Neutral Citation Number: [2023] EWCA Crim 279

Case No: 202000950 B1
and 202100968 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT IPSWICH
HHJ PETERS and HHJ GOODIN

—

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/03/2023

Before:

LORD JUSTICE BEAN
MR JUSTICE SOOLE
and
MR JUSTICE CHAMBERLAIN

- -

Between:

JULIAN PHILIP MYERSCOUGH	**Applicant**
- and -	
REX	**Respondent**

- -

Simon Csoka KC for the **Appellant**
Paul Jarvis for the **Respondent**

Hearing date: Thursday 9 March 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday 22 March 2023 by circulation to the parties and/or their representatives by e-mail and by release to the National Archives.

Lord Justice Bean, Mr Justice Soole and Mr Justice Chamberlain:

Introduction

1 The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with s. 3 of the Act.

2 The appellant Julian Myerscough was a lecturer in criminal law. In 2010, he was convicted of five offences of possessing indecent images of children and sentenced to 15 months' imprisonment. In 2015, he was tried again, this time before HHJ Peters and a jury at Chelmsford Crown Court, for further offences relating to indecent images of children. The jury found him guilty on 3 counts of breaching a Sexual Offences Prevention Order and 13 counts of making indecent images of children. However, shortly before the jury delivered their verdicts, he absconded and travelled to the Republic of Ireland.

3 The UK was at that time a Member State of the European Union. A European arrest warrant was issued on 1 October 2015 under Framework Decision 2002/584/JHA ("the Framework Decision"). This warrant recorded that the appellant had been convicted and sought the appellant's surrender for sentence. The appellant was arrested under that warrant in Ireland within a few days of arriving there and remanded in custody. However, he resisted extradition and the proceedings had not finished when, after some 21 months in custody, he was released.

4 This had already happened by 14 September 2017, when HHJ Peters sentenced the appellant in his absence to concurrent terms of 12 months' imprisonment on each count of breaching the Sexual Offences Prevention Order and a consecutive term of 30 months' imprisonment for making indecent images of children. That gave a total of 3 years and 6 months' imprisonment. The judge made clear that she was sentencing the appellant as if it were the last day of his trial. She added this:

> "If in due course Mr Myerscough returns to this jurisdiction, then he will face arrest, and in due course there can be an argument if it's appropriate as to what extent that time in custody in Ireland counts towards his sentence."

5 At the end of her sentencing remarks, the judge said that she saw it as by no means certain that the time spent on remand in Ireland should count, but that if he returned to the UK that would be a matter to be resolved by a judge at the time when he is brought into custody. It seems that the judge may have been aware of the possibility that the appellant might in the future leave Ireland, because she referred to the fact that an EAW remained extant "in other countries".

6 As a matter of fact, the appellant did leave Ireland and went to Romania. By that time, there was another investigation on foot into much more serious sexual offences which it was suspected the appellant had committed against young girls. A further European arrest warrant was issued on 24 July 2018 seeking his surrender to stand trial for these offences.

This was an accusation warrant. He was arrested in Romania at the end of July 2018 pursuant to that warrant and also the conviction warrant issued in 2015.

7 It appears that the appellant spent 17 days in custody in Romania before being surrendered to the authorities in this jurisdiction in August 2018 pursuant to both warrants. Once here, he remained in custody until his trial.

8 On 24 June 2019, before HHJ Goodin and a jury at Ipswich Crown Court, the appellant was convicted of four counts of indecent assault, two counts of rape of a girl under 13, four counts of sexual assault of a child under 13 and one count of cruelty to a person under 16. On 25 June 2019, he was sentenced. The judge asked whether the appellant was a serving prisoner, to which his counsel replied that his sentence had been served. The judge indicated that he understood the appellant to have the status of a remand prisoner. He imposed an extended sentence of 26 years, consisting of a custodial term of 21 years and an extended licence period of 5 years. He ended by saying this:

> "The time you've spent on remand not serving a sentence on remand, awaiting trial in this case, will count towards that sentence."

9 The appellant appealed both the 2015 and the 2019 convictions and also both sentences. Leave to appeal against the convictions was refused by the single judge and, on 20 October 2022, by the full court: see [2022] EWCA Crim 1412. As to the sentences, leave was refused save in relation to a point about credit for the 21 months spent on remand in Ireland and the 17 days spent on remand in Romania. The appeals on those points are now before us. In addition, the appellant renews his application for permission to appeal against sentence on other grounds.

