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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

McAfee's Application [2008] NIQB 142

AN APPLICATION FOR JUDICIAL REVIEW BY SIMON JUSTIN McAFEE

Before Kerr LCJ, Higgins LJ and Girvan LJ

KERR LCJ

Introduction

[1] This is an application by Simon McAfee, a sentenced prisoner, for judicial review of a decision of the Northern Ireland Prison Service determining 16 February 2009 as the earliest date on which he is due to be released from custody on foot of sentences imposed on him at Belfast Crown Court on 25 June 2008.

Factual background

[2] Mr McAfee was arrested on 19 December 2007 on suspicion of driving while disqualified, possession of Class C drugs and possession of those drugs with intent to supply them to others. At the time of his arrest he had been driving a motor vehicle. He had been disqualified from driving for a period of nine months at Newry Magistrates' Court on 29 October 2007 and was therefore not legally entitled to drive at the time. A quantity of Class C drugs was found in the motor vehicle.

[3] Following his arrest the applicant was interviewed by police and then charged with both the driving offence and the drugs offences. He was held in custody to appear at Belfast Magistrates' Court on 21 December 2007. At that court he was remanded in custody on all charges. Initially the offences were charged on a single charge sheet. At the time of Mr McAfee's arrest the charge of driving whilst disqualified could only be prosecuted as a summary

offence under article 168A of the Road Traffic (Northern Ireland) Order 1981. (The Criminal Justice (Northern Ireland) Order 2008 has subsequently amended this provision so that driving whilst disqualified is now a hybrid offence but this did not take effect until 16 July 2008 - Criminal Justice (Northern Ireland) Order 2008 (Commencement No 2) Order 2008.)

[4] It was decided by the Public Prosecution Service that the drugs charges should be prosecuted on indictment and on 25 April 2008 Mr McAfee was returned for trial on those charges. On the same date he pleaded guilty to the charge of driving whilst disqualified and was sentenced by the Presiding Resident Magistrate to four months' imprisonment on that charge. As the applicant had been in custody from the time of his arrest until he was sentenced to this period of imprisonment, the Prison Service calculated that he had already served the equivalent of this term. He was not kept in custody on foot of that charge, therefore but continued to be remanded in custody on the drugs offences. On 25 June 2008 at Belfast Crown Court the applicant pleaded guilty to these charges and was sentenced to a custody probation order comprising two years' imprisonment and twelve months' probation.

The sentence calculation

[5] The Prison Service's sentence calculation was set out in a letter of 7 October 2008 to the applicant's solicitors. The calculation was made on the following basis: -

1. The applicant had spent two days in police custody (19-21 December 2007).

2. He had then been in custody on remand in prison between 21 December 2007 and 17 February 2008 prior to his conviction on the driving offence. This was a period of 59 days.

3. Since the sentence of the court for this offence was four months' imprisonment, when 50% remission was taken into account this constituted en effective sentence of 61 days.

4. Accordingly as of the date of sentence for the driving offence he was 'time served'.

5. By the date of the sentence for the drugs offences the applicant had been in custody on remand for a period beyond the 61 days for which he obtained credit in respect of the driving offence. The period of custody beyond the 61 days amounted to 128 days (18 February 2008 - 24 June 2008).

6. The sentence for the drugs offences was one of imprisonment for two years which, when 50% remission was taken into consideration, amounted to a sentence of 365 days. When the 365 days was reduced by the 128 days remand in custody the time to be served was 237 days.

7. This resulted in the determination of the earliest release date of 16 February 2009.

[6] The applicant does not dispute any of the figures comprised in the sentence calculation but he maintains that the period to be credited to him against the sentence imposed by the Crown Court is the entire period of 189 days from 19 December 2007 to 24 June 2008. This would result in a release date of 17 December 2008.

The relevant statutory provisions

[7] The sentence pronounced by a court may be subject to adjustment to take account of two factors: - 1. remission of sentence as provided for in Rule 30 of the Prison and Young Offenders Centre (Northern Ireland) Rules 1995; and 2. any period spent by the prisoner in custody on remand while waiting trial.

