APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 31
HCA/2022/000158/XC

Lady Dorrian
Lord Matthews
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

CROWN APPEAL AGAINST SENTENCE

by

HER MAJESTY'S ADVOCATE

Appellant

against

JAKE O'DOHERTY

Respondent

Appellant: Edwards, QC, AD; Crown Agent
Respondent: Kerrigan, QC, RSC Solicitors

11 August 2022

Introduction

[1] The respondent was convicted after trial of a charge of attempted murder. The trial judge selected a headline sentence of 6 years, which is not challenged in this appeal. At a prior stage of the proceedings the respondent had been remanded in custody for a period of 289 days, after which he was granted bail. The trial judge reduced the overall sentence on

that account by double the remand period, a period of 578 days, resulting in a sentence yet to be served of 4 years and 152 days. In this appeal on a point of law in terms of section 108(2)(a) of the Criminal Procedure (Scotland) Act 1995, the Crown argue that he was wrong to do so.

[2] Section 210(1) of the Criminal Procedure (Scotland) Act 1995 provides (a) that in determining the period of imprisonment to impose a court "shall (a) have regard to any period of time spent in custody by the person on remand awaiting trial or sentence"; (b) specify the commencement date of the sentence; and (c) where there has been a period on remand and the date under (b) is not earlier than the date on which sentence was passed, state the reasons for not specifying an earlier date. In *Martin (Ronald O'Neill)* v *HM Advocate* 2007 JC 70 the court concluded that a non-continuous period spent on remand should generally be recognised by deduction not just of the period itself but of the length of sentence which would result in that period being served in custody. In *Martin,* a short term case where the prisoner would be entitled to release after half the period served (Prisoners and Criminal Proceedings (Scotland) Act 1993 section 1), that meant that the deduction, barring other considerations, would be double the period spent on remand.

[3] The position for a long term prisoner is different. At the time of *Martin,* a long term prisoner would have been entitled to automatic release on licence at the two-thirds stage of the sentence (1993 Act, section 1(2)), and any deduction for non-continuous remand would have had to be adjusted accordingly. The prisoner would (section 1(3)) have been entitled to be released on the recommendation of the Parole Board after serving half the sentence. These provisions continue to apply in respect of prisoners sentenced before 1 February 2016. However, for long term prisoners sentenced after that date, (and not sentenced to an extended sentence) the 1993 Act now provides that the automatic entitlement to release on

licence does not arise until there is only six months left to serve (section 2A). Otherwise the provisions of section 1(3), whereby release on licence may result from a recommendation of the Parole Board at a stage no sooner than half way through the sentence continue to apply.

[4] The core of the Crown argument was that whilst the approach in *Martin* might be appropriate for a "short term prisoner", in the case of a long term prisoner it is not possible to calculate in any clear or consistent manner the length of sentence which would result in a specific period being served in custody. Doubling the period on remand, as the basis for a deduction calculated to have regard to the time spent on remand, would risk comparative injustice to other prisoners, including those who had not been remanded at all; or those whose remand had been continuous. In other words, it would risk the kind of unfair consequences which the court in *Martin* sought to avoid. Insofar as the trial judge followed *Martin* he was in error.

[5] For the respondent, the argument was that it should be open to sentencers to reduce the sentence by double the period spent on remand (as was done *in Martin*) or to select some shorter period within the discretion provided for by section 210. The approach of the trial judge had not resulted in a sentence which was unduly lenient and the appeal should be refused.

Analysis and decision

[6] It is important to recognise that section 210(1) of the 1995 Act only provides that the court must "have regard" to the relevant remand period, and explain clearly the effect which it has had, including the reasons for any decision not to backdate. The statute does not provide that it is always necessary to backdate a sentence where possible; that credit must be given for the full period on remand, whether continuous or not; or that any

deduction made to reflect a period on remand must be increased by a given proportion according to whether the accused qualifies as a long or short term prisoner, and the early release provisions which apply as a consequence.

[7] In *Wojociechowski* v *McLeod* 1992 SCCR 563 (dealing with a prior iteration of the relevant section) the court confirmed that the question whether to backdate a sentence is a matter entirely within the discretion of the sentencing judge, although of course that discretion required to be exercised upon proper grounds. There may be cases where the court concludes that backdating is not justified, for example where the accused was remanded following an earlier failure to attend a diet of trial; where remand was partly or wholly attributable to another matter; or where the period of remand had already been reflected in the selection of the headline sentence (see *Douglas* v *HMA* 1997 SCCR 671; *Hutcheson* v *HMA* 2001 SCCR 43). Other factors may be relevant to the consideration of the matter, including any discrepancy between the charges as libelled and as convicted. Where there are no particular considerations such as these, in a case where the remand has been continuous up to the time of sentencing, it is commonplace to deal with the period on remand by backdating to the date of remand.

[8] Following *Martin*, in cases where, as here, the remand had not been a continuous one, the practice developed to deal with the issue by applying an overall deduction commensurate with the relevant early release provisions which applied to the prisoner. There was no absolute rule, nor was a fine arithmetical approach necessary, but in general in the case of a short term prisoner, that would mean that the deduction would be double the time spent on remand; in the case of a long term prisoner, it may have been one and a half times the period so spent, subject to consideration of whether such an approach caused the prisoner to be re-classified as a short-term prisoner. In either case, the issue would be

relatively straightforward, standing the clear, automatic and arithmetical basis upon which the early release provisions then operated. The objective was that the deduction should reflect (*Martin* para 8): "the length of sentence which would result in that period being served in custody." The rationale for the decision is expressed in the next sentence:

> "If that were not so, it would mean that someone who happened to have been remanded for a period prior to the date of sentence but in circumstances where there could not readily be backdating would be likely to end up being deprived of his or her liberty for longer than, not merely a person who was never remanded at all, but also someone remanded for the same length of time but throughout the period from committal until sentence."

