Neutral Citation Number: [2013] EWCA Crim 1024

Case No: 201300883 A6

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM LEICESTER CROWN COURT
HHJ Pert QC
S20120537

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/06/2013

Before :

LORD JUSTICE HUGHES
VICE PRESIDENT OF COURT OF APPEAL CRIMINAL DIVISION
MR JUSTICE SWEENEY
and
RECORDER OF REDBRIDGE - HIS HONOUR JUDGE RADFORD (SITTING AS A JUDGE OF THE COURT OF APPEAL CRIMINAL DIVISION)

- -

Between :

THE QUEEN
- and -
BARRIE HOGGARD

- -
- -

Miss F Campbell (Solicitor Advocate) (instructed by The Johnson Partnership) appeared on behalf of the **Appellant**

Hearing dates : 27 March 2013

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Judgment

MR JUSTICE SWEENEY:

1. On 27 March 2013 we allowed this appeal against sentence, which was brought by leave of the single judge. The appeal was limited to the issues of whether there should have been a direction under s.240A of the Criminal Justice Act 2003 ("the 2003 Act"), as amended by the Legal Aid Sentencing and Punishment of Offenders Act 2012 ("the 2012 Act"), and, if so, how many days spent on qualifying curfew and electronic monitoring conditions should count towards service of the sentence of 12 months' imprisonment imposed upon the appellant in the Crown Court at Leicester on 13 December 2012.

2. The appeal underlined the problems that can still be encountered in relation to the credit to be given when the offender has been subject to the relevant conditions. In the result, we concluded that a direction should have been given, and ordered that 47 days should count towards service of the appellant's sentence.

3. We now give our reasons.

4. The factual background is, in short, as follows. On 18 May 2012, for an offence of burglary and for two breaches of a non-molestation order the appellant was sentenced by HH Judge Milmo QC, in the Crown Court at Nottingham, to a two year Community Order with a requirement to attend an integrated domestic abuse programme, a six month drug rehabilitation requirement and a six month electronically monitored curfew order.

5. On 17th July 2012, following a breach, the Community Order was extended by two months.

6. On 13 December 2012 in the Crown Court at Leicester, following a further breach, HH Judge Pert QC revoked the Community Order and re-sentenced the appellant. As we have already noted, a total sentence of twelve months' imprisonment was imposed.

7. It is unnecessary to set out the facts of the offences.

8. There is no doubt that the appellant was on bail, and subject to a qualifying curfew condition and an electronic monitoring condition, for a number of days during the period from 1 February 2012 until he was first sentenced on 18 May 2012.

9. It is also clear that, in re-sentencing the appellant on 13 December 2012, HH Judge Pert QC intended that the appellant should receive credit for the 38 days that he had spent on remand and for half the number of days that he had spent on bail whilst subject to the relevant conditions. However the judge did not give a direction to that effect because he believed that, following the then recent coming into force of the 2012 Act amendments in relation to sections 240 & 240A of the 2003 Act, no such direction was required as appropriate credit would be given automatically. Equally, whilst an attempt was made thereafter to invite the judge to give a direction in relation to the days spent on bail whilst subject to the relevant conditions, the papers were not placed before him until after the expiry of the 56 day period provided by s.155 of the Powers of Criminal Courts (Sentencing) Act 2000 ("the 2000 Act").

10. The position before us was further complicated by information that was not before the judge – namely a letter from the Probation Service dated 19 March 2013 asserting that the appellant had breached the terms of the qualifying curfew on a number of the relevant days.

11. We first make a number of general observations.

12. As originally enacted, S.240 of the 2003 Act required the court to give a direction as to time spent on remand counting towards a custodial sentence. The difficulties to which that gave rise are notorious.

