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

Delivered: 13/12/2018

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION
FOR JUDICIAL REVIEW BY CONOR McCONVILLE

AND IN THE MATTER OF A DECISION OF THE NORTHERN IRELAND
PRISON SERVICE DETERMINING 26 NOVEMBER AS THE APPLICANT'S
CUSTODY EXPIRY DATE

Before: Morgan LCJ, Stephens LJ and Sir Paul Girvan

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 ("the respondent") in relation to the calculation of the applicant's release date. On 11 October 2018, the applicant was sentenced at Craigavon Crown Court to a determinate custodial sentence of 24 months (12 months imprisonment and 12 months licence period) in respect of a number of offences including assault occasioning actual bodily harm, threats to kill and assault on police (the "Crown Court matters"). On 12 October 2018, he was sentenced at Craigavon Magistrates' Court to 4 months in custody (2 months custody and 2 months remission) in respect of offences including common assaults and assaults on police (the "Magistrates' Court matters"). The applicant submits that he was entitled to be released on 12 October 2018 as time served. The respondent calculated his release date as 26 November 2018. These judicial review proceedings were issued on 13 October 2018 and the applicant was released by way of interim relief on 16 October. Mr Lannon appeared for the applicant and Ms Murnaghan QC and Ms Jones for the respondent.

Background

[2] On 10 October 2016, the applicant was arrested and detained in police custody for 1 day on the Crown Court matters. From 11 October 2016 to 4 April 2017, he was remanded in custody in respect of the Crown Court matters.

[3] On 5 April 2017, the applicant received a sentence in respect of other offences committed in 2016. He did not spend any time on remand in relation to these other offences and his release date was calculated as 20 June 2017. Therefore, as the applicant was a sentenced prisoner from 5 April 2017 – 20 June 2017, he did not spend any time on remand during this period in relation to the Crown Court matters.

[4] From 21 June 2017 to 22 June 2017, the applicant reverted to being a remand prisoner in respect of the Crown Court matters. As an application for bail in respect of the Crown Court matters was granted, the applicant was released on bail on 22 June 2017.

[5] On 21 July 2017 the applicant was arrested for committing further offences (the “July 2017 Offences”) and for breach of his bail conditions in relation to the Crown Court matters. He was remanded in custody in respect of both matters. On 29 November 2017, the applicant was sentenced in respect of the July 2017 Offences. Once remission and the remand time of 103 days (i.e. 21 July 2017 – 3 November) was applied, he was time served in relation to the July 2017 Offences.

[6] The unused portion of remand time from 4 November 2017 to 29 November 2017 (i.e. date on which the applicant was sentenced re the July 2017 offences) became allocated remand time in respect of the Crown Court matters. Thereafter, from 30 November 2017 to 19 December 2017, the applicant continued to serve time on remand solely in relation to the Crown Court matters. On 19 December 2017, he was released on bail in relation to the Crown Court matters.

[7] On 27 December 2017, the applicant was arrested for committing further offences (the “December 2017 Offences”) and he was held in police custody until 28 December 2017. On 29 December 2017, he was remanded into prison custody in respect of the December 2017 Offences and for breach of the bail conditions in relation to the Crown Court matters. On 20 April 2018, the applicant was sentenced in respect of the December 2017 Offences and, the application of remission and remand time (i.e. 27 – 28 December 2017 (time in police custody) and 29 December 2017 – 26 January 2018 (time on remand in prison)) resulted in the applicant being time served in relation to the December 2017 Offences.

[8] The applicant continued to serve time on remand solely in relation to the Crown Court matters from 27 January 2017 to 21 June 2018 when he was released on bail in relation to the Crown Court matters.

[9] On 30 June 2018, the applicant was arrested and detained in police custody until 1 July 2018 on 10 charges (i.e. the Magistrates’ Court matters). On 2 July 2018, he was remanded into prison custody in relation to the Magistrates’ Court matters.

On 16 July 2018, in relation to the Crown Court matters, a remand warrant was issued and Craigavon Crown Court issued a holding letter. Therefore, from 30 June 2018 - 15 July 2018, the applicant was solely on remand in relation to the Magistrates' Court matters and from 16 July 2018, the applicant was on remand for both the Magistrates' Court matters and the Crown Court matters.