[8] The relevant provisions as to remission are to be found in Rule 30 of the 1995 Rules as follows: -

> "(1) A prisoner serving a sentence of imprisonment for an actual term of more than five days may, on ground of his good conduct, be granted remission in accordance with the provisions of this Rule but this Rule shall not permit the reduction of the actual term to less than five days.
>
> (2) The remission shall not exceed half the total of the actual term and any period spent in custody which is taken into account under section 26(2) of the Treatment of Offenders Act (Northern Ireland) 1968 …
>
> …
>
> (7) In this Rule "actual term" means "the term of a sentence of imprisonment as reduced by section 26(2) of the Treatment of Offenders Act (Northern Ireland) 1968 …"

[9] The effect of these provisions in practice is that prisoners in Northern Ireland are treated as receiving remission of 50% of the actual term and any period which is taken into account under section 26(2) of the 1968 Act (the period spent in custody on remand). Although Rule 30 (1) is phrased in permissive terms ("a prisoner … *may* … be granted remission") it is accepted that because of its virtually invariable invocation, the effect of the provision is to create a legitimate expectation on the part of sentenced prisoners that they will receive remission of 50% of their pronounced sentence.

[10] Section 26 of the 1968 Act deals with credit for periods spent on remand in custody. Section 26 (2) is in the following terms: -

> "(2) The length of any sentence of imprisonment … imposed … by a court shall be treated as reduced by any relevant period …
>
> (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."

Re Montgomery's application

[11] This court has recently considered the statutory scheme for the computation of sentences of imprisonment in *Re Montgomery's Application* [2008] NIQB 130 (judgment delivered on 12 November 2008). The court endorsed the decision of the Divisional Court in England and Wales in *R v Governor of Brockhill Prison, Ex parte Evans and Regina v Governor of Onley Young Offender Institution, Rugby, Ex Parte Reid* [1997] QB 443 which 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 custody, the resultant sentence was to be treated as a single term even though it was made up of consecutive or wholly or partly concurrent terms. In consequence, time spent in custody in relation to any of the offences for which sentence is passed should serve to reduce the term to be served. Lord Bingham of Cornhill CJ, who delivered the judgment of the court in *Evans*, added the important rider to this conclusion in the following words, "subject always to the condition that time can never be counted more than once."

[12] The court in *Montgomery* distinguished *Evans.* It stated that these remarks (that time could not be counted more than once) were made in the context of a term of imprisonment which, whether concurrent or consecutive or imposed on the same or different occasions, constituted a single term. In *Montgomery* sentences which this court concluded were neither consecutive nor concurrent had been imposed on the applicant on different dates. It was therefore held that they were freestanding sentences and that since the prisoner had spent partly concurrent periods on remand in respect of each they could not be regarded as a single term. The court expressed its conclusion in the following passage from paragraph [24] of its judgment: -

> "How periods of remand in such unusual (though not unique) circumstances should be treated was not considered in *Ex parte Evans* or any of the other cases to which we have been referred. In those circumstances it is necessary to consider the language of the statute. By section 26(2A) he is entitled to have his sentence of imprisonment reduced by any relevant period during which he was in custody by an order of a court made in connection with any proceedings relating to that sentence. The applicant was remanded in custody in connection with the complaint that he was in breach of the probation order for which breach he was sentenced. He was remanded in connection with that complaint from 9 April 2008. Coincidentally he was in custody on remand on the burglary charge for which he was given credit when sentenced on that charge. As was stated in *Ex parte Naughton* (and approved in *Ex parte Evans*) the use of the word 'only' in Section 2A (b) (ii) is intended to preclude any account being taken of periods in custody unrelated to the offence or offences for which the relevant sentence or sentences were passed. The period 9 April to 17 June 2008 could not be said to be unrelated to the

> complaint that he was in breach of probation as he was remanded in custody by a court of competent jurisdiction on that complaint. The fact that he was also on remand on another offence does not alter the position. Nor can that period on remand be regarded notionally as a term of imprisonment. This is a criminal statute and where the liberty of the subject is concerned it should be interpreted strictly and in accordance with the clear words of the section. It is clear that the applicant was on remand between 9 April 2008 and 17 June 2008 (and until 5 September 2008) in connection with the complaint that he was in breach of probation and was entitled to have his sentence on that complaint reduced by the entire amount that he was on remand on foot of the complaint. For these reasons we concluded that the applicant should be released immediately."

