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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA Crim 1796



No. 202101657 A3

Royal Courts of Justice

Tuesday, 9 November 2021

Before:

LADY JUSTICE CARR
MR JUSTICE SPENCER
SIR NIGEL DAVIS

REGINA
V
PHILIP ROY ANDERSON

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MR K. LIGHT appeared on behalf of the Appellant.
MS L. HOLLINGBERRY appeared on behalf of the Respondent.

J U D G M E N T

MR JUSTICE SPENCER:

- 1 This is an appeal against sentence. The single judge granted leave solely to enable the full court to quash an unlawful order of disqualification, directing that the matter could be dealt with on the papers. However, there turned out to be another more difficult technical issue, which led to the need for assistance from counsel; Mr Light, on behalf of the appellant, and Ms Hollingbery, for the Crown. We are grateful for their written and oral submissions.
- 2 The appellant was committed for sentence to the Crown Court in respect of an offence of dangerous driving, two offences of driving a motor vehicle with drugs in his body in excess of the specified limit, and an offence of using a motor vehicle without insurance. He appeared in the Crown Court at Lewes before Her Honour Judge Waddicor on 4 May 2022. At that time the appellant was already serving a sentence of 34 months' imprisonment for other unrelated offences.
- 3 These four motoring offences for which he had to be sentenced were committed on the same occasion on 12 June 2020. Police officers observed the appellant driving a Renault Clio in Hastings. A check revealed that the vehicle was uninsured. The officers followed the vehicle, having activated their blue lights and siren. The appellant evaded the police by driving at speed and thoroughly dangerously in a built-up area, damaging several vehicles. The appellant ran off but was arrested nearby. He was found to have well over the permitted limit of cocaine and the breakdown components of cocaine in his system.
- 4 The appellant had a very bad record for driving offences. The judge concluded that the appropriate sentence for the offence of dangerous driving, to reflect the criminality of all the offences, was 14 months' imprisonment, consecutive to the sentence he was already serving. There was an appeal against that custodial sentence, but leave was refused by the single judge and that ground of appeal has not been renewed.
- 5 The question of disqualification was problematic and complicated by the fact that the appellant was already serving a term of imprisonment, to which the new sentence of 14 months would run consecutively. Mr Light and Ms Hollingbery acknowledge that the judge did not have all the assistance she should have had from them in grappling with the provisions of s.35A and s.35B of the Road Traffic Offenders Act 1988 in the light of the guidance this court gave in *R v Needham* [2016] EWCA Crim 455; [2016] 2 Crim App R (S) 26.
- 6 The offence of dangerous driving carried obligatory disqualification for at least 12 months. Each of the offences of driving with drugs in his blood, likewise, carried an obligatory disqualification of at least 12 months. The judge indicated that the appropriate period of disqualification for the offence of dangerous driving would be two years. Applying s.35A of the 1988 Act, the judge was obliged to fix the "discretionary disqualification period" and in addition the appropriate "extension period" by reference to the time the appellant would serve in custody for the offence of dangerous driving, in order to ensure that the intended two-year disqualification would effectively commence only upon his release. In order to achieve that end, the judge imposed a disqualification of 31 months for the offence of dangerous driving, made up of 24 months for the discretionary period and seven months for the extension period, i.e half of the 14 month custodial sentence he was ordered to serve.
- 7 The complication arose in relation to the obligatory disqualification for the offences of drug driving. Each attracted an obligatory disqualification of 12 months. However, as the judge

had imposed no separate penalty for those offences, instead reflecting their criminality in the term of 14 months' imprisonment on the charge of dangerous driving, the provisions of s.35A had no further application.

8 There was a certain amount of confusion during the course of the judge's sentencing remarks as to what course should be taken in relation to these other charges. The judge initially imposed no separate penalty for the two drug driving charges, save to order that the appellant's licence be endorsed with the convictions. Mr Light then reminded the judge that there was a mandatory disqualification of 12 months for each of these charges. The judge's immediate reaction, significantly we think, was to say that there would be a "co-terminous" disqualification of 12 months on each charge concurrent, and concurrent with the 31 months' disqualification for dangerous driving.

