Neutral Citation Number: [2023] EWCA Crim 485

No. 202202069 B3

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Wednesday, 5 April 2023

Before:

LORD JUSTICE WILLIAM DAVIS
MRS JUSTICE COCKERILL
MR JUSTICE SAINI

REX
V
JANARTHAN SOTHILINGHAM

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MR J KERN appeared on behalf of the Appellant.

MS D WILSON appeared on behalf of the Crown.

J U D G M E N T

MRS JUSTICE COCKERILL:

1 On 14 March 2022 in the Crown Court at Inner London before His Honour Judge Pawlak the appellant was convicted of offences committed during a pre-planned attack on the complainants, brothers Tahir and Tayeb Hussain, resulting in a serious incident of violent public disorder. He was sentenced to 57 months' imprisonment. The appeal, (brought with the leave of the single judge) relates solely to the fact that no time was ordered to count towards sentence under section 240(A) of the Criminal Justice Act 2003/section 325 of the Sentencing Act 2020, although the judge gave a limited credit in the form of a deduction of three months from the sentence he would otherwise have received.

2 The appellant also seeks leave pursuant to section 23 of the Criminal Appeal Act 1968 to introduce fresh evidence concerning his compliance with the curfew requirement in the form of;

a. Evidence of his solicitor, Goldan Lambert, who had the conduct of the case in the Crown Court providing evidence that the appellant notified him and counsel on several occasions that electronic monitoring equipment had not been fitted;

b. Evidence of the appellant's uncle Thirugnanasundaralinkam Murukupillay, this provides evidence that he was aware of and monitored the appellant's adherence to his curfew hours.

3 Given the narrowness of the issue, we can turn straight to the critical part of the sentencing exercise.

The Sentencing exercise

4 The appellant had been released on bail in 2019 subject to a qualifying curfew condition with electronic monitoring, but the electronic monitor was never fitted. The court heard argument on the implications of this on 1 June 2022. The appellant's partner Baneet Khatra

gave unsworn evidence in which she stated that she was with the appellant in the evenings and that he had complied with his bail conditions. The appellant also gave evidence. He said that he told his solicitor more than once that the tag had not been fitted, but no-one came to fix the tag. Nonetheless, he said he abided by the curfew hours, picking his shifts for Just Eat accordingly. He said that when he was at home his uncle was also at home and other members of the family, all of whom could vouch for him.

5 His Honour Judge Pawlak elicited the evidence that during this period the appellant did attend the court, but did not on this occasion mention the absence of the tag. The judge also refused an adjournment to enable the appellant to call evidence from his family and his solicitor, (effectively the evidence which is now sought to be adduced on appeal).

6 Ruling on sentence, the judge said this as regards the absent tag and the effect on the sentence:

> "The court granted bail in 2019 subject to a qualifying curfew condition and an electronic monitoring condition. But in fact, the electronic monitor was never fitted, and the defendant never drew that fact to the attention of anyone official except [...] that he told his solicitor, but the solicitor did nothing about it, apparently. And it's not known whether he complied with the curfew or not, as it was never officially checked or monitored. So in fact, this defendant was never subject to that enquiry, in my judgment.
>
> I've heard evidence from him and from his partner this morning. I don't accept the evidence [...] that she was able to monitor the curfew, and in fact, she would not have seen any reason to do so, because this was (sic) only arisen ex post facto in the wake of the trial."

7 There is then an inaudible passage, and it goes on:

> "[…] that the defendant, who was found by the jury to be a liar, never mentioned the absence of the monitor when he came to court on at least one occasion, if not more, and [during] the first trial to any official. Subject two is not only that the condition was operative, but that it was effective.
>
> Section 326 of the Sentencing Act provides that [...] I read this as meaning that the [monitoring] has to be effective for the necessary purpose. Requirement was not effective, as the monitor was never fitted, as the defendant himself very well knew [...]
>
> I bear very much in mind that the defendant can only have been very much aware of the fact that he was not, in fact, subject to an electronic tag, and kept quiet about that so far as officials were concerned of one sort or another and that his curfew was

never in fact checked.

So I have no idea whether he in fact kept to curfew, and there is no reason why I should believe the assertion that he did. However, on the basis that at some time he probably did so, I will exercise my discretion to the very limited extent by giving limited credit by deducting three months from the credit he would otherwise have received."

8 Following that hearing, the appellant's counsel wrote to the judge indicating that the appellant had mentioned the absence of the tag to police when arrested for a drug driving offence. The judge declined to bring the matter back to court and there was no mention on the detention log in relation to this incident.

9 This appeal is brought on the basis that the trial judge erred in law by failing properly to interpret an "electronic monitoring condition" under section 326 of the Sentencing Act as "*any electronic monitoring requirements imposed under section 3(6ZAA) of the Bail Act 1976*."

