IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202102797/A4

NCN [2022] EWCA Crim 267

Royal Courts of Justice

Strand

London

WC2A 2LL

Wednesday 16 February 2022

LORD JUSTICE HOLROYDE

MR JUSTICE PEPPERALL

MR JUSTICE SWEETING

REFERENCE BY THE CRIMINAL CASES REVIEW COMMISSION UNDER S.9 CRIMINAL APPEAL ACT 1995

REGINA

v

GAVIN TRENDELL

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR M DACEY appeared on behalf of the Appellant.

MS V AILES appeared on behalf of the Crown.

J U D G M E N T

1. LORD JUSTICE HOLROYDE: This case raises an issue as to how time spent on remand in custody is to be treated when a court imposes a discretionary life sentence and makes a minimum term order. It comes before the court by way of a reference by the Criminal Cases Review Commission, pursuant to section 9 of the Criminal Appeal Act 1995. We are grateful to the Commission for its thorough investigation and presentation of the case. By section 9(3) of the 1995 Act its reference to this court is to be treated as an appeal against sentence.
2. In July 2018 the appellant, together with another man (Grainger), pleaded guilty to offences of causing grievous bodily harm with intent, contrary to section 18 of the Offences Against the Person Act 1861 (count 1) and false imprisonment (count 2). For present purposes it is unnecessary to go into any detail about the very serious circumstances of the offences. It suffices to say that over a period of hours the two offenders imprisoned and tortured their unfortunate victim, whom they accused of being "a grass", causing him serious physical injury and enduring psychological harm.
3. On 12 October 2018, in the Crown Court at Maidstone, the appellant and Grainger were each sentenced on count 1 to life imprisonment, pursuant to the provisions of section 225 of the Criminal Justice Act 2003 (now replaced by section 285 of the Sentencing Code 2020). Concurrent determinate sentences were imposed in each case on count 2. The judge specified a minimum term of 8 years in the appellant's case. In the case of Grainger, who had a worse criminal record, which included a previous conviction for sadistic violence, the minimum term was 10 years.
4. By the time of that sentencing hearing the appellant had been on remand in custody for 203 days. Regrettably, neither prosecution nor defence counsel made any reference in their written and oral submissions to the question of whether the judge should make any reduction in the minimum term to reflect that period. We assume that Grainger must also have been remanded in custody for a substantial period prior to sentence. If so, nothing was said about that question in his case either. The judge made no mention of it in her sentencing remarks. In explaining the minimum term to this appellant she said:

> "... if you had continued to plead not guilty, the notional determinate sentence would have been 20 years. Giving you approximately 20 per cent credit for your guilty pleas, the notional determinate sentence is 16 years, half of which is eight years. I set the minimum term at eight years' imprisonment**."**

5. Both offenders appealed against their sentences. The appellant was represented by counsel who had acted at trial but had been unable to appear at the sentencing hearing. His grounds of appeal challenged the length of the minimum term, in particular with reference to the basis of the appellant's guilty pleas, and the finding of dangerousness. On 20 June 2019 a constitution of this court allowed the appeals to the extent of reducing the minimum term to 6 years in the appellant's case and 8 years in Grainger's case. Again, it appears that nothing was said at any stage during that appeal hearing about whether the long period when the appellant had been remanded in custody should be deducted from the minimum term.
6. The appellant himself had not been silent on that topic: it was one of the matters which he mentioned a few days after the sentencing hearing, when he wrote to his solicitors about

his appeal. He wrote again after his appeal complaining that the point had not been raised at the hearing and that he had not received any credit for his time on remand in custody. It appears that counsel took the view that the days on remand should have been deducted automatically from the minimum term, and that an error had been made by the prison authorities.

7. It was in those circumstances that the appellant himself raised the issue with the Commission. The Commission considered, amongst other things, whether it should exercise its discretion not to refer because of delay on the part of the applicant. It felt that it would be unfair to criticise the appellant, given the efforts he had made to raise this issue with his legal representatives, and given that he was unrepresented at the time of his application to the Commission. It therefore decided that in the unusual circumstances of this case it could properly conclude that this court would have granted leave to appeal out of time. We respectfully agree. In any event, the provisions of section 16C of the Criminal Appeal Act 1968 do not apply to this case, and this court accordingly has no power to dismiss the appeal on the ground that it would have refused an extension of time.
8. The Commission accordingly referred the appellant's sentence to this court on the ground that:

> "There is a real possibility that the Court of Appeal would correct the legal error which has occurred with Mr Trendell's sentence and deduct 203 days from the minimum term."