[10] On 11 October 2018, the applicant was sentenced to a determinate custodial sentence of 24 months (12 months imprisonment and 12 months licence period) in respect of the Crown Court matters. On 12 October 2018, the applicant was sentenced to 4 months in custody (2 months custody and 2 months remission) in respect of the Magistrates' Court matters. Also, on 12 October 2018, the respondent calculated that the applicant's earliest date of release was 26 November 2018.

The Impugned decision

[11] The respondent's decision dated 12 October 2018 sets out the calculations for the applicant's Custody Expiry Date ("CED") and Sentence Licence Expiry Date ("SLED"):

"Your client was sentenced on 11/10/2018 to 1 year imprisonment and 1 year licence, calculation is as follows:

PSNI: 10/10/16

Remand: 11/10/16 - 04/04/17

Remand: 21/06/17 - 22/06/17

Remand: 04/11/17 - 19/12/17

Remand: 27/01/18 - 21/06/18

Remand: 16/07/18 - 10/10/18

CED: 365 days - 458 days = Time served on remand

SLED: 731 DAYS - 458 DAYS = 10/07/19

*this was calculated as per the Williamson Ruling

Sentenced today to 4 months sentence

PSNI: 30/06/18 - 01/07/18

Remand: 02/07/18 - 15/07/18

EDR: 62 days - 16 days = 26/11/2018

LDR: 123 days - 16 days = 26/01/2019

Currently your clients release date is 26 November 2018."

[12] It is the respondent's practice to calculate the CED and SLED on the date a prisoner is sentenced. Therefore, on 11 October 2018 when the applicant was sentenced for the Crown Court matters, the respondent determined he had served 458 days on remand in respect of such matters. The respondent then applied 365 of the days on remand to the custodial element of the sentence for the Crown Court matters. This meant the applicant was deemed time served in relation to the custodial element of the sentence for the Crown Court matters. The respondent proceeded to allocate the remaining remand days to the 365 day licence period for the Crown Court matters applying the ruling of this court in An Application by Andrew Williamson for Judicial Review [2017] NIQB 63 (i.e. credit for a relevant period in custody applies to both the custody period and the licence period of the sentence of imprisonment). That resulted in a SLED of 10 July 2019.

[13] The applicant was not released on 11 October 2018 as he remained on remand for the Magistrates' Court matters. On 12 October 2018, when the applicant was sentenced for the Magistrates' Court matters, the respondent determined that the applicant's EDR in respect of the sentence imposed for such matters was 26 November 2018. In arriving at that decision, the respondent says the following matters were considered:

- (i) The applicant was not serving a custodial sentence in respect of any other matter at the date of sentence. Therefore, the respondent considered that the sentence was not concurrent or overlapping.
- (ii) The respondent calculated the relevant remand days, being days on which the applicant was held solely in respect of the Magistrates' Court matters, during the period of 30 June 2018 to 15 July 2018 (i.e. 16 days).
- (iii) As the sentence was considered to be neither concurrent nor overlapping, the respondent determined that the shared remand days had already been allocated to the sentence for the Crown Court matters. Therefore, the respondent concluded that to credit the sentence for the Magistrates' Court matters would be to double count such days.

Statutory Background

[14] In each case the applicant was sentenced pursuant to the provisions of the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order"). Article 16(2) of the 2008 Order defines a custodial sentence as meaning a sentence of imprisonment and a determinate custodial sentence as meaning a custodial sentence for a determinate term. It follows, therefore, that in each case the applicant was sentenced to a determinate custodial sentence.

[15] Article 8 of the 2008 Order provides that where a court passes a determinate custodial sentence it shall specify a period (referred to as "the custodial period") at the end of which the offender is to be released on licence under Article 17. The custodial period is not to exceed one half of the term of the sentence and the

custodial period is the term of the sentence less than licence period. As it happens these provisions only apply to the Crown Court matters as the arrangements have not been commenced in relation to sentences of less than 12 months but for the purposes of this case that is not material.

[16] Article 17 of the 2008 Order deals with the duty to release prisoners subject to a determinate custodial sentence and provides that once the prisoner has served the custodial period specified by the court under Article 8 he must be released on licence unless the prisoner is serving a concurrent or consecutive sentence in which case the provisions of Articles 32 and 33 apply.

