

ENGLAND AND WALES / JUDGMENT

Hudson, R. v

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Neutral Citation Number: [2011] EWCA Crim 906 Case No: 201100348/A1 IN THE COURT OF APPEAL CRIMINAL DIVISION Royal Courts of Justice Strand London, WC2A 2LL Date: Thursday, 24th March 2011 B e f o r e: LORD JUSTICE MOSES MR JUSTICE DOBBS DBE HIS HONOUR JUDGE GORDON (Sitting as a Judge of the CACD)

- ----- R E G I N A v CHRISTOPHER PAUL HUDSON
- ----- Computer Aided Transcript of the Stenograph Notes of QWordWave International Limited A Merrill Communications Company 165 Fleet Street London EC4A 2DY Tel No: 020 7404 1400 Fax No: 020 7831 8838 (Official Shorthand Writers to the Court)
- ----- Mr P Cassidy appeared on behalf of the Applicant Mr M Monaghan appeared on behalf of the Crown
- ----- J U D G M E N T 1. 2. 3. 4. 5. 6. MRS JUSTICE DOBBS: The issue in this application is whether the sentencing judge had power to vary the sentence imposed on this 44-year-old applicant following a conviction for rape, by virtue of section 155 of the Powers of the Criminal Courts (Sentencing) Act 2000 after the 56-day period had elapsed. The case has been referred to the Full Court by the Registrar. There is an application for an extension of time within which to apply to appeal sentence. The sentence in question was dealt with on 25th November 2010 with reasons being handed down by the judge on 7th December. The form NG was received in the Crown Court on 17th January 2011. The reason for the delay are given as (a) the judge further varied his ruling in an email dated 15th December 2010; draft grounds of appeal were received from counsel on 23rd December but were not dealt with by the solicitors until their office opened in the New Year and the form was submitted to the court on 6th January. We grant an extension of time and give leave to appeal. The chronology of events is as follows. On 13th February at the Manchester Crown Court the appellant was convicted of rape. On 7th April 2008 he was sentenced to 6 years' imprisonment, with a direction that 54 days should count towards sentence. On 28th April 2009 the Court of Appeal (Criminal Division) quashed the conviction and ordered a retrial. He was admitted to bail. On 21st May 2010 the appellant was convicted of rape. On 9th July he was sentenced to 3 years and 215 days' imprisonment, with a direction that 49 days should count towards the sentence. On 25th November 2010 the sentence was varied to 6-years' imprisonment with a direction that 54 days should count towards the sentence. The judge gave his reasons on 7th December and on 15th December he made slight amendments to those reasons. The facts need not detain us save to say that the incident took place after a

drunken evening involving the appellant, a friend, the friend's girlfriend and the girlfriend's flatmate, an incident which took place at the two women's flat, where in the following morning the flatmate awoke to find her bedclothes not covering her and pyjama bottoms down and the defendant's semen was found on the inside of her thighs although he had no memory of the incident. The Variation