13. As to crediting time spent on bail, s.240A of the 2003 Act was inserted by s.21(1) & (4) of the Criminal Justice and Immigration Act 2008 (which came into force on 3 November 2008). As originally enacted it provided that:

> "Crediting periods of remand on bail…
>
> (1) This section applies where –
>
> (a) a court sentences an offender to imprisonment for a term in respect of an offence committed on or after 4th April 2005.
>
> (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, after the coming into force of section 21 of the Criminal Justice and Immigration Act 2008
>
> (c) the offender's bail was subject to a qualifying curfew condition and an electronic monitoring condition ("the relevant conditions")
>
> (2) Subject to subsection (4) the court must direct that the credit period is to count as the time served by the offender as part of the sentence.
>
> (3) The "credit period" is the number of days represented by half of the sum of –
>
> (a) The day upon which the offender's bail was first subject to conditions that, had they applied throughout the day in question, would have been relevant conditions, and
>
> (b) the number of other days on which the offender's bail was subject to those conditions (excluding the last day on which it was so subject) rounded up to the nearest whole number.
>
> (4) Subsection (2) does not apply if and to the extent that –
>
> (a) rules made by the Secretary of State so provide, or
>
> (b) it is in the opinion of the court just in all the circumstances not to give a direction under that subsection.

(5) Where as a result of subparagraph (a) or (b) of subsection (4) the court does not give a direction under subsection (2), it may give a direction in accordance with either of those paragraphs to the effect that a period of days which is less than the credit period is to count as time served by the offender as part of the sentence.

(6) Rules made under subsection 4(a) may, in particular, make provision in relation to –

(a) sentences of imprisonment for consecutive terms;

(b) sentences of imprisonment for terms which are wholly or partly concurrent;

(c) periods during which a person granted bail is also subject to electronic monitoring required by an order made by a Court of the Secretary of State.

(7) In considering whether it is of the opinion mentioned in subsection (4)(b) the court must, in particular, take into account whether or not the offender has, at any time whilst on bail subject to the relevant conditions, broken either or both of them

(8) Where the court gives a direction under subsection (2) or (5) it shall state in open court –

(a) the number of days on which the offender was subject to the relevant conditions, and

(b) the number of days in relation to which the direction is given.

(9) Subsection (10) applies where the court –

(a) does not give a direction under subsection (2) but gives a direction under subsection (5), or

(b) decides not to give a direction under this section.

(10) The court shall state in open court –

(a) that its decision in accordance with Rules made under paragraph (a) of subsection (4), or

(b) that it is of the opinion mentioned in paragraph (b) of that subsection and what the circumstances are….

(12) In this section –

"electronic monitoring condition" means any electronic monitoring requirement 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 ……"

14. The rules made under subsection (4)(a) were the Remand on Bail (Disapplication of Credit Period) Rules 2008 (S.I. 2008 no. 2793).

15. The difficulties to which s.240A (as thus originally enacted) and the Rules gave rise are also notorious.

16. In *Irving [2010] 2 Cr. App. R. (S.) 75*, which followed the detailed examination and explanation of the statutory provisions in *Monaghan [2010] 2 Cr. App. R. (S.) 50*, the Court observed that the general effect of s.240A was that a court was required, when passing sentence, to make a specific order as to the number of days for which credit was to be given – with that number being one-half of the days on which the defendant was subject to a court order for bail containing a condition imposing a curfew for at least nine hours per day and requiring electronic tagging. The court indicated that the problem, as the court had already observed in *Nnaji [2009] 2 Cr. App. R. (S.) 107*, was that it was not always simple to have the necessary information before the sentencing court and that, in the event of error, and if the error was not corrected within the 56 day period provided by s.155 of the 2000 Act it could only be corrected on appeal – which would inevitably involve the use of valuable administrative time, court time and expense.

17. Accordingly in *Irving* (above) the court identified four things which, under the provisions then in force, courts and practitioners were required to do, or to take note of, as follows:-

(1) When passing sentence every judge was required to employ the formula suggested in *Gordon [2007] 2 Cr. App. R. (S.) 66*, which was simplified in *Nnaji* (above) to the following effect:

> "The defendant will receive full credit for the full period of time spent in custody on remand and half the time spent under curfew if the curfew qualified under the provision of s.240A. On the information before me the total period is …. days, but if this period is mistaken, this court will order an amendment of the record for the correct period to be recorded."

It was underlined that use of the formula would mean that, if an error was made, it could be corrected in the court office even after the expiry of the 56 day period provided by s.155 of the 2000 Act.

(2) Every court which imposed a curfew and tagging condition was required to use the Court Service form entitled "Record of Electronic Monitoring of Curfew Bail", which was required to follow the defendant from court to court. It was thus said to be essential, when a defendant was committed or sent to the Crown Court, and either was or had been in the past subject to curfew and tagging, that the form

(properly completed) went with his papers to the Crown Court. If the defendant was on bail but had never been the subject of curfew and tagging the magistrates were required to say so, or to send a copy of his bail conditions. If on receipt of a case involving a defendant on bail there was no such form and the question of his status was not clear, then the Crown Court was required to ask the magistrates for clarification and to get hold of the form if it existed.