The appeal

10 Chapter 3 of the Framework Decision is headed "Effects of the Surrender". Its first provision is Article 26, headed "Deduction of the period of detention served in the executing Member State", which provides as follows:

> "1. The issuing Member State shall deduct all periods of detention arising from the execution of a European arrest warrant from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed.
>
> 2. To that end, all information concerning the duration of the detention of the requested person on the basis of the European arrest warrant shall be transmitted by the executing judicial authority or the central authority designated under Article 7 to the issuing judicial authority at the time of the surrender."

11 The UK implemented these obligations in two separate statutory provisions. The first, s. 243 of the Criminal Justice Act 2003 ("the 2003 Act"), applied to prisoners tried or sentenced after having been extradited. It is headed "Persons extradited to the United Kingdom". At the time the sentences were imposed, it provided as follows:

> "(1) A fixed-term prisoner is an extradited prisoner for the purposes of this section if—

(a) he was tried for the offence in respect of which his sentence was imposed or he received that sentence—

(i) after having been extradited to the United Kingdom, and

(ii) without having first been restored or had an opportunity of leaving the United Kingdom, and

(b) he was for any period kept in custody while awaiting his extradition to the United Kingdom as mentioned in paragraph (a).

(2) In the case of an extradited prisoner, the court must specify in open court the number of days for which the prisoner was kept in custody while awaiting extradition.

(2A) Section 240ZA applies to days specified under subsection (2) as if they were days for which the prisoner was remanded in custody in connection with the offence or a related offence."

12 Section 240ZA counted time spent on remand in this jurisdiction as time served for the purpose of any sentence subsequently imposed. However, by sub-section (4) of that section, if on any day on which the offender was remanded in custody he was also detained in connection with any other matter, that day does not count as time served. Certain amendments were made to these provisions in connection with the coming into force of the Sentencing Act 2020. These were not in force at the date of the sentences under appeal and do not matter for present purposes.

13 The second way in which the Framework Decision was implemented was by s. 49(3A) & (3B) of the Prison Act 1952 ("the 1952 Act"), which applies only to those extradited from category 1 territories under conviction warrants. Section 49 is headed "Persons unlawfully at large". Section 49(2) provides that, in calculating the period for which a prisoner is liable to be detained, no account is to be taken of any time when he is unlawfully at large, unless the Secretary of State otherwise directs. Sub-sections 3A & 3B were inserted by the Anti-social Behaviour, Crime and Policing Act 2014. They provide:

"(3A) Where—

(a) a person is extradited to the United Kingdom from a category 1 territory for the purpose of serving a term of imprisonment or another form of detention mentioned in subsection (2) of this section, and

(b) the person was for any time kept in custody in that territory with a view to the extradition (and not also for any other reason),

the Secretary of State shall exercise the power under that subsection to direct that account shall be taken of that time in calculating the period for which the person is liable to be detained.

(3B) In subsection (3A) of this section 'category 1 territory' means a territory designated under the Extradition Act 2003 for the purposes of Part 1 of that Act."

14 The difficulty facing the appellant is that s. 243 of the 2003 Act did not apply to him when he was sentenced in 2017, because he was not tried or sentenced "after having been extradited to the United Kingdom"; on the contrary, he was sentenced *in absentia* because efforts to extradite him from Ireland had failed. And, after he was extradited from Romania, s. 49(3A) of the 1952 Act applied (if at all) only in relation to the 17 days he spent in custody in Romania, since that was the category 1 territory from which he had been extradited.

15 For the appellant, Simon Csoka KC, who did not appear below, submits that, on the face of the statutory provisions, the appellant falls between two stools. There is no apparent way in which he can be credited with the 21 months spent on remand in Ireland. This, he submits, is illogical and unfair, because it would mean that a person who spends time in custody in a category 1 territory but then returns voluntarily would be in a worse position than one who fights extradition to the last and is extradited. This, Mr Csoka submits, is contrary to the requirements of Article 26(1) of the Framework Decision. He invites us to correct the position by exercising an exceptional power to vary a lawful sentence, which power he says is established by two authorities: *R v Prenga* [2017] EWCA Crim 249 and *R v Flynn* [2022] EWCA Crim 1102.

