. If the sentence is ordered to run consecutively the two terms will then be treated as a single term;
- (iii) if the offender has been released on licence from the existing sentence the judge may not order the subsequent sentence to be served consecutively to the existing sentence;
- (iv) a judge is not entitled to inflate a subsequent sentence to ensure a defendant receives additional punishment for the new offence;
- (v) the only power of recalling a prisoner on licence is held by the secretary of state;
- (vi) it is the task of the Prison Service to calculate the number of days spent on remand for which credit should be given to an offender, it is not the duty of the judge; the Prison Service's calculations are open to challenge by way of judicial review;
- (vii) a day spent in custody counts as time served in relation to only one sentence; and

• (viii) a judge retains the discretion to do justice on the particular facts of a case, for example in the case of excessive delay, and may therefore reduce an otherwise appropriate sentence accordingly.

Conclusions

Applying those principles to the facts here, the appellants do not qualify for any automatic reduction in their sentences. They breached their licence, they were recalled to serve the balance, or part of the balance, of an existing sentence and they were, therefore, detained pursuant to a custodial sentence for most, if not all, ***232** the time they were on remand in relation to the subsequent offence. In those circumstances Parliament's intention is clear: a day counts as time served in relation to only one sentence. Section 240ZA prohibits double counting. Unless, therefore, the appellants can bring themselves within the judge's general discretion to do justice, the periods they spent on remand which coincided with time spent in custody on recall should not be counted twice.

We turn to the overall circumstances of both their cases and the effect of delay. We consider whether there has been any injustice that requires correcting.

First, we should observe that we are satisfied that neither appellant comes close to satisfying the high threshold for the breach of the reasonable time requirement. The delay in each case may not have been ideal, but it was far from excessive and there was a satisfactory explanation. The general principle is clear that, where possible, an offender should be sentenced for all outstanding matters at the same time and with any co-accused.

Secondly, we accept that the delay has meant the appellants have been prejudiced, but only in the sense that they cannot benefit from what the court has described as an "unjust anomaly". They were well aware of the possible consequences of committing an offence on licence and their fate was far from uncertain. They may have had to wait rather longer than would normally be the case to know their ultimate fate, but throughout they could not have been in any doubt that they were to receive a further sentence of imprisonment of some length. As Mr Lodato observed, the ultimate sentences fell within a predictable and limited range of available sentences; any uncertainty was restricted to fine margins.

Thus, Walker's 10-and-a-half months in custody for breach of his licence prior to sentence was the consequence of his associating with Killip and offending on licence, about which he had been warned. Had he not continued to associate with Killip and commit offences with him, he would not have found himself in the position he did. The delay therefore was in part due to his own conduct and in part due to the normal trial and sentencing process.

Similar considerations apply to Kerrigan. It might have been better had the prosecution been able to review the evidence in his case and his co-accused's case to reach a decision on the progress of outstanding matters, but the delay was far from excessive. It was not of a kind which has caused the court concern in the way Lord Bingham described.

Accordingly, we can see no injustice in either case which would merit our interference and a reduction in their sentence.

Further, although each may well be behaving appropriately in prison, there is nothing to suggest that either has made exceptional progress or turned his life around during the course of the delay in his case. They have no legitimate expectations of any kind.

We are satisfied that the sentences were not excessive and the appeals must be dismissed. ***233**

[2015] 1 Cr. App. R. (S.) 29

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R. v Lynch (Dean Charles)

Court of Appeal Criminal Division | October 17, 2007 | 2007 WL 3236273

Search Details

Jurisdiction: United Kingdom

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Regina v. Dean Charles Lynch
No. 2007/04217/A6
Court of Appeal Criminal Division
17 October 2007

[2007] EWCA Crim 2624

2007 WL 3236273

Before: Mr Justice Butterfield and Mrs Justice Dobbs DBE
Wednesday 17 October 2007

Analysis

Representation

- Mr N R Stelling appeared on behalf of the Appellant.

Judgment
Wednesday 17 October 2007
Mr Justice Butterfield:

On 6 August 2007, in the Crown Court at Birmingham, the appellant Dean Lynch pleaded guilty to common assault and was sentenced to a conditional discharge for two years. He now appeals against that sentence by leave of the single judge.

The facts fall within a short compass, but they raise a point of sentencing principle. The appellant is 39 years of age. He has no less than 29 previous convictions. Many of those convictions are for offences of violence, including five for robbery, three for unlawfully inflicting grievous bodily harm, one for wounding with intent, three for assault occasioning actual bodily harm and two for common assault. Clearly the appellant is a very violent man.

On the morning of 12 February 2007, the victim of the common assault, Mr Winn, saw what appeared to him to be an assault being committed by the appellant against Miss Leach, the appellant's then partner, in the street outside Mr Winn's home. Being of a public-spirited disposition, and having seen what he thought was an act of violence, Mr Winn went to assist the lady. He asked the appellant what he was doing. He was told that there was an argument about money. The appellant then swung a punch at Mr Winn and grabbed hold of him. The two men fell to the ground, where they scuffled together for about 30 seconds before they were separated by others. Miss Leach had by then made good her escape.

The police were called. The appellant was arrested, but he could remember little about the incident and was plainly drunk.

The appellant was charged with two offences of assault occasioning actual bodily harm, one on Miss Leach and the other on Mr Winn. The appellant was arraigned on 8 May 2007 and pleaded not guilty. The case was adjourned for trial. The appellant was remanded in custody. The trial was due to take place on 20 June 2007, but on that occasion Miss Leach failed to attend the hearing. The trial was adjourned to a later date. It was re-listed on 6 August 2007. Again Miss Leach did not attend. At this point the prosecution indicated that they would accept a plea to common assault on Mr Winn. He had sustained only bruising and a minor abrasion to his head. The appellant duly pleaded guilty to the added count of common assault. The plea was accepted and the court moved to sentence.

By the date of sentence the appellant had been on remand in custody for five months and 22 days — the equivalent of a substantive sentence of nearly twelve months' imprisonment. The maximum sentence for an offence of common assault is six months' imprisonment. In the course of the sentencing hearing the judge expressed the view that the court needed to retain some control over the appellant. Despite the efforts of defending counsel, the judge took the view that the appropriate course was the imposition of the Conditional discharge. When passing sentence he went on to say that the appellant should view himself as effectively being under a suspended sentence of imprisonment if he was to commit an offence of violence during the period of the conditional discharge.

The short point made by Mr Stelling on the appellant's behalf is that the consequence of the judge's order was to render the appellant liable, if he were to re-offend, for further punishment in respect of the offence of common assault when he had already served nearly twice the maximum permitted in law for that offence.

We entirely sympathise with the proper and understandable desire of the court to keep some form of control over the appellant if possible, particularly as the likelihood of his committing a further offence of violence was, as it seems to us, high. That said, we consider that it was inappropriate to impose a sentence which exposed the appellant to the risk of further punishment when the punishment he had already experienced greatly exceeded the maximum that the judge would have been able to impose at the outset of the proceedings.

In those circumstances we accede to the submissions made on behalf of the appellant by Mr Stelling. We set aside the sentence of the two year conditional discharge. We would have wished to impose a prison sentence of perhaps five months, reflecting the fact that the appellant pleaded guilty, but that with his record he could expect little mercy from the court so far as length of sentence was concerned. That, however, is not open to us. This court is not permitted to impose a sentence which is more severe than the sentence imposed by the original sentencing court. In those circumstances the only course we can take is to impose an absolute discharge. To that extent this appeal is allowed.

We add as a postscript that we strongly suspect that at some time in the future there will be a court looking at the antecedents of this appellant and noting that the Court of Appeal substituted an absolute discharge for an offence of common assault in circumstances where no doubt the learned judge then considering it will have reason to question the sanity of this court. However, that is for another day.

2007 WL 3236273

R. v McCabe (Adrian)

Court of Appeal | March 22, 1988 | (1988) 10 Cr. App. R. (S.) 134

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*134 R. v. Adrian McCabe

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Court of Appeal
22 March 1988

(1988) 10 Cr. App. R. (S.) 134

(Lord Justice Stocker , Mr. Justice Otton and Mr. Justice McKinnon):
March 22, 1988

Analysis

Suspended sentence—offender in custody on remand for substantial period before imposition of suspended sentence—whether appropriate to impose suspended sentence shorter in length than period already spent in custody.

Editor's note: where an offender has been in custody on remand for a period which (after allowing for remission) would be equivalent to the term of imprisonment which would be appropriate for his offences, the sentencer should not impose a suspended sentence but should impose an immediate term so that the offender will have the benefit of the deduction from that term of the time spent in custody on remand, and will not be at risk of effectively serving two periods of custody for the same offence.

The appellant pleaded guilty to burglary and theft. The appellant and another man broke into a golf club by making a hole in the roof; they were arrested shortly afterwards. The appellant was on bail following his arrest for a theft committed a few weeks earlier. Sentenced to three months' imprisonment for each offence concurrent, suspended for two years. The appellant had been in custody for about four months before being sentenced, and it was argued that if he had received an immediate sentence of the same length, he would have been released forthwith without the suspended sentence hanging over him. On the basis that he had served the equivalent of a sentence of six months' imprisonment, it was submitted that the sentence would have been correct only if the trial judge had been of the view that a sentence of nine months in total was justified for the offences.

(considering Mah-Wing (1983) 5 Cr.App.R.(S.) 247) the trial judge appeared to have considered that a custodial sentence of three months was appropriate for the appellant: the same sentence had been passed on his co-defendant. In the view of the Court, the sentencer was bound to pass an immediate sentence of three months' imprisonment, which would result in the appellant's immediate release. To hold otherwise would mean that the appellant would have served the equivalent of a six month sentence, and have hanging over him for a period of two years a further period of three months' imprisonment should he commit another ***135** offence. As the Court's powers were limited so as to prohibit the substitution of a sentence which was more severe than that imposed below, the Court could not substitute an immediate sentence: instead, a conditional discharge would be substituted for both offences.

Case cited: Mah-Wing (1983) 5 Cr.App.R.(S.) 247 .

References: suspended sentence, *Current Sentencing Practice* D 5.5 (c); Archbold 5-143 .

Commentary: [1988] Crim.L.R. 469 .

R. Latham for the appellant.

McKINNON J.:

On June 23, 1987 at the Inner London Crown Court the appellant pleaded guilty to burglary on the first indictment. He was put back for sentence in custody. On August 5, 1987 he retracted a plea of not guilty to theft on a second indictment and pleaded guilty before a jury was sworn. He was sentenced to three months' imprisonment suspended for two years on each indictment concurrent. He now appeals against sentence by leave of the single judge.

On the first indictment a David Oliphant, a co-accused, also pleaded guilty to the burglary. He was sentenced to three months' imprisonment suspended for two years and ordered to pay £100 compensation.

The facts may be very shortly stated. During the afternoon of February 9, 1987 the appellant and others stole two marble horse statuettes from a shop in the Walworth Road and drove off in a Rover car. They were seen by a police officer who was on duty in a nearby shop. He noted the registration number of the Rover. Shortly afterwards the Rover was stopped by police cars. The appellant was one of the passengers. The stolen marble horses were on the rear seat. The appellant was arrested and refused to answer any questions during interview. He was released on bail.

In the early hours of April 1, 1987 the appellant whilst on bail and at least one other man, including the man Oliphant, broke into a golf club in East Dulwich by making a hole in the roof. Police arrived whilst they were still at the premises. They were arrested after a chase. Cigarettes which had been stolen from the club were still in their possession. During interview the appellant refused to answer questions.

The appellant is now 23 years of age. He is single and was working as a self-employed roofing contractor. He has one finding of guilt for causing actual bodily harm and one previous conviction for going equipped to steal. On both occasions he was fined.

The social enquiry report states that for most of the winter up to the time of his arrest he had been unemployed but work was now immediately available. He now bitterly regretted his offences. He was usually well aware of what he was doing and was competent to control his own destiny. A letter in the papers confirmed an offer of work by a roofing contractor.

The learned judge in sentencing the appellant said he was going to take a lenient course but he was conscious of the fact that the appellant had spent some time in custody.

It is pointed out in the grounds of appeal that the appellant had been in custody since April 1, 1987, a period equivalent to a six months' sentence of imprisonment. Counsel submits that instead of passing a suspended sentence of three months' imprisonment the judge should have imposed a three month sentence of immediate imprisonment. That would have resulted in the appellant's immediate release without a further suspended sentence hanging over him. It is submitted that the suspended ***136** sentence would only have been appropriate had the trial judge been of the view that a total sentence of nine months was justified.

In an addendum to the grounds of appeal counsel submits that the learned judge failed to consider the appropriate term of immediate imprisonment before going on to consider whether the sentence should be suspended. Reference is made to the case of Mah-Wing (1983) 5 Cr.App.R.(S.) 247 . It is submitted that if the learned judge had done so he would have imposed a term of immediate imprisonment resulting in the appellant's immediate release. It is further submitted that if the Court of Appeal accepts that argument a nominal sentence should be substituted.

We should quote first from the case of *Mah-Wing* where Griffiths L.J. said this:

> "When the court passes a suspended sentence its first duty is to consider what would be the appropriate immediate custodial sentence, pass that and then go on to consider whether there are grounds for suspending it. What this court must not do is pass a longer custodial sentence than it would otherwise do because it is suspended."

Here the learned judge appears to have considered that an immediate custodial sentence of three months' imprisonment was appropriate, the learned judge, in his own words, being "conscious of the fact that he had spent time in custody." Although this Court does not feel that that is sufficiently clear from what he said we do approve of the intentions of the learned judge. But the fact that he passed a three months' suspended sentence on the co-accused Oliphant leaves us in no doubt that the learned judge must have considered that a sentence of no more than three months' imprisonment was appropriate for this particular defendant. Was the learned judge bound to pass an immediate sentence of three months' imprisonment which would have meant the appellant's immediate release, giving him credit pursuant to section 67(1) of the Criminal Justice Act 1967 for the time he had already spent in custody? In the Court's view he was so bound. To hold otherwise would mean that the appellant would have served the equivalent of a six month sentence. That is three months greater than the sentence the learned judge appears to have considered appropriate, and as well the appellant would have hanging over him for a period of two years a further period of three months' imprisonment should he commit another offence punishable with imprisonment.

As the appellant has already served the equivalent of a sentence at least as great as that considered to be appropriate by the learned judge he should have received such sentence as would have resulted in his immediate release.

What is the Court to do? Under section 11(3) of the Criminal Appeal Act 1968 : “The court shall so exercise their powers under this subsection that, taking the case as a whole, the appellant is not more severely dealt with on appeal than he was dealt with by the court below.” As can be seen in the case of *Mah-Wing* , the effect of that subsection in relation to a suspended sentence was considered by this court in Thompson (1977) 66 Cr.App.R. 130 . In that case the Court held that they had no power to order an immediate imprisonment when the court below had ordered that the imprisonment should be suspended, the reason being, as Griffiths L.J. said in *Mah-Wing* —“that any ordinary person would consider themselves more severely dealt with on appeal if they were sent into prison albeit for a shorter period than if they were given the opportunity of a suspended sentence.”

