

Neutral Citation No: [2022] NICA 18

Ref: HUM11806

*Judgment: approved by the court for handing down
(subject to editorial corrections)**

Delivered: 30/03/2022

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

**ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY KEVIN CONWAY
FOR JUDICIAL REVIEW**

**Ivor McAteer QC and David McKeown (instructed by Joe Mulholland & Co) for the
Appellant
Neasa Murnaghan QC and Ashleigh Jones (instructed by the Departmental Solicitor's
Office) for the Respondent**

Before: Treacy LJ & Humphreys J

HUMPHREYS J (delivering the judgment of the court)

Introduction

[1] This is an appeal from a decision of Colton J delivered on 14 December 2021 whereby he dismissed the appellant's application for judicial review. The application arose out of the calculation of the appellant's custody expiry date ('CED') by the Northern Ireland Prison Service, the respondent.

[2] Four separate sentences of imprisonment were imposed upon the appellant between 5 November 2020 and 19 March 2021. Each of these sentences was concurrent with the others.

[3] We set out in tabular form the nature and effect of each of those sentences. The CED in each case is the one calculated by the respondent.

Date	Court	Sentence	Custody/Licence	CED/EDR
(1) 5.11.20	Crown	20m DCS	8m/12m	1.7.21
(2) 27.11.20	Magistrates	4m	4m	22.1.21
(3) 27.11.20	Magistrates	3m	3m	8.1.21
(4) 19.3.21	Crown	21m DCS	7m/14m	15.10.21

[4] The dates have been adjusted to take account of three days when the appellant was remanded on bail at court. The appellant takes no issue with the calculations save for the CED in relation to sentence (4). It is his case that since this sentence was concurrent with sentence (1), the CED should have been 1 July 2021 as the time he spent in custody between 5 November 2020 and 19 March 2021 ought to have been taken into the reckoning.

[5] On 30 June 2021, by way of interim relief, the appellant was released from custody, subject to the undertaking that should his application for judicial review fail, he was liable to serve the remainder of his sentence and would present himself to HMP Maghaberry within 24 hours of the judgment of the court dismissing his application. When Colton J dismissed the application on 14 December 2021, he stayed the requirement to serve the remaining part of the sentence pending an appeal to the Court of Appeal.

The Grounds of Challenge

[6] The appellant's Order 53 statement seeks to impugn the respondent's calculation of the CED on the grounds that it has erred in law in failing to treat concurrent sentences as one single sentence and by distinguishing between time spent on remand and time served as a sentenced prisoner.

[7] Essentially this question is a matter of statutory interpretation. Colton J held that a proper interpretation of the legislative provisions resulted in the period spent in custody between 5 November 2020 and 19 March 2021 being excluded from the calculation of the CED as, during this period, the appellant was a sentenced prisoner.

[8] Section 26(2) of the Treatment of Offenders Act (Northern Ireland) 1968 ('the 1968 Act') provides:

“(2) The length of any sentence of imprisonment or term of detention in a young offenders centre or sentence of detention under Article 13A(6),14(5) or 15A(5) of the Criminal Justice (Northern Ireland) Order 2008 imposed on or ordered in relation to an offender by a court shall be treated as reduced by any relevant period, but where he was previously subject to a probation order, a community service order, an order for conditional discharge or a suspended sentence or order for detention in respect of

that offence, any such period falling before the order was made or the suspended sentence or order for detention was passed or made shall be disregarded for the purposes of this section.

- (2A) In subsection (2) “relevant period” means –
- (a) any period during which the offender was in police detention in connection with the offence for which the sentence was passed; or
 - (b) any period during which he was in custody –
 - (i) by reason only of having been committed to custody by an order of a court made in connection with any proceedings relating to that sentence or the offence for which it was passed or any proceedings from which those proceedings arose; or
 - (ii) by reason of his having been so committed and having been concurrently detained otherwise than by order of a court; or
 - (c) any period during which he was in custody in a category 1 territory with a view to his being extradited to the United Kingdom to be tried or sentenced for that offence (and not for any other reason).”

[9] Section 33 of the 1968 Act is an interpretive provision and s. 33(2) says:

“(2) For the purposes of any reference in the Prison Act and this Act to a term of imprisonment or to a term of detention in a young offenders centre, consecutive terms or terms which are wholly or partly concurrent shall 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 under Chapter 4 of Part 2 of the Criminal Justice (Northern Ireland) Order 2008 at any time during the period beginning with the first and ending with the last of those occasions.”

[10] The appellant's case is based squarely on section 33(2). It is argued that these were partly concurrent terms, imposed on different occasions, and the appellant was not released between the respective dates, and therefore the terms "*shall be treated as a single term.*"

[11] The corollary of this position, it is contended, is that any time spent in custody as a result of the first sentence should be taken into account in respect of the later concurrent sentence.

