

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Millar's (Christopher) Application [2013] NIQB 132

IN THE MATTER OF AN APPLICATION BY CHRISTOPHER MILLAR FOR
JUDICIAL REVIEW

Before: Morgan LCJ, Girvan LJ and Coghlin LJ

MORGAN LCJ (delivering the judgment of the court)

[1] This is an application for judicial review of a decision by the Northern Ireland Prison Service ("Prison Service") in relation to the calculation of the applicant's release date. The applicant served a custodial sentence for drugs offences. During the period for which he had been remanded in custody for those offences he was also remanded in custody and latterly serving a custodial sentence for attempted robbery. The Court of Appeal, however, has since quashed the attempted robbery conviction. The applicant argued that the failure by the Prison Service to count all of the period during which he was remanded in custody for the drugs offences against his sentence was unlawful as was its consequent determination that the applicant's custody expiry date was 5 August 2013.

Background

[2] The relevant periods of remand on bail or in custody are set out below.

- (i) On 11 December 2010 the applicant appeared before Belfast Magistrates' Court for drugs offences and was remanded on bail. From

11 December 2010 to 8 March 2011 he was on bail for the drugs offences.

- (ii) On 9 March 2011 the applicant appeared at Downpatrick Magistrates' Court on a charge of attempted robbery and was remanded in custody. From 9 March 2011 to 15 March 2011 he was remanded in custody for the attempted robbery but was still on bail for the drugs offences.
- (iii) On 16 March 2011 the applicant was sentenced to 4 months imprisonment (reduced on appeal to 3 months imprisonment) for assault on police and disorderly behaviour. From 16 March 2011 to 30 April 2011 he was a serving prisoner in respect of the assault and disorderly behaviour. This sentence expired on 30 April 2011 and from 1 May 2011 to 11 May 2011 the applicant remained remanded in custody for the attempted robbery but was still on bail for the drugs offences.
- (iv) On 12 May 2011 the applicant was committed to custody in default of payment of a fine. From 12 May 2011 to 15 May 2011 he was a serving prisoner in respect of the fine default. This sentence expired on 15 May 2011 and from 16 May 2011 to 14 August 2011 the applicant was still remanded in custody for the attempted robbery but was on bail for the drugs offences.
- (v) On 15 August 2011 the applicant was committed to custody in default of payment of a fine. From 15 August 2011 to 18 August 2011 he was a serving prisoner in respect of the fine default. This sentence expired on 18 August 2011. On that date bail on the drugs charges was revoked.
- (vi) From 19 August 2011 to 22 August 2011 the applicant was remanded in custody on both the attempted robbery and drugs offences.
- (vii) On 23 August 2011 the applicant was sentenced to 2 months imprisonment for theft. From 23 August 2011 to 22 September 2011 he was a sentenced prisoner in respect of the theft offence.
- (viii) From 23 September 2011 to 7 March 2012 the applicant was remanded in custody on both the attempted robbery and drugs offences.
- (ix) On 8 March 2012 the applicant was sentenced to a 2 year determinate custodial sentence (comprising 10 months custodial period and 14 months licence) for the attempted robbery offence.

- (x) From 8 March 2012 to 3 April 2012 the applicant was a serving prisoner in respect of the attempted robbery offence but was remanded in custody in respect of the drugs offences.
- (xi) On 3 April 2012 the custodial period of the applicant's sentence for robbery expired and the licence period commenced.
- (xii) From 4 April 2012 to 12 April 2012 the applicant remained remanded in custody on foot of the drugs offences.
- (xiii) On 12 April 2012 the applicant was released on licence for the attempted robbery. He also perfected his bail in relation to the drugs offences and was therefore released from custody on bail. From 12 April 2012 to 14 April 2012 he was at liberty on bail and on licence. However, the applicant's licence was revoked on 14 April 2012.
- (xiv) From 14 April 2012 to 30 April 2012 the applicant was again a serving prisoner for the attempted robbery but was still on bail for the drugs offences.
- (xv) The applicant was sentenced on 30 April 2012 to 4 months imprisonment for common assault. He was a serving prisoner from 30 April 2012 to 17 May 2012 in relation to both the attempted robbery offence and the assault offence but was still on bail in relation to the drugs offences.
- (xvi) On 17 May 2012 the applicant was committed to custody for trial on the drugs offences. From 17 May 2012 to 29 June 2012 he was a serving prisoner in respect of both the attempted robbery offence and the assault offence but was remanded in custody in respect of the drugs offences. The sentence for the assault offence expired on 29 June 2012.
- (xvii) From 30 June 2012 to 15 November 2012 the applicant was a serving prisoner in respect of the attempted robbery offence but was remanded in custody in respect of the drugs offences.
- (xviii) On 15 November 2012 the applicant was granted a licence again for the attempted robbery.
- (xix) From 16 November 2012 to 19 November 2012 the applicant was on licence for the attempted robbery offence but remained remanded in custody in respect of the drugs offences.
- (xx) On 20 November 2012 the applicant was sentenced in respect of the drugs offences to a 2 year determinate custodial sentence comprising 9

months custody and 15 months on licence. From 20 November 2012 to 6 June 2013 he was on licence in respect of the attempted robbery but a serving prisoner in respect of the drugs offences.