What this Court proposes to do is to allow this appeal, setting aside the sentence of three months' imprisonment suspended for two years and substituting a conditional discharge for one year in respect of both offences.

(1988) 10 Cr. App. R. (S.) 134

R v MMK

New South Wales Court of Criminal Appeal | September 5, 2006 | 164 A Crim R 481

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2006 WL 2590507, [2006] NSWCCA 272, [2007] ALMD 3448

Keywords

Synopsis

Cases Cited
Opinions

The Court (Spigelman CJ, The Court (Whealy and The Court (Howie JJ)
R v MMK

Supreme Court of New South Wales

Court of Criminal Appeal

Docket Number(s):2006/906

Spigelman CJ, Whealy and Howie JJ

28 August, 5 September 2006

Sentence — Crown appeal — Purposes of sentencing — Principle of totality — Principle of proportionality — Whether fully concurrent sentence appropriate — Relationship between s 3A of the Crimes (Sentencing Procedure) Act and the common law — *Crimes (Sentencing Procedure) Act 1999* (NSW), s 3A

> The respondent pleaded guilty to an offence of having intercourse with a child between the age of 10 and 16 years, contrary to the *Crimes Act 1900* (NSW), s 66C(1). A fixed term of imprisonment of one year was imposed. The Crown appealed against the sentence.
>
> The sentence took into consideration an aggravated indecent assault and a common assault on a Form 1. At the time of sentencing, the respondent had already been sentenced by another judge to a total term of 22 years with a non-parole period of 13 years for nine counts of aggravated sexual assault in company under the *Crimes*

Act, s 61AJ. The sentence under challenge was ordered to run completely concurrent with those other sentences. The Crown contended that while the term of the sentence was appropriate, his Honour erred by making the sentence wholly concurrent with the sentences then being served by the respondent.

More particularly, the Crown's principal submission was that because the sentence was to be served completely concurrent with the respondent's other sentences, it amounted to no penalty at all and failed to comply with the purposes of punishment set out in the *Crimes (Sentencing Procedure) Act 1999* (NSW), s 3A. It was submitted that the sentence did not denounce the respondent's conduct, had insufficient regard to the harm done to the victims and failed to punish the respondent adequately for his offence.

Held: (per curiam) (dismissing the appeal) (1) The Crown's principal submission failed to acknowledge that the purposes of punishment have to be promoted within the limits of overarching fundamental principles of sentencing derived from the common law. Section 3A is largely a codification and elaboration of the purposes of punishment derived from the common law. The purposes of punishment were enunciated in judgments of this and other appellate courts long before s 3A was introduced.

R v MA (2004) 145 A Crim R 434, referred to.

(2) One limiting principle that constrains a sentencing court in seeking to promote the purposes of punishment is the principle of proportionality. Another is the principle of totality and it is this principle that operated in the present case. It is the application of the totality principle that will generally determine the extent to which a particular sentence is to be served concurrently or cumulatively with an existing sentence.

Mill v The Queen (1988) 166 CLR 59; 36 A Crim R 468; *Pearce v The Queen* (1998) 194 CLR 610; 103 A Crim R 372; *Johnson v The Queen* (2004) 78 ALJR 616; *R v Holder* [1983] 3 NSWLR 245; (1983) 13 A Crim R 375; *R v Brown* [1999] NSWCCA 323; *R v Janceski* (2005) 44 MVR 328; *R v Gorman* (2002) 137 A Crim R 326; *R v Hammoud* (2000) 118 A Crim R 66, referred to.

(3) In the circumstances of the present case, the criminality of the offences committed by the offender was so great and the punishment imposed for the offences for which the respondent was previously sentenced was so justifiably harsh in order to reflect the total criminality, that there was little or no room to impose a further penalty to achieve an appropriate purpose of punishment.

(4) It was well within the discretion of the sentencing judge to determine that the sentence should be served completely concurrently so as not to increase the period to be served before the respondent might be released on parole.

The propositions that the purposes of sentencing point in different directions, that none of them can be considered in isolation and that sentencing is not a purely logical exercise, as explained in *Veen v The Queen (No 2)* (1988) 164 CLR 465; 33 A Crim R 230, also discussed.

Cases Cited
The following cases are cited in the judgment:

Veen v The Queen (No 2) (1988) 164 CLR 465; 33 A Crim R 230.

R v Holder [1983] 3 NSWLR 245; (1983) 13 A Crim R 375.

Pearce v The Queen (1998) 194 CLR 610; 103 A Crim R 372.

Mill v The Queen (1988) 166 CLR 59; 36 A Crim R 468.

R v Janceski (2005) 44 MVR 328.

Markarian v The Queen (2005) 228 CLR 357.

R v Ibrahimi [2005] NSWCCA 153.

R v Tadrosse (2005) 65 NSWLR 740.

R v MA (2004) 145 A Crim R 434.

Johnson v The Queen (2004) 78 ALJR 616.

R v Gorman (2002) 137 A Crim R 326.

R v Hammoud (2000) 118 A Crim R 66.

R v Brown [1999] NSWCCA 323.

Crown appeal against sentence

R Cogswell SC and J Caldwell, for the Crown
A Haesler SC, for the respondent

Cur adv vult

5 September 2006

The Court (Spigelman CJ, The Court (Whealy and The Court (Howie JJ)
1 The Crown has appealed against the sentence imposed upon the respondent by Justice Hidden following a plea of guilty to an offence of having intercourse with a child between the age of 10 and 16 years contrary to s 66C(1) of the *Crimes Act 1900* (NSW). This is an offence for which the maximum penalty prescribed is imprisonment for 8 years. In addition the respondent asked the Judge to take into account on a Form 1 two offences being an aggravated indecent assault and a common assault. As a result in 5 April 2006 his Honour sentenced the respondent to a fixed term of imprisonment of 1 year to commence on 5 April 2006 and to expire on 4 April 2007.

2 At the time he was sentenced by Hidden J the respondent was serving a term of imprisonment imposed upon him by Sully J on 22 April 2004 for nine counts of aggravated sexual assault in company contrary to s 61AJ of the *Crimes Act*. The respondent was subject to a sentence amounting to a total term of 22 years with a non-parole period of 13 years. The respondent was eligible to be considered for parole on 31 July 2015.

3 It should be apparent that the sentence imposed upon the respondent by Hidden J was totally concurrent with, and subsumed within, that imposed by Sully J. The Crown argues that, although the length of the sentence imposed upon the respondent was appropriate, it was an error for his Honour to make the sentence totally concurrent with the sentences then being served and resulted in a sentence that was manifestly inadequate. In particular the Crown submitted that Hidden J erred in the following ways:

(i) in placing too much weight on the subjective circumstances of the respondent;

(ii) in failing to take into account the respondent's prior convictions recorded by Sully J for the purpose of determining whether the respondent was deserving of lenient treatment even though the convictions were for offences that took place later in time; and

(iii) in rejecting the Crown's submission that the vulnerability of the victim was an aggravating factor that should be taken into account pursuant to s 21A(2)(l) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

4 The facts upon which the respondent was to be sentenced were included in a statement placed before Hidden J by the parties. The victim of the offence on the indictment shall be referred to as CH. The complainant in respect of the offences on the Form 1 shall be referred to as MSM. Hidden J stated the facts of the offence on the indictment as follows:

> "The offence involving CH is the offender's act of consensual sexual intercourse with her to which I have already referred in dealing with MSK. As I have said, she was thirteen years old at the time. The offender himself was fifteen. As at the date of the offence, 14 July 2002, they had known each other for about eight months. They had been out together on a few occasions and she felt that she could trust him.
>
> I referred earlier to another young lady from Fairfield who was with the group at the Ashfield house on that occasion. At one stage MAK and that young lady left the lounge room. The other young men were speaking about what the two of them were doing, and the offender said to CH, 'They're rooting.' About thirty minutes later the other young lady returned to the lounge room, and CH observed that she appeared to be fine. The offender asked CH if she wanted to go to a bedroom. She agreed, and they did so. There, they kissed and had penile/vaginal intercourse, to which she consented.
>
> As they were getting dressed afterwards, MAK entered the room and told the offender that the other young lady wanted to be taken home. The offender asked CH if she wanted to go with them, but she said that she would stay until MAK returned …"

5 The Judge stated the facts of the matters on the Form 1 as follows:

> "The offences on the Form 1, as I have said, were committed much earlier, on 24 November 2001. On this occasion also the offender was fifteen years old. That evening, MSM, then fourteen years old, and a young lady friend of hers met two of the offender's brothers at Ashfield Railway Station. Both young women had known the offender and some of his brothers for about six months. They were driven to the Ashfield house, alcohol being purchased on the way. At the house MSM began to drink an alcoholic beverage, when she received a call on her mobile phone. As a result of that call, she left the house and met some other friends at a location nearby. She returned to the home, apparently in the company of some of those friends. During the evening, she observed that the lady friend to whom I first referred was drinking and that the brothers were encouraging her to drink more.
>
> At one stage, she and others at the house went into a bedroom. She lay on a bed, fully dressed. The offender got onto the bed and began to hug her. He tried to pull her on top of him. She asked him to stop, but he tried to kiss her on a number of occasions. She rolled away from him, whereupon he placed

> his hand under her top and squeezed her breast. This gave rise to the charge of indecent assault. She pushed him away and abused him verbally. He then smacked her on the bottom, before getting off the bed.
>
> Later, MSM wanted to leave, but was concerned about a friend of hers (not identified in the statement of facts) remaining at the house. She expressed that concern to one of the offender's brothers, who abused her. The offender said, 'Look at the hassle you caused'. He then slapped her across the face, making her cry. This gave rise to the charge of common assault. Another person at the house intervened. As MSM and her companion left the house, the offender was heard to say, 'If I ever see you dirty scrags you better not walk the streets of Ashfield again. Watch your backs.'
>
> The incident in the bedroom had been videotaped by another person who was at the house. Police found that videotape in the course of a search of the house conducted in the investigation of the offences dealt with by Sully J."

6 The respondent was 19 years of age at the time he was sentenced by Hidden J. There was in evidence before his Honour a psychological report that had been before Sully J in the earlier sentencing proceedings and a current report from a counsellor in the Sexual Offender Programme run by the Department of Juvenile Justice. Of the respondent's subjective features Hidden J stated:

> "What emerges from that material is that, while the offender's family was well off and respected in their community in Pakistan, there was conflict within the home. The effect of his account also was that his father was a stern disciplinarian. He saw arguments between his father and his older brothers in which there was physical aggression, and on at least one of those occasions a gun was produced. He also reported lawlessness, including gunfire, in the streets of the village, and having witnessed a violent incident in which a number of people were shot. Despite all this, he progressed well at school in his home country.
>
> He came to Australia with some of his siblings when he was only thirteen years old. For virtually the whole of the time from then until his arrest in August 2002, he was under the supervision of his brother, MAK, but without parental control. He attended school here, and had commenced study in year eleven at the time he was taken into custody. His school reports were favourable at first, but over time his behaviour and academic performance deteriorated. He acknowledged to [the counsellor] that he engaged in truancy because of his lifestyle at the time. In the absence of his parents and appropriate guidance from his older brothers, he was drinking alcohol and associating with an undesirable peer group.

> He was reported to have engaged in inappropriate sexual behaviour, in a variety of ways, while at school. Generally, he appears to have been sexually active with a number of girls around his age. About six months prior to his arrest he formed a more stable relationship with a young lady, which has endured. Nevertheless, he continued to have what [the counsellor] described as 'casual sexual encounters' …"

7 There was material before his Honour that indicated that the respondent was progressing well in the detention centre in which he was serving his sentence, he was pursuing his education and had undergone a number of courses. He was following his religion and had vowed to abstain from alcohol. The respondent had been a willing participant in the assessment by the counsellor and she thought that he might benefit from inclusion in the Sexual Offender Programme "in order to develop insight into the social, cognitive, emotional and behavioural precursors to his offending."

8 During the course of the hearing before us the Crown Advocate abandoned his complaint concerning the failure of the Judge to take into account that the victim was vulnerable as a matter of aggravation under s 21A(2)(l). He acknowledged the correctness of this Court's decision in *R v Tadrosse* [2005] NSWCCA 145 and conceded that it was incompatible with his argument that Hidden J should have found as an aggravating factor, independent of a consideration of the circumstances of the offending, that CH was in the home of the respondent when the offence occurred and that she was in a relationship of trust with him because of his assertions of love for her. That concession was well founded. However, we would note, in light of the submissions initially made in writing by the Crown, that there is nothing inconsistent with the statement of general principle contained in *Tadrosse* as to the operation of s 21A(1)(l) and the decision of this Court in *R v Ibrahimi* [2005] NSWCCA 153 that recognised persons travelling alone at night in public transport as being especially vulnerable within the terms of that provision. There was nothing in the present case that engaged that section.

9 There may be more merit in the Crown's argument that his Honour erred in stating that the respondent was "entitled to the benefit of a clear criminal record at the time of these offences" in light of the offences for which he was convicted by Sully J even though those offences occurred after the offence for which he was being sentenced by Hidden J. However, it is unnecessary to determine that matter in order to dispose of the present appeal because, even if his Honour was technically in error in that regard, it could have had little, or no, impact upon his Honour's decision to make the sentence fully concurrent with the sentences imposed by Sully J.

10 The Crown's principal submission was to the effect that, because the sentence was to be served totally concurrent with that imposed by Sully J, the sentence was no penalty at all and therefore failed to comply with the purposes of punishment set out in s 3A of the *Crimes (Sentencing Procedure) Act*. In particular it was submitted that the sentence did not denounce the respondent's conduct, nor did it have sufficient regard to the harm to the victims nor adequately punish the respondent for his criminal behaviour. That argument may have a superficial attraction but it fails to acknowledge that the purposes of punishment have to be promoted within the limits of over-arching fundamental principles of sentencing derived from the common law. After all s 3A is largely a codification and elaboration of the purposes of punishment derived from the common law and which can be found enunciated in judgments of this and other appellate Courts long before the section was introduced: see *R v MA* (2004) 145 A Crim R 434.

11 One of the limiting principles that constrains a sentencing court in seeking to promote the purposes of punishment is the principle of proportionality. Another is the, not-unrelated, principle of totality and it is this principle that operated in the present case. It is the application of the totality principle that will generally determine the extent to which a particular sentence is to be served concurrently or cumulatively with an existing sentence in accordance with statements of the High Court as to the operation of the principle in *Mill v The Queen* (1988) 166 CLR 59; 36 A Crim R 468; *Pearce v The Queen* (1998) 194 CLR 610; 103 A Crim R 372 and *Johnson v The Queen* (2004) 78 ALJR 616.

