Sentencing Alert No 97

17 February 2015

Court of Appeal

Extension of time, Applications for

R v Thorsby and Others 2015 EWCA Crim 1 All the defendants appealed the failure to give them credit, under Criminal Justice Act 2003 s 240A, for half of the time they had spent on a qualifying curfew. All their appeals were out of time, none due to the defendants' fault. The number of days was substantial. As soon as the defendants became aware of the entitlement their legal advisors were told. Held. Neither Criminal Appeal Act 1968 nor the [Criminal Procedure] Rules limit the discretion of the Court on the issue whether an extension of time should be granted. The principled approach to extensions of time is that the Court will grant an extension if it is in the interests of justice to do so. However, there are several components that contribute to the interests of justice. The Court will have in mind finality, the interests of the [parties], the efficient use of resources and good administration. The public interest also critically embraces the justice of the case and the liberty of the individual. In none of these tag cases is it suggested that the interval between discovery and the application for leave was excessive. If a significant number of days was due, it would be right in principle to refuse an extension of time by reason only if the proportion that those days bear to the total sentence imposed (sic).[1] Where there is no good reason why the time limits were not complied with, the Court is unlikely to grant an extension unless injustice would be caused in consequence. The merits of the underlying grounds will be examined. The judgement is judicial and not merely administrative.

In the Court's experience, this Court is likely to extend time limits to correct an error of law once the error is discovered whether the fault lies in the failure of representatives to advise the Court or in the failure of the Court itself. The practice of the Court is generally to refuse a long extension of time unless injustice would be caused by refusal. It is improbable that a long extension of time would be granted on the ground that the sentence imposed was manifestly excessive, particularly when the defendant has already received competent advice to the effect that it was not. The Court will be more likely closely to examine the merits of an out of time appeal when it is argued that some principle of law or legal requirement has been ignored or overlooked.

para 16 In each of the present cases, the Crown Court failed to perform its duty under section 240A (as to which it has no discretion, since the section is mandatory in its terms), partly because of the neglect of the advocates on both sides and partly because it failed to obtain or apply the information relevant to the applicant's case. While we embrace the demand that advocates and those instructing them must perform their professional duty to the Court, we do not consider that the failure of the advocates to perform that duty can absolve the Crown Court from its statutory responsibility to give the credit required. It follows, in our view, that when the statutory duty of the Crown Court is not performed, the error in sentencing is not one of judicial assessment but one of law and of principle: a defendant, on whom no statutory duty has been placed, has been deprived of his statutory right to have his days on qualifying curfew and his credit period calculated. In the ordinary way, errors of principle or law in sentencing occur rarely and it is our experience that, when they are clear and the applicant bears no responsibility for the failure, this court is likely to take steps to correct the error even when a significant extension of time is required to achieve it. However, when the applicant, with knowledge of the error, fails to act with due diligence to make the application for an extension of time the position is likely to be different. In those circumstances, the applicant cannot be heard to complain that he has been kept out of his remedy for an error in the performance of the Court's duty that he is entitled to expect will be corrected when discovered.

para 18 Where the passage of time has obscured the entitlement itself, and the problem cannot be solved by drawing appropriate inferences in favour of the applicant, the Full Court may refuse the extension or grant the extension but refuse leave or dismiss the appeal. One or more of the cases considered by the Court in *R v Leacock and Others* 2013 EWCA Crim 1994 demonstrates that a substantial passage of time may put the Court in difficulty in resolving whether or not an error has occurred and if so to what extent. In those circumstances, the Court may not be able to conclude that it would be in the interests of justice to intervene.

Curfew discount

General principles

R v Thorsby and Others 2015 EWCA Crim 1 All the defendants appealed the failure to give credit, under Criminal Justice Act 2003 s 240A, for half of the time they spent on qualifying curfew. All

their appeals were out of time, none due to the defendants' fault. Held. The credit period is calculated as follows:

Step 1 Add up the days spent on **qualifying** curfew including the first, but not the last if on the last day the defendant was taken into custody.

Step 2 Deduct days on which the defendant was at the same time **also**: i) being monitored with a tag for compliance with a curfew requirement and/or ii) on temporary release from custody.

Step 3 Deduct days when the defendant has broken the curfew or the tagging condition.

Step 4 Divide the result by 2.

Step 5 If necessary, round up to the nearest whole number.

The decisions in *R v Leacock and Others* 2013 EWCA Crim 1994 make clear that there is a duty on the court imposing a qualifying curfew to complete the appropriate form, for court officials to ensure that the form travels with the defendant from court to court and for those representing the defendant to ensure that they have all the necessary details to hand at the time of sentence. It is for the parties to make the calculations, agree the result and inform the judge. In the unlikely event of a dispute, the judge must decide whether it is necessary and proportionate to resolve the dispute and, if so, how the dispute is to be resolved.

Appeals

R v Thorsby and Others 2015 EWCA Crim 1 All the defendants appealed the failure to give them credit for half of the time they had spent on a qualifying curfew. All their appeals were out of time, none due to the defendants' fault. The number of days was substantial. As soon as the defendants became aware of the entitlement their legal advisors were told. Held. Neither the Criminal Appeal Act nor the [Criminal Procedure] Rules limit the discretion of the Court on the issue whether an extension of time should be granted. The principled approach to extensions of time is that the Court will grant an extension if it is in the interests of justice to do so. In none of the cases is it suggested that the interval between discovery and the application for leave was excessive. If a significant number of days was due, it would be right in principle to refuse an extension of time by reason only if the proportion that those days bear to the total sentence imposed (sic). In future we expect defendants' representatives to send the Court of Appeal office the notice and grounds, either with

agreement with the prosecution, or with the necessary documentary evidence to support: a) that he or she is entitled to the tag credit and b) the number of those days. The Court of Appeal office will not routinely become the investigator for the applicant. It is the responsibility of his legal representatives to make the necessary enquiries.