9 The judge was then led into apparent error by a discussion as to whether that 12 months' disqualification needed to be extended because of the prison sentence she had imposed. Various figures were canvassed. The judge seemed to recognise the difficulty, observing:

"But the period of custody, that in itself is tricky, isn't, because the sentence I am going to be imposing for dangerous driving is going to be served consecutively to the current sentence that he has ... so I have to project, don't I, what his likely release date is ... in relation to both of them together?"

10 There was a further discussion with some over-speaking between the judge and Mr Light, all not helped by the fact that in part the hearing was being conducted remotely. Ms Hollingbery was appearing from another venue and the sound quality, we can see from the transcript, was not always great. The exchanges concluded with the judge saying at p.5F:

"...In which case it will be 18 months then consecutive -- sorry, concurrent with each other and consecutive on the 31 months, is that -- is that clear? Ms Hollingbery, do you have any comments to make?"

Ms Hollingbery: No, that's clear, your Honour.

Judge: Mr Light, do you have any queries on that?

Mr Light: I don't immediately. If anything comes to mind, then I will --

Judge: Please come back. I know these driving matters are not straightforward."

11 Pausing there, we observe that from the judge's last words it was apparent that she was very amenable to looking again at the question of disqualification if counsel returned and were able to assist her with further clarification. We are also bound to observe that it is not at all clear that the judge really did mean to impose and pronounce a consecutive period of 18 months' disqualification, not least because, as a very experienced judge, she would have known that it was not lawful to impose consecutive periods of disqualification.

12 An order for disqualification runs from the date that it is imposed by the court: see *R v Kent* [1983] 5 Crim App R (S) 171, as emphasised in *R v Hellyer* [2015] EWCA Crim 1410 and *R v Holmes* [2018] EWCA Crim 131. In both those cases the judge had imposed a period of disqualification expressed to run consecutively to an existing disqualification. Furthermore, in one of the appeals in *R v Needham* itself, *Sadiq Khan*, at [131] to [146] of the judgment, the judge had imposed a period of disqualification expressed to commence on the defendant's release from prison. In all these cases the order for disqualification was quashed

as unlawful because it purported to impose a disqualification commencing later than the date of sentence.

- 13 It is now common ground that what the judge could and should have done was to go on to consider the provisions of s.35B of the 1988 Act which address the situation in the present case where a defendant is already serving a custodial sentence. Section 35B applies where:

"... at the time of sentencing for the offence, a custodial sentence imposed on the person on an earlier occasion has not expired."

- 14 Section 35B then provides as follows:

"(2) In determining the period for which the person is to be disqualified under section 34 or 35, the court must have regard to the consideration in subsection (3) if and to the extent that it is appropriate to do so.

(3) The consideration is the diminished effect of disqualification as a distinct punishment if the person who is disqualified is also detained in pursuance of a custodial sentence."

- 15 In the checklist which this court provided in *R v Needham* for the use of s.35A and 35B the additional period of disqualification to be imposed for s.35B(3) is referred to as "the uplift." We observe that, as distinct from the extension period provided for in s.35A, there is no mandatory requirement under s.35B to impose an "uplift" of any particular length or indeed any uplift at all. The court is merely required to "have regard" to the specified consideration to the extent that is appropriate.

- 16 In order to achieve her objective of ensuring that the appellant would remain disqualified for two years on his release from custody, the judge needed to add an uplift to the period of 31 months to reflect the fact that he still had part of his previous sentence to serve before the new consecutive sentence of 14 months would commence. Taking the previous sentence into account, this meant that his release date from the new sentence would be 22 September 2022. Therefore, from the date of sentence on 4 May 2021 until his projected release on 22 September 2021, he had period of some 16 months to serve, rather than only seven months which was the basis for the period of 31 months' disqualification the judge imposed.

- 17 Instead, in order to achieve the judge's objective, the total period of disqualification needed to be 40 months, comprising 24 months "discretionary qualification", seven months "extension period" under s.35A, plus nine months "uplift" under s.35B. Furthermore, any period of obligatory disqualification for the two offences of drug driving (for which no separate penalty was imposed) had to run from the date of sentence (4 May 2021) and would therefore be served concurrently with the much longer period of disqualification for the offence of dangerous driving.