[17] Article 32 deals with concurrent sentences:

“32. – Concurrent terms

- (1) This Article applies where –
 - (a) a person (“the offender”) has been sentenced by any court to two or more custodial sentences the terms of which are wholly or partly concurrent; and
 - (b) the sentences were passed on the same occasion or, where they were passed on different occasions, the person has not been released under this Chapter at any time during the period beginning with the first and ending with the last of those occasions.
- (2) Where this Article applies –
 - (a) nothing in this Chapter requires the Department of Justice to release the offender in respect of any of the terms unless and until the Department of Justice is required to release the offender in respect of each of the others;
 - (b) Article 17 does not authorise the Department of Justice to release the offender on licence under that Article in respect of any of the terms unless and until that Article authorises the Department of Justice to do so in respect of each of the others;
 - (c) on and after release under this Chapter the offender is to be on licence for so long, and subject to such conditions, as is required by this Chapter in respect of any of the sentences...”

[18] The calculation of credit for periods spent on remand in custody is governed by section 26 of the Treatment of Offenders Act (Northern Ireland) 1968 ("the 1968 Act") which provides as follows:

"(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.

...

(5) Any reference in this Act or any other enactment (whether passed before or after the commencement of this Act) to the length of any sentence of imprisonment or order for detention in a young offenders centre shall, unless the context otherwise requires, be construed as a reference to the sentence or order pronounced by the court and not the sentence or order as reduced by this section."

The submissions

The applicant

[19] On behalf of the applicant it was submitted that by 15 June 2018 he had served a total of 365 days on remand in custody and was time served in respect of the custodial element of the Crown Court matters. Since then he has spent a further 105 days in custody including 88 days where he was in custody in respect of both the Crown Court matters and the Magistrates' Court matters. The applicant contended that those 105 days were available for accounting against any custodial element of the sentence for the Magistrates' Court matters.

[20] It was asserted that the result of the respondent's approach in the present case was to arbitrarily extend the applicant's overall custody period. Such a result is not required by the decision in Williamson's Application. That case involved remand time accrued on one set of offences whereas this case involves two sentencing exercises for which there was common remand time.

[21] The applicant argued that the 12 month custodial element of the sentence for the Crown Court matters ended on or about 15 June 2016 and the 4 month custodial period of the sentence for the Magistrates' Court matters began on 30 June 2018 and ended on or about 30 August 2018. It was submitted that the applicant was entitled to be released on 12 October 2018 when the sentence was passed for the Magistrates' Court matters, on the basis he was more than time-served.

[22] Any other conclusion was anomalous as, applying the respondent's approach, if the Magistrates' Court matters had been dealt with by the Magistrates' Court on 11 October 2018 and the Crown Court matters had been dealt with by the Crown Court on 12 October 2018, the applicant would have been released on 12 October 2018 and his SLED would have been adjusted accordingly.

The respondent

[23] The respondent acknowledged the anomalous situation arising in relation to the sequencing of the imposition of the sentences in the present case but stated it had been unable to locate any statutory basis to confirm that it had the power to carry out an exercise of re-calculation of sentence length to take into account the subsequent sentence in respect of the Magistrates' Court matters. Therefore, the respondent submitted it did not have the power to revisit the sentence calculations previously effected or to defer the calculation of a sentence on the expectation that a prisoner would receive a subsequent sentence in order to calculate both of those sentences together.

[24] The respondent contended that the critical issue at the core of this challenge was the question of whether the two custodial sentences were to be regarded as being concurrent. The significance of accepting the two sentences were properly to be regarded as concurrent was that the respondent would then have the power to recalculate the allocation of the shared remand time on 12 October 2018 in accordance with the principles established by R v Governor of Brockhill Prison ex

parte Evans [1997] QB 443, so that the remand time would be credited to both sentences, subject only to double counting.

[25] If the reference to “custodial sentence” in Article 32 of the 2008 Order was interpreted as the entirety of the sentence (not just the custodial element), then the fact that the applicant was ‘time served’ in respect of the custodial element of the sentence for the Crown Court matters was irrelevant and the currency of the licence period was sufficient to keep the sentence “live”. It was asserted that this would permit the two sentences to be considered as being concurrent.

