



Neutral Citation Number: [2023] EWCA Crim 1414

Case No: 202302634 A5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM DERBY CROWN COURT
HIS HONOUR JUDGE S. SMITH KC
T20197342

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/11/2023

Before :

LADY JUSTICE THIRLWALL
MRS JUSTICE FOSTER
and
MR JUSTICE JOHNSON

Between :

CALVIN JAMES GRANT
- and -
REX

Appellant

Respondent

Mr S. Cobley (instructed by **Mrs Barbara Johal of Messrs CJH Solicitors**)
for the **Appellant**
Mr M. Achurch (instructed by the **Registrar**) for the **Respondent**

Hearing date : 08 November 2023

Approved Judgment

This judgment was handed down remotely at 2pm on Tuesday, 28 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE FOSTER :

INTRODUCTION

1. This application raises the question of whether when sentencing an offender for a number of offences including a non-driving related matter, it is open to a Judge obliged by statute to impose disqualification, to reflect in the calculation of the period of disqualification, the fact that the offender has spent time remanded in custody.
2. The facts giving rise to this application were as follows.
3. On 16th January 2020 following a conviction after summary trial before the Southern Derbyshire Magistrate's Court, the Applicant was committed for sentence under the Powers of Criminal Courts (Sentencing) Act 2000. On 23rd October 2020 in the Crown Court at Derby the Applicant pleaded guilty to a charge of dangerous driving contrary to Section 2 of the Road Traffic Act 1988. On 9th September 2021 also at Derby Crown Court the Applicant pleaded guilty on re-arraignment to a charge of possessing a prohibited weapon contrary to Section 5(1)(aba) of the Firearms Act 1968.
4. On 15th October 2021 he was sentenced at Derby and, following relisting on 19th October 2021 (pursuant to Section 385 of the Sentencing Act 2020), the sentence was varied such that the position was as follows:
 - (i) On the Applicant's conviction for possession of a bladed article, 12 months' imprisonment;
 - (ii) On the Applicant's plea of guilty to dangerous driving, 12 months' imprisonment;
 - (iii) On the Applicant's plea of guilty to possession of a prohibited weapon, 5 years 10 months imprisonment;
 - (iv) Disqualification from driving for a period of 3 years 11 months representing a one year disqualification with an uplift of 2 years 11 months; and
 - (v) He was ordered to take a re-test.

The entries at (ii) and (iii) were counts 1 and 4 respectively on an indictment in respect of which counts 2, 3, 5, 6 and 7 were ordered to remain on the file. The custodial sentences were ordered to be served concurrently.
5. In respect of an offence under Section 51(1)(b) of the Crime and Disorder Act 1998, using a motor vehicle without third party insurance, to which the Applicant had pleaded guilty, there was no separate penalty imposed. A statutory victim surcharge of £181 was also imposed and orders made for forfeiture of the lock knife and baseball bat.

FACTS

6. On 6th November 2019, the Applicant was seen at about 10 o'clock in the evening leaving an address in Kinross Avenue, Derby wearing gloves. When followed by police he accelerated through a red light, driving at speeds of between 90 mph and 100 mph in a 40 mph zone. He sought strenuously to evade arrest but was eventually stopped by a manoeuvre involving three police vehicles. A Luger pistol found in the Kinross Avenue address's garden bore DNA linking it to the Applicant and gunshot residue was found on his hat.
7. As to the 12th February 2019 offence, the Applicant had been stopped when police saw him using his mobile phone when driving. He threw a lock knife from the vehicle and ran from the car but was detained.