The Caselaw

[12] The statutory scheme for the computation of dates for the release of prisoners has been the subject of judicial analysis both in this jurisdiction and in England & Wales. In *R v Governor of Brockhill Prison ex p. Evans* [1997] QB 443, the Divisional Court considered the question of the account to be taken of time spent in custody on remand when the prisoner is subsequently sentenced to concurrent terms of imprisonment. Sections 67(1) and 104(2) of the Criminal Justice Act 1967 were in virtually identical terms to the provisions set out above of the 1968 Act.

[13] Lord Bingham LCJ concluded that the effect of the statutory provisions was:

"If concurrent sentences are imposed on the same occasion, the single term will in effect be the longest of the concurrent terms because that will be the last sentence to expire. Where concurrent sentences are imposed on different occasions they must still be treated as a single term, but the terminal date of the sentence pronounced by the court will not necessarily be that of the longest of the concurrent terms; it will, however, be the terminal date of the last sentence to expire, which may or may not be the longest of all the sentences." [at 460 F-G]

[14] In order to succeed in this appeal, the appellant must satisfy the court that Lord Bingham's conclusion was wrong. The inevitable consequence of the argument advanced by him is that the terminal date will always be calculated by reference to the longest of the concurrent sentences.

[15] In *R v Secretary of State ex p. Naughton* [1997] 1 WLR 118, Simon Brown LJ differentiated between the words 'sentence of imprisonment' in section 67 and 'term of imprisonment' in section 104(2), in reliance on his previous decision in *ex parte Mooney* [1996] 1 Cr. App. R (S) 74. He rejected the assertion that they meant the same thing as being 'plainly wrong' and stated:

"It seems clear from that passage that we regarded the crucial words in section 67 to be the words 'sentence of

imprisonment' in the first line and we understood those to refer to each individual sentence imposed rather than the total produced by the various different concurrent sentences." [at 124 A-B]

[16] The learned Lord Justice continued, with reference to section 67(1A)(b)(i):

"It seems to me that Mr Weatherby is clearly correct in submitting that the word 'only' is introduced simply so as to exclude periods spent in custody whilst serving another sentence."

[17] The appellant relies on the decision of the Divisional Court in this jurisdiction in *Re McConville* [2018] NIQB 98, another case concerning remand time and concurrent sentences. Morgan LCJ followed *ex p. Evans*, noting that:

"The Divisional Court held that where a defendant spends time in custody awaiting trial for more than one offence, and is, on conviction, sentenced to concurrent or overlapping terms of imprisonment, the resultant sentence was to be treated as a single term and the total period of the time spent on remand in relation to any of the offences could be set off against the single term."

[18] *McConville* itself related to concurrent sentences passed at different times but the court found:

"The 1968 Act, however, expressly contemplates the circumstance where the concurrent sentences are passed on different occasions and the same principles apply as long as there is no period of release between the imposition of the sentences."

[19] In *Re Allen* [2020] NICA 40, the Court of Appeal emphasised that:

"In every section 26 case, the court must be scrupulously faithful to every part of the interlocking and cumulative requirements prescribed by the words of the statute."

Consideration

[20] We have concluded that there is no merit in the appellant's argument. Section 26(2A)(b)(i) prescribes three situations whereby a sentence may be reduced by virtue of time spent in custody. As analysed by McCloskey LJ in *Allen*, such relevant periods are only:

- (i) The custody of an offender solely by reason of a committal order of a court made in connection with any proceedings giving rise to the sentence of imprisonment under consideration.
- (ii) The custody of an offender solely by reason of a committal order of a court made in connection with the offence giving rise to the relevant sentence.
- (iii) The custody of an offender solely by reason of a committal order of a court made in connection with any proceedings from which the proceedings concerning either (i) or (ii) arose.

[21] Had the legislature wished to include within that part of the definition of 'relevant period' any period of time served as a sentenced prisoner in respect of another offence, it could have done so. Instead, the legislation uses the word 'only' which, as Simon Brown LJ found in *Naughten*, serves to exclude periods spent in custody as a sentenced prisoner.

[22] The effect of section 33(2) is simply that a prisoner who is serving two or more concurrent sentences has them treated as a 'single term.' From 19 March 2021 the appellant was serving two separate concurrent sentences of imprisonment but these are treated as a single term. This does not speak to the question of the reduction of any sentence of imprisonment by reason of time spent in custody for other reasons. Applying McCloskey LJ's admonition that the courts must scrupulously adhere to the provisions of section 26, there is no basis to find an entitlement to the reduction of any sentence by reason of time spent as a sentenced prisoner.

[23] Both parties postulated hypothetical factual situations which, it was said, could give rise to absurd results depending on the timing of pleas and the imposition of sentences. None of these would cause the court to depart from the clear meaning of the words used in the statutory provisions that it is only time spent in custody on remand, rather than as a sentenced prisoner, which is taken into account in reducing a sentence of imprisonment. This also accords with the practice and understanding of judges imposing sentences in this jurisdiction for over 50 years.

Conclusion

[24] For these reasons, the appeal is dismissed and the order of Colton J affirmed.

[25] We will order that the appellant presents himself tomorrow, 31 March 2022, to HMP Maghaberry in order to serve the remainder of his sentence. We order that the appellant pay the respondent's costs of the appeal, such order not to be enforced without further order of the court.