Other relevant authorities

[13] The court's decision in *Montgomery* depends critically on the conclusion that Lord Bingham had intended to confine his injunction about double counting to those cases where the sentences could be said to constitute a single term. The court was not referred to another decision that bears on this question, *R v Secretary of State for the Home Department ex parte Kitaya* (The Times 30 January 1998). Furthermore, the report provided to the court of another important decision in the area, *Regina v Governor of Haverigg Prison, Ex parte McMahon* (1997) unreported, contained an abbreviated version of the judgment of Sedley J. A full version of this is now available and it contains significant material on the central issue in the present application that was not included in the shorter report. One cannot be critical of counsel in this regard since the hearing of the application in *Montgomery* necessarily came on in some haste.

[14] One may begin the review of the relevant authorities in England and Wales with *R v Secretary of State for the Home Department ex parte Naughton* [1997] 1 All ER 426. In that case the applicant had been arrested on 26 September 1994 on a charge of possession of drugs. He was remanded in custody and not admitted to bail until 9 January 1995. During that period he served 25 days' imprisonment for other offences for which he had been sentenced to a short period of imprisonment. On 23 March 1995, while on bail, he was arrested for burglary and again remanded in custody. On 17 November 1995 he was sentenced at the Crown Court to 18 months' imprisonment on each of the offences of drug possession and burglary, the sentences to run consecutively, making a total of 36 months' imprisonment.

The applicant contended that the period between 23 March and 17 November 1995 when he was in custody on remand for both offences should be taken into account in respect of each offence, and not just once, when calculating the applicant's release date. The Divisional Court (Simon Brown LJ and Popplewell J) dismissed the applicant's challenge to the Home Secretary's decision that the period on remand should be counted only once. Although that case was an example of how consecutive sentences constituted a single term of imprisonment and was, on the basis of the court's reasoning in *Montgomery,* distinguishable, a passage from the judgment of Popplewell J at page 437 is instructive. He said: -

> "Above all, it has to be remembered that the purpose of section 67 [the English equivalent of section 26 of the 1968 Act] is to ensure that when the length of sentence which the prisoner actually has to serve is determined, the amount of time he has spent on remand is thereby to be deducted so that, for instance, compared to a co-defendant who is on bail, the total amount of time spent in prison is the same. Disparity is one of the commonest grounds of appeal in criminal cases. It equally follows that the period to be taken into account by way of deduction should be not less but certainly not more than the actual period served."

[15] As was pointed out by Mr Maguire QC (who appeared on behalf of the respondent with Mr McGleenan), if the result in *Montgomery* was correct, a co-defendant charged with the same offences and sentenced at the same time to the same terms of imprisonment but who had been remanded on bail would serve longer in prison than the offender who had been remanded in custody. This we consider to be a compelling argument against the notion of double counting in any circumstances whatever. That conclusion appears to us to be in accord with the object of the statutory scheme. The purpose of section 26 is to ensure that periods of pre-trial custody can be taken into account in reducing the sentence of the court but there is no obvious policy reason that this reduction should be augmented where an offender has been convicted in circumstances that lead to his being sentenced to what the court in *Montgomery* described as freestanding offences.

[16] In *Ex parte McMahon* the offender was arrested on 4 July 1996 for two assaults on a woman. He was granted bail. On 17 and 20 October, while still on bail, he committed further acts of intimidation and assault on the same victim. For these and for the breach of his bail conditions he was arrested on 21 October and was remanded in custody in relation to all the offences. He was sentenced to imprisonment for four months on 3 February 1997. By virtue of section 33 of the Criminal Justice Act 1991 he was entitled to be

released unconditionally at the expiry of one half of that sentence. By the time that he was sentenced he had spent more days on remand in custody than was required to meet this term but he was not released because he was remanded in custody to await his trial in the Crown Court on the remaining charges. He was sentenced to 15 months' imprisonment on these charges which, after deduction for remission, amounted to 228 days. The Divisional Court decided that the prisoner was entitled to have the benefit of the unexpired portion of the period during which he had been remanded in custody before sentence on 3 February 1997 and duly deducted this from the time that he was he was required to serve.