[26] Although the sentences for the Crown Court matters and the Magistrates’ Court matters were passed on different occasions, the respondent submitted that as the applicant was not released on licence when he was time-served in respect of the Crown Court matters (as he remained on remand for the Magistrates’ Court matters) it appeared that the provisions of Article 32(1)(b) of the 2008 Order were satisfied. The respondent contended that Article 32(1)(b) of the 2008 Order could be interpreted differently if a sentence was still live by dint of the licence period but the person had been released from custody. The respondent stated it would be unfair that an individual who remained detained on remand would have a more favourable outcome than someone whose sentence was technically concurrent but had been released on licence.

[27] It was asserted that there were circumstances where the respondent implicitly has the power to recalculate sentences when a prisoner has escaped or has failed to return after a home leave (per section 38(2) of the Prison Act (Northern Ireland) 1953). By application and extension to this particular applicant’s situation, it was contended it would seem equitable that the respondent should be empowered with a comparable ability to re-calculate the applicant’s sentence for the Crown Court matters, after receipt of the sentence for the Magistrates’ Court matters.

Consideration

[28] The first question is whether the sentence passed in respect of the Magistrates’ Court matters was concurrent with the sentence passed in respect of the Crown Court matters. It is common case that the sentences were not passed consecutively. The 2008 Order provides that a determinate custodial sentence is a sentence of imprisonment for a determinate term. By Article 8 of the 2008 Order the term of the sentence comprises both the custodial period and the licence period.

[29] Article 32 of the 2008 Order applies to an offender who has been sentenced by any court to two or more custodial sentences the terms of which are wholly or partly concurrent. Concurrent sentences are those which are being served at the same time with the longer sentence generally controlling the liberty of the offender. We agree with the respondent that the conditions in Article 32 (1) (b) of the 2008 Order were satisfied in this case. That, however, only governs the duty on the Secretary of State to release on licence under Article 17 of the 2008 Order. It does not answer the question concerning the effect of periods of remands in custody on the sentence to be served by the offender.

[30] We are satisfied that when the sentence of imprisonment in respect of the Magistrates' Court matters was passed the licence period element of the term of the sentence passed in respect of the Crown Court matters was still being served by the applicant. The warrant of commitment for the first of the Magistrates' Court offences is silent as to whether the sentence is concurrent with the Crown Court matters or consecutive to those matters. The warrants in respect of the further Magistrates' Court matters expressly make those sentences concurrent. It may be that the District Judge (MC) intended to make the sentences consecutive to the Crown Court matters but where the court does not make it clear whether the sentence is concurrent or consecutive it is presumed that the sentence is concurrent (See Blackstone (2019) E2.19). Accordingly the Magistrates' Court sentences were overlapping and partly concurrent.

[31] When passing sentence the court is required to make clear which sentence relates to which count and whether the sentences are concurrent or consecutive. This case demonstrates the importance of taking into account the term of any previous sentence and where a subsisting sentence is still active to specify whether the sentence imposed is concurrent with or consecutive to the previous sentence. In this case the Crown Court matters comprised offences of assault and assault on police. The Magistrates' Court matters were committed while on bail for those matters and consisted of common assault and assault on police. In our view it is difficult to imagine any circumstances in which it would have been appropriate not to impose a consecutive sentence for such similar offences committed while on bail.

[32] The leading case on the application of remand time where concurrent sentences are passed is Ex parte Evans. In each case the applicant had been held in custody on remand for separate and overlapping periods charged with a number of offences. Following conviction, the applicants were sentenced to concurrent terms of imprisonment. In determining the periods to be served by the applicants, and in giving credit for "any relevant period" spent in custody on remand "in connection with any proceedings relating to that sentence or the offence for which it was passed", the prison authorities allocated each period spent on remand to the particular offence for which the sentence relating to it had been passed, and only such remand time as related to the dominant sentence, being the latest to expire, was taken to reduce the term to be served. As a result, the applicant's release date was later than they would have been if the aggregate of all time spent on remand in custody had been taken to reduce the overall period to be served.

[33] The longest sentence related to charge of robbery. The applicant had been remanded for 73 days in respect of the robbery but also wanted the benefit a period of 62 days of remand in custody for offences of assault and burglary in respect of which concurrent sentences were passed. 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. Lord Bingham of Cornhill CJ, who delivered the judgment of the court, concluded, at p.461:

“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, subject always to the condition that time can never be counted more than once”.