9. The statutory provisions applicable to the setting of the minimum term in the appellant's case were contained in section 82A of the Powers of Criminal Courts (Sentencing) Act 2000. They are now to be found in section 323 of the Sentencing Code. In each of those sections the words "relevant to the issue which arises in this case" are materially the same, and the outcome of this appeal would not have been different if the provisions of the Sentencing Code had been applicable.
10. Save where a whole life order is made, a court imposing a discretionary life sentence must make a minimum term order. The judge was required by section 82A of the 2000 Act to impose a minimum term:

> "...such as the court considers appropriate taking into account—
> (a) the seriousness of the offence, or of the combination of the offence and one or more offences associated with it;
> (b) the effect that the following would have if the court had sentenced the offender to a term of imprisonment—
> (i) section 240ZA of the Criminal Justice Act 2003 (crediting periods of remand in custody);
> (ii) ...
> (iii) any direction which the court would have given under section 240A of the Criminal Justice Act 2003 (crediting periods of remand on bail subject to certain types of condition) …"

11. The effect of section 240ZA of the 2003 Act is that time spent on remand in custody in

connection with the relevant offence or a related offence is automatically credited against a determinate sentence (see R (Shields-McKinley) v Secretary of State for Justice and Lord Chancellor [2019] EWCA Civ 1954, at paragraphs 8-9). It is therefore unnecessary for a court imposing a determinate sentence to refer to the period on remand in custody: the prison authorities will in any event ensure that the period counts as time served as part of the sentence. Crucially, however, that automatic procedure only applies when a court imposes a determinate sentence, and not when it imposes a discretionary life sentence and makes a minimum term order: see, for example, R v Sylvester [2018] EWCA Crim 599, at paragraph 25.

12. We should note in passing that section 240A(2) of the 2003 Act requires the court, when imposing a determinate sentence on an offender who has been on bail subject to a qualifying curfew condition and an electronic monitoring condition, to direct that the credit period is to count as time served by the offender as part of the sentence. The process by which the credit period must be calculated is now set out in section 325 of the Sentencing Code, but it is unnecessary for present purposes to say any more about it.
13. In their reasons for referring the sentence to this court, the Commission interpreted the statutory provisions as having the effect that in a case such as this the appellant "is entitled to be credited with the time spent in custody whilst on remand". It spoke of his "statutory right" to credit for that time and of there being "a requirement on the court to give the credit for time spent in custody on remand" where a life sentence is imposed and the court makes a minimum term order.
14. Mr Dacey, who represents the appellant in this appeal, adopts a somewhat different approach. He accepts that the statutory framework provides the court with a residual discretion, but submits that the only proper way to take into account the period on remand is to deduct the precise number of days after fixing the minimum term, unless it is unjust to do so or there are other exceptional circumstances for not doing so.
15. On behalf of the respondent, Ms Ailes accepts that the judge failed to take account of the effect which section 240ZA would have if she had imposed a determinate sentence. She submits however that deduction of the days spent on remand in custody, when imposing a discretionary life sentence and making a minimum term order, is not mandatory, although in general it is appropriate.
16. We are grateful for the assistance we have received from the very clear written and oral submissions of both counsel.
17. With all respect to the Commission, it is not correct to say that a court imposing a discretionary life sentence and making a minimum term order is required to give credit for the time spent on remand in custody. The duty of the court, consistently with section 82A of the 2000 Act and now with section 323 of the Sentencing Code, is to impose such minimum term as it considers appropriate, taking into account amongst other things what the effect of section 240ZA would be if it were imposing a determinate sentence. The statute requires the effect of section 240ZA to be taken into account, but gives the court a discretion as to how it is taken into account. If Parliament had not intended to confer any such discretion, and instead to impose a mandatory requirement that each day spent on remand in custody must count towards the minimum term, it could easily have said so.
18. However, although a court has that discretion, it will, in our view, generally be appropriate to reduce the minimum term by the precise number of days which the offender has spent remanded in custody for the relevant offence or an associated offence.

That is because it will generally be appropriate, in the absence of any compelling reason to the contrary, to make the same reduction in respect of time on remand as would automatically be made pursuant to section 240ZA if a determinate sentence were imposed. It will also generally be appropriate, in the interests of transparency, to make clear that the reduction reflects the precise period of remand in custody.

19. A court has, as we have said, a discretion to take a different course. It is impossible to foresee all the situations which may arise in criminal cases, and there may be unusual circumstances in which a court, having taken into account the effect of section 240ZA, finds it appropriate to make no or a lesser reduction in the minimum term. In general however, it will be appropriate for a court to take the effect of section 240ZA into account by determining the appropriate minimum term and then deducting from it the number of days which the defendant has already spent in custody on remand. We do not think it appropriate to prescribe any particular form of words by which the judge should explain the decision.
20. In the present case it appears that neither the judge, nor anybody else, took the effect of section 240ZA into account. The passage we have quoted from the sentencing remarks appears to indicate that the judge neither made any reduction in the minimum term to reflect time in custody on remand, nor decided not to do so. That topic was simply not addressed at all. The explanation may lie in a common assumption that there was no need to consider the time spent remanded in custody because it would automatically be taken into account. But if such an assumption was made, then for the reasons we have indicated it was quite wrong. The time on remand on custody is not automatically taken into account in these circumstances. Only the court can take it into account. If the court fails to do so then, as the appellant has learned to his dismay, there is no administrative procedure by which the credit can later be given.
21. The judge, who did not receive in this regard the help she was entitled to expect from counsel, therefore fell into error. Her decision as to the minimum term did not take into account something which she was required to take into account and was accordingly wrong in principle.
22. If section 240ZA had been brought to the judge's attention, she would no doubt have taken the effect of that section into account by adopting what we have identified as the usual approach. There is, in our view, nothing in the circumstances of this case which would make it appropriate to exercise the statutory discretion in any other way.
23. For those reasons, we allow this appeal to the following extent: we quash the minimum term of 6 years and substitute for it a minimum term of 5 years 162 days.

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