- (xxi) On 6 June 2013 the Court of Appeal quashed the applicant's conviction for the attempted robbery offence.
- (xxii) From 6 June 2013 until his release on foot of interim relief on 21 June 2013 the applicant was a serving prisoner in relation to drugs offences only.

[3] Section 26 of the Treatment of Offenders Act (NI) 1968 ("the 1968 Act") governs the calculation of sentences. The relevant subsections are set out below.

"(2) The length of any sentence of imprisonment or term of detention in a young offenders centre or sentence of detention under Article 14(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."

[4] Prison Service took into account the periods from 4 April to 12 April 2012 and 16 November to 19 November 2012 in calculating the applicant's custody expiry date on the drugs charges. The applicant submitted that the periods from 18 August to 22 August 2011, 23 September 2011 to 4 April 2012 and 30 June to 15 November 2012 should also have been taken into account. Accordingly once the robbery conviction was quashed on 6 June 2012 the applicant should have been released immediately.

The submissions of the parties

[5] In his written submissions the applicant argued that the periods during which he was remanded in custody for the drugs offences concurrently with either being remanded in custody or serving the custodial element of his sentence for attempted robbery should be taken into account in calculating his release date for the drugs offences. He contended that these 337 days were a relevant period within section 26 of the 1968 Act. The quashing of the attempted robbery conviction meant that the sentence imposed for that offence no longer existed. Prison Service could not thereafter count any period in custody against that charge. The continued detention of the applicant on the basis that periods of custody arising from the attempted robbery charge should be counted against the remand and conviction for that charge was contrary to Article 5 ECHR.

[6] The respondent submitted that this very situation was dealt with in R v Governor of Wandsworth ex parte Sorhaindo (14 December 1998) (Unreported). There the English Divisional Court held that the quashing of the conviction did not render the conviction and sentence void ab initio. The sentence remained a legal fact providing the lawful basis for any period of detention the offender may have served and thus a defence to an action in false imprisonment. Moreover, the appropriate remedy in such cases is either for offender to ask the sentencing judge to take the time served into consideration. Alternatively the applicant could have brought an appeal against sentence, if needs be following an extension of time, and asked the Court of Appeal to take into consideration the time served. The first was the solution that was suggested by the Divisional Court in R v Governor of HMP Wandsworth ex p Sorhaindo (14 December 1998) EWHC Div Ct and the latter approach was that suggested in Re Damien Page [2007] EWHC 1708 (Admin).

[7] The applicant contended in writing that R v Governor of Wandsworth ex parte Sorhaindo [1998] All ER (D) 726 could be distinguished. It pre-dated the

commencement of the Human Rights Act 1998 and, in any event, the solution postulated in that judgment that the offender should request the sentencing judge to take the time served into consideration proved fruitless in the present case because the attempted robbery conviction had yet to be quashed at the time of his sentencing on the drugs matter. In his oral submissions Mr Ronan Lavery QC submitted on reflection that an appeal may well be necessary in any case as the acquittal on the robbery charge was not known at the time of sentence in respect of the drugs charge and that acquittal may influence the appropriate sentence on that charge. Mr Lavery considered that the statutory provisions were opaque and that the appeal mechanism was likely to enable a judge to find the right practical outcome.

Consideration

[8] In R v Governor of Brockhill Prison Ex p Evans [1997] QB 443 the Divisional Court in England and Wales considered the meaning of "relevant period" in section 67 (1A) of the Criminal Justice Act 1967 ("the 1967 Act") which for all practical purposes corresponds to section 26 (2A) of the 1968 Act. The background to that case was extensive academic criticism of a number of decisions of the Divisional Court dealing with concurrent sentences. The earlier cases had concluded that periods spent previously in custody should be deducted from each particular sentence to which they related before calculating the release date by reference to the total sentence. A leading academic authority on sentencing, Dr Thomas, argued that the periods in custody should be aggregated and the release date calculated simply by deducting that aggregate from the total sentence.

[9] In Evans the court was dealing with concurrent sentences passed at the same time and which by virtue of section 104 (2) of the 1967 Act were treated as a single term. The position in this case is somewhat different because the sentences were passed on different occasions and the applicant had been released under Chapter 4 of Part 2 of the Criminal Justice (Northern Ireland) Order 2008 before the sentence in relation to the drugs offence was passed. These sentences, therefore, fell outside the terms of section 33 (2) of the 1968 Act and did not constitute a single term of imprisonment.