12 *R v Holder* [1983] 3 NSWLR 245 at 260; (1983) 13 A Crim R 375 at 389, Street CJ described the principle as follows:

> "… The principle of totality is a convenient phrase, descriptive of the significant practical consideration confronting a sentencing Judge when sentencing for two or more offences. Not infrequently a straightforward arithmetical addition of sentences appropriate for each individual offence considered separately will arrive at an ultimate aggregate that exceeds what is called for in the whole of the circumstances. In such a situation the sentencing Judge will evaluate, in a broad sense, the overall criminality involved in all of the offences and, having done so, will determine what, if any, downward adjustment is necessary, whether by telescoping or otherwise, in the aggregate sentences in order to achieve an appropriate relativity between the totality of the criminality and the totality of the sentences …"

13 In some cases the fact that a sentence for a particular offence is to be served completely concurrently with another sentence for a different offence will result in a sentence that is erroneously inadequate because it does not reflect the totality of the criminality for which the offender was to be punished for the two acts of offending: see for example *R v Brown* [1999]

NSWCCA 323. This may be so even if the two offences arise from the same precise criminal act, such as the dangerous driving of a motor vehicle on the one occasion: *R v Janceski* (2005) 44 MVR 328. The same principle has been applied to sexual assault offences arising from a single incident of sexual assault: *R v Gorman* (2002) 137 A Crim R 326. Although, it has been held that a determination of the extent, if any, that a sentence is to be served cumulatively with another sentence is an exercise of discretion on which minds might differ, *R v Hammoud* (2000) 118 A Crim R 66, that discretion is generally circumscribed by a proper application of the principle of totality.

14 There will be cases, of which, in Hidden J's opinion, this was one, where the criminality of offences committed by an offender is so great and the punishment imposed for those sentences is justifiably so harsh in order to reflect that criminality that there is little, or no, room for a further penalty to be imposed upon the offender to achieve an appropriate purpose of punishment in the circumstances of the particular case. In the present case those circumstances included the relatively low criminality involved in the offence on the indictment having regard to the relationship between the applicant and the complainant, the age differential between them and the fact that intercourse was consensual. It was also a highly relevant matter than any further actual punishment could not take effect until the expiration of the non-parole period fixed by Sully J some 15 years after the offences were committed.

15 It is acknowledged that in the present case the complainants in the offence on the indictment and the matter on the Form 1 may feel aggrieved that the applicant does not appear to have been punished in any real sense for his criminal conduct toward them. Further, members of the community, without an understanding of all the facts and the well-established sentencing principles to be applied, might also be concerned that the result appears to inadequately express public attitudes to the offence and the offender. But the different purposes of punishment will sometimes pull in different directions. Not one of them can be considered in isolation. The justifiable limitations placed upon the promotion of those sometimes competing purposes cannot be disregarded in an appropriate case in order to address public or private desires for retribution notwithstanding the importance of that factor in the determination of appropriate punishment.

16 As was stated in the joint judgment of Mason CJ, Brennan Dawson and Toohey JJ in *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 476; 33 A Crim R 230 at 238 (footnotes omitted):

> "… sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The

> purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions."

17 In the present case Hidden J stated:

> "In what has been a difficult sentencing exercise generally, the sentence of this offender has required particularly careful consideration. In all the circumstances, I think that it is appropriate that he be dealt with according to law. Given the substantial sentence he is now undergoing, no purpose would be served by dealing with him otherwise. I have also concluded that his criminality should be marked by a short custodial sentence.
>
> I have considered carefully whether that sentence should be accumulated, wholly or partly, upon the non-parole period which he is now serving. That was the Crown prosecutor's submission. I have decided that it should not. As matters stand, he will remain in Juvenile Justice detention until he turns twenty-one in 2007, when he will be removed to an adult prison. He will then have no prospect of release until 2015, when he is twenty-nine. In all the circumstances, I think it appropriate that the sentence I pass should be concurrent with his present term, and should be served in a Juvenile Justice centre. I have regard to his plea of guilty, but I do not think it necessary to specify as a discount the measure of leniency it has earned him."

18 In light of the seriousness of the offences for which the respondent was sentenced by Sully J and the length of the sentences imposed upon him in order to promote the purposes of punishment in relation to those crimes, it was well within the discretion of Hidden J to determine that the principle of totality required him to order that the sentence for the offence before him be served completely concurrently with the sentences imposed by Sully J so as not to increase the period to be served by the respondent before he might be released to parole in 2015.

19 In their joint judgment in *Markarian v The Queen* (2005) 79 ALJR 1048 at [27], Gleeson CJ, Gummow, Hayne and Callinan JJ stated:

> "Express legislative provisions apart, neither principle, nor any of the grounds of appellate review, dictates the particular path that a sentencer, passing sentence in a case where the penalty is not fixed by statute, must follow in reasoning to the conclusion that the sentence to be imposed should be fixed as it is. The judgment is a discretionary judgment and, as the bases for appellate review reveal, what is required is that the sentencer must take into account all relevant considerations (and only relevant considerations) in forming the

> conclusion reached. As has now been pointed out more than once, there is no single correct sentence. And judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies."

20 There is no basis shown by the Crown for this Court to review the discretion of Hidden J. The appeal is dismissed.

Appeal dismissed

Solicitor for the Crown: S Kavanagh
Solicitor for the respondent: S O'Connor
Ivan Potas

164 A Crim R 481

R. v Peppard (Mark)

Court of Appeal | February 22, 1990 | (1990-91) 12 Cr. App. R. (S.) 88

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***88 R. v. Mark Peppard**

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Court of Appeal
22 February 1990

(1990-91) 12 Cr. App. R. (S.) 88

(Lord Justice Russell , Mr. Justice Turner and Mr. Justice Potts):
February 22, 1990

Analysis

Suspended sentence of imprisonment—offender spending substantial period of time in custody on remand—whether appropriate to impose suspended sentence on offender who has spent time in custody on remand equivalent to sentence of imprisonment which is suspended.

Where the period of time which an offender has spent in custody on remand before being convicted or sentenced is equivalent in length to the sentence of imprisonment which would be appropriate to his offence, the court which deals with him should not impose a suspended sentence of imprisonment but should pass an immediate sentence so that the offender has the benefit of the reduction of his sentence by the time spent in custody on remand.

The appellant pleaded guilty to three counts of burglary. The appellant twice broke into a school and once into a social services office, and stole some cash and various items. Sentenced to eight months' imprisonment on each count concurrent, suspended for two years together with a supervision order for two years. The appellant had been in custody on remand for four months before the sentence was passed.

in passing sentence the sentencer referred to the fact that the appellant had served the equivalent of a sentence of eight months in custody on remand, which ***89** would not count as part of the suspended sentence if it were activated. The action of the sentencer was wrong in principle and contrary to the decision of the Court in McCabe (1988) 10 Cr.App.R.(S.)

134 , where it was held that where an offender had been in custody on remand for a period which would be equivalent to the appropriate sentence for the offence, the sentencer should impose an immediate term of imprisonment so that the offender would have the benefit of the reduction of the term served. There was no distinction to be made between the present case and McCabe , and the suspended sentences would be quashed. As was held in McCabe , the Court could not substitute an immediate sentence for a suspended sentence on appeal, as this would amount to dealing with the appellant more severely on appeal than in the court below. A conditional discharge would be substituted.

Case cited: McCabe (1988) 10 Cr.App.R.(S.) 134 .

References: Suspended sentence of imprisonment, Current Sentencing Practice D5.4(e);

Commentary [1990] Crim.L.R. 446

P. Wilcox for the appellant.

POTTS J.:

On August 4, 1989 in the Crown Court at Snaresbrook before Mr. Recorder Singer the applicant pleaded guilty to three counts of burglary and was sentenced to eight months' imprisonment on each count concurrent suspended for two years, together with a supervision order for two years.

His application for leave to appeal against sentence has been referred to the court by the Registrar.

The facts giving rise to the three charges are as follows. On the night of June 1/2, 1988 the applicant entered the International School of London in North West London by breaking a fire door window. Inside, he stole £200 in cash, some sports equipment and other items (count 1). During the night of June 8/9, 1988 the applicant returned to the school and again entered by the fire door. He stole £25 in cash, an amplifier, some confectionery and a safe key (count 2).

During the evening of December 29, 1988 the applicant broke into the Camden Social Services offices and stole £45 in cash, two bottles of spirits, a camera, a cheque and certain other articles (count 3).

The applicant was arrested in April 1989 as a result of examination of fingerprints found at the scene of the offences. When interviewed he admitted the offences. He said that the school burglaries were committed under the influence of alcohol and he alleged that the offence against the social services offices was the result of anger he felt against them as they had instituted proceedings against his wife.

Following his arrest, the applicant remained in custody for four months until the Crown Court hearing as he was unable to supply a surety.

The applicant will be 29 on March 7. At the material times he was unemployed. Eight previous court appearances are recorded with findings of guilt and convictions for offences of assault, damaging property, theft and threatening behaviour. He has been dealt with by way of fines, supervision, detention centre and short periods of imprisonment.

The learned recorder had before him a social enquiry report, dated July 24, 1989, which we have read. This report states that the applicant has had a long-standing difficulty, as the probation officer puts it, "in handling frustrating situations." Alcohol consumption played a part in his offending. The report states that the applicant had come to terms with accommodation problems at home and a breakup of his marriage. It states that in prison the applicant has spent time in the punishment ***90** block and created alienation. Probation is recommended by the officer although the writer is unsure whether the applicant could contain his anger.

When he came to pass sentence the learned recorder said this:

> "Because you have pleaded guilty, because of the nature of these offences … and because you have served the equivalent of an 8 months' sentence already,

> I am going to take a course that may appear slightly illogical. It will have the effect that you will retain your liberty if you behave. But it seems to me … that some degree of support is needed if you are to stay on the rails."

The learned recorder then went on to pass the sentences we have described and added:

> "That means that if during the next two years you commit any offence punishable with imprisonment—and that does not mean burglary: it means any offence punishable with imprisonment, whether it is violence, theft, or what—you will be brought back to court, and you will be dealt with not only for the new offence, but the suspended sentence will almost inevitably be ordered to take effect … That will be 8 months on top. I may tell you, although it may sound harsh, that the 8 months' equivalent, namely the 4 months that you have already served, will not count towards that sentence."

By a notice of appeal settled by counsel it is stated on the applicant's behalf that in passing sentence the learned recorder did not give proper weight to the time spent in custody; that he failed to give proper weight to the fact that had the sentence imposed been immediate the applicant would have been released forthwith and, finally, reference is made to McCabe (1988) 10 Cr.App.R.(S.) 134 , counsel for the applicant stating that consideration had not been given to this case.

We understand that on November 29, 1989 the applicant was arrested and charged with an offence of burglary. He has been brought here today from prison having been remanded in custody since November 29, 1989, awaiting his trial on this charge.

We now go on to consider the submissions made in the notice of appeal. We have to say that not only was the sentence imposed by the learned recorder, as he put it, "slightly illogical," it was wrong in principle and contrary to authority. This Court had to consider a similar situation to the present in McCabe , which was decided on March 22, 1988. In that case it was held that where an offender has been in custody on remand for a period which would be equivalent to the appropriate sentence for that offence, the sentencer should impose an immediate term of imprisonment so the offender may have the benefit of the reduction of the term served. In giving the judgment of the court McKinnon J. stated:

> "As the appellant has already served the equivalent of a sentence at least as great as that considered to be appropriate by the learned judge he should have received such sentence as would have resulted in his immediate release."

Counsel for this applicant has submitted:

> "As the commentary on this case, (*i.e.* McCabe) in the Criminal Law Review points out, to impose a suspended sentence in these circumstances would lead to the possibility of a double punishment for the same offence— (1988) Crim.L.R. 469 ."

There is on the facts before us no distinction to be made between the present case and McCabe . The learned recorder fell into the same error as the trial judge in McCabe . We are satisfied that the suspended sentences of imprisonment must be quashed. What sentence or order can this court substitute? We derive assistance once again from McCabe . At page 136 of the relevant volume of the law reports, in the penultimate paragraph, the learned judge says:

> "What is the court to do? Under section 11(3) of the Criminal Appeal Act 1968 : 'The court shall so exercise their powers under this subsection that, taking the case as a whole, the appellant is not more severely dealt with on appeal than he was dealt with by the court below.' As can be seen in the case of Mah-Wing , the effect of that subsection in relation to a suspended sentence was considered by this court in Thompson (1977) 66 Cr.App.R. 130 . In that case the court held that they had no power to order an immediate imprisonment when the court below had ordered that the imprisonment should be suspended, the

reason being, as Griffiths L.J. said in Mah-Wing —'that any ordinary person would consider themselves more severely dealt with on appeal if they were sent into prison albeit for a shorter period than if they were given the opportunity of a suspended sentence.'

'What this court proposes to do is to allow this appeal, setting aside the sentence of 3 months' imprisonment suspended for 2 years and substituting a conditional discharge for one year in respect of both offences."

We propose to take the same course in this case. We therefore grant leave to appeal. With counsel's consent we treat the hearing of the application as the appeal. We quash the sentences of imprisonment. We substitute a conditional discharge for one year in respect of each of the three counts of burglary.

(1990-91) 12 Cr. App. R. (S.) 88

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R. v Roberts (Karl Eric)

Court of Appeal | October 28, 1999 | [2000] 1 Cr. App. R. (S.) 569

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***569 R. v. Karl Eric Roberts**

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Court of Appeal
28 October 1999

[2000] 1 Cr. App. R. (S.) 569

(Lord Justice Rose (Vice President, Court of Appeal, Criminal Division), Mr Justice Jowitt and Mr Justice Hooper):
October 28, 1999

Analysis

Time spent in custody on remand—offender simultaneously serving sentence for other offences—time not counting as relevant period—sentence for other offences subsequently quashed—whether a ground for reducing later sentence.

Editor's note : where an offender is remanded in custody for one offence and is simultaneously serving a sentence for other offences, and that sentence is subsequently quashed, the time when the offender was serving the quashed sentence will not count as a relevant period for the purposes of the Criminal Justice Act 1967, s.67 and the sentencer should make an appropriate allowance in the sentence eventually passed for the offence for which the offender was remanded in custody.

The appellant pleaded guilty to being concerned in the importation of 29.3 kilogrammes of cannabis. He was sentenced to 42 months' imprisonment. The appellant had been in custody on remand, but for two and a half months of the time when he was in custody he was serving a sentence for other offences imposed by a Magistrates' court. The sentence imposed by the Magistrates' court was subsequently quashed on appeal, but the quashing of the sentence did not allow the period during ***570** which the appellant was in custody on remand, and at the same time serving the sentence imposed by the Magistrates' court, to be treated as a relevant period for the purposes of the Criminal Justice Act 1967, s.67 , and to be deducted from the sentence imposed by the Crown Court.

the Court would reduce the sentence of 42 months by five months, to 37 months.