Factual basis

Judge must sentence for the offences the defendant(s) had pleaded to/been convicted of

See also: *R v S* 2015 EWCA Crim 52 The Judge was wrong to use an acquittal as support for a finding of 'dangerousness' and to fix the length of the custodial term. However, if we ignore the acquittal, neither the 'dangerousness' finding nor the length of the imprisonment were wrong.

Judge determining roles played ***Better to give counsel notice before deciding***

R v B and J 2015 EWCA Crim 11 D1 and D2 were convicted of a section 18 assault. D1 and D2 were, between them, armed with one or two knives. D1, D2 and another pushed V over a wall and pursued him down the street whereupon V collapsed between two parked cars. He had been stabbed three times, which led to blood loss and poisoning, causing all of V's limbs to be amputated, and he now uses a colostomy bag. At trial, no particular roles were ascribed but nonetheless the Judge principally ascribed the stabbing to D2. Held. para 8 It may have been better for the Judge to have given counsel notice of the findings he was proposing to make.

Murder

Knife etc. ***25-year starting point***

Judical guidance

R v Dillon 2015 EWCA Crim 3 D was convicted of murder. After repeated aggressive behaviour between D and V, V started banging on D's flat door. D came out of the door and stabbed V without saying a word. V died in a pool of blood. Held. The following emerges from the authorities: a) a knife taken from a kitchen to another part of the same flat or house, including a balcony, will not normally be regarded as having been taken to the scene, even if a door is forced

open, b) conversely, if the knife is taken out of the house or flat into the street, or into another part of the premises, or on to a landing outside a flat, it will normally be regarded as having been taken to the scene, c) however, a starting point is not the same thing as a finishing point [in determining the sentence].

Suitable sentence

R v Dillon 2015 EWCA Crim 3 D was convicted of murder. He lived alone in a block of flats, next to P, who had a boyfriend, V, who lived elsewhere. V regularly visited P. P argued with a close friend of D's. P made complaints about D playing loud music day and night which affected P and V's baby. P and D's relationship was affected by untrue rumours that D was a paedophile. V stayed with P and in the morning they argued and after V had left, they exchanged angry text messages. P spent the afternoon drinking. Also during the afternoon, D was seen by P drinking on the balcony of his flat. Later that afternoon, P went out and returned in the evening and saw D in the car park behaving strangely. P followed D into the front door of flats and in the communal area outside their flat doors, P thought D said, "fat whore" or something similar. The words were repeated and P told D to "fuck off". D approached P angrily and P struggled to push her front door open. D tried forcibly to stop P entering her flat and shouted abuse. This led to P calling the police. D went out to buy beer and M, a mutual friend of V and P's, phoned V. V then entered the flat landing and angrily banged on D's door, shouting, "Get the prick out here". P told him to stop, but V returned to D's door and continued banging on the door. D opened his door and, without saying a word, plunged a knife into V's chest to a depth of 23 cm with 80% of the 11-inch blade buried. The knife damaged V's lung and penetrated his heart. A second, forceful and substantial blow was dealt by D with the knife to the back of V's head. This caused a groove in V's skull. V also received a 4 cm wound to his cheek. D then pushed V out of sight and returned to his flat where he washed the blood from the knife and replaced it in a drawer. V died shortly after at the scene having lost a great deal of blood. D then calmly went to another flat, carrying a small knife. He then calmly called the police saying that his door had been attacked and that, "I was so scared…that I got a knife". He also admitted stabbing V. The police arrived. D was incredulous at his arrest and was found to have a small stab wound which he claimed V inflicted. It was unclear how it was caused, but V did not use a knife.

D had many previous convictions for relatively minor violence (all under 6 months, the last in 2009) and dishonesty, spanning 30 years. The Judge considered the knife was taken to the scene and started at 25 years. He considered the previous convictions were an aggravating factor. He reduced the term because of the lack of an intention to kill, a lack of premeditation and because D suffered from a fear that V was going to be violent to him. Held. This case falls within paragraph 5A. However, D's dishonesty convictions are almost entirely immaterial and his violence convictions are of limited significance. With the Judge's mitigating factors, **20-year minimum term**, not 22.

Offences Against the Person Act 1861 s 18

Defendant aged 16-17 and victim caused permanent disability

R v B and J 2015 EWCA Crim 11 D1 and D2 were convicted of section 18. They were at a party with B, D1's older brother, R and others when there was a disagreement over a missing mobile phone. A fight then broke out between V and B, 'the leader of what happened'. D1 and D2 joined in and were, between them, armed with one or two knives. A knife had been passed to D1 by B. D1, D2 and R pushed V over a wall and pursued him down the street whereupon V collapsed between two parked cars. He had been stabbed three times, principally ascribed to D2. The wounds were all life threatening. One caused severe blood loss and another led to poisoning. This caused all of V's limbs to be amputated and he now used a colostomy bag, all severely affecting his quality of life. D1 was aged 17 and D2 was 16 and both were heavily influenced by their peers. Held. The Judge rightly identified this as a Category 1 case at the very top end but youth cannot be balanced and cancelled out by findings of fact adverse to any defendant. B received 16 years' detention and it was not appealed. Taking 3/4 of that due to their youth, **12 years' detention**, not 15 for both D1 (in a YOI) and D2 (under section 91).

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[1] Note: Perhaps this means the Court will not grant leave when the sentence to be served is long and the number of tag days owed is small. Ed.

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