10 It is said that given the requirements were imposed by the court as a condition of the appellant's bail and the prosecution did not allege that the appellant had "broken" either of these conditions, the judge was required to follow the steps contained in section 325 of the Sentencing Act and find that the appellant was entitled to full credit for the time he spent subject to the conditions imposed (in the sense of prescribed and adjudicated) by the court, even if the physical enforcement (or "implementation" per *R v Marshall*) of the condition had ultimately not occurred. Alternatively, it is submitted that the trial judge failed to exercise his discretion reasonably. In either event, it is said that the appellant should be entitled to credit of 423 days.

11 Pursuant to the direction of the single judge, the prosecution lodged a Respondent's Notice and Grounds of Opposition in which they submit;

a. The appellant in fact spent no time on electronically monitored tag and did not bring this to the attention of the court before sentencing;

b. The wording of section 325 should be interpreted as meaning while the curfew was active and monitored, not simply when it was ordered to be so, and that to interpret this any other way would be to undermine the point of the provision;

c. The court is asked to "revisit" the issue as dealt with at paragraph 40 in *R v Marshall* [2015] EWCA Crim 1999 or in the alternative, to distinguish the instant case from that. If the court does not "revisit" the authority of *Marshall*, it is said defendants will have no incentive to bring tagging issues to the attention of the Court;

d. The witnesses for the appellant could not give reliable evidence on the issue and the judge at sentence. The Judge was generous to allow any credit in the circumstances,

e. The further witnesses on which the appellant seeks to rely are of little assistance and their evidence does not touch on the point of principle for the Court to decide. The Crown do not therefore seek their attendance at the hearing.

12 We have been much assisted today by the submissions of Miss Wilson for the Crown and Mr Kern for the appellant, both of whom appeared below.

Discussion

13 Section 325 of the Sentencing Act 2020 states:

> "325 Time on bail under certain conditions: declaration by court
>
> (1) This section applies where—
>
> (a) a court passes a determinate sentence on an offender in respect of an offence [...],
>
> (b) the offender was remanded on bail by a court in course of or in connection with proceedings for the offence, or any related offence, and
>
> (c) the offender's bail was subject to a qualifying curfew condition and an electronic monitoring condition ("the relevant conditions")
>
> (2) The court must specify the credit period for the purposes of section 240A of the Criminal Justice Act 2003 [...] in relation to the sentence.

(3) The credit period is calculated by taking the following steps.

Step 1

Add—

the day on which the offender's bail was first subject to the relevant conditions (and for this purpose a condition is not prevented from being a relevant condition by the fact that it does not apply for the whole of the day in question), and the number of other days on which the offender's bail was subject to those conditions (but exclude the last of those days if the offender spends the last part of it in custody) [...]

Step 3

From the remainder, deduct the number of days during that remainder on which the offender has broken either or both of the relevant conditions.

Step 4

Divide the result by 2."

14 Section 326(3) of the Sentencing Act states:

"326 Section 325: Interpretation [...]

(3) In section 325—

'curfew requirement' means a requirement (however described) to remain at one or more specified places for a specified number of hours in any given day [...]

'electronic monitoring condition' means any electronic monitoring requirements imposed under section 3(6ZAA) of the Bail Act 1976 for the purpose of securing the electronic monitoring of a person's compliance with a qualifying curfew condition;

'qualifying curfew condition' means a condition of bail which requires the person granted bail to remain at one or more specified places for a total of not less than 9 hours in any given day."

15 The starting point is the wording of the relevant provisions. By the terms of the order made, the appellant's bail was subject to a qualifying curfew condition and an electronic monitoring condition. By the wording of section 325 of the Sentencing Code, and in particular, the calculation provision, he was entitled to credit for half of the days he was subject to those conditions. There is provision for a deduction to be made in respect of any days on which he broke either or both of the conditions. There is no other relevant provision, (such as Step 2), which would apply to deduct days. There is no provision made

in the statute for deduction of days on which the monitoring provision is not effective.

16 On the face of it, therefore, the appellant was subject to the relevant conditions. There was no evidence that Step 3 was engaged, i.e. that he had broken either of the conditions, unless the appellant's failure to remind his lawyers or to tell the court that his tag had not been fitted was breaking the electronic monitoring condition. That was not argued below and it is not argued now. The judge, rather, placed repeated emphasis on the fact that the appellant could have told the court that the tag had not ever been fitted, though he did not in terms say that failure to do so was a breach of the condition. His approach rather anticipates the argument as to upon whom the risk is placed by the statute. We would add in this context that as to the factual point on breach, to the extent that there is any evidence as to compliance with the curfew, that evidence adduced by the appellant below and as sought to be adduced before us today, supports rather than impedes the appellant's argument.