16 For the Crown, Paul Jarvis submits that these cases show that a sentencing court has discretion to adjust an otherwise lawful sentence. They do not show that this Court has any such discretion. If the sentencing court exercised its discretion properly at the time the sentence was passed, this Court cannot intervene because subsequent events make the sentence unjust. If it could, we would be throwing open the door to every prisoner who has subsequently suffered some misfortune that makes it unjust that he should serve the sentence passed. Mr Jarvis asks us to concentrate first on the decision of HHJ Peters in 2017. It would have been wrong in principle for her to reduce the sentence on the basis of time served in Ireland. For all she knew, the appellant might still be extradited from Ireland to serve that sentence. If so, he would have the benefit of s. 49(3A) of the 1952 Act. If his sentence were also reduced, he would get double credit for the time served in Ireland.

17 Mr Jarvis also submits that the appellant could have claimed a declaration that s. 49 of the 1952 Act, read in accordance with the Framework Decision, entitled him to a declaration from the Secretary of State that time served in Ireland should count towards his sentence. But the proper place for such an application would be the Administrative Court.

18 Finally, Mr Jarvis points out that the appellant chose to flee the jurisdiction. If the consequence of that decision is that time served in Ireland does not count, so be it. That will be a disincentive to others to do the same.

19 In our view, Mr Jarvis is correct that HHJ Peters could not properly have specified under s. 243 of the 2003 Act the time spent by the appellant in custody in Ireland. The appellant was not being sentenced after extradition, so s. 243 did not apply to him. Moreover, his location was not known, and it followed that he might still be extradited from Ireland. If that happened, s. 49(3A) of the 1952 would apply. In those circumstances, the only

course open to HHJ Peters was to do as she did, that is, to sentence without reference to the time spent in Ireland.

20 The judge appears to have thought that there would be some further hearing at which the court would determine whether time spent in Ireland counted towards the sentence. This was an error on her part, but it did not affect the reasoning behind her sentence: she made that clear by her observation that it was by no means clear the time spent on custody in Ireland would fall to be credited.

21 The position in 2019 is somewhat different. By that time, the appellant had been extradited from a different territory, Romania, pursuant to the conviction warrant issued in 2015 and also pursuant to a new accusation warrant issued in 2018. The latter warrant sought his surrender to stand trial for sexual offences against three young girls. When sentencing the appellant after conviction of these offences, s. 243(2) of the 2003 Act required the court to "specify in open court the number of days for which the prisoner was kept in custody while awaiting extradition".

22 On one view, it might be said that this ought to include the 21 months spent in custody in Ireland. He was, after all, "awaiting extradition" at that time. But s. 243(2) must in our view be read with s. 243(1). That defines "extradition prisoner" materially for present purposes as (a) someone tried for an offence "after having been extradited to the United Kingdom" and "without having first been restored or had an opportunity of leaving the United Kingdom" who (b) was for any period kept in custody while awaiting his extradition to the United Kingdom "as mentioned in paragraph (a)". This last phrase seems to us to indicate that the custody referred to is custody while awaiting the extradition which led to the trial. Here, that means the 17 or so days spent in custody in Romania, not the 21 months spent in custody awaiting an extradition that never occurred from a different territory.

23 The question then arises whether s. 243 should be "read down" to achieve consistency with Article 26(1) of the Framework Decision. If that provision, properly construed, entitled the appellant to have the time spent in Ireland taken into account, we would be obliged to read s. 243 compatibly with it, because the effect of the Framework Decision is continued by the Withdrawal Agreement for cases where a person is arrested under a European arrest warrant on or before 31 January 2021 (see Article 62(1)(b)) and natural persons can rely directly on the provisions referred to in that Agreement which meet the conditions for direct effect in EU law (see Article 4(1)). Those conditions would, in our view, be met here if Article 26(1) bore the construction contended for. The Withdrawal Agreement is given effect in domestic law by s. 7A of the European Union (Withdrawal) Act 2018.