[17] The circumstances in *McMahon* are strikingly similar to those encountered in the present case in that the offences for which he was sentenced were 'freestanding' in the sense that this expression was used by the court in *Montgomery*. But it is clear from the judgment of Sedley J in *McMahon* that he considered that the rule against double counting applied equally firmly to that case as to the other cases in which it had been articulated for he said that the result "avoids any double counting, as on authority must be done: *R v Home Secretary, ex parte Naughton* [1997] 1 WLR 118, *R v Governor of Brockhill Prison, ex parte Evans* [1997] QB 443".

[18] *R v Secretary of State for the Home Department, ex parte Kitaya* (1998) unreported, is another case of freestanding sentences. In that case the applicant became involved in various benefit frauds in early 1996. After this he was involved in a conspiracy to obtain property by deception. On 24 April 1996 he was arrested and remanded in custody, charged with the conspiracy offence. Six days later, on 30 April 1996, he was remanded in custody also in connection with the fraud offences for which he had earlier been arrested and bailed. He was dealt with first for the fraud offences and, on 7 June 1996, he received a sentence of six months' imprisonment in respect of those. He was convicted of the conspiracy charge in December 1996 and sentenced on 20 December 1996 to three years' imprisonment for that offence. The six-month sentence had already come to an end before that three-year sentence was passed. What separated the parties in their respective calculations of the due release date from the three-year sentence was whether the period between 30 April 1996, when the applicant was first remanded in custody in respect of both offences, and 6 June 1996, when he received the first of his two prison sentences, was to be credited against the second sentence. Both sides agreed that he was entitled to credit for that 38-day period in respect of the six-month sentence but the issue was whether he should be accredited again, for this period, given that he had already received credit in respect of the six-month sentence.

[19] The Divisional Court concluded that the applicant should not receive credit twice. Simon Brown LJ observed that the dictum of Lord Bingham to the effect that there should not be double counting applied "consistently

across the board, even to a case such as the present, where the sentences were distinct and imposed neither concurrently nor consecutively". Mance J stated that a result in which the overlapping period could be used more than once amounted to "unacceptable double counting". He considered the use of the word, "only" in section 67 (1A) (b) (i) (which is in similar terms to section 26 (2A) (b) (i) of the 1968 Act) and said: -

> "On the face of it … read literally, section 67 would exclude the present 38-day period spent in custody awaiting trial as well as any periods spent in custody whilst serving another sentence; but, by beneficial interpretation of its words in *R v Secretary of State for the Home Department, ex parte Naughton* [1997] 1 WLR 118 at 126D-F, the court will disregard another reason for custody in cases where a person is held on two concurrent charges. However, this beneficial interpretation cannot itself be carried to absurd lengths. Thus, firstly, another reason for custody cannot sensibly be disregarded if the period of such custody has already been taken into account in reduction of another sentence not passed concurrently or consecutively, and, secondly, that double counting of the same period, which would result from the contrary view, cannot have been contemplated by the section."

Conclusions

[20] Having considered the *Kitaya* case and the rather fuller version of *McMahon* we have concluded that the decision in *Montgomery* should not be followed. The rule against double counting (which is soundly based in common sense and logic) should inform the interpretation of section 26. While a literal interpretation of the provision could produce the result contended for by the applicant, on further reflection, all the members of this court (which happily include those who constituted the court in *Montgomery*) have reached the view that this was not the intention of the legislature. The purpose of the legislation is to ensure that offenders do not spend longer in prison than is warranted by the pronounced sentence. It is not designed to allow a prisoner convicted of multiple offences to be the undeserving beneficiary of a reduction in a series of sentences because of a single period of detention on remand.

[21] Although the principle of *stare decisis* does not apply in the Divisional Court, plainly we must pause before deciding not to follow an earlier decision of this court, particularly one so recently given as *Montgomery*. But, if we are

convinced that an earlier decision was wrong we are not obliged to follow it (see *R v Greater Manchester Coroner, ex p Tal* [1985] QB 67 at 81). Having given the matter anxious thought we are satisfied that, had the judgments in *Kitaya* been available to the earlier court, *Montgomery* would not have been decided as it was. We therefore dismiss this application.