(3) Solicitors and, if they had not done it, counsel were required to ask the defendant whether he had been subject to curfew and tagging. If he said he had, they were required to find out, from the court record, for which periods. It was the responsibility of the CPS also to have a system for ensuring that such information was available.

(4) Whether in connection with alleged errors of calculation made under s.240 or s.240A, it ought not to be expected in future that the Court would routinely grant long extensions of time when no one had applied his mind to the issue until long after the event.

18. Finally, the Court in *Irving* urged Parliament to consider making changes to sections 240 and 240A as soon as a convenient opportunity presented itself – so that continuing undesirable consequences could be avoided in the future.

19. In *Williams [2012] EWCA Crim 1590*, which was concerned with time spent on remand, the Court indicated that the form of words used in *Irving* (above) should always be used, even if all parties believed that there were no days to count.

20. Sections 108 and 109 of the 2012 Act came into force on 3 December 2012 – i.e. ten days before sentences was passed in this case.

21. Section 108, which by virtue of paragraph 2(1)(a) of Schedule 15 to the 2012 Act applies in relation to any person who falls to be released under Chapter 6 of Part 12 the 2003 Act on or after the commencement date, removes s.240 of the 2003 Act altogether and inserts in its place s.240ZA – which provides a scheme for the crediting of time on remand in custody to be dealt with administratively.

22. Section 109, which by virtue of paragraph 3(a) of Schedule 15 to the 2012 Act applies in relation to any person sentenced on or after the commencement date, combined with s.121(5) and paragraphs 13 and 14 of Schedule 16 to the 2012 Act, amends s.240A of the 2003 Act so that it now provides as follows:-

> "Time remanded on bail to count towards time served….
>
> (1) This section applies where –
>
> a) A court sentences an offender to imprisonment for a term 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, after the coming into force of section 21 of the Criminal Justice and Immigration Act 2008, and

c) The offender's bail was subject to a qualifying curfew condition and an electronic monitoring condition ("the relevant conditions").

(2) Subject to subsections (3A) and (3B) the court must direct that the credit period is to count as time served by the offender as part of the sentence

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

Step 1

Add –

a) 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

b) The number of other days on which the offender's bail was subject to those conditions (but excludes the last of those days if the offender spends the last part of it in custody).

Step 2

Deduct the number of days on which the offender, whilst on bail subject to the relevant conditions, was also –

a) subject to any requirement imposed for the purpose of securing the electronic monitoring of the offender's compliance with a curfew requirement, or

b) on temporary release under rules made under section 47 of the Prison Act 1952.

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

Step 5

If necessary, round up to the nearest whole number.

(3A) A day of the credit period counts as time served –

a) in relation to any one sentence

b) only once in relation to that sentence.

(3B) A day of credit is not to count as time served as part of any period of 28 days served by the offender before automatic release (see section 255B(1)).

(8) Where the court gives a direction under subsection (2) it shall state in open court -

a) the number of days on which the offender was subject to the relevant conditions, and

b) the number of days (if any) which it deducted under each of Steps 2 and 3…….

(12) In this section-

"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, provided that the requirement is imposed by a court or the Secretary of State and arises as a result of a conviction.

"electronic monitoring condition" means any 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."

23. It can thus be seen, amongst other things, that:-

(1) In contrast to s.240ZA, there is no automatic deduction of days spent on bail subject to a qualifying curfew condition and an electronic monitoring condition.

(2) The discretion, formerly provided by the combination of subsections 4(b) (5) and (7), not to give a direction at all, or to give a direction as to a period of days less than the credit period, has gone.

(3) Instead, there is now a requirement under subsection (2) that, subject to subsections (3A) and (3B), the court must direct that the credit period is to count as time served.

(4) Subsection (3A) prevents the same remand time counting several times against two or more sentences (whether they are to be served concurrently or consecutively)

(5) Subsection (3B) prevents remand time shortening any 'fixed term recall' under s.255B (which was introduced by the 2008 Act).

(6) Step 2 in subsection (3) prevents credit for tagged bail counting towards a subsequent sentence for such time as the defendant was also subject to an electronically monitored curfew requirement in connection with any other

sentence (which includes being released on Home Detention Curfew) or had been temporarily released from prison in relation to another sentence.