17 Is there anything which would require a different reading of this provision: we think not. Section 326 of the Act defines electronic monitoring condition as: "*[...] any electronic monitoring requirements imposed [...] for the purpose of securing the electronic monitoring of a person's compliance*." The judge seems to have interpreted that "*as meaning that the [monitoring] has to be effective for the necessary purpose*". That is echoed by the respondent's notice arguing that:

> "The wording of section 325 should be interpreted as meaning while the curfew was active and monitored, not simply when it was ordered to be so. To interpret this any other way would be to undermine the point of the provision."

18 Despite the skill with which the arguments were put in writing and before us today by Miss Wilson, we do not agree with this approach. There is nothing in section 325 or section 326 which imports a requirement for the device utilised for monitoring to be functioning. The wording is, on its face, directed to the requirements imposed, and not to operation of the equipment. These are distinct matters, and had something different been meant, it could very easily have been made clear. The prosecution argues that this meaning

is implicit, essentially for policy reasons, i.e. that failure to make this implication undermines the purpose of the provision. Again, we do not concur with this analysis. Where this goes is, in effect, to place the onus on the defendant to ensure that he is tagged and that his tag is functional (see the submission that "*Defendants will have no incentive to bring tagging issues to the attention of the court*".

19 The basis for this would seem to be counter-intuitive, and indeed, potentially to offend against the principle against doubtful penalisation. But there is no wording which places any onus or duty on the defendant. And, as Mr Kern noted in his submissions, there seems to be no reason for it to be so.

20 The Crown's approach also seems to invite a secondary and potentially complex enquiry not justified by the statue as to whether the defendant has acted reasonably, so as to engage a discretionary allowance for time spent on curfew in which there was no functional monitoring. As Lord Justice Davis noted in argument, this approach seems to open the door to a lot of collateral litigation. This is highly undesirable, particularly when there is an easy solution (the authorities ensuring the fitting of the tag), which also has the advantage of being completely aligned with the wording of the statute.

21 In effect, via these sections, Parliament has put in place a system whereby monitoring and effectiveness of a curfew is effectively deputed to a device which acts as an agent or proxy for keeping a suspect in custody on remand using prison resources or put in place a different system involving direct law enforcement officer checks. It seems to us that if there is a failure to put in place a robust process for deploying that electronic agent, it would be illogical that the results should lie at the door of the subject, rather than at the door of the authorities. If that were to be the case, we would expect that to be made explicit by the wording, which it is not.

22 This approach is consistent with that discernible in the authorities, specifically *R v Marshall* [2015] EWCA Crim 1999. In that case the facts, though somewhat obscure in

the details, indicate that tagging equipment was initially fitted but later removed owing to an error. At paragraph 40 Hallett LJ said:

> "The requirements of section 240A apply where the offender's bail is *'subject to a qualifying curfew condition and an electronic monitoring condition'*. In this case the appellant was subject at all [...] times to a qualifying curfew condition and an electronic monitoring condition. The fact that there was an administrative error and the court's order was not implemented does not alter the fact that he was subject to a qualifying curfew. He must receive the credit."

23 The respondent says that the situation there was different because an administrative error led to a tag being removed. Prior to that, there was some period when the curfew was being monitored electronically. However, we do not consider that the principle is different when the administrative error involves removal of a tag, as opposed to never fitting one in the first place. Nor is it easy to see how this factual distinction could survive the principles sought to be implied into the wording of the statute.

24 The approach which we adopt is also supported by what seems on the evidence before us to be the *de facto* position on treatment of tagging and operational gaps. The evidence suggests that it is far from unusual for tags not be to put in place at once, that it may take a few days to get a device fitted, even if all goes to plan. It does not appear that it has ever been suggested that the person subjected to a curfew and tagging order loses the benefit of those few days. Yet, that must be the logical result of reading into the statute a requirement that the device be effective. The same would apply if there were a software glitch completely outside the knowledge or control of the subject.

Fresh evidence

25 On this basis we incline to the view that the evidence of: (1) the appellant telling his solicitor (in November 2019 and March 2020 and his counsel (in December 2019 and March 2020) that his tag had not been fitted, and (2) compliance with the curfew adduced by his uncle assists matters in either direction. In the circumstances, the requirement for permitting the admission of fresh evidence is not satisfied and we refuse the application to admit fresh evidence.

Conclusion

26 We conclude that on a true construction of the relevant sections, the appellant was entitled to the appropriate credit under section 325.

27 Accordingly, the appeal should be allowed and the appellant given credit for 423 days on tagged curfew. This will require an adjustment of the sentence imposed, as Mr Kern accepted, in the light of the fact that the three months' credit allowed by the judge was in the form of a reduction of sentence that he would otherwise have given by three months.

28 We, therefore, quash the sentence imposed and substitute a sentence of five years' imprisonment. We certify that the appellant has spent 845 days on remand, subject to a qualifying curfew, and we direct that 423 days will, therefore, count towards sentence. If this calculation is later found to be wrong, it will be put right by correcting the record administratively without any further hearing.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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