THIS APPLICATION

8. The Applicant, who was released from prison on 8th October 2022 initially asked his representatives whether he had grounds to appeal the driving disqualification. He was told he did not. Following further personal investigation and attempts to contact his original representatives, he prepared an appeal in person assisted pro bono by Mrs Johal of CJH Solicitors, Derby in which he challenged the imposition of the driving disqualification for a period of 3 years 11 months, made up of 1 year disqualification and an uplift of 2 years 11 months and an order to take an extended re-test. He requires an extension of time of 636 days. In these unusual circumstances, we grant that extension.
9. It is a matter of regret, as Counsel have acknowledged, that the Judge below did not receive appropriate assistance as to the applicable law. The appeal was initially brought by the Applicant in person, following reference to the Registrar, Counsel who did not appear below has been instructed on his behalf. The Respondent's Notice acknowledges the position below and accepts that the Judge ought to have been told about available guidance in the caselaw and the correct approach to the point in issue but was not. Both sides now accept that the Judge was indeed able to reflect time spent on remand and thereby impose a proportionate sentence, the mechanism by which they reach their shared conclusion differs.
10. We turn first to the legal framework.

THE LAW

11. Statute law contains a number of provisions under which a person may be disqualified from driving.
 - 1) under section 163 of the Sentencing Act 2020 there is a general power to disqualify an offender in addition to dealing with them in any other way;
 - 2) under section 164 of the Sentencing Act 2020 likewise where a motor vehicle is used by a person convicted, or another, for the purpose of committing or facilitating the commission of the offence;
 - 3) under section 34 of the Road Traffic Offenders Act 1988 on conviction of an offence attracting obligatory or discretionary disqualification; or

- 4) under section 35 of the Road Traffic Offenders Act 1988 in the case of the commission of repeated offences attracting the imposition of penalty points under the 1988 Act (the ‘totting-up’ procedure).

The 2020 Act applies to convictions after 1 December 2020.

12. In the present case the Judge was exercising his power under section 34 which obliged him to disqualify following the Applicant’s conviction for dangerous driving under section 2 of the Road Traffic Act 1988 (“the RTA”). Accordingly, the provisions of the Road Traffic Offenders Act 1988 (“the RTOA”) applied.
13. Section 35A and 35B of the RTOA provide as follows:

“35A Extension of disqualification where custodial sentence also imposed

- (1) This section applies where a person is convicted in England and Wales of an offence for which the court-
 - (a) Imposes a custodial sentence, and
 - (b) Orders the person to be disqualified under section 34 or 35.
- (2) The order under section 34 or 35 must provide for the person to be disqualified for the appropriate extension period, in addition to the discretionary qualification period.
- (3) The discretionary qualification period is the period for which in the absence of this section the court would have disqualified the person under section 34 or 35.
- (4) The appropriate extension period is-
 - (a) ...
...
(h) in any other case, a period equal to half the custodial sentence imposed.”

35B Effect of custodial sentence in other cases

- (1) This section applies where a person is convicted in England and Wales of an offence for which a court proposes to order the person to be disqualified under section 34 or 35 and—
 - (a) the court proposes to impose on the person a custodial sentence (other than a suspended sentence) for another offence, or

(b) at the time of sentencing for the offence, a custodial sentence imposed on the person on an earlier occasion has not expired.

(2) In determining the period for which the person is to be disqualified under section 34 or 35, the court must have regard to the consideration in subsection (3) if and to the extent that it is appropriate to do so.

(3) The consideration is the diminished effect of disqualification as a distinct punishment if the person who is disqualified is also detained in pursuance of a custodial sentence.

(4) If the court proposes to order the person to be disqualified under section 34 or 35 and to impose a custodial sentence for the same offence, the court may not in relation to that disqualification take that custodial sentence into account for the purposes of subsection (2).

(5) In this section “custodial sentence” and “suspended sentence” have the same meaning as in section 35A.”

14. Well-known principles apply to the making of orders following conviction for dangerous driving. The statutory framework shows that in circumstances such as the present it is:
- a) obligatory to impose an extended driving test (section 36 RTOA);
 - b) obligatory to impose a disqualification (section 34 RTOA); and
 - c) obligatory to impose an extension to the disqualification (section 35A and section 35B) in the latter case to ensure the disqualification is not all of it served in prison where a prison sentence in respect of a different offence has been imposed, or a sentence is already being served.