[9] In the present case, the trial judge was satisfied that it was appropriate for him to take account of the whole period spent on remand. The question facing him, in light of the current legislation, was how to do that. The problem which has arisen is a consequence of the amendment to the early release provisions. Automatic early release for long term prisoners is much more limited, and arises only when there remains 6 months of the sentence to serve, although release on parole may take place at the half way stage. The trial judge considered that this created a dilemma, with potential unfairness and inconsistency arising as between those long term prisoners subject to continuous remand and those whose remand had been interrupted. In our view the trial judge was correct to say that any attempt to anticipate whether, and if so when, parole might be granted would be fraught with difficulty. Even a simple measure based on whether an accused was a first or prolific offender would not be a safe guide. Such an attempt is not only fraught with difficulty, it would be impossible. The trial judge was right to eschew it.

[10] He was also correct to say that it would be artificial and unrealistic to approach the matter on that basis that no credit should be given for time on remand, or to restrict it to an allowance which reflected only the right to automatic release when only six months of the

sentence was left to serve. It would surely be artificial to assume that in the vast majority of cases a long term prisoner would not be granted early release before the automatic release provisions applied. To proceed on such a basis could be productive of unfairness.

[11] There is in fact now no satisfactory basis upon which the court can properly deal with the issue by means of deduction from the sentence. It is important to recognise that the matter relates not only to the date at which a prisoner might be entitled to automatic release, but to the date when he might be eligible for parole. Take the example of a prisoner with a proposed headline sentence of 6 years having spent one year on remand. If his remand had been continuous he would be entitled to automatic release having spent a total of 5 years and 6 months in custody; partly on remand and partly as a sentenced prisoner; and would be eligible for parole having served a total of three years in custody. Where the remand for one year was non-continuous, parity of eligibility for parole could only be achieved by a deduction of double the relevant period and imposing a sentence of 4 years, in which case however the effect would be that the prisoner became entitled to early release having served only a total of 4 years and 6 months in custody. Deducting only the period spent on remand and imposing a sentence of 5 years would create equivalence of early release dates, but would mean that such a prisoner would have to spend an additional 6 months in custody before becoming eligible for parole. On any of these approaches there would be no parity between those given the same headline sentence and having spent the same period on remand. It is in fact impossible to ensure a deduction which reflects "the length of sentence which would result in that period being served in custody." There is in any event a danger that approaches involving deduction would give inadequate deference to the role of the Parole Board, the issues of risk, and the intention of Parliament.

[12] As noted already, the prisoner in the present case would become eligible for parole at the same time as a continuous remand prisoner, but would spend longer in custody before being entitled to early release. A continued hearing of this case was fixed to take place on the same day as the hearing in the appeal in *Clark* v *HMA* (HCA/2022/000196/XC) where the trial judge had applied a deduction limited to the period spent on remand. The prisoner in that case would become entitled to early release after serving the same time as a continuous remand prisoner, but would have to serve longer before being eligible for parole. Moreover, as between two equally placed non-continuous remand prisoners, the approach of the judge in this case would be advantageous in both respects compared to the approach taken by the judge in *Clark*. Such inequalities are iniquitous. It is important moreover that there should be clarity, consistency and predictability in how non-continuous periods on remand are dealt with. It is apparent that this is not the case.

[13] In the course of the hearing of the appeal, the broad terms of section 210 identified at para [6] above were noted, and the question raised whether it would not be possible to identify a notional date for the commencement of the sentence, by calculating back a period equivalent to that spent on remand. There is nothing in the statute which prevents this. It seemed that the question had not arisen before, no doubt because (a) it had not been necessary standing the very clear early release provisions; and (b) out of a concern that doing so might introduce impossible complications for both the Scottish Prison Service and the Parole Board. (We have since become aware of a case in which backdating to a notional diet was applied by the sentencing judge – *HMA* v *Davidson, Mullarkey, Hardy and Smith* 15 February 2022, unreported). As a potential solution it would have the advantages of simplicity and clarity, and would achieve the true objective behind *Martin* of placing those on non-continuous remand on exactly the same footing as those whose remand had been

continuous. Accordingly the court determined to continue the appeal for the Crown to make inquiries of both the Scottish Prison Service and Parole Board for Scotland.

[14] At the continued hearing the court was advised that the Scottish Prison Service have confirmed that there is nothing in their processes or systems which would cause difficulties with, or prevent, the Court imposing a sentence with a historical notional commencement date. In respect of every single prisoner entering the prison environment, the Scottish Prison Service will already always carry out a manual calculation on a prisoner's critical dates to ensure accuracy. Any proposed change in practice relating to backdating would therefore not result in any additional workload/change in practice or require any change in IT systems. Opportunities for participation in programmes of rehabilitation and intervention focused work would be unaffected. The Parole Board for Scotland does not believe that there would be any adverse impact on the prisoner in relation to the factors considered when a prisoner is eligible for potential release on licence. In short there is no barrier to the imposition of a sentence backdated to a notional commencement date. Supplementary written submissions were lodged on behalf of the respondent acknowledging that in these circumstances the proposed solution "has much to commend it, not least its simplicity". However, it was maintained that the trial judge had taken account of section 210, and that the sentence could not be described as unduly lenient. These submissions appear to overlook the fact that this appeal proceeds not on the provisions of section 108(2)(b) in relation to unduly lenient or inappropriate sentences, but on section 108(2)(a) which provides that an appeal against sentence at the instance of the crown may proceed on a point of law. In the present case the sentence imposed on the respondent on 28 March 2022 will be quashed and substituted by a sentence of 6 years imprisonment backdated to

commence from 16 May 2021.