Case cited : R. v. Governor of Wandsworth Prison, ex p. Sorhaindo (1999) 96 (4) L.S.G. 38 .

References : time on remand, *Current Sentencing Practice* A6.

J. Higgs for the appellant.

JOWITT J.:

On July 29, 1998, at Canterbury Crown Court, this applicant pleaded guilty before H.H. Judge Robbins to an offence involving the importation of 29.3 kilogrammes of cannabis resin, which he brought by motor coach into Dover, having reached there from Spain. He received a sentence of 42 months' imprisonment.

He applied for leave to appeal against that sentence on the ground that it was in itself manifestly excessive. Leave was refused by the single judge who pointed out that the sentence might indeed have been longer.

The applicant now seeks an extension of time in which to renew his application to this Court and, if granted, he seeks leave to appeal against sentence but on a wholly different ground, which is nothing to do with the facts of the offence. Therefore we need say no more about it. We grant the extension of time and we grant leave to appeal.

To understand the point which we have to consider today, it is necessary to set out the chronology of events. On April 12, 1998 the applicant was arrested for the drugs offence and was remanded in custody. Prior to this, however, he had been arrested for minor offences of dishonesty and released on bail.

On April 30, 1998, he was convicted of those offences in the Tunbridge Wells Magistrates' Court and sentenced to five months' imprisonment. He would have completed serving that sentence after two and a half months, that is on July 15, 1998.

When therefore the appellant appeared before the Crown Court on July 29, he was no longer serving a sentence of imprisonment but was a remand prisoner.

On August 28, at the same Crown Court, the sentence of five months' imprisonment imposed by the magistrates was quashed and there was substituted for it an order that the appellant be conditionally discharged for 12 months.

The effect on such a case as the present of a prison sentence being quashed was considered by the Divisional Court in R. v. Governor of Wandsworth Prison, ex p. Sorhaindo (1999) 96 (4) L.S.G. 38 . It is clear from the judgment of Simon Brown L.J., given on December 14, 1998, that, in a case such as the present, the effect of the successful appeal does not mean that the sentence imposed by the magistrates should be treated as though it had never been imposed.

The consequence of that is that two and a half months was spent serving that sentence which is precluded by section 67(1)(a) paragraph (b)(i) of the Criminal Justice Act 1967 from counting towards the sentence of 42 months' imprisonment in respect of the importation of cannabis resin. But for that, the appellant's earliest release date would have been 21 months after the date of his arrest, on April 12, 1998, namely January 12, 2000. However, because the two and a half months spent serving the sentence imposed by the magistrates does not count towards the sentence of 42 months, the applicant's earliest release date is postponed by two and a half months.

This of course was not a point which could have been brought to the attention of ***571** H.H. Judge Robbins because, at that stage, the sentence of five months had been served and was undisturbed.

In giving judgment, in Sorhaindo , Simon Brown L.J. said:

> "The remedy where this kind of problem arises is to tell the later sentencing judge of the fact that the earlier sentence has been adjusted so that he himself may make an adjustment to his sentence to take account of that."

That was not possible in this case because, when H.H. Judge Robbins passed sentence, the Magistrates' sentence had not been altered.

In all these circumstances, the effect of section 67 of the 1967 Act is that the appellant's earliest release date is postponed by two and a half months, by reason of the five-month sentence which he served, but which has been set aside.

Accordingly we think the appropriate course is to allow this appeal by deducting from the 42 months (a perfectly proper sentence in itself) the equivalent of the two and a half months actually served in respect of the five months, that is the five months. Accordingly, we reduce this sentence to one of 37 months' imprisonment. To that extent this appeal is allowed.

[2000] 1 Cr. App. R. (S.) 569

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R. v. Summers

Supreme Court of Canada | April 11, 2014 | 2014 SCC 26, 2014 CSC 26, 2014 CarswellOnt 4479

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2014 SCC 26, 2014 CSC 26
Supreme Court of Canada

R. v. Summers

2014 CarswellOnt 4479, 2014 CarswellOnt 4480, 2014 SCC 26, 2014 CSC 26, [2014] 1 S.C.R. 575, [2014] S.C.J. No. 26, 112 W.C.B. (2d) 393, 130 O.R. (3d) 80 (note), 307 C.R.R. (2d) 96, 308 C.C.C. (3d) 471, 316 O.A.C. 349, 371 D.L.R. (4th) 581, 456 N.R. 1, 9 C.R. (7th) 223, J.E. 2014-658

Her Majesty The Queen, Appellant and Sean Summers, Respondent and Director of Criminal and Penal Prosecutions of Quebec, British Columbia Civil Liberties Association, Criminal Lawyers' Association of Ontario, John Howard Society of Canada and Canadian Civil Liberties Association, Interveners

McLachlin C.J.C., LeBel, Abella, Rothstein, Cromwell, Karakatsanis, Wagner JJ.

Heard: January 23, 2014
Judgment: April 11, 2014
Docket: 35339

Proceedings: affirming *R. v. Summers* (2013), 2013 ONCA 147, [2013] O.J. No. 1068, 2013 CarswellOnt 2626, 304 O.A.C. 322, 297 C.C.C. (3d) 166, 114 O.R. (3d) 641, 279 C.R.R. (2d) 289, 3 C.R. (7th) 125, E.A. Cronk J.A., M. Tulloch J.A., S.E. Pepall J.A. (Ont. C.A.); affirming *R. v. Summers* (2011), 2011 CarswellOnt 16080, [2011] O.J. No. 6377, C.S. Glithero J. (Ont. S.C.J.)

Counsel: Gregory J. Tweney, Molly Flanagan, for Appellant
Brennan Smart, Russell Silverstein, for Respondent
Dennis Galiatsatos, for Intervener, Director of Criminal and Penal Prosecutions of Quebec
Ryan D.W. Dalziel, Anne Amos-Stewart, for Intervener, British Columbia Civil Liberties Association
Ingrid Grant, for Intervener, Criminal Lawyers' Association of Ontario
Andrew S. Faith, Jeffrey Haylock, for Intervener, John Howard Society of Canada
Jasmine T. Akbarali, Josh Koziebrocki, for Intervener, Canadian Civil Liberties Association

Subject: Criminal; Family

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Generally — referred to

s. 24(1) — referred to

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Generally — referred to

s. 120 — referred to

s. 120(2) — referred to

s. 127(3) — referred to

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

Pt. XXIII — referred to

s. 457(1) — considered

s. 457(2) — considered

s. 515(9.1) [en. 2009, c. 29, s. 3] — referred to

s. 524(4)(a) — referred to

s. 524(4)(b) — referred to

s. 524(8)(a) — referred to

s. 524(8)(b) — referred to

s. 672.14(3) [en. 1991, c. 43, s. 4] — referred to

s. 672.47(2) [en. 1991, c. 43, s. 4] — referred to

s. 718 — considered

s. 718.1 [en. R.S.C. 1985, c. 27 (1st Supp.), s. 156] — considered

s. 718.2 [en. 1995, c. 22, s. 6] — considered

s. 718.2(b) [en. 1995, c. 22, s. 6] — considered

s. 719 [am. 2009, c. 29, s. 3] — referred to

s. 719(1) — referred to

s. 719(3) — considered

s. 719(3) [rep. & sub. 2009, c. 29, s. 3] — considered

s. 719(3.1) [en. 2009, c. 29, s. 3] — considered

s. 719(3.2) [en. 2009, c. 29, s. 3] — considered

s. 719(3.3) [en. 2009, c. 29, s. 3] — considered

s. 742.6(16) [en. 1999, c. 5, s. 41(4)] — referred to
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s. 14 — referred to
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APPEAL by Crown from judgment reported at *R. v. Summers* (2013), 2013 ONCA 147, 2013 CarswellOnt 2626, [2013] O.J. No. 1068, 114 O.R. (3d) 641, 297 C.C.C. (3d) 166, 3 C.R. (7th) 125, 304 O.A.C. 322, 279 C.R.R. (2d) 289 (Ont. C.A.), dismissing Crown's appeal from sentence.
POURVOI formé par le ministère public à l'encontre d'un jugement publié à *R. v. Summers* (2013), 2013 ONCA 147, 2013 CarswellOnt 2626, [2013] O.J. No. 1068, 114 O.R. (3d) 641, 297 C.C.C. (3d) 166, 3 C.R. (7th) 125, 304 O.A.C. 322, 279 C.R.R. (2d) 289 (Ont. C.A.), ayant rejeté son appel interjeté à l'encontre de la peine imposée.

Comment

This ruling should put to rest the controversy that has dogged the issue of determining credit for pre-sentence custody after the passage of the *Truth in Sentencing Act*, S.C. 2009, c. 29, at least under the present wording. It is open to Parliament, of course, to make further amendments to the legislation. However, if there were an attempt to legislate that the circumstances justifying enhanced credit must be "exceptional," Justice Karakatsanis may have headed that attempt off at the pass. Her reasoning that the principles of parity and proportionality would be offended if offenders in otherwise identical circumstances received different sentences according to whether or not they were granted bail is extremely important. The Supreme Court of Canada has already ruled that proportionality in sentencing is a principle of fundamental justice: *R. v. Ipeelee* (2012), 91 C.R. (6th) 1 (S.C.C.). Although the parity principle has not yet achieved that status, it would not be a stretch to also consider it a principle of fundamental justice. This is because of the equality concerns that animate the parity principle. Therefore, an attempt by Parliament to institute a pre-sentence custody regime that resulted in inequitable treatment as highlighted by Justice Karakatsanis might violate more than one principle of fundamental justice and therefore be a violation of section 7 of the *Charter*.

Tim Quigley

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***Karakatsanis J.* (McLachlin C.J.C. and LeBel, Abella, Rothstein, Cromwell and Wagner JJ. concurring):**

I. Introduction

1 When an accused person is not granted bail, and must be remanded in jail awaiting trial, the *Criminal Code*, R.S.C. 1985, c. C-46, allows time served to be credited towards a resulting sentence of imprisonment. A day in jail should count as a day in jail.

2 However, crediting a single day for every day spent in a remand centre is often insufficient to account for the full impact of that detention, both quantitatively and qualitatively. Time in a remand centre does not count for the purposes of eligibility for parole, earned remission or statutory release, and this can result in a longer term of actual incarceration for offenders who were denied bail. Moreover, conditions in remand centres tend to be particularly harsh; they are often overcrowded and dangerous, and do not provide rehabilitative programs.

3 As a result, for many years courts frequently granted "enhanced" credit: 2 days for each day spent in pre-sentence custody. This practice was endorsed by this Court in *R. v. W. (L.W.)*, 2000 SCC 18, [2000] 1 S.C.R. 455 (S.C.C.). When conditions were exceptionally harsh, judges granted credit at a rate of 3 to 1 or more.

4 The *Truth in Sentencing Act*, S.C. 2009, c. 29 (*TISA*), passed in 2009, amended the *Criminal Code* to cap pre-sentence credit at a maximum of 1.5 days for every day in custody. The purpose was to remove any incentive for an accused to drag out time in remand custody, and to provide transparency so that the public would know what the fit sentence was, how much credit had been given, and why.

5 In this case, the Court is called upon to interpret these amendments. There is no dispute that Parliament imposed a cap on enhanced credit at a rate of 1.5 to 1. However, there are conflicting lower court decisions on when "enhanced" credit at a rate higher than 1 to 1 is available.

6 The statute does not definitively address the issue, providing simply that enhanced credit is available when "the circumstances justify it" (s. 719 (3.1)). The legislative history is contradictory and inconclusive. We must interpret the provisions to determine what "circumstances" justify enhanced credit of up to a rate of 1.5 to 1. The appellant, the Attorney General of Ontario, argues that the loss of eligibility for parole and statutory release cannot be a "circumstance" justifying enhanced credit under the new s. 719(3.1) of the *Criminal Code*.[1] The Ontario Court of Appeal in this case and the Nova Scotia Court of Appeal in the companion case, *R. v. C. (L.)*, 2012 NSCA 107, 321 N.S.R. (2d) 321 (N.S. C.A.), came to the opposite conclusion[2], and held that the loss of eligibility for parole and statutory release is a "circumstance" that can justify enhanced credit.

7 In my view, while the *Truth in Sentencing Act* caps pre-sentence credit, it does not limit the "circumstances" that justify granting credit. Where Parliament intended to alter existing practice, as with respect to the maximum amount of credit, it did so expressly. However, the legislation excludes no particular "circumstances" from consideration. Had Parliament intended to alter the well-established rule that enhanced credit compensates for the loss of eligibility for early release, it would have done so expressly.

II. Statutory Provisions

8 This appeal concerns amendments to s. 719(3) of the *Criminal Code*, resulting from the *TISA*. Sections 719(3) and (3.1) now read (changes underlined):

> (3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.
>
> (3.1) Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody unless the reason for detaining the person in

custody was stated in the record under subsection 515(9.1) or the person was detained in custody under subsection 524(4) or (8).

III. Background

A. Facts

9 On July 9, 2010, Sean Summers, the respondent, violently shook his infant daughter, resulting in her death three days later. He was initially arrested on a charge of second degree murder but, in April 2011, that information was withdrawn and he was charged with manslaughter. On May 30, 2011, he pleaded guilty to manslaughter.

10 The respondent was in custody for a period of 10.5 months, from his arrest in July 2010 until he pleaded guilty and was sentenced, in May 2011. There has been no suggestion that the conditions of detention were unusually harsh.

B. Sentencing Decision, (Ont. S.C.J.) (QL)

11 Counsel agreed that an appropriate range for the sentence was between eight and ten years' imprisonment.

12 Defence counsel argued that the respondent should receive credit at a rate of 1.5 days for every day in custody; the lost eligibility for early release and parole while in remand custody was a circumstance justifying the application of s. 719(3.1) of the *Code*. The Crown did not object to granting credit for the first six months of detention at a rate of 1.5 to 1; during this time, the accused was waiting for a post-mortem report to be disclosed. As for the rest of the detention, the Crown invited the judge to use his discretion in assessing credit.

13 The sentencing judge, Glithero J., of the Ontario Superior Court of Justice, reasoned that the traditional practice of granting credit at a rate of two days for every day in detention was based upon the fact that time served on remand did not count towards parole eligibility. Since most offenders are released on parole between the one-third and two-third marks of their sentences, it would be inequitable not to give enhanced credit to reflect time in pre-trial custody. The fact that pre-trial detention did not count towards parole eligibility for the respondent was a circumstance justifying credit at a ratio of 1.5:1 under s. 719(3.1) of the *Code*.

