6 pages.

ROYAL COURT (SUPERIOR NUMBER)
(exercising the appellate jurisdiction conferred upon it by Article 22 of the Court of Appeal (Jersey) Law, 1961.)

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1st October, 1996.

Before: Sir Philip Bailhache, Bailiff, and Jurats Blampied, Myles, Gruchy, Rumfitt and Querée

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Steven Graham

- v -

The Attorney General

Application for leave to appeal against a total sentence of 1 year's imprisonment passed by the Inferior Number of the Royal Court on 26th July, 1996, in substitution for a probation order, the breach of which was admitted, imposed on 8th December, 1995, following guilty pleas on 17th November, 1995, to:

1 count of	grave and criminal assault (count 1) on which count a sentence of 1 year's imprisonment was imposed; and
1 count of	assault (count 5) on which count a sentence of 9 months' imprisonment, concurrent, was imposed.

(The Appellant's co-accused, Mark Ferguson, pleaded guilty on 8th December, 1995, to 3 counts of grave and criminal assault (counts 1,2, & 3), and to 1 count of malicious damage (count 4), and was sentenced to a total of 3 years' youth detention, made up as follows: on each of counts 1 & 2, to 18 months' youth detention; on count 3, to 3 years' youth detention; and on count 4 to 1 month's youth detention, the sentences to run concurrently. On 20th February, 1996, the Superior Number of the Royal Court, exercising appellate jurisdiction, dismissed Ferguson's appeal against sentence.)

Leave to appeal was refused by the Bailiff on 23rd August, 1996.

Advocate A. Messervy for the appellant.
D.E. Le Cornu, Esq., Crown Advocate.

JUDGMENT

THE BAILIFF: This is an application for leave to appeal by Steven Graham against a total sentence of one year's imprisonment passed

by the Inferior Number on 26th July, 1996, in substitution for a Probation Order, the breach of which was admitted. The Probation Order was imposed on 8th December, 1995, following guilty pleas to one count of grave and criminal assault and one count of common assault.

The application raises an interesting point of principle which does not appear to have been decided in this jurisdiction before.

The facts can be shortly described. On 18th June, 1995, shortly before midnight, the applicant and another man called Mark Ferguson went to Pontins Holiday Village at Plémont and were served with drink. It appears that they were both at that time under the influence of alcohol and, shortly after they had been served, Ferguson began taunting the manager of the premises with his alleged sexual predilections. Ferguson was asked by the manager to leave and refused to do so. Subsequently Ferguson was also asked by the security guard to leave the premises and, again, he refused.

The applicant, with Ferguson, then launched a sustained and unprovoked attack upon the security guard which resulted in the man receiving a severe beating necessitating his attendance at the General Hospital. The two men then set upon another man called Owen and punched and kicked him whilst he was on the floor.

The applicant was arrested and charged with these offences and remained in custody on remand for some five months and nineteen days prior to being sentenced on 8th December, 1995. On that day he was sentenced to three years' probation, subject to the usual conditions and subject to a further condition that he perform 240 hours of community service.

The sentence was imposed, it may be worth adding, as a result of the casting vote of the Deputy Bailiff, the Jurats being divided as to whether a custodial sentence should be imposed.

Subsequently the applicant has committed two further offences. On 21st May, 1996, he was convicted before the Magistrate's Court of causing a breach of the peace by fighting and was sentenced to seven days' imprisonment. On 28th June, 1996, again before the Magistrate's Court, he was convicted of being drunk and incapable and fined £50. He failed to perform the community service to the satisfaction of the community service organiser and the breach of the probation order was reported to the appropriate authorities.

On 26th July, 1996, he admitted the breach of the probation order and appeared before the Inferior Number for sentence. The Crown Advocate's conclusions totalling fifteen months' imprisonment had been reduced by the Crown Advocate from the

eighteen months originally sought by reason of the 80 hours' community service which the applicant had performed prior to his representation before the Court. The Inferior Number sentenced the applicant to a total of twelve months' imprisonment.

Mr. Messervy now submits, on behalf of the applicant, that the Inferior Number did not take adequate account of the time spent on remand in custody.

The Criminal Proceedings (Computation of Sentences) (Jersey) Rules 1968 provide:

> *"The length of any sentence of imprisonment imposed on an offender by a court after the commencement of these rules shall be treated as reduced by any period during which he was in custody by reason only of having been committed to custody by an order of a court made in connexion with any proceedings relating to that sentence or the offence for which it was passed or any proceedings from which those proceedings arose, but where the offender was previously subject to an order made under Article 2 of the "Loi (1937) sur l'atténuation des peines et sur la mise en liberté surveillée" in respect of that offence, any such period falling before the order was made shall be disregarded for the purposes of this rule".*

Despite that clear statutory provision Mr. Messervy drew our attention to a number of English authorities where an equivalent provision in English law had been construed and which suggest that allowance for time spent in custody on remand should nonetheless be made.