7. When the applicant was sentenced on 9th July 2010 the judge decided that 6 years' imprisonment was the appropriate sentence. That was the same sentence as passed at the conclusion of the first trial. It is now common ground that in order to give effect to his intention the judge should (a) have imposed a sentence of 6 years' imprisonment and
- (b) directed all the days the appellant had spent in custody prior to the original sentence, namely 54 days should count towards that sentence. Had he done so the 54 days would have been taken into account pursuant to section 240 of the Criminal Justice Act 2003 and by virtue of Schedule 2 to the Criminal Appeal Act 1968 the 8. 9. sentence of 6 years would have been deemed to have commenced on 7th April 2008, the date of sentence following the original trial. The sentencing judge made it quite clear in his remarks that he considered the 6-year period to be the appropriate starting point for the offence of rape, but he indicated that he reduced that sentence to take account of the time which had been spent in custody following the first trial which, as he understood it, as a matter of law, could not count towards the sentence on that particular occasion. Unfortunately, the judge and both counsel had overlooked the provisions of the 1968 Criminal Appeal Act. The judge, as is apparent, had mistakenly concluded that the only time he could order to count was the 49 days spent on remand in the re-trial proceedings and that he needed to deduct the time the applicant had spent in custody prior to the re-trial, to ensure that the appellant spent no more than 3 years in custody, in other words half the 6-year sentence. By that reasoning the judge arrived at the sentence of 3 years 215 days with 49 days to count. Everyone including the applicant understood that from that date he would serve half of that term. In September 2010, slightly more than 56 days after the date of sentence, the judge was made aware of information from the Sentencing Policies and Penalties Unit to the effect that, by virtue of Schedule 2 of the 1968 Act, the applicant was likely to be released earlier than the judge had envisaged when sentencing. This information was passed to counsel, and a hearing was held with the appellant present on 25th November. The court was informed that as the sentence presently stood, namely 3 years and 215 days the appellant would be released in December 2010.
10. The issue for the judge was to decide whether, in order to give effect to his stated intention, he had the power to direct that the sentence be amended to 6 years' imprisonment less 54 days and the relevant warrant be amended accordingly. Counsel for the prosecution submitted that such powers were open to him, notwithstanding that more than 56 days had elapsed since the date of sentence. Counsel for the appellant disagreed, but conceded that, up to 56 days from sentence, such powers would have been available pursuant to section 155 of the Powers of Criminal Courts (Sentencing) Act 2000. The judge ruled that he did have the powers to make the amendment and directed accordingly. 11. In coming to his decision the

judge considered the judgments of R v Gordons & Ors

[2007] EWCA Crim 165 and Nnanji & Ors [2009] EWCA Crim 468. His understanding was that the adoption of the formula recommended in Gordon, permitted the correction of a mistake as to the number of days to count towards sentence outside the 56-day limit, because (i) the intention of the court was clear at the time of passing sentence and (ii) the purpose of the correction would be to bring the sentence into line with that clearly stated intention.

12. Whilst the judge recognised the mistake in the present case was of a different kind, in his judgment Gordon and Nnanji demonstrated that there was a distinction to be drawn between an amendment to a sentence that amounted to a variation or rescission of a sentence imposed and an amendment to a sentence which amounted to the correction of the mistake. The judge concluded that his directions for the amendment of the terms of SMITH BERNAL WORDWAVE the appellant's sentence amounted to the correction of a mistake which was not significant in the sense the results (a) accorded with his stated intention on 9th July and
- (b) did not effect the time that the appellant must served pursuant to what was intended when the sentence was pronounced. The judge also noted that the appellant would not be prejudiced by the directions given on 25th November, in the sense that he would not serve a day longer than had been intended. However, he recognised the mistake and that its aftermath had caused the appellant's expectations as to when he might be released to fluctuate. He apologised to the appellant for the mistake. The Law 13. Section 155 of the Powers of Criminal Courts (Sentencing) Act read as follows: "(1) Subject to the following provisions of this section, a sentence imposed, or other order made, by the Crown Court when dealing with an offender may be varied or rescinded by the Crown Court within the period of [56] days beginning with the day on which the sentence or other order was imposed or made..."
14. The case of Gordon involved a group of appeals and applications for leave to appeal which raised common questions about the operation of and interaction between section 67 of the Criminal Justice Act 1967 and section 240 of the Criminal Justice Act 2003 and the impact on the sentencing process of time spent by defendants in custody on remand. The court also considered the jurisdiction of the Crown Court to correct its own errors and the effect of section 11(3) of the Criminal Appeal Act 1968, now reflected in section 155 of the Powers of Criminal Courts (Sentencing) Act 2000.
15. At paragraph 34 of Gordon, the President of the Queen's Bench Division (Sir Igor Judge) said: "It is well established that s 155 permits significant alterations in sentence, for example, changing a suspended sentence into an immediately effective one ... or ordering that the term of an immediate custodial sentence should be longer... The discretion to vary sentence of course may also produce a sentence of reduced severity. The power must always be exercised with great caution, not least because (subject to any appeal or reference by the Attorney General) the administration of criminal justice is hindered by doubt or hesitation

whether the order pronounced by the court as its sentencing decision is final. Everyone with an interest in the sentence (in particular the defendant and the victim) wants what is sometimes described as closure, and by long hallowed tradition the sentence of the court is effectively the culmination of the criminal process. The area in which the exercise of the power under s 155 is of particular value is where there is a need to cure what would otherwise be an unlawful sentence.