Schedule 2 of the RTOA (pursuant to section 97) lists those offences subject to obligatory disqualification.

15. The approach a court must adopt in such cases was considered in the case of *R v Needham & Ors* [2016] EWCA Crim 455; [2016] 1 WLR 4449. The case is support for the following propositions:
- a) Disqualification from driving starts from the day upon which the court pronounces the sentence [*Needham* para 42].
 - b) Parliament intended by enacting sections 35A and 35B to avoid offenders given a custodial sentence as well as a driving disqualification, from serving all of the disqualification while in

custody – in effect avoiding that punishment. This is the statutory mischief [*Needham* para 2].

- c) Parliament’s intention was given effect by compelling an additional “extension” period added to the disqualification in a case where custody and disqualification were given for the same offence [section 35A].
- d) Such an extension period was prescribed and (where not a particular designated sentence), would amount to half the custodial term, reflecting release at the half way point [section 35A(4)(h) and *Needham* para 20].
- e) Section 35A relates only to an offence for which both disqualification and custody are ordered [section 35A(1)(a) and (b) and *Needham* para 25.]
- f) Where the court proposes a section 34 or 35 disqualification but also proposes a custodial offence in respect of a *different* offence, then section 35B comes into play. It also applies where disqualification is proposed but a sentence for another offence is still being served [section 35B (1)(a) and (b) and *Needham* para 25].
- g) Under section 35B, Parliament’s intention where custody for *another* offence (or an existing custodial sentence) are in play, is given effect by compelling the Court’s regard to the statutory mischief “*if and to the extent that it is appropriate to do so*” when calculating the disqualification period. The words import a discretion, and this involves a less mechanical means of adjusting the period of disqualification [section 35B (2) and (3) and *Needham* para 26 and 28C].
- h) Section 35B(4) applies only to avoid double counting of any section 35A offence custodial element under section 35B [*Needham* para 27].
- i) Section 35A may apply alone, as may section 35B, but both section 35A and section 35B may apply [as in a case such as the present] where there is disqualification and custody for one offence, and custody in respect a different offence [*Needham* para 28].
- j) There is a judicial discretion under section 35B but ordinarily a Judge would be expected to give such uplift as caused the disqualification period all to be served upon release [*Needham* para 30].
- k) In cases where an offender has served a significant period on remand the unfairness of him facing the whole disqualification period on release (and thus being worse off than a person not in custody prior to sentence) may be avoided both under section 35A and under 35B by adjusting the “discretionary” period of disqualification (so long as not to a period that is below the statutory minimum) [*Needham* paras 34-36].

16. The Court in *Needham* expressed itself as follows when describing the Court's ability to take periods on remand into account:

“34. Both sides pointed out to us the potential for unfairness which might arise if an offender who had spent a lengthy period on remand was disqualified and found himself on release facing the full period of disqualification (i.e. the combined discretionary and extension period). He would be in a worse position than an offender who had not been in custody prior to sentence. Because the extension period under section 35A must be determined solely by reference to section 35A(4), this has the potential to produce injustice.

35. It seems to us that it is open to the court to avoid such injustice by permitting a court to take into account a significant remand period in determining the appropriate discretionary period under section 35A. Many of the offences to which section 35A applies involve obligatory minimum periods of disqualification. There can be no question of such a minimum period being reduced to take account of time spent on remand, but there may be scope for some reduction if the sentencer has in mind a longer period than the statutory minimum.”

17. The Court indicated the limits of that discretion as follows:

“38...