[10] There are, however, some helpful indicators of the approach that should be taken in this case. The court agreed with the conclusion in Ex parte Naughton [1997] 1 WLR 118 that the expression "only" in section 26(2A)(b)(i) of the 1968 Act is intended to preclude any account being taken of periods in custody unrelated to the offence for which the relevant sentence was passed. Secondly, the court accepted that considerations of justice required that the time spent in custody in relation to any offence for which a sentence is passed should serve to reduce the term to be served subject always to the condition that time can never be counted more than once.

[11] The only sentence with which we are concerned is the determinate custodial sentence of two years comprising nine months in custody and 15 months on licence passed on 20 November 2012 in respect of the drugs offence. In considering the remand time served by the applicant we must focus only on those periods when he was remanded in custody in respect of this offence. That is consistent with Naughton. The periods in custody for the offences of theft and assault when he was also on remand in relation to the drugs charge cannot accrue to his benefit because those periods were used to discharge his liability on those convictions and cannot be used twice. That is consistent with the principle in Evans.

[12] When he was convicted of attempted robbery and sentenced the Prison Service correctly allowed his periods of remand in relation to that charge to count against the custodial period required to be served by him subject to the deduction of periods when he was serving other sentences or imprisoned for fine default. While the robbery conviction stood, those periods could not be used again to reduce the custodial period on the drugs offence because of the Evans principle. When the attempted robbery conviction was quashed the applicant had already served the custodial element of that sentence and the effect of the appeal court decision was to release him from the subsequent licence obligations. The question at issue in this application is whether the quashing of the conviction for attempted robbery had any effect on the entitlement of the applicant to count the periods on remand for the drugs charges which had been used to satisfy the custodial element of the attempted robbery conviction.

[13] The respondent submitted that the fact that almost all of those periods had been used in the serving of the custodial element of the attempted robbery conviction precluded them being used again. That submission was dependent on the Evans principle that a prisoner cannot use a remand period in respect of an offence if he has already used it to satisfy another sentence. The respondent also relied on the decision of the Divisional Court in ex p Sorhaindo. In that case the applicant was remanded in custody on firearms offences on 12 September 1997. He was convicted of the firearms offences on 20 March 1998 and sentenced to 30 months imprisonment. While on remand he had been convicted on 31 October 1997 of assault and threatening behaviour and sentenced to 4 months imprisonment. That sentence was served by 31 December 1997. On 20 February 1998 his appeal against the convictions for assault and threatening behaviour was allowed.

[14] The issue was whether the applicant could count the period between 31 October and 31 December 1997 against the sentence for the firearms offence. The Divisional Court noted that the effect of the appeal was not to render the sentence void *ab initio*. The sentence remained of legal effect and operated as a defence to an action in false imprisonment. The sentence could not simply be treated as if it had never been imposed. Although the court recognised the merit in the argument advanced on behalf of the applicant that he should benefit from that remand time it concluded that the plain meaning of the statutory words was to the contrary.

[15] We have some difficulty in accepting the latter conclusion. Section 67(1) of the 1967 Act, like section 26(2A) of the 1968 Act, provides that the only periods which can count against a sentence are those spent in custody in connection with that offence. Evans establishes that considerations of justice mean that an offender should get the benefit of any period spent on remand subject to double counting. While serving the sentence of imprisonment for 4 months the applicant was also on remand for the firearms offences. That period was allowable under the 1967 Act unless there was double counting. Once the 4 month sentence had been quashed it could not be revived to prevent the applicant subsequently availing of the entire period spent on remand. That entitlement did not depend on the sentence being void *ab initio* but rather reflected the fact that having been quashed it should not *in futuro* operate to deprive the applicant of the benefit of all of the remand time to which he was entitled under the statute. This conclusion does not in any way undermine the efficacy of the original sentence as a defence to false imprisonment in the earlier period.

[16] The effect of Sorhaindo is to allow a quashed conviction to operate as a basis for extending the period to be served in custody by an offender. As a matter of principle we cannot see how such an outcome can be correct. The injustice of that outcome has been recognised in R v Roberts [2000] 1 Cr App R(S) 569 and Page. In each case an alternative remedy by way of appeal or the prerogative of mercy was advanced. In our view no such devices are required to address this injustice. We have concluded that we should not follow Sorhaindo.

[17] In this case once the attempted robbery conviction was quashed the remand periods and the sentence associated with it could no longer bar the applicant's reliance on the periods during which he was remanded on foot of the drugs charges. He was entitled to have those periods taken into account pursuant to section 26(2A) of the 1968 Act in calculating the period he had to serve in custody on the drugs charges. Any periods serving other sentences or fine defaults cannot be deducted as that would be double counting.

Conclusion

[18] For the reasons given we quash the Prison Service's determination of the applicant's custody expiry date. Prison Service should now recalculate the applicant's custody expiry date and his sentence licence expiry date in accordance with this judgment.