- 18 We should record that both Mr Light and Ms Hollingbery agree that this is the way in which the disqualification should have been structured. Mr Light realised soon after the sentencing hearing that the order for disqualification as apparently pronounced by the judge at the end of the sentencing remarks would not achieve her objective and had resulted in a potentially unlawful sentence. On the same day, no doubt mindful of what the judge had said at the end of her sentencing remarks about his coming back to court if necessary, he emailed the court clerk explaining the problem. We need not recite the terms of Mr Light's very full email in which he also drew attention to the provisions of s.34A and 35A.

- 19 Regrettably, Mr Light received no response from the Crown Court. This appears to have been purely an oversight. It would have been appropriate for the case to be relisted under the "slip rule" so that the errors could be corrected and the appropriate order of disqualification imposed, although we note that with the current difficulties caused by the pandemic the listing of additional cases may in itself cause logistical problems. Instead, for whatever reason, what seems to have happened is that the court clerk on receiving Mr Light's email did refer the matter back to Judge Waddicor who clarified that it was not her intention that the disqualification of 18 months should run consecutively to the other disqualification. The Crown Court Officer therefore simply amended the Crown Court record so that the disqualification of 18 months for the drug driving offences was expressed to be concurrent, rather than consecutive, to the 31 months' disqualification for dangerous driving.
- 20 As this court has made clear on many occasions, it is not permissible for the sentence a judge has imposed to be altered administratively in this way. The matter has to be addressed formally by a hearing in open court under the slip rule (now set out in s.385 of the Sentencing Act 2020) and in accordance with the procedure set out in Criminal Procedure Rule 28.4: see *R v D* [2014] EWCA Crim 2340; [2015] 1 Cr App R (S) 23. Giving the judgment of the court, Sir Brian Leveson, (President of the Queen's Bench Division) said at [17]:
- "... It is clear from a study of the authorities that any variation of sentence should be made in the presence of the defendant unless either expressly or by [implication] his right to attend had been waived. In this case, although the learned judge apparently communicated by e-mail with the defence, he did not communicate with the Crown, he did not order the case to come back into court; in short, he did not comply with these requirements."
- 21 Not having received a reply from the Crown Court, and mindful of the 28 day time limit for an appeal against sentence to this Court, Mr Light duly lodged the present appeal on 2 June 2021. In the grounds of appeal it was asserted, quite correctly, that there was no power to order a consecutive period of disqualification. It was only after the appeal had been lodged that Mr Light sent a further email to Judge Waddicor's clerk and discovered that the judge's order had in fact been altered administratively by recording that the disqualification was now concurrent rather than consecutive.
- 22 It was against this background that the single judge granted limited leave for the unlawful sentence to be corrected and for the disqualification to be ordered to run concurrently. A few days before the appeal was listed before the full court on 12 October 2021, the Criminal Appeal Office lawyer spotted the further error in the court below. The judge had omitted to add an "uplift" to the 31 months' disqualification to take account of the unexpired balance of the existing sentence the appellant was serving. It was recognised that in order to achieve the judge's objective of the appellant serving a period of two years' disqualification on his release from custody, the period of 31 months' disqualification would need to be increased by that unexpired balance of nine months.
- 23 This, however, raised a further potential issue as to whether such a course would be permissible having regard to s.11(3) of the Criminal Appeal Act 1968, which precludes the Court of Appeal from exercising its powers to vary the sentence in the court below, if, taking the case as a whole, the result would be that the appellant is more severely dealt with on appeal than he was dealt with in the court below. It was for this reason that the court directed that counsel should address this issue, and the issue of disqualification generally, in written submissions and directed that the matter should be relisted for hearing with oral submissions from counsel.