(7) Step 3 in subsection (3) prevents credit for days on which the defendant breached either the qualifying curfew condition or the electronic monitoring condition.

(8) Under subsection (8), when a direction is given the court must state in open court the number of days on which the offender was subject to the relevant conditions, and the number of days (if any) which it has deducted under Steps 2 and 3.

24. Against that background, and in view of the guidance previously given in *Irving* and in *Williams* (above) it seems to us that:

(1) It remains essential that every court which imposes a curfew and tagging condition uses the Court Service form entitled 'Record of Electronic Monitoring of Curfew Bail' (or its up-to-date equivalent) which is required to follow the defendant from court to court. When a defendant is sent or committed to the Crown Court then the form (properly completed) must go with the papers to the Crown Court. If the defendant has never been subject to curfew and tagging the magistrates are required to say so, or to send a copy of his bail conditions. If on receipt of a case involving a defendant on bail there is no such form and the question of his status is not clear, then the Crown Court must ask the magistrates for clarification and get hold of the form if it exists.

(2) Solicitors and, if they have not done it, counsel are required to ask the defendant whether he has been subject to curfew and tagging. If he says that he has, they are required to find out, from the court record, for which periods. It is also the responsibility of the CPS to have a system for ensuring that such information is available.

(3) Compliance with above-mentioned requirements should ensure that Step 1 is relatively straightforward.

(4) In any event, the consideration of Steps 1 – 3 will be part of the post-conviction proceedings and thus not subject to the invariable application of strict rules of evidence. The approach to admissibility, particularly in relation to hearsay evidence, should be that identified in *Clipston [2011] 2 Cr. App. R. (S.) 101* – with emphasis upon the procedures adopted to deal with Steps 1-3 being both flexible and fair.

(5) Nevertheless, if there is a dispute under, in particular, Step 2 and/or Step 3, then the prosecution must prove to the criminal standard that the days sought to be deducted from the number of days identified under Step 1 are caught by the relevant Step.

(6) However, if the court is of the opinion that the resolution of the dispute, or part of it, would be likely to amount to the disproportionate use of time and expense then (without more) the dispute, or the relevant part of it, should be resolved in the defendant's favour and no deduction made from the number of days

identified under Step 1. The court is only likely to be of such an opinion if the number of days involved is relatively modest.

(7) The court will then deal with the maths required by Steps 4 and 5 and will thereafter give a direction – complying in the process with subsection (8).

(8) Save in a case where it is clear that there is no possibility of crediting a period of remand on bail, the order of the court should, in accordance with *Nnaji* and *Williams*, be along the following lines:

> "The defendant will receive full credit for half the time spent under curfew if the curfew qualified under the provisions of s.240A. On the information before me the total period is … days (subject to the deduction of ... days that I have directed under Step(s) 2 and/or 3 making a total of … days), but if this period is mistaken, this Court will order an amendment of the record for the correct period to be recorded."

(9) It remains the case that it ought not to be expected that this Court will routinely grant long extensions of time to correct errors when no one has applied his mind to the issue until long after the event.

25. As to the instant case, the judge was clearly right to conclude that, in accordance with s.240ZA, the 38 days which the appellant had spent on remand in custody would automatically count towards the service of his sentence. However, the judge erred in concluding that, likewise, no direction was required in relation to the days that the appellant had spent on bail whilst subject to qualifying curfew and electronic monitoring conditions. A direction complying with s.240A (as now amended) was required. We therefore considered s.240A(3) Steps 1-5. Under Step 1 we identified a period of 94 days. There was nothing to suggest the need for a deduction from that total under Step 2. However, the letter from the Probation Service dated 19 March 2013 (to which we have already made reference) raised the issue, under Step 3, of whether the appellant had broken either or both of the relevant conditions on a total of 8 of the 94 days. The alleged breaches were denied. The net credit in dispute was thus 4 days. In the particular circumstances of this case resolution of the dispute would have required an adjournment, the attendance of the prosecution, and the likely calling of evidence. We concluded that such further proceedings would be likely to amount to a disproportionate use of time and expense. Accordingly we resolved the dispute in the appellant's favour and, having applied Steps 4 & 5, ordered (as indicated above) that 47 days should count towards the service of his sentence.