35. Once the 28 day period has expired, the power to vary or rescind a sentence imposed in the Crown Court expires." SMITH BERNAL WORDWAVE At paragraph 49 he said this: "We shall briefly return to s 155 of the 2000 Act. Our conclusion is that save in very limited circumstances an extension to the 28 day period is impermissible. This period coincides with the time for any appeal against conviction or sentence. On occasions when an appeal is launched it is immediately apparent that the point, although correct, is purely technical. For example, the judge may have passed a sentence on one of the lesser counts of the indictment which is in excess of the permitted maximum. If the 28 day period allowed under s 155 were extended to, say, 42 days, a number of appeals against sentence in particular could probably be dealt with by referring them back to the original Crown Court to correct an oversight. At present, once the 28 day period allowed under s 155 has expired, such cases require the attention of the CACD. That is not an appropriate use of limited resources." 16. 17. 18. 19. It should be noted now that the statutory period of 28 days referred to in Gordon has now been extended to 56 days by virtue of the Criminal Justice and Immigration Act 2008. In Nnanji the court considered the effect of any direction made under section 240 of the Criminal Justice Act 2003 for time spent on remand to be deducted from any sentence of imprisonment imposed. The court also considered the situation where the error in calculation of the number of days to be deducted came to light outside the period, permitted to alteration by virtue of section 155. At paragraph 9, Thomas LJ observed that as a matter of practice errors are still being made, as to the calculation of numbers of days to be deducted, such errors not being picked up even within the time period allowed for amendment. He suggested two solutions to the problem: firstly, reconsideration by the Parliament of section 240 but, pending that, use of the formula suggested in Gordon which allowed, in the event that the information about days to be credited given to the judge at the time of sentencing was incorrect to be amended. In this case the learned judge made an error of law. He mistakenly believed (and was not assisted by counsel) that the starting point of his sentence was the date on which he passed sentence, as opposed to the date of the sentence at the original trial. Thus he passed that sentence of 3 years and 215 days minus the time served. The effect of his error was that the defendant would serve less than he otherwise would have done. It is correct to note that in Gordon the court envisaged a situation where a sentence could be amended outside the time period allotted but this was a situation where the amendment would have no effect on the overall sentence passed. In the present case the sentence passed was shorter than the original sentence. It was not a case of adjusting the calculation of days spent on remand, which would have no effect on the recorded sentence passed, but would be pertinent to the administrative side of what was

actually to be served of that sentence. Nor is this a case of amending an unlawful sentence as envisaged in Gordon that has no effect on the overall sentence. This was the passing of a significantly lower sentence. It was a matter of substance. SMITH BERNAL WORDWAVE

20. Whilst it is correct to say that the judge had indicated in his sentencing remarks of 9th July 2010 that he considered 6 years to be the appropriate starting point, it does not get around the fact that the sentence actually passed, as opposed to any number of days to be credited for time spent on remand, was significantly different.
21. We have every sympathy with the judge who, at the hearing for the variation was between a rock and hard place. But in our judgment, he erred in finding that he did have power to amend the sentence outside the 56-day time limit. 22. It follows therefore that the variation made in November 2010 was unlawful and stands to be quashed. This leaves the original sentence passed on 9th July 2010 which will stand, namely a sentence of 3 years and 215 days with 49 days to count, the effect of which, of course, is that the appellant will in fact have served a shorter sentence than that originally envisaged, but that is the way it has to be in this case in the light of the error. 23. It follows therefore that this appeal against sentence accordingly is allowed. SMITH BERNAL WORDWAVE

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