24 In our view, however, Article 26(1) does not have the effect contended for by the appellant. That paragraph cannot be read on its own. Its heading is "Deduction of the period of detention served <u>in the executing Member State</u>" (emphasis added). Article 26(2) imposes a requirement on the "executing judicial authority" or the "central authority designated under Article 7" to transmit to the issuing judicial authority "all information concerning the duration of the detention of the requested person on the basis of the European arrest warrant". This makes sense only if the "periods of detention arising from the execution of a European arrest warrant" referred to in Article 26(1) are those spent in detention in the executing state (i.e. the one from which the requested

person is in fact extradited). That state could hardly be expected to transmit information about the duration of detention in a different state.

25 This means that s. 243 of the 2003 Act and s. 49(3A) of the 1952 Act, taken together, properly implement the UK's obligations under Article 26(1) of the Framework Decision. No "reading down" is required.

26 Mr Csoka submits that HHJ Goodin should nonetheless have recognised, or alternatively that we should now recognise, the time spent in Ireland by exercising the exceptional jurisdiction to reduce the sentence that would otherwise be appropriate. The answer to this submission is provided by the decision of this Court in *R v Flynn* [2022] EWCA Crim 1102. In that case, the appellant had spent time on remand in the USA awaiting extradition on a conviction warrant. Because the USA is not a category 1 territory, s. 49(3A) of the 1952 Act did not apply, so the time was not credited. He argued that this created an arbitrary and unfair distinction between category 1 and category 2 territories and that the court should fill the gap by reducing his sentence.

27 At [33], the Court held that, where Parliament had made a clear policy choice that credit should be given for time spent on remand in some cases but not others it was not for the courts "to negate and then rewrite that clear policy distinction". Nor did Article 6 ECHR require such a result. Justice did not require the exercise of an exceptional jurisdiction to reduce the sentence. At [38], the Court said this:

> "the reason why the appellant accrued time spent on remand in the US was because he had, unlawfully, absconded from the UK and was awaiting extradition. He was the author of his own woes. It would be antithetical to justice to reward a flight from that justice in the manner suggested."

28 In our view, the same analysis applies here. The EU legislator has specified in the Framework Decision the circumstances in which it intends time spent awaiting extradition to count towards a sentence imposed or served after extradition between Member States. Parliament has implemented that intention in domestic law. Where, as here, there is a detailed statutory scheme, it is not for the courts to go behind the scheme provided by Parliament or to fill gaps in that regime.

29 Nor, in our view, does fairness require that. The case for the appellant here is, if anything less strong than that advanced on behalf of the appellant in *Flynn*. In this case, the appellant would have been entitled to have his time spent in Ireland taken into account under s. 49(3A) of the 1952 Act if he had been extradited from Ireland, even though he had absconded from court in Chelmsford. The only reason he was not entitled to credit for that time is that, having first absconded to Ireland, he then fled again, to Romania, in a second attempt to evade justice. Thus, even if HHJ Goodin had power to take into account the 21 months spent in custody in Ireland when passing sentence, we do not think that his failure to do so can properly be described as unjust. Nor do we consider that justice requires us to take that time into account. We do not rule out that the exceptional jurisdiction recognised in *Flynn* might be exercised in the extradition context, for example, in the type of case referred to by Mr Csoka, where an individual is released by the first executing state and then voluntarily returns to face justice. But, as we have said, that was not the position here.

30 The only error made by HHJ Goodin was that he should have specified the 17 days spent in custody in Romania as time spent under s. 243(2) of the 2003 Act. He can hardly be

criticised for that error, since no-one suggested to him that he should do so. Since the matter has been raised before us, however, we shall allow the appeal at least to that very limited extent.

The renewed application for leave

31 Mr Csoka made clear that he was only addressing us on the points referred to the full court by the single judges in respect of the 2017 and 2019 sentences. Other points were advanced by the appellant himself in relation to the 2019 sentence. Unfortunately, these were not drawn to the attention of the single judge. The only point considered by him concerned the absence of a pre-sentence report in relation to the question of dangerousness. Since then, a report has been provided. It assesses the defendant to pose high risk of committing further sexual offences against children. This confirms the judge's conclusion that there was a significant risk to members of the public of serious harm occasioned by the commission by the appellant of further specified offences. Mr Csoka very sensibly conceded that in the light of that report he could not advance the argument the absence of a pre-sentence report before the judge supplied any basis for impugning his conclusion on dangerousness.

32 We have considered carefully the other points made by the appellant in his grounds of appeal. We do not consider any of them to be arguable.