- 24 On behalf the Crown, Ms Hollingbery submits that we are entitled to increase the period of 31 months' disqualification in order to achieve the judge's objective. She points out that the total disqualification imposed by the judge was 49 months. She submits that provided the period of disqualification, as varied by this court, is less than 49 months, there cannot be a breach of s.11(3), because the appellant will not have been dealt with more severely overall than in the court below.
- 25 On behalf of the appellant, Mr Light concedes that provided the consecutive period of disqualification is quashed, an increase of the 31 months' disqualification to include an uplift under s.35 would seem not to offend against s.11(3) of the Criminal Appeal Act 1968. However, somewhat cryptically, he added in his written submissions:
- "The only moot point perhaps is whether it would be right in principle to adopt this approach in circumstances where the order made for consecutive disqualification for the drug driving offence was an order that the Crown Court had no power to make."
- 26 In the course of oral submissions this morning, we raised with counsel the more fundamental question of whether the judge did in fact intend to and did pass a consecutive period of 18 months' disqualification, or whether in the confusion which seems to have pervaded the discussion in the latter part of her sentencing remarks, the proper construction of her sentence is that it was indeed a concurrent period of disqualification that she imposed.
- 27 Both Ms Hollingbery and Mr Light in the end agreed that there was a considerable degree of uncertainty and confusion and that it may have been a slip of the tongue on the judge's part at the very end of the sentencing remarks in appearing to indicate that the 18 months was intended to be a consecutive period of disqualification.
- 28 We have given this matter very careful consideration. We have reached the conclusion that we should simply quash the purported consecutive disqualification of 18 months and direct that it be served concurrently with the 31 months' disqualification.
- 29 Looking at the sentencing remarks as a whole, and in the light of the judge's subsequent clarification of what she intended, we think, as counsel very fairly have said, that it would be wrong to proceed on the basis that the sentence the judge pronounced was unequivocally a consecutive disqualification of 18 months, rather than a concurrent disqualification of 18 months. Where such an ambiguity exists in the judge's order, it must be resolved in the defendant's favour: see, for example, *R v Watkins* [2015] EWCA Crim 1677; [2015] 1 Crim App R (S) 6 at [6] to [7].
- 30 In these circumstances, it would not be permissible for us to restructure the disqualification by imposing a further "uplift" under s.35B of the 1988 Act, because to do so would result in the appellant being "dealt with more severely on appeal than he was dealt with by the court below," in breach of s.11(3) of the Criminal Appeal Act 1968. To that extent the appellant may count himself fortunate, but we note that on his release from custody on 22 September 2022, he will still have about 15 months of the 31 months' disqualification still to serve, which itself is significantly longer than the minimum obligatory period of 12 months' disqualification for an offence of dangerous driving.
- 31 We should add this. Had we concluded that the sentence the judge had passed was unequivocally a consecutive period of 18 months' disqualification, making a total of disqualification of 49 months, we would have been minded to quash that unlawful consecutive disqualification, but to increase the disqualification for dangerous driving from 31 months to 40 months to ensure that the appellant still had two years' disqualification to serve when released from his current sentence.

- 32 In our view that would not have infringed s.11(3) of the 1968 Act because he would have been "dealt with by the court below" by a sentence of 49 months' disqualification, and increasing the disqualification to 40 months in total on appeal would not, therefore, have resulted in him being "more severely dealt with on appeal than in the court below." The consecutive disqualification would have been unlawful, but unless and until quashed on appeal by this court, it remained the sentence which was imposed in the court below and, therefore, that was how he was "dealt with by the court below" for the purpose of s.11(3).
- 33 Any other construction would effectively require implying into s.11(3) the additional underlined words "... than he was dealt with or could lawfully have been dealt with in the court below", for which we can see no justification.
- 34 In expressing this view, we have not overlooked the observations of this Court in *R v Holmes* above at [10] to [12] and in *R v Needham (Sadiq Khan)* above at [142] to [143], where an apparently different conclusion may have been canvassed. But in any event those two cases are, in our view, distinguishable on the facts.
- 35 Accordingly, we allow the appeal to the extent only of declaring and ordering that the disqualification of 18 months on the charges of drug driving shall be served concurrently with the disqualification of 31 months on the charge of dangerous driving. The judge's order that the appellant in any event remains disqualified until he passes an extended driving test stands.
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CERTIFICATE

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