If the time spent on remand would lead to a disproportionate result in terms of the period of disqualification, then the court has power in fixing the discretionary element to adjust that period to take account of time spent on remand. We do not envisage a precise arithmetical calculation taking place. We wish to avoid the sort of problems which beset the courts after the introduction of section 240 of the Criminal Justice Act 2003 and consider that the court should take a broad brush approach to the question of adjustment. We stress that the scope for such adjustment would only arise (a) if there had been no interim disqualification, (b) if the period of remand was of such a nature that the term of disqualification would otherwise be disproportionate, and (c) would not reduce the discretionary term below the obligatory statutory minimum period of disqualification. A similar approach would apply when the court is assessing the correct period of disqualification under section 35B.”

18. These principles are of direct application here.

CONSIDERATION

19. The Judge in this case had said, after sentencing the Applicant to 70 months (once corrected) in custody, and a concurrent 12 months for the bladed article, and 12 months concurrent for the dangerous driving:

“You will be disqualified from driving for 12 months and take a re-test, but because of the fact that your sentence is one of 5½ years then the disqualification period will be 3 years and 9 months. I think that is right ... that will be pursuant to section 35B, attaching to other offences – not the driving offence which was concurrent.”

Counsel agreed with the Judge. He was not, it is accepted, assisted by any reference to *Needham* or other relevant argument.

20. The Defendant himself then asked the Judge about the length of the disqualification and said, “*Does that mean that when I’m released, I’ve got three years left?*” The Judge answered “yes”, and said this:

“We all agree this, Judges, barristers, everybody, agree that it’s not fair but the law says that I have got to give the disqualification now and so I’m sorry it is going to last, even though you have spent quite a bit of time in custody, it is going to be 3 years 9 months from today yes alright?”

21. It is clear from the propositions set out above that the Judge and Counsel were in error. It was indeed possible to render the sentence proportionate and take account of the fact that the offender had spent significant time in custody by ensuring that only a proportionate period of disqualification extended beyond his release date.
22. It is helpful to recall the checklist given by the Court in *Needham* at para 31 as an *aide memoire* to the correct approach in these circumstances. It reads as follows:

“Step 1 - Does the court intend to impose a “discretionary” disqualification under section 34 or section 35 for any offence?

YES – go to step 2.

Step 2 – Does the court intend to impose a custodial term for that **same** offence?

YES – section 35A applies and the court must impose an extension period (see section 35A(4)(h) for that **same** offence and consider step 3.

NO – section 35A does not apply at all – go on to consider section 35B and step 4.

Step 3 – does the court intend to impose a custodial term for **another** offence (which is longer or consecutive) or is the defendant already serving a custodial sentence?

YES – then consider what increase (“uplift”) in the period of “discretionary disqualification” is required to comply with section 35B(2) and (3). In accordance with section 35B(4) ignore any custodial term imposed for an offence involving disqualification under section 35A.

Discretionary period + extension period + uplift = total period of disqualification

NO – no need to consider section 35B at all.

Discretionary period + extension period = total period of disqualification

Step 4 – does the court intend to impose a custodial term for **another** offence or is the defendant already serving a custodial sentence?

YES – then consider what increase (“uplift”) in the period of “discretionary disqualification” is required to comply with section 35B(2) and (3).

Discretionary period + uplift = total period of disqualification.”

CONCLUSION

23. It is clear from *Needham* para 38 that it is open to this court to take a broad brush approach to the question of any appropriate adjustment to sentence. We accordingly propose to adjust the sentence imposed to reflect a fair outcome in light of the time served on remand.
24. We substitute a disqualification period of 2 years (being 12 months and a 6 month extension under section 35A with a 6 month uplift under section 35B) in place of the 1 year plus 2 years 11 months’ extension which made up the period of 3 years 11 months. This is a case where there is no impediment to such a course as described in *Needham* para 38 (above) and the length of the disqualification would otherwise be disproportionate.
25. The rest of the sentence remains unchanged.
26. It is also necessary to correct the victim surcharge order administratively, since an error was made in respect of it; that amount will be reduced from £181 to £170.
27. Accordingly, this appeal is allowed for the reasons given.