33 The first ground of challenge is to the judge's decision to impose sentences above the top of the range for category 1A for the two lead offences (rape of a child under 13). There is nothing in this ground. The judge decided to select these two offences as lead offences and to impose sentences for each of them to reflect the totality of the offending on all counts, imposing concurrent sentences for the other offences. That was a permissible and indeed sensible approach. It was inevitable that he might have to impose a sentence above the category range for a single offence. In this case, the sentences imposed for the lead offences (21 years) was only just above the top of the category range (19 years). It was justified bearing in mind the totality of the offending against these three young victims.

34 Next, the appellant complains that the counts in the indictment were single incident counts but the judge nonetheless sentenced on the basis that the acts alleged and proved had happened on many other occasions. That complaint flows from a misreading of the judge's sentencing remarks. Although he referred to the evidence given by L about the frequency of the abuse inflicted on her, he also properly reminded himself that he had to sentence the appellant for the individual offences charged on the indictment, those being the offences for which he had been extradited from Romania to stand trial. There is nothing to indicate that he did not abide by that self-direction. The reference to the abuse continuing until the appellant's arrest in 2010 was not an error. The date ranges in counts 3 and 5 (which charged the rape of L) were between 2003 and 10 May 2010. The judge was entitled to find as a fact that the abuse continued until the appellant's arrest in 2010, even though, as he noted, he was sentencing for individual offences committed within the range of dates he identified. The number of years spanned by these offences was a powerful aggravating factor because it meant that the abuse had affected a large proportion of L's childhood.

35 Next, the appellant challenges the judge's reliance on the appellant's conviction from 2010. The appellant had invited the jury to reject the correctness of that conviction on the

basis that L's mother must have taken some of the pictures. But the judge was entitled to form a view himself on that question. He clearly did so and on that basis was entitled to take into account the previous convictions relating to indecent images of children. Such offences would have been relevant to sentence for the later contact offences in any event. They were especially so given that one of the images was an indecent photograph of L taken by the appellant at the same time as he was abusing her.

36 Next, the appellant challenges the judge's reliance on the material found on the appellant's mobile phone when he was extradited. Even though the judge could not know what conclusion the jury had reached about this material, the judge himself had seen it and heard evidence about it. He was entitled to take that material into account in deciding to what extent the appellant's sexual interest in children persisted. It was relevant in particular to the issue of dangerousness. Insofar as the appellant complains that this breached the specialty provisions of the Framework Decision, the complaint is based on a misunderstanding of those provisions. They limit the matters for which an extradited person can be tried or sentenced. They do not limit the ability of the sentencing court, when sentencing a defendant for those matters, to take into account material that would otherwise be relevant to sentence.

37 The final ground or grounds of challenge were set out on a manuscript page of the appellant's grounds of appeal which has gone missing. However, their substance can be gleaned from a subsequent handwritten response document filed by the appellant. He complains about double counting because he was subject to a sentence exceeding the top of the range for a category 1A offence of rape of a child under 13 and a finding of dangerousness (which had the effect that he would have to serve two thirds of his total sentence before his case could be considered by the Parole Board). There was, in our view, no double counting here. We have already explained why we consider that sentences of 21 years for the two lead counts, reflecting the overall criminality in this case, were appropriate. It was a separate question whether the appellant was dangerous. The affirmative answer to that question was unimpeachable. The effect of this on the date when the appellant could expect to have his case considered by the Parole Board flowed from the statutory provisions and was irrelevant to the sentencing exercise.

38 Insofar as the victim personal statement of L contained references to offences for which he had not been convicted, there is nothing to indicate that the judge took those matters into account. However, he rightly regarded that statement as highly relevant to the overall sentence insofar as it explained the devastating effects the appellant's conduct have had on her.

39 We can detect no error of principle or approach in the judge's sentence and no arguable basis for contending that it was too high. We therefore refuse permission to appeal on these grounds.

Conclusion

40 The appeal will be allowed to this extent only. HHJ Goodin should have specified under s. 243(2) of the 2003 Act that the appellant had spent 17 days in custody in Romania awaiting extradition for the offences. We now so specify. This means that those days will count towards the overall sentence. In the other respects referred to the full court, the appeal is dismissed and the sentence remains unaltered. As to the grounds of appeal which were not referred to the full court, permission to appeal is refused.