14 The judge sentenced the respondent to 8 years' imprisonment, less a credit of 16 months for 10.5 months of pre-trial detention. This resulted in a sentence of 6 years and 8 months.

C. Ontario Court of Appeal, 2013 ONCA 147, 114 O.R. (3d) 641 (Ont. C.A.)

15 The Crown appealed on the basis that, under s. 719(3.1), credit cannot be assigned at a rate of 1.5:1 solely to account for an accused's loss of eligibility for early release and parole.

16 Cronk J.A., writing for the Court of Appeal, concluded that enhanced credit under s. 719(3.1) was not limited to exceptional circumstances and could be justified on the basis of lost eligibility for early release and parole. She engaged in a thoughtful and thorough interpretation of s. 719(3.1), considering the text of the *TISA*, its legislative history, and the principles that underpin the *Criminal Code* sentencing scheme.

17 The Court of Appeal clarified that not every remand offender will be granted enhanced credit under s. 719(3.1) on the basis of lost eligibility for early release and parole. These may be circumstances justifying credit, but only if the accused would probably have received early release or parole. A judge retains the discretion to deny credit at the enhanced rate, for example when an accused intentionally delayed proceedings. Certain offenders are expressly excluded from s. 719(3.1), and are therefore entitled to no more than one-for-one pre-trial credit under s. 719(3).

18 Given that there was no basis to conclude that the respondent would have been denied parole or early release, there was no error in granting enhanced credit at a rate of 1.5:1 to account for lost early release and parole eligibility.

IV. Issue

19 Is ineligibility for early release and parole while on remand a "circumstance" that can justify granting enhanced credit for pre-sentence custody under s. 719(3.1) of the *Criminal Code*?

V. Analysis

A. Prior Regime for Crediting Pre-Sentence Custody

20 Prior to the enactment of the *TISA* in 2009, s. 719(3) of the *Criminal Code* simply provided that a sentencing court "may take into account any time spent in custody by the person as a result of the offence". The *Code* imposed no restrictions on the reasons for giving credit, nor the rate at which credit was granted. In *R. v. Rezaie* (1996), 31 O.R. (3d) 713 (Ont. C.A.), Laskin J.A. of the Ontario Court of Appeal explained the rationale for granting credit. He noted that

> a judge should not deny credit without good reason. To do so offends one's sense of fairness. Incarceration at any stage of the criminal process is a denial of an accused's liberty. [p. 721]

21 This recognized that it would be unfair if a day spent in custody, prior to sentencing, were not counted towards an offender's ultimate sentence. Otherwise, an offender who spent time in pre-sentence custody would serve longer in jail than an identical offender who committed an identical offence, but was granted bail. Thus, a day of incarceration requires at least a credit of one day towards the sentence.

22 Courts generally gave enhanced credit in recognition of the fact that "in two respects, pre-trial custody is even more onerous than post-sentencing custody" (*Rezaie*, at p. 721). As Laskin J.A. explained:

> First, other than for a sentence of life imprisonment, legislative provisions for parole eligibility and statutory release do not take into account time spent in custody before trial (or before sentencing). Second, local detention centres ordinarily do not provide educational, retraining or rehabilitation programs to an accused in custody awaiting trial. [ibid.]

23 First, the *quantitative* rationale for the practice of granting enhanced credit is to ensure that the offender does not spend more time behind bars than if he had been released on bail.

24 Under the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (*CCRA*), parole becomes available to a federal inmate after one third of the sentence has been served (s. 120), and statutory release is available once two thirds of the sentence has been served (s. 127(3)). Provincial inmates can earn essentially equivalent "earned remission", absent bad conduct, credited at 15 days *per* month as calculated under the Federal *Prisons and Reformatories Act*, R.S.C. 1985, c. P-20, s. 6.[3] Throughout these reasons, I refer to statutory release and earned remission collectively as "early release".

25 In practice, the "vast majority of those serving reformatory sentences are released on 'remission' ... at approximately the two-thirds point in their sentence", and only two to three percent of federal prisoners are not released either by way of parole or "statutory release"; C. C. Ruby, G. J. Chan and N. R. Hasan, *Sentencing* (8th ed. 2012), at § 13.38 and 13.39.

26 Because a sentence begins when it is imposed (s. 719(1)) and the statutory rules for parole eligibility and early release do not take into account time spent in custody before sentencing, pre-sentence detention almost always needs to be credited at a rate higher than 1:1 in order to ensure that it does not prejudice the offender.

27 A ratio of 1.5:1 ensures that an offender who is released after serving two thirds of his sentence serves the same amount of time in jail, whether or not he is subject to pre-sentence detention. A higher ratio than 1.5:1 was therefore often used to account for other

circumstances, including the loss of parole eligibility (i.e., the loss of the opportunity to be released after serving one third of the sentence).

28 The second rationale for enhanced credit is *qualitative* in nature. Remand detention centres tend not to provide the educational, retraining or rehabilitation programs that are generally available when serving a sentence in corrections facilities. Consequently, time in pre-trial detention is often more onerous than post-sentence incarceration. As Cronk J.A. noted in this case, overcrowding, inmate turnover, labour disputes and other factors also tend to make pre-sentence detention more onerous.

29 The impact of overcrowding, or a lack of educational programs, varies depending on the particular offender's needs, character and disposition. Assigning enhanced credit on this basis is a qualitative, fact-dependent and discretionary exercise.

30 As a result of these twin rationales, a practice developed over time of granting credit for pre-sentence detention at a rate of 2:1. In *Wust*, this Court endorsed this practice, but noted that the correct rate cannot be determined by a rigid formula, and is best left to the sentencing judge.

31 For example, when an accused was detained in a remand institution with full access to educational and rehabilitation programs, credit at a ratio of less than 2:1 was sometimes appropriate (although some enhanced credit was still generally appropriate to account for the quantitative rationale). Similarly, when extended pre-sentence detention could be attributed to bad conduct on the part of the accused (such as breaching bail conditions), that militated against enhanced credit (*Rezaie*). By contrast, when an offender was subjected to particularly harsh conditions, rates as high as 3:1 or (rarely) 4:1 were sometimes applied.

B. The Interpretation of Section 719(3.1)

32 In 2009, Parliament changed the statutory regime governing credit for pre-sentence detention. As noted above, the *TISA* amended s. 719 of the *Criminal Code* in two relevant ways. First, Parliament modified s. 719(3) to limit credit for pre-trial custody "to a maximum of one day for each day spent in custody". Second, Parliament provided in s. 719(3.1) that despite that limit, "if the circumstances justify it, the maximum is one and one-half days for each day spent in custody" unless the accused was detained pending trial for specific reasons such as breach of bail conditions.

33 Our task in this case is to interpret these provisions. Specifically, we must determine the meaning of "circumstances" in s. 719(3.1), and whether the lost opportunity for early release and parole in pre-sentence detention can be such a circumstance, capable of justifying enhanced credit at a rate of 1.5:1.

34 I conclude that loss of access to parole and early release constitutes a "circumstance" capable of justifying enhanced credit. In reaching this conclusion, I am in substantial agreement with the exemplary reasons of both Cronk J.A. in this case, and Beveridge J.A. in the companion case *Carvery*.

35 In the reasons that follow, I discuss: (1) the text of the provision, (2) the structure of the section, (3) the intention of parliament, and (4) the scheme of the *Criminal Code*; see *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.). In my view, the meaning of the provision is clear on the basis of conventional principles of statutory interpretation, and it is therefore neither appropriate nor necessary to have recourse to the presumption that the legislation conforms to the *Canadian Charter of Rights and Freedoms*; see *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.), at paras. 28-30 and 61-66.

(1) The Text of the Provision

36 Section 719(3.1) reads as follows:

> (3.1) Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody unless the reason for detaining the person in custody was stated in the record under subsection 515(9.1) or the person was detained in custody under subsection 524(4) or (8).

37 As Beveridge J.A. and Cronk J.A. noted, this provision is free of any language limiting the scope of what may constitute "circumstances". The legislature could easily have provided that only "exceptional circumstances" or "circumstances other than the loss of eligibility for early release and parole" justify enhanced credit.

38 As Cronk J.A. observed, language limiting the scope of the word "circumstances" is used elsewhere in the *Criminal Code*. For example, reference is made to "exceptional circumstances" or "compelling circumstances" in ss. 672.14(3) (fitness assessments last no longer than 30 days, except they may last for 60 if "compelling circumstances" so warrant), 672.47(2) (when an accused is found unfit to stand trial, a disposition must be made within 45 days but, in "exceptional circumstances" may be made within 90 days) and 742.6(16) (when an offender breaches a conditional sentence order, in "exceptional cases", some of the suspended sentence may be deemed to be time served).

39 The absence of qualifications on "circumstances" in ss. 719(3.1) is telling since Parliament *did* restrict enhanced credit, withholding it from offenders who have been denied bail primarily as a result of a previous conviction (s. 515(9.1)), those who contravened their bail conditions (ss. 524(4)(*a*) and 524(8)(*a*)), and those who committed an indictable offence while on bail (ss. 524(4)(*b*) and 524(8)(*b*)). Parliament clearly turned its attention to the

circumstances under which s. 719(3.1) should *not* apply, but did not include any limitations on the scope of "circumstances" justifying its application.

40 Consequently, at the hearing before this Court, the Crown conceded that the circumstances referred to in s. 719(3.1) need not be exceptional. Instead, the Crown took the position that "circumstances" resulting from operation of law, and specifically lost eligibility for early release and parole, could not justify enhanced credit. The Crown argues that "circumstances" suggest facts that are particular to the offender and do not include those consequences that are universal and inherent to the statutory regime.

41 However, the provision is devoid of any limiting language supporting this interpretation. Moreover, the *impact* of the legal regime is a circumstance that is particular to each offender because the law affects offenders differently. For example, the loss of parole or early release eligibility will not make a difference to offenders who would not have received early release or parole in any event. Moreover, the legislation can change over time such that its impact on offenders becomes less uniform.

(2) Structure of the Section

42 The Crown submits that s. 719(3) creates a general rule of credit at a rate of 1:1, to which s. 719(3.1) is an exception. If lost eligibility for early release or parole, while in pre-sentence custody, is a "circumstance" justifying enhanced credit of 1.5:1, then almost every remand offender will qualify. This would transform the "exception" into the new "general rule" and render s. 719(3) irrelevant, an absurd result.

43 I agree that s. 719(3.1) is structured as an exception to s. 719(3). Section 719(3.1) begins with the words "[d]espite subsection (3)" and applies only when "circumstances justify it", which tends to indicate that it is an exception to the general rule. While marginal notes are not part of the enactment and are of limited value in statutory interpretation (*Interpretation Act*, R.S.C. 1985, c. I-21, s. 14), the fact that the subsection has the marginal note "[e]xception" is consistent with this conclusion.

44 I also agree with the Crown that it is somewhat inelegant to create an exception that applies in more cases than the general rule. However, the strength of this argument is limited for three reasons.

45 First, there is no general rule of statutory interpretation that the circumstances falling under an exception must be numerically fewer than those falling under the general rule. If the criteria that permit departure from a general proposition are satisfied, the numerical relationship is not relevant.

46 For example, s. 457(1) makes it an offence to make, publish, print, execute, issue, distribute or circulate anything in the likeness of a current bank-note. However s. 457(2) provides exceptions, including for the Bank of Canada, its employees carrying out their duties and its contractors. Presumably, the overwhelming majority of bank-notes are produced by the Bank of Canada, its employees, and its contractors, and therefore fall under the exception.

47 Indeed, Crown counsel accepts that the lack of programs in detention facilities and overcrowding are common problems, and could result in exceptions under s. 719(3.1) that are numerically greater than those limited by s. 719(3).

48 Second, an interpretation of "circumstances" that includes loss of eligibility for parole and early release does not render subsection 3 redundant. Where an accused falls under an explicit exception to s. 719(3.1) (for instance, because she has been detained for breach of bail conditions), the one-for-one cap set by s. 719(3) will apply. Moreover, enhanced credit need not be granted in every case. For example, when long periods of pre-sentence detention are attributable to the wrongful conduct of the offender, enhanced credit will often be inappropriate. Section 719(3) continues to exist for such cases.

49 Third, the structure of s. 719 is consistent with the rationales for the existence of pre-sentence credit. Section 719(3) reflects the general rationale for giving credit. As Laskin J.A. wrote in *Rezaie*, at p. 721, "[i]ncarceration at any stage of the criminal process is a denial of an accused's liberty" — any time in jail should generally be credited day for day. On the other hand, s. 719(3.1) reflects the rationale for *enhanced* credit. Crediting a day in pre-sentence custody as a day served is insufficient to account for the full prejudicial circumstances of remand custody; enhanced credit accounts for both loss of eligibility for parole and early release (circumstances with quantitative impact) and the harshness of the conditions (circumstances with qualitative impact). Thus, the division between the subsections reflects the different theoretical underpinnings of credit and enhanced credit.

50 Further, this structure builds resilience into the statutory scheme. For example, if Parliament were to amend the *Corrections and Conditional Release Act*, so that pre-sentence custody counted for the purposes of parole eligibility and early release,[4] s. 719(3.1) would only be called upon to account for situations of *qualitative* harshness, and an increased number of cases would fall solely under s. 719(3). The structure of the provision logically mirrors the rationales for credit and enhanced credit.

(3) Intention of Parliament

51 The intention of Parliament can be determined with reference to the legislative history, including Hansard evidence and committee debates, although the court should be mindful of

the limited reliability and weight of such evidence (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 593-94 and 609).

52 Parliament clearly intended to restrict the amount of pre-sentence credit. This is plain from the cap of 1.5 days credit for every day spent in detention. It is also consistent with statements made by the then Justice Minister, before the House of Common Standing Committee on Justice and Human Rights, on May 6, 2009:

> The practice of awarding overly generous credit can put the administration of justice into disrepute because it creates the impression that offenders are getting more lenient sentences than they deserve. The public does not understand how the final sentence reflects the seriousness of the crime. For these reasons, the current practice of routinely awarding two-for-one credit must be curtailed. [p. 11]

(*Evidence*, No. 20, 2nd Sess., 40th Parl.)

This objective is achieved regardless of what circumstances may justify the use of enhanced credit in s. 719(3.1).

53 Parliament also intended that the process of granting credit under s. 719 should be more transparent and easily understood by the public. It achieved this end through the insertion of ss. 719(3.2) and 719(3.3), which provide that judges should give reasons for granting credit and state both the fit sentence and the amount of credit granted.

54 However, I agree with Beveridge J.A. and Cronk J.A. that the intention of Parliament with respect to what "circumstances" may justify enhanced credit under s. 719(3.1) is far less clear and even contradictory (*Carvery*, at paras. 79-82; *Summers*, at paras. 82-88). Therefore, the legislative history is of no assistance in answering this question.