[34] The operative provision for the calculation of the "relevant period" in Evans was section 67(1A)(1)(b)(i) of the Criminal Justice Act 1967 ("the 1967 Act"). That provision corresponds exactly to section 26(2A)(b)(i) of the 1968 Act. For the conclusion that concurrent terms should be treated as a single term the Divisional Court in Evans relied on section 104(2) of the 1967 Act which provided that for any reference to the term of imprisonment to which a person has been sentenced or which, or part of which, he has served, consecutive terms or terms which are wholly or partly concurrent shall be treated as a single term. The corresponding provision in this jurisdiction is section 33(2) of the 1968 Act which provides:

"(2) For the purposes of any reference in .. this Act to a term of imprisonment .., 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."

We have already found that section 33(2)(b) has been satisfied so there is no material distinction between these statutory provisions.

[35] That enabled the court to interpret “that sentence” in section 26(2A)(b)(i) as the single term. The court then relied on the provision in the Interpretation Act 1978 that words in the singular include the plural unless a contrary intention appears. The same interpretive provision in this jurisdiction is section 37(2)(a) of the Interpretation Act (Northern Ireland) 1954. The word “offence” in the subsection determining the relevant period to be taken into account could, therefore, properly be interpreted to include the remand time for all of the offences for which the concurrent sentences were passed. The court concluded that the particular approach followed prior to this had produced anomalies which gave rise to injustice and the aggregate approach protected against this.

[36] None of the previous cases in this area have had to confront this issue. In this case once one establishes that the sentences are concurrent the “particular” approach will still lead to a release date of 12 October 2018 as all of the remand time from 30 June 2018 is available to the offender and is unused against the Crown Court matters. The anomaly in this case is that the Evans approach makes available to the offender in the Crown Court matters the period for which he was remanded solely in respect of the Magistrates’ Court matters against the licence period. In other words his sentence is less than it would have been if he had been sentenced on the Crown Court matters only.

[37] At the hearing we explored the consequences of the Evans decision by examining the following situations:

- (i) The offender is sentenced to a term of six months imprisonment on each of two counts to be served concurrently. He will serve a period of three months in custody as the sentence is treated as a single sentence. In effect the period served in custody counts against both charges.
- (ii) Where the said sentences are ordered to be served consecutively the offender will serve six months before release being half the period of the sentence.
- (iii) Where the said sentences are ordered to be served concurrently but the offender has spent three months on remand in custody on both charges he will be released as having served the custodial period of the single sentence. Again the period in custody is effectively set against both sentences. That is not double counting as the sentences are concurrent.
- (iv) Where the said sentences are ordered to be served concurrently and he has served a period of three months on remand in custody on either of the charges he will be released as having served the custodial period. That is the same principle as (iii) above except that any period in custody for either offence counts against both offences since they are treated as a single sentence as a result of Evans.
- (v) Where the said sentences are ordered to be served consecutively and he has served a period of three months in custody on either one or both charges he will be required to serve a further period of three months in custody before release. Because the sentences are consecutive it would be double counting to allow the period of remand against more than one sentence (ex parte Naughton [1997] 1 All ER 426).

[38] We accept that the approach in Evans was taken in circumstances where the concurrent sentences were passed at the same time. 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. The respondent may be required to re-calculate the offender’s custody release date in those circumstances. It remains the position that a different approach to double counting is taken where the sentences

are passed separately and we wish to make it clear that the decision in Re McAfee's Application [2009] NIQB 142 applies in such cases.

Conclusion

[39] It is the responsibility of the judge to pronounce sentence. Where the offender is serving a sentence the judge needs to determine whether the sentence imposed should be concurrent with or consecutive to the sentence being served. It is the responsibility of those presenting the prosecution case to draw the judge's attention to the need to make that determination. Where the judge imposes a concurrent sentence when a consecutive sentence should have been imposed it can give rise to anomalies leading to a sense of injustice.

[40] For the reasons given we quash the decision of the respondent dated 12 October 2018 determining that the custody expiry date of the applicant was 26 November 2018. The respondent should now determine the custody expiry date in accordance with this judgment.