In R. -v- Wiltshire (1992) 13 Cr.App.R.(S) 642 the headnote reads:

> *"The appellant pleaded guilty to criminal damage. He threw a slate through a shop window after spending an evening drinking. He was ordered to perform 80 hours' community service, with a further 20 hours for an earlier offence for which he had been conditionally discharged. The appellant refused to carry out any work under the community service orders. He was brought before a magistrates' court and committed to the Crown Court to be dealt with for the breach of the community service order. Sentenced to six months' imprisonment. Prior to his conviction for criminal damage the appellant had spent two months in custody on remand; this time did not count as part of the eventual custodial sentence by virtue of the Criminal Justice Act 1967, s.67(1). The appellant's solicitors asked for the case to be relisted so that this matter could be considered by the sentencer, but the sentencer declined to consider the matter. It was argued*

that the sentence should have been discounted to allow for the time spent in custody on remand".

Laws J stated:

"This Court has held in the case of MacKenzie (1988) 10 Cr.App.R.299, that where a defendant falls to be re-sentenced for an offence after failure to comply with a community service order and has before the community service order was made spent time in custody, such a period in custody is a relevant consideration for the re-sentencing judge. The court added this in its judgment, that how far the sentencing judge takes into account the previous period in custody is of course a matter for judicial discretion. But no doubt in the ordinary way and in the generality of cases it will be right to give credit for such a period consistently with the court's general approach in such matters".

Mr. Messervy submitted that, in effect, this was saying that an allowance equivalent to the time spent on remand in custody ought to have been made.

Similar circumstances arose in the appeal of R. -v- MacKenzie (1988) 10 Cr.App.R.(S) 299, where the appellant had been sentenced to imprisonment following the imposition of a community service order. Glidewell LJ said in the course of his Judgment:

"But if the community service order is breached by the commission of another offence, then, it seems to this Court, that it does become a relevant consideration for the second sentencing judge to take into account that this man has spent time in custody awaiting trial for the original offence and is not going to get any credit for that time by virtue of the proviso to section 67(1) of the Criminal Justice Act 1967. We say it is relevant, but how far he takes it into account is of course a matter for judicial discretion".

In R. -v- Needham (1989) 11 Cr.App.R.(S) 506, Stocker LJ went rather further and stated:

"We have been referred to the case of Macdonald [1989] Crim. L.R. 229 in which the judgment of the Court was to this effect: "The court which imposed the second sentence should have taken into account the time spent in custody prior to making the probation order and should have allowed 15 months for that reason". They said that the sentence of five years was, in any event, too long for the burglary itself and that was reduced.

This Court therefore made it plain that it is the duty of a sentencing court to give credit for such period as the appellant may have been in custody and which will not count against his sentence for the purposes of remission. If the appropriate calculation is made and added to the four months and one week for which this appellant had been in custody, a period of six months results.

The view of this Court therefore is that the sentence imposed by the learned judge was correct in principle and was certainly not excessive save for that one factor. Normally, this Court would not reduce a sentence passed by an experienced judge by a period of so little as six months since that would be regarded as tinkering with a matter which is within the discretion of a sentencing court. However, in this case, the appropriate credit for the period spent in custody prior to being placed on probation was not taken into account as this Court has indicated that it should have been. Accordingly, we propose to reflect that matter".

In the judgment of this Court the reasoning of the English Court of Appeal in MacKenzie is to be preferred. It appears to us wrong effectively to overrule the provisions of the Criminal Proceedings (Computation of Sentences) Rules by deciding that in the generality of cases a period equivalent to the period spent in custody on remand should be deducted. The period spent on remand is a relevant consideration, but the extent to which allowance should be made is a matter for the Court's discretion given the individual circumstances of the case in question.

Applying that principle we are quite satisfied that the Inferior Number did in fact make an allowance in sentencing the applicant for the time which he had spent in custody on remand. It is a pity that no express reference was made in the Court's judgment but the Court was certainly aware, from the papers before it, of the fact that the applicant had spent nearly six months in custody while awaiting sentence.

Given all the circumstances of this case, in particular the nature of the original offences, and the applicant's long record, we cannot find that the exercise of discretion by the Inferior Number was erroneous or unreasonable in any way. The application for leave to appeal is accordingly refused. In accordance with proviso (b) to Article 35(4) of the Court of Appeal (Jersey) Law 1961 we further direct that no part of the time during which this applicant has been specially treated as an appellant in pursuance of the Prison Rules shall be disregarded in computing the term of the sentence to which he is now subject.

Authorities

Current Sentencing Practice:

R. -v- McDonald (1988) 10 Cr.App.R.(S)458: D6-2C01.
R. -v- Gyorgy (1989) 11 Cr.App.R.(S)1: D6-2C02.
R. -v- Needham (1989) 11 Cr.App.R.(S)506: D6-2C03.
R. -v- McIntyre (1985) 7 Cr.App.R.(S)196: D6-2C04.
R. -v- Wiltshire (1992) 13 Cr.App.R.(S)642: D6-2C06.
R. -v- Worcester Crown Court & Birmingham Magistrate's Court ex parte Lamb (1985) 7 Cr.App.R.(S)44: D6-2D01.
R. -v- MacKenzie (1988) 10 Cr.App.R.(S)299.

Criminal Proceedings (Computation of Sentences) (Jersey) Rules 1968.

Court of Appeal (Jersey) Law, 1961: Article 35(4)(b).