55 Parliament is presumed to know the legal context in which it legislates. [5] The practice of using the former s. 719(3) to award enhanced credit for both the quantitative and qualitative consequences of pre-sentence detention was deeply entrenched in our sentencing system. This practice was expressly endorsed by this Court in *Wust*, where the Court identified the loss of eligibility for early release and parole as a reason justifying enhanced credit.

56 Parliament does, of course, have the power to exclude these circumstances from consideration (barring a constitutional challenge). However, it strikes me as inconceivable that Parliament intended to overturn a principled and long-standing sentencing practice, without using explicit language, by instead relying on inferences that could possibly be drawn from the order of certain provisions in the *Criminal Code*.

57 Rather, it seems more likely that Parliament intended to do what it did explicitly. The amendments clearly impose a *cap* on the rate at which credit can be awarded, at 1.5:1. This is a substantial and clear departure from pre-*TISA* practice. Having made its intention so clear on that point, Parliament gave no indication it intended to alter the reasons for which enhanced credit can be granted.

58 In my view, neither the language of the provision nor the external evidence demonstrates a clear intention to abolish one of the principled rationales for enhanced credit.

(4) Scheme of the Sentencing Regime

59 While the foregoing is sufficient to dispose of the appeal, I recognize that ss. 719(3) and 719(3.1) do not exist in isolation, but form part of the overall sentencing scheme in the *Criminal Code*. As the legislature is presumed to have created a coherent, consistent and harmonious statutory scheme, s. 719 should be interpreted in a manner that is consistent with the principles and purposes of sentencing set out in Part XXIII of the *Criminal Code*. Sections 718, 718.1 and 718.2 of the *Code* provide:

> **718.** The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.
>
> **718.1** A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> **718.2** A court that imposes a sentence shall also take into consideration the following principles:
>
> . . . . .
>
> (*b*) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

60 As Beveridge J.A. and Cronk J.A. recognized, an interpretation of s. 719(3.1) that does not account for loss of eligibility for early release and parole during remand custody means that offenders who do not receive bail will serve longer sentences than otherwise identical offenders who are granted bail.

61 This result is incompatible with the parity principle. A rule that results in longer sentences for offenders who do not obtain bail, compared to otherwise identical offenders, does not result in "similar ... sentences imposed on similar offenders for similar offences committed in similar circumstances": s. 718.2(*b*).

62 The Crown says that parity does not require absolute equality and that in any event, enhanced credit is an ineffective tool to achieve equality between offenders, since it is premised on both being released on their statutory release date (after two thirds of their sentence). In practice, some offenders will be released on parole after one third of their sentences; others will never be released during their sentence.

63 Obviously, the scope of the disparity will vary, depending on if and when offenders are ultimately released. Nonetheless, a rule that creates structural differences in sentences, based on criteria irrelevant to sentencing, is inconsistent with the principle of parity.

64 The Crown also says that the Court of Appeal's reliance on the sentencing principle of proportionality was misplaced. Proportionality is simply concerned with the imposition of a just sanction in a particular case; any comparison with similar offenders is irrelevant.

65 However, it is difficult to see how sentences can reliably be "proportionate to the gravity of the offence and the degree of responsibility of the offender" (s. 718.1) when the length of incarceration is also a product of the offender's ability to obtain bail, which is frequently dependent on totally different criteria.

66 Judicial interim release requires the judge to be confident that, amongst other things, the accused will neither flee nor reoffend while on bail. When an accused is able to deposit money, or be released to family and friends acting as sureties (who often pledge money themselves), this can help provide the court with such assurance. Unfortunately, those without either a support network of family and friends or financial means cannot provide these assurances. Consequently, as the intervener the John Howard Society submitted, this means that vulnerable and impoverished offenders are less able to access bail.

67 For example, Aboriginal people are more likely to be denied bail, and make up a disproportionate share of the population in remand custody.[6] A system that results in consistently longer, harsher sentences for vulnerable members of society, not based on the wrongfulness of their conduct but because of their isolation and inability to pay, can hardly

be said to be assigning sentences in line with the principles of parity and proportionality. Accounting for loss of early release eligibility through enhanced credit responds to this concern.

(5) Conclusion

68 For these reasons, I conclude that the "circumstances" justifying enhanced credit under s. 719(3.1) may include loss of eligibility for early release and parole.

69 To conclude otherwise, it would be necessary for the Court to read limiting language into s. 719(3.1) that is simply not there. Such an interpretation would result in sentences inconsistent with the *Code*'s own statement of principles, and would presume that the legislature intended to abolish the quantitative rationale for enhanced credit — that offenders should not be punished more severely because they were not released on bail — without clear language. And this despite the well-established practice, endorsed by this Court in *Wust* in the year 2000, that enhanced credit can be justified based upon the loss of eligibility for parole and early release. Such a conclusion is not plausible.

C. How to Calculate Pre-Sentence Credit

(1) Analytical Approach

70 In determining credit for pre-sentence custody, judges may credit at most 1.5 days for every day served where circumstances warrant. While there is now a statutory maximum, the analytical approach endorsed in *Wust* otherwise remains unchanged. Judges should continue to assign credit on the basis of the quantitative rationale, to account for lost eligibility for early release and parole during pre-sentence custody, and the qualitative rationale, to account for the relative harshness of the conditions in detention centres.

71 The loss of early release, taken alone, will generally be a sufficient basis to award credit at the rate of 1.5 to 1, even if the conditions of detention are not particularly harsh, and parole is unlikely. Of course, a lower rate may be appropriate when detention was a result of the offender's bad conduct, or the offender is likely to obtain neither early release nor parole. When the statutory exceptions within s. 719(3.1) are engaged, credit may only be given at a rate of 1 to 1. Moreover, s. 719 is engaged only where the pre-sentence detention is a result of the offence for which the offender is being sentenced.

72 This means that two offenders, one of whom lost the opportunity for early release and parole, and a second who, in addition to losing those opportunities, was also subject to extremely harsh conditions, will likely both have credit assigned at a rate of 1.5 to 1. The unavoidable consequence of capping pre-sentence credit at this rate is that it is insufficient to compensate for the harshness of pre-sentence detention in *all* cases. However, this does not

mean that credit should be scaled back in order to "leave room at the top" of the scale for the most egregious cases. A cap is a cut-off and means simply that the upper limit will be reached in more cases. It should not lead judges to deny or restrict credit when it is warranted.

73 Indeed, individuals who have suffered particularly harsh treatment, such as assaults in detention, can often look to other remedies, including under s. 24(1) of the *Charter*.

74 The sentencing judge is also required to give reasons for any credit granted (s. 719(3.2)) and to state "the amount of time spent in custody, the term of imprisonment that would have been imposed before any credit was granted, the amount of time credited, if any, and the sentence imposed" (s. 719(3.3)). This is not a particularly onerous requirement, but plays an important role in explaining the nature of the sentencing process, and the reasons for giving credit, to the public.

(2) The Particular Offender's Prospects of Early Release

75 For many offenders, the loss of eligibility for early release and parole will justify credit at a rate of 1.5: 1. However, as Beveridge J.A. concluded, it is not an "automatic or a foregone conclusion that a judge must grant credit at more than 1:1 based on loss of remission or parole" (para. 60). If it appears to a sentencing judge that an offender will be denied early release, there is no reason to assign enhanced credit for the meaningless lost opportunity.

76 As Beveridge J.A. wrote:

> ... it would not be onerous for most offenders to establish that they would have earned remission or been granted parole, and hence, it is not likely to be a rare occurrence for an offender to be worthy of a credit of more than 1:1. [para. 66]

77 The Crown says it is not appropriate for the sentencing court to inquire into the likelihood that a particular offender will receive parole because considerations relating to the administration of the sentence are irrelevant to sentencing. Further, it is improper to reduce a sentence by granting enhanced credit based on speculation about when the offender may be released.

78 However, judges are often called upon to make assessments about an offender's future, for example by considering prospects for rehabilitation. I see no reason why judges cannot draw similar inferences with respect to the offender's future conduct in prison and the likelihood of parole or early release.

79 The process need not be elaborate. The onus is on the offender to demonstrate that he should be awarded enhanced credit as a result of his pre-sentence detention. Generally speaking, the fact that pre-sentence detention has occurred will usually be sufficient to give

rise to an inference that the offender has lost eligibility for parole or early release, justifying enhanced credit. Of course, the Crown may respond by challenging such an inference. There will be particularly dangerous offenders who have committed certain serious offences for whom early release and parole are simply not available. [7] Similarly, if the accused's conduct in jail suggests that he is unlikely to be granted early release or parole, the judge may be justified in withholding enhanced credit. Extensive evidence will rarely be necessary. A practical approach is required that does not complicate or prolong the sentencing process.

80 As well, when evaluating the qualitative rationale for granting enhanced credit, the onus is on the offender, but it will generally not be necessary to lead extensive evidence. Judges have dealt with claims for enhanced credit for many years. The conditions and overcrowding in remand centres are generally well known and often subject to agreement between the parties; there is no reason this helpful practice should not continue. There is no need for a new and elaborate process — the *TISA* introduced a cap on the amount of enhanced credit that may be awarded, but did not alter the process for determining the amount of credit to apply.

(3) No Double Counting

81 The intervener the Quebec Director of Criminal and Penal Prosecutions argues that factors based on the personal circumstances of a particular inmate, with no relation to the conditions in which he or she was detained, cannot justify enhanced credit under s. 719(3.1).

82 It has long been recognized that credit for pre-sentence detention is intended to ensure that individuals are punished equally, whether they are released on bail or remanded in custody prior to trial. Consequently, any circumstances that speak to the relative harshness of pre-sentence custody, as opposed to serving a sentence, are relevant.

83 On this basis, it is difficult to see how factors such as reduced moral culpability of the offender, or the fact that it was a first conviction, could be relevant circumstances with respect to the *relative* harshness of pre-trial detention. The fact that the respondent entered an early guilty plea, accepted responsibility for his actions, and expressed sincere remorse are generally only relevant to the determination of a fit sentence and not to assigning credit under s. 719(3) or s. 719(3.1). To consider them again is what was described as "double dipping".

VI. Application to the Facts

84 The sentencing judge did not err in law by granting enhanced credit under s. 719(3.1) on the basis of the respondent's loss of eligibility for early release and parole.

85 The sentencing judge in this case did not rely on improper factors in assessing credit for pre-trial detention. In his analysis of the appropriate credit, the judge focused on the lack of

access to parole, not the respondent's guilty plea and remorse (paras. 39-43). His discussion of the latter factors was directed at sentencing generally.

86 To the extent Cronk J.A. referred to these considerations, at para. 124 of her decision, I take her to be suggesting they are relevant for the limited purpose of determining whether the respondent was likely to be granted parole (which is relevant to whether the respondent, in fact, lost the opportunity for parole and early release). She did not treat them as independent circumstances justifying enhanced credit.

87 I agree with Cronk J.A. that there was no basis to think that the respondent would be denied parole or early release. She said of Crown counsel at trial:

> By her reference to the likelihood of early parole for the respondent, she also conceded, in effect, the respondent's good behaviour while in remand custody. Certainly, she did not suggest that the respondent's conduct would in any way disentitle him to earned remission or negatively affect his statutory release and parole eligibility. [para. 125]

88 While little evidence was available on this point, there is no serious challenge to the conclusion that the respondent was likely to access parole and early release. Therefore, it was appropriate to grant credit at a rate of 1.5 days for every day in detention on the basis of the quantitative rationale for enhanced credit.

89 I would dismiss the appeal.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

1 See also *R. v. Bradbury*, 2013 BCCA 280, 339 B.C.A.C. 169 (B.C. C.A.).

2 See also *R. v. Stonefish*, 2012 MBCA 116, 288 Man. R. (2d) 103 (Man. C.A.); *R. v. Johnson*, 2013 ABCA 190, 85 Alta. L.R. (5th) 320 (Alta. C.A.); *R. v. Cluney*, 2013 NLCA 46, 338 Nfld. & P.E.I.R. 57 (N.L. C.A.); *R. c. Henrico*, 2013 QCCA 1431 (C.A. Que.) (CanLII).

3 Incorporated by reference in Ontario through the *Ministry of Correctional Services Act*, R.S.O. 1990, c. M. 22, ss. 28 and 28.1.

4 For example, when a life sentence has been imposed, parole eligibility is calculated as of the date of arrest for that offence: *CCRA*, s. 120(2).

5 Sullivan, at p. 205; *Townsend v. Kroppmanns*, 2004 SCC 10, [2004] 1 S.C.R. 315 (S.C.C.), at para. 9.

6 A. Babooram, "The changing profile of adults in custody, 2006/2007" (2008) *Juristat*, online, Canada. Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Evidence*, No. 14, 2nd Sess., 40th Parl., October 1, 2009, pp. 27-30.

7 For example, a person who is convicted of first degree murder and sentenced to imprisonment for life shall not be eligible for parole until they have served 25 years of the sentence (s. 745).

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Court of Appeal
22 February 2008

[2008] EWCA Crim 465

[2008] 2 Cr. App. R. (S.) 83

Lord Justice Hooper , Mr Justice Blake and Dame Heather Steel :
February 22, 2008

Analysis

Actual bodily harm; Credit for time served; Dangerous offenders; Imprisonment for public protection; Minimum term; Robbery; Sentencing guidelines;

H1 Imprisonment for public protection—reduction of minimum term on account of time spent in custody on remand—calculation of period to be deducted

Editor's note: where a court is determining what allowance to make for time spent in custody on remand for the purpose of determining the minimum term to be served in conjunction with a sentence of imprisonment for public protection, the actual time spent in custody on remand should be deducted without being doubled.

The appellant was convicted of two counts of robbery and two counts of assault occasioning actual bodily harm. The appellant attacked a prostitute who was working the streets at night, took £80 from her by force and then kicked her severely six or more times, causing extensive bruising to various parts of the body, and made threats to kill her. The victim had previously given evidence against the appellant in a trial at which he was acquitted. A few weeks later, the appellant robbed a man who was protecting a prostitute who was working the streets. The man's wallet and mobile phone were grabbed by the appellant's female accomplice, but when the victim resisted, the appellant produced a knife and gratuitously cut the victim, inflicting minor injuries. The appellant had numerous previous convictions, including convictions for assault and carrying a bladed instrument in public. Sentenced to imprisonment for public protection, with a minimum term of eight years, less the period spent in custody on remand, with concurrent determinate sentences for the assaults occasioning actual bodily harm.

Held: leave to appeal had been given on the question whether the minimum term of eight years was manifestly excessive, what was the period to be deducted from the eight years in respect of time spent in custody on remand, and what should the sentences have been for the assaults occasioning actual bodily harm. It was accepted that the determinate sentences for assault occasioning actual bodily harm were unlawful and that concurrent extended sentences should have been imposed. The appellant originally submitted that the period of 114 days spent in custody by the appellant should be doubled before being deducted from the minimum term, by analogy with the practice where detention and training orders were involved, or where there had been a period of administrative recall on licence. This ground of appeal had been abandoned. The Court would ***481** observe that when considering allowance for periods in custody on remand where a sentence of imprisonment for public protection was to be imposed, the relevant statutory provisions were not the Criminal Justice Act 2003 s.240 , but the Powers of Criminal Courts (Sentencing) Act 2000 s.82A(3)(b) . Section 82A(3)(b) directed the court to have regard to the remand time when setting the minimum term rather than providing that the remand time was treated as having been served as part of that term. There was a superficial resemblance in the statutory language between s.82A(3) and s.101(8) of the same act, dealing with remand time where the court was imposing a detention and training order. It was clear, for the reasons set out in Eagles [2007] 1 Cr. App. R. (S.) 99 (p.612), that when a detention and training order was to be imposed, the court looked at the total term to be served and was limited to one of a number of pre-set terms provided by the statute. In those circumstances, because the remand time had to be taken into account when assessing the total term, the remand time was doubled in order to ensure that people sentenced to a detention and training order were treated in the same way as those serving an ordinary term. There was no analogy between a detention and training order and the minimum term when fixing imprisonment for public protection. The remand time in the case of a sentence of imprisonment for public protection was being deducted not from the notional determinate sentence, but from the minimum term, which was half of the notional determinate sentence, and therefore there was no need to double the remand time. It had been submitted that the judge should have taken into account time spent on remand prior to a previous acquittal of the appellant. This was a matter for the judge to consider, but he was not bound to make such a deduction. So far as the minimum term was concerned, the sentencing judge indicated that if he had imposed determinate sentences, he would make one consecutive to the other. He was entitled to take the view that consecutive sentences were appropriate and to have regard to the aggregate criminality demonstrated on the two occasions when fixing the minimum term for the two robberies. The sentencing judge made no reference to the Sentencing Guidelines Council

Definitive Guideline on robbery. This was unfortunate. It was the duty of the court, in accordance with the Criminal Justice Act 2003 s.172 , to have regard to the Sentencing Guidelines Council Guideline. The Guideline provided a classification of seriousness for cases of street robbery. Guidelines were guidelines rather than a strait jacket, but where there were applicable guidelines directly in point, the Court would expect them to be reflected in the judges' reasons if there was to be a departure from them. In this case, taking the robbery and assault on the first victim, the guidance of the Council showed that for the first incident, a starting point of eight years was appropriate, having regard to the serious physical injuries to the complainant. The victim was vulnerable, terrified of the appellant and might have been targeted. The possession of the knife in the second incident was a significant aggravating factor, but in the light of the judges' conclusion that the actual injuries inflicted were not serious, this was a Category Two robbery, with a starting point of four years and a range of two to seven years in custody. Taking the eight years plus the consecutive term for the second robbery, with a range of two to seven years, and applying the totality principle, the Court considered ***482** that the notional determinate sentence should have been 14 years and the minimum term should accordingly be half of that, namely seven years. The Court would accordingly substitute a minimum term of seven years with the deduction of 114 days spent in custody on remand, making a minimum term of six years and 224 days.

H5 Case cited:

- Eagles [2006] EWCA Crim 2368; [2007] 1 Cr. App. R. (S.) 99 (p.612); [2007] Crim. L.R. 94

References: dangerous offenders, *Current Sentencing Practice* A18

Commentary: [2008] Crim. L.R. 479

H8 Representation

- I.F. Storey for the appellant.

JUDGMENT

Blake J.:

On August 15, 2007, at the Crown Court at Sheffield following a trial, this appellant was convicted on two counts of robbery and two counts of assault occasioning actual bodily harm. For the robberies he was sentenced by H.H. Judge Keen to concurrent terms of imprisonment for public protection with a minimum term of eight years less the period spent on remand. He was sentenced to two concurrent determinate sentences on the assaults occasioning actual bodily harm.

Permission to appeal having been granted by the single judge, there are three issues raised in this appeal: first, was the minimum term of eight years manifestly excessive in the circumstances of this case; secondly, what was the period to be deducted from the eight years in respect of time spent on remand; third, what should the sentences have been for the assaults occasioning actual bodily harm?

At the hearing of this appeal on February 19, we indicated that we were proposing to allow the appeal to the extent of reducing the minimum term from eight years to seven. It was common ground that the determinate sentences for the assault occasioning actual bodily harm were unlawful and concurrent sentences of extended sentences under the 2003 Act should have been imposed. There was then an issue as to what period of deduction should be made for the period of 114 days this appellant spent on remand on these charges prior to his conviction. The appellant submitted that the appropriate deduction should be double that period on an analogy with the practice of the court in both detention and training order cases and also where there has been a period of administrative recall on licence to be taken into account by the court when a prisoner is sentenced for offences committed in breach of licence.

He appears to have persuaded the trial judge that it was appropriate to make double accounting of the period on remand and there was some degree of confusion in the court papers as to what the precise determinate period was. We directed that this part of the argument should be put over for the Crown to attend and make submissions, but in the event counsel for the appellant notified this ***483** Court on February 21 that he was abandoning this limb of the argument as erroneous. In all the circumstances, the sentence that we substitute is thus seven years minus 114 days, which makes a minimum term of six years and 224 days. We now give our reasons for this decision.

There were two victims of the appellant's violence, each of whom was robbed and then assaulted on different days. On February 21, 2007, the appellant attacked the first complainant, who was a prostitute working the streets of Sheffield at night and who had transacted business with a client. The appellant was known to the complainant and indeed the complainant had given evidence against the appellant in the past for serious crimes for which he had been acquitted, having been remanded on custody for substantial periods. From the account at trial the jury were satisfied that the appellant had grabbed the complainant, took £80 from her by force, pushed her to the ground and, when on the ground and having robbed her of her money, kicked her severely six or more times, causing extensive bruising to her back, buttocks, arms and legs. He was making threats to kill her. The jury were not satisfied that in the course of this assault there was in addition a use of a weapon or a broom handle for a sexual attack upon the complainant. The learned judge described the assault, after the robbery had been effected, as one of the most serious offences of assault occasioning actual bodily harm he had ever seen and it was an act of gratuitous violence, putting her to the ground, persistently hitting and kicking her until she was black and blue virtually all over her body.

On March 26, 2007 the second offence occurred. The appellant, with another accomplice, a female prostitute, robbed a male complainant, who was the boyfriend and protector of yet another prostitute working the streets of Sheffield. On this occasion, the grabbing of a wallet and mobile phone was undertaken by the female accomplice of the appellant but, when the victim resisted, the appellant produced a knife that he carried with him and then gratuitously cut the victim, causing minor injuries.

No complaint is or could be made of the sentence of imprisonment for public protection imposed for these robberies. Amongst his numerous previous convictions, the appellant had convictions including for a specified offence for assault occasioning grievous bodily harm in February 2004, for which he had been sent to prison for 18 months, and in 2001 he had a conviction for an offence of carrying a bladed instrument, a meat cleaver, with an eight inch blade in a public place.

In his sentencing remarks, the learned judge indicated that if he had imposed determinate sentences he would have made each consecutive to the other in the light of the fact that there were different occasions and gratuitous violence was inflicted after the property had been taken. He was entitled to take the view that consecutive sentences were appropriate and was entitled to have regard to the aggregate criminality demonstrated on the two occasions when fixing the minimum term for the two robberies, which were the only offences to which a sentence of imprisonment for public protection could apply. However, the learned judge made no reference to the Sentencing Guidelines Council Definitive Guidelines on Robbery, published in July 2006. That was unfortunate. It is the duty of the court to have regard to the Sentencing Guidelines Council guidelines ***484** pursuant to s.172 of the Criminal Justice Act 2003 . Further, in a case of street robbery such as the present, the guidelines provided a helpful classification of seriousness, starting point and range. Of course, guidelines are guidelines rather than a straitjacket, but where there are applicable guidelines directly in point this Court would expect it to be reflected in the judge's reasons if there is to be a departure from them.

In this case, taking the robbery and the ABH on the first victim together, the guidance of the Council shows that for the first incident a starting point of eight years was appropriate, having regard to the serious physical injuries to the complainant and the fact that this made it a category 3 case. The victim was vulnerable, clearly terrified of the appellant and may have been targeted because of the previous unsuccessful prosecution. The possession of the knife and the use of it to persuade the male complainant in the second incident to desist from resistance to the robbery that the appellant was engaged in is a significant factor of the second incident but, in the light of the judge's conclusions that the actual injuries inflicted were not serious and minor, this was a category 2 robbery with a starting point of four and range of two to seven years in custody. Taking the eight years plus the consecutive term for the second robbery, with a range of two to seven years and applying the totality principle, we consider that the notional determinate sentence should have been 14 years rather than 16 years and the minimum term should accordingly be half that, namely seven years, and the eight years was excessive.

The minimum term must be expressed with clarity so that the defendant and the prison service know precisely what has to be served. This sentence failed to achieve that. We make the following observations. First, when considering allowing for periods in remand where a sentence of imprisonment for public protection is to be imposed, the relevant statutory provisions are not s.240 of the Criminal Justice Act 2003 but s.82A of the Powers of Criminal Courts (Sentencing) Act 2000 . Section 82A directs the court to have regard to the remand when setting the minimum term rather than providing that the remand time is treated as serving that term. There is a superficial resemblance in the statutory language with the provisions in s.101(8) of the 2000 statute dealing with remand time where the court is imposing a detention and training order. It is clear, for the reasons set out most recently by this Court in its decision in the case of Eagles [2006] EWCA Crim 2368; [2007] 1 Cr. App. R. (S.) 99 (p.612) that, when a detention and training order is to be imposed, the court looks at the total term to be served and is limited to one of a number of pre-set total terms provided by the statute. In those circumstances, because the remand time has to be taken into account when assessing the total determinate term, the remand time is doubled in order to ensure that people sentenced to a detention and training order are treated in the same way as those serving an ordinary determinate term. There is no analogy, however, between a detention and training order and the minimum term when fixing an imprisonment for public protection. The remand time here is not being deducted from the 14 years that we would have concluded would have been the appropriate notional determinate term but from the minimum term, the half of the 14 years, and therefore there is no need to double the remand time and that is ***485** an error in principle. It is not necessary in this judgment to also explain the distinction between the cases where the courts have provided for double remand time where there has been a breach of licence.

It was also urged that the judge should have noted the time spent on remand pursuant to a previous acquittal of this appellant. That is a matter for the judge to consider. In any particular case he is not bound to make such a deduction but might well think in an appropriate case he should reflect it. However, it does not affect the conclusion to which we have come, which is that the minimum term was in any event manifestly excessive and for these reasons this appeal is allowed to the extent of substituting the term already specified earlier in this judgment.

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Ontario Court of Justice | February 2, 2010 | 2010 CarswellOnt 4417

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R. v. Vujcic

2010 CarswellOnt 4417

Her Majesty the Queen v. Tania Vujcic

J.A.T. Colvin J.

Heard: February 2, 2010
Judgment: February 2, 2010
Docket: 09 W48638

Counsel: R. Mahler, for Crown
J. Root, for Tania Vujcic

Subject: Criminal; Property

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s. 718.2 [en. 1995, c. 22, s. 6] — considered

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s. 730 — considered

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Generally — referred to

***J.A.T. Colvin J.*, (Orally):**

1 Tania Vujcic is charged between the 7th of October, 2008 and the 18th of July, 2009, with stealing from her employer, Cineplex Odeon Theatres at the Seaway Mall, in Welland.

2 The employer began an investigation because of losses that were not explained. On July the 3rd of 2009, a closed circuit television system was put in various locations in the cinema. Between the 11th and the 19th of July, Tania Vujcic was seen taking approximately $550 from the cash, and from the cash float. This triggered an audit, which revealed losses from October 7, 2008 to July 19th, 2009, in the amount of $6,092.41.

3 The police were called. She was arrested. She provided a full statement, taking responsibility for the $6,092.41.

4 She very promptly made restitution in the amount of $8,500. She took responsibility for sums over and above that covered by the period of the audit. On September 20th, 2009, she wrote a letter of apology, which was filed as part of Exhibit One. She also wrote a letter of apology to Cineplex, expressing her remorse for her actions.

5 Counsel has filed a number of letters in support of her, they are Exhibit One. The letters show a very positive side to her. The letter from James Marion speaks of her completing her education, while working full-time. It also indicates that she has been a straight "A" student. I accept the comments of Mr. Marion in this regard, although certainly, Ms. Vujcic's case would have been much stronger, had her school transcripts been filed on her behalf as well, particularly where she seeks a discharge in the face of a trust theft.

6 Her husband is supportive of her. She has obtained other employment; employment which, according to her counsel, she will lose if she does not receive an absolute discharge.

7 In response to my concerns that nothing explained why a person of sterling character would commit these offences, counsel for Ms. Vujcic had her see Dr. Abraham for an assessment. Dr. Abraham found her remorseful. He did not find any traits of a psychopathic

personality disorder. There were no thought disorders, delusions or distorted perceptions. He did not see any compulsive obsessions or compulsive behaviours in her. She is concerned to have an absolute discharge and is worried about criminal records. Dr. Abraham does not see her as somebody likely to re-offend.

8 The Crown's position is that there should be a suspended sentence and probation. I should indicate that the Crown's position is, in my view, a very fair one on the circumstances of the case.

9 Mr. Root, on her behalf, seeks an absolute discharge. His argument is that the new job that she has found, will be lost, if she gets anything less than an absolute discharge.

10 The Crown's response to this is that while an absolute discharge is plainly in her best interests, it cannot be said to be in the public interest, in the face of a trust theft.

11 The sentencing principles are laid down in sections 718 to 718.21 of the *Criminal Code*. They include, among other factors, the deterrence of the offender and other persons from committing offences. They also mention assisting in the rehabilitation of offenders.

12 Section 718.1 captures what has, for years, been the position at law; that is, that a sentence must be proportionate to the gravity of the offence and the responsibility of the offender. Section 718.2 lays out certain aggravating factors, one of which, 718.2(a) (iii), indicates that abuse of a position of trust in relation to the victim is an aggravating factor.

13 Section 730 of the *Criminal Code* governs the use of discharges. A discharge may be granted where there is no minimum punishment. It may be granted where the maximum punishment for the offence is less than 14 years. The section further indicates that the discharge must be in the interest of the accused and not contrary to the public interest. The discharge may be absolute or it may be subject to certain conditions before it may be said to crystalize.

14 The discharge provisions do not limit the discharge to any particular offence. They do not limit the application to any particular offender. Aggravating factors are not listed as a bar to a discharge.

15 Sentencing is a delicate balancing of several factors. The balance requires that the aggravating factors, and those in favour of the accused, be taken into account. They must be weighed. Personal factors of the offender's background and the background of the offence must also be considered in the balance.

16 The case law on sentencing is, to use a colloquialism, "all over the map". Shakespeare, in his play "The Merchant of Venice" was more eloquent, "The devil can cite scripture for his

own purpose." In this similar vein, it is possible to find case law for almost every proposition in sentencing. The case law on trust theft ranges from imprisonment to absolute discharges. A careful reading of them, identifies factors - global, factual and legal, that have swayed the particular judge on the particular case - sometimes in favour of a discharge, sometimes against.

17 The Crown argues very eloquently, that a trust theft requires a conviction. Her argument is that this is required to show general deterrence and denunciation of the offence. Not long ago, this argument was echoed by [then] Chief Justice Howland, in *R. v. McEachern* (1978), 42 C.C.C. (2d) 189 (Ont. C.A.). The gist of Chief Justice Howland's comments was that trust theft required a period of incarceration. For almost 30 years, that has remained the position of the courts. Only recently has that changed. Notwithstanding that, discharges have been granted, particularly in the last 10 years.

18 The question of deterrence and its effectiveness, have been looked at by the courts for a long time. In 1974, Justice Dubin in a case, *R. v. Meneses*, [1974] O.J. No. 736 (Ont. C.A.), spoke of deterrence in the following words:

> "The argument that a conviction and a fine against the accused must stand to effect a more apparent deterrent to others must give way when other considerations are paramount and when the broad view of the public interest is considered. In our opinion, the knowledge of speedy apprehension, arrest and trial should be an effective deterrent to persons such as the accused who may be tempted to commit such an offence. A conviction and a fine would not be a deterrent to a professional shoplifter but of course, such a person would not receive either an absolute or conditional discharge." (At paragraph 10)

19 Justice Rosenberg, in dealing with a conditional sentence, spoke of deterrence, and indicated the controversy that surrounds its effectiveness in *R. v. W. (J.)* (1997), 115 C.C.C. (3d) 18 (Ont. C.A.) at pages 36 to 39. Though his comments are in relation to imprisonment, his comments insofar as deterrence is affected by imprisonment, are worth bearing in mind.

20 Any consideration of discharges usually begins with the case of *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450 (B.C. C.A.). That decision was handed down in 1973 by the British Columbia Court of Appeal. They set out considerations in the exercise of the discharge. They have been approved and followed ever since. The important ones, for our purposes, are as follows:

> "The section contemplates the commission of an offence. There is nothing in the language that limits it to a technical or trivial violation."
>
> "Generally, the first condition, (that it be in the best interests of the accused) would presuppose that the accused is a person of good character, without previous conviction,

> that it is not necessary to enter a conviction against him in order to deter him from future offences, or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions."
>
> "In the context of the second condition, (that it is not contrary to the public interest) the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of the discharge provisions."
>
> "The section should not be applied routinely to any particular offence. This may result in an apparent lack of uniformity in the application of the discharge provisions. This lack will be more apparent than real and will stem from the differences in the circumstances of the cases.

21 In *R. v. Totten*, [1992] O.J. No. 2805 (Ont. Prov. Div.), an absolute discharge was given. In that case, the accused was a university student intending to continue his studies in the United States. As a result of the offence, he lost his employment. He had support of his family. He had a good academic record and had good academic prospects. In speaking of the accused in the case:

> ... it possesses sufficient exceptional circumstances, not only to take it out of the realm of incarceration, but also to bring it within the framework of the discharge provisions of the Criminal Code.

22 I should add that this involved a trust theft situation.

23 In *R. v. Ward* (1975), 7 C.R. (3d) S-11 (Ont. C.A.), the Ontario Court of Appeal reversed a conviction in a trust theft situation. The trial judge had refused a defence request for a discharge because it was a trust theft situation. Justice Brooke, speaking on behalf of Justices Martin and Zuber, said:

> With the greatest deference to the learned trial judge, we do not agree. We do not think that that was a sufficient reason to disqualify this man from a conditional discharge if the circumstances were otherwise appropriate.

24 The amount of the trust theft has not necessarily been a factor. In *R. v. Tassopoulos*, [1974] Ont. D. Crim. Sent. 7240-01, the accused had stolen $41,000 over a period of a year. The court found that she was under "extreme pressure" from her then boyfriend, and was subject to both verbal and physical abuse. She would be beaten if she did not comply with his demands. In granting a conditional discharge, the court said:

> It is in the interest of society, as well as the accused, to encourage the positive things that she is doing and not to sentence her in a way that might cause her further emotional

collapse. General deterrence would not be better served or accomplished by imposing a criminal record on the accused than by granting her a discharge.

25 *R. v. Flynn*, [1995] O.J. No. 1216 (Ont. Gen. Div.), involved a trust theft from an employer in the amount of $6,200. The accused had been director of education for a school board. Justice Salhany wrote of denunciation and deterrence as follows:

> We have to start with the basic recognition that it is not the function of the courts to prevent crime - that is the duty and responsibility of the police. The function of the courts is to punish offenders who have been proven to have committed crimes. Unfortunately, there is a misguided and simplistic belief by some members of the public that the imposition of heavy sentences will automatically deter crime. We know from history and experience that this is simply not true. Such a belief places an unfair burden on the courts and instills an unrealistic expectation in the minds of the public.

26 In that case, Justice Salhany granted a conditional discharge. He concluded by saying:

> It seems to me that to not impose a conditional discharge in this case would have a prejudicial impact that is totally disproportionate to the offence he has committed.

27 I must also consider the effects of a conviction in today's social and political climate. It is common knowledge that a conviction and even a conditional discharge can be a bar to foreign travel. It is common knowledge for residents in the Niagara Region, that the American border services will refuse any with a criminal record, absent special permission. In Canada, many employers commonly do annual criminal record checks and will even seek a release from a prospective employee to search for any incidents that the police services may have recorded. Under these circumstances, it can be very difficult to overcome past mistakes. It is reminiscent of Nathaniel Hawthorne's novel, "The Scarlet Letter" the badge of shame can be impossible to remove. In some cases, this is desireable, and even necessary, but that is not always so.

28 Arguments are also advanced that a criminal record can be sealed by a pardon under the *Criminal Records Act*. This is granted under the authority of the National Parole Board. This, however, does not necessarily bury the former conviction for all time.

29 In *Therrien c. Québec (Ministre de la justice)*, [2001] 2 S.C.R. 3 (S.C.C.), at pages 48 to 51, Justice Gonthier reviewed the nature of a pardon under the *Criminal Records Act*, as granted, and reviewed the nature of a pardon. He held that a pardon was:

> "... limited to the legal disqualifications created by federal statutes or the regulations thereunder and therefore exclude all the post sentence consequences provided in

provincial legislation, which also suggests that a pardon has only limited effect." (p.48, paragraph 116)

30 At page 50, paragraph 120, Justice Gonthier said:

> Sections 6(2) and 6(3) of the Criminal Records Act, permit the Minister to disclose the conviction if he is satisfied that the disclosure is desirable in the interests of the administration of justice or for any purpose related to the safety or security of Canada or any state allied or associated with Canada.

31 This makes more important, any decision as to whether to grant a discharge or enter a conviction.

32 The consequences may be more severe than they were in the past.

33 Under the *Criminal Records Act*, an absolute discharge is removed automatically from the record within a matter of months. A conditional discharge is not removed from the record except after three years beyond the expiry of the condition of the discharge.

34 Discharges, absolute or conditional, are exceptional remedies. It should not be thought that defence counsel can simply stand up and say to the court - this is a trust theft; this is a good person of no record; therefore, an absolute discharge should be granted.

35 The accused must, of course, be an exemplary citizen beyond the offence that brings them before the court. There just be some explanation as to what led to the aberrant conduct. There must be an indication as to what steps have been taken to solve the problem that led to the offence. Particularly where an absolute discharge is sought, it is important to show that any conditions that might be imposed, are no longer needed. This would mean that any counselling, treatment or other intervention has been successfully completed.

36 Restitution is an important factor. Evidence that the accused has overcome the difficulties, by obtaining other employment, or returning to school to better themselves, are factors that may be of influence as well.

37 This case has a number of weaknesses. There is little indication in the materials filed, as to what led to the offence. The letter from Dr. Abraham does not seem to touch on what weaknesses, particular to Ms. Vujcic, led to this offence. As a result, he does not speak of what steps might be taken to strengthen her character, or to help her overcome those defects in her character that led to such bad judgment. These all militate against the granting of a discharge, particularly against the step of an absolute discharge.

38 The factors that incline towards a discharge, are the following: she had accepted responsibility; she cooperated fully with the police; she has written a letter of apology to

the employer; she had made restitution, over and above the amounts that can be proved against her; she enjoys strong support from her family and the community; she has managed to obtain other employment in a responsible position.

39 Those factors that would lift it from a conditional to an absolute discharge are the following. Dr. Abraham does not see a need for counselling. He does not see emotional or psychiatric problems. The one reservation in this is that he does not appear to have assessed her credibility as an informant and appears to have relied solely on his interview with her.

40 The second point in favour of an absolute discharge is that her employment would be in jeopardy if there were any conditions attached to a discharge.

41 This is a borderline case. I am inclined, however, to give the benefit of the doubt to Ms. Vujcic and, accordingly, I will grant an absolute discharge.

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advocate not to be in issue and yet the Court by the finding of guilt in effect rejected it. The hearing of the appeal was a nullity.

[*Reported by Lynne Knapman, Barrister*]

Commentary. As the hearing was an appeal against conviction, the judge was involved in the fact-finding exercise. All the more important, then, as the court accepts, that he should not be seen to descend into the arena.

The judge has an undoubted power to call witnesses, but it has been consistently held that this should be exercised not in order to supplement the prosecution, but to put before the jury evidence which it is in the interests of justice that they should have. (See *Tregear* (1967) 51 Cr.App.R. 280, where the judge called an eye-witness who had made previous inconsistent statements in order that both sides could cross-examine him, and was held to have made acceptable use of the power; and *Grafton* [1993] Q.B. 101; [1992] Crim.L.R. 826, in which the judge tried to overturn prosecuting counsel's decision to discontinue the case by calling the remaining witnesses himself, which was held unacceptable.) *A fortiori* it must be unacceptable to kick off the case for the Crown in the absence of the prosecutor.

In response to the applicant's further submission that his evidence, being unchallenged, should not have been disbelieved, the court approved a passage in *Blackstone's Criminal Practice* (1995), para. F7.4. to the effect that a party who fails to cross-examine a witness upon a particular matter in respect of which it is intended to contradict him or impeach his credit by calling other witnesses tacitly accepts the truth of the witness's evidence in chief on the matter. The learned author, in a passage not referred to by the court, goes on to state that there may be some exceptions to the rule, for example where the witness tells a palpable whopper of a story, but that where such cases arise "it is a sensible practice . . . to secure the assurance of the trial judge, and the agreement of the party calling the witness, that failure to cross-examine in such circumstances will not be taken as a tacit acceptance of the witness's evidence". In the present case the submission would have had to be made by the judge, to the judge, and counsel for the applicant would rightly have had to withhold agreement on the grounds that the judge's proposed course of action would not have been proper! [*D.J.B.*]

Custody Time Limits

Magistrates' Courts Act 1980, s.128—Prosecution of Offences Act 1985, s.22—defendant remanded in custody pending provision of surety

Re Ofili

Queen's Bench Divisional Court: Rose L.J. and Tuckey J.: February 24, 1995.

The applicant sought a writ of habeas corpus. The stipendiary magistrate took the view that the custody time limits provided under section 22 of the Prosecution of Offences Act 1985 did not apply in favour of a person who remains in custody because of inability to meet a condition to be complied with before release on bail. The applicant had been unable to provide a surety in the sum of £4000.

Held, allowing the application, the respondent prosecutor accepted that the applicant did have the benefit of the custody time limits. In the context of custody time limits section 22(11) of the 1985 Act provided that "custody of a magistrates' court means custody to which a person is committed in pursuance of section 128 of the

Magistrates Courts Act 1980". The applicant fell within the terms of section 128(1) and (2) of the 1980 Act; the court had fixed a recognizance with a view to its being taken subsequently and had remanded him in custody in the meantime. The applicant was in custody of the magistrates and the custody time limits provisions applied to him. The applicant was ordered to be released on bail subject to reporting and residence conditions.

[*Reported by Lynne Knapman, Barrister*]

Evidence

Judicature (Appellate Jurisdiction) Act, s.14(1)—evidence—admissibility—judge's discretionary power to exclude evidence—circumstances in which such power limited

Lobban v. R.

Privy Council: Lord Goff of Chieveley, Lord Mustill, Lord Slynn of Hadley, Lord Nicholls of Birkenhead and Lord Steyn: April 6, 1995.

Three murders were committed during an armed robbery in Jamaica. The appellant and a co-defendant were charged with the murders. In his statement under caution to the police the co-defendant admitted driving three unknown men to and from the scene of the robbery but denied knowing their intention. At the end of his statement he identified the appellant from a photograph in a newspaper as being one of the robbers. The prosecution tendered the co-defendant's statement as part of its case against him. Counsel for the appellant, in the absence of the jury, asked the judge to direct the exclusion of the final part of the statement implicating the appellant. Prosecuting counsel and the co-defendant's counsel objected, but the judge rules that the statement should be admitted in its entirety. The appellant subsequently gave evidence, was cross-examined and called one witness, counsel for the co-defendant made a belated but successful submission of no case to answer and the co-defendant was acquitted on the judge's direction. In his summing-up the judge directed the jury that the co-defendant's statement was not evidence against the appellant and that they should disregard it entirely. The appellant was convicted of murder on all three counts. His application for leave to appeal against conviction to the Court of Appeal of Jamaica was dismissed. On appeal therefrom to the Judicial Committee of the Privy Council on the grounds, *inter alia*, that (1) the judge should have ordered the editing of the co-defendant's statement so as to exclude that part which implicated the appellant or at least that part of it which referred to him by name and that the resulting material irregularity was not cured by the directions in the summing-up; (2) the judge should not have permitted counsel for the prosecution to cross-examine the appellant upon the content of the co-defendant's statement; and (3) the submission of no case on behalf of the co-defendant was made at the wrong time, *i.e.* after the appellant's case, and should not have been made in the presence of the jury.

Held, dismissing the appeal, that (1) a judge in a criminal trial had no discretionary power to exclude the exculpatory part of a mixed statement containing admissions as well as an exculpatory explanation on which a defendant wished to rely. The discretionary power to exclude relevant evidence because its prejudicial effect outweighed its probative value was confined only to evidence on which the prosecution proposed to rely. It existed to ensure a fair trial to the defendant, or, in a joint trial, to each defendant without seeking to differentiate between the quality of justice