

ENGLAND AND WALES / JUDGMENT

Norman & Ors, R. v

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Neutral Citation Number: [2006] EWCA Crim 1792 Case No: 2006/1032/A6 & ORS IN THE SUPREME COURT OF JUDICATURE COURT OF APPEAL (CRIMINAL DIVISION) ON APPEAL FROM (1)THE CROWN COURT AT MIDDLESBOROUGH HIS HONOUR JUDGE TAYLOR (2)THE CROWN COURT AT WOLVERHAMPTON MR RECORDER BAKER, QC (3)THE CROWN COURT AT MIDDLESEX GUILDHALL HIS HON JUDGE SIMON SMITH

(4) THE INNER LONDON CROWN COURT HIS HON JUDGE VAN DER WERFF

5) THE CROWN COURT AT BLACKFRIARS HIS HONOUR JUDGE WALKER (6)THE CROWN COURT AT SWANSEA HIS HONOUR JUDGE GERALD PRICE Royal Courts of Justice Strand, London, WC2A 2LL Date: 20/07/2006 Before : LORD JUSTICE LATHAM (VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION) MR JUSTICE FORBES and MR JUSTICE IRWIN

- ----- Between : 2006/1032/A6 2006/0740/A4 2006/0979/A6 2006/1204/A1 2006/1432/A3 2006/1193/A0 THE QUEEN

- and - Shane Martin NORMAN Jaameed HUSSAIN Jason EGAN Lee Alan WALTON Ambrose Otsemobor IGBANOI Rodney Phillip CORY Appellant Respondents

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- ----- Mr Richard Whittam (instructed by CPS York) for the Prosecution A Braithwaite (instructed by Clark Willis Solicitors, 105, Bondgate, Darlington) for the appellant Shane Martin Norman S Crawford (instructed by Challinors Ltd) for the appellant Jameed Hussain J Shepherd (instructed by Powell Spencer & Partners) for the appellant Jason Egan P Shaw (instructed by Harters, London) for the appellant Lee Alan Walton N Marney (instructed by Rock Solicitors) for the appellant Ambrose Otsemobor Igbanoi F Phillips (instructed by Graham Evans & Partners) for the appellant Rodney Phillip Cory
Hearing dates : 26th June 2006

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Judgment

Judgment Approved by the court for handing down (subject to editorial corrections) R –v- Shane Martin Norman & Ors Lord Justice Latham:

1. These appeals raise a variety of issues arising out of the provisions of section 240 of the Criminal Justice Act 2003 (the 2003 Act). This section imposes an obligation on judges when passing sentence to make a specific direction that the number of days that the offender has spent in custody on remand in connection with the offence or a related offence should count as part of the sentence being served. We will return to the detailed provisions later. The purpose of the Section was to bring clarity and transparency to the process of sentencing, and in particular to the effect of any particular sentence. It replaced, in relation to offences committed on or after the 4th April 2005, the commencement date of the relevant provisions, section 67 of the Criminal Justice Act 1967 (the 1967 Act) under which period spent in custody on remand were taken into account administratively by the Prison Service when calculating the number of days that a particular prisoner had to serve. The application of this provision has undoubtedly caused difficulty, not least because of successive amendments to deal with changing sentencing regimes.
2. The principle behind both section 67 of the 1967 Act and section 240 of the 2003 Act, is that time spent on remand should count towards the serving of the sentence ultimately imposed. But, like many apparently clear principles it is not always easy to apply in practice. Although the six appeals raise a number of different issues, a clear theme emerges, which is that there are difficulties in ensuring that courts have accurate information about relevant periods of custody at the time of sentence, and what a court should do if it is subsequently discovered that incorrect information has been given. This problem was referred to by the court in R – v- Oosthuizen [2005] EWCA Crim 1978. The present cases provide an opportunity to look in more detail at the relevant statutory provisions.
3. Section 240 of the 2003 Act provides: “(1) This section applies where:-
 - (a) A court sentences an offender to imprisonment for a term in respect of an offence committed after the commencement of this section, and
 - (b) The offender has been remanded in custody (within the meaning of section 242) in connection with the offence or a related offence, that is to say, any other offence the charge for which was founded on the same facts or evidence. (2) It is immaterial for that purpose whether the offender –
 - (a) Has also been remanded in custody in connection with other offences; or
 - (b) has also been detained in connection with other matters. Subject to sub-section (4), the court must direct that the number of (3) days for which the offender was remanded in custody in connection with the Judgment Approved by the court for handing down (subject to editorial corrections) R –v- Shane Martin Norman & Ors offence or a related offence is to count as time served by him as part of the sentence. (4) Sub-section (3) does not apply if and to the extent that –
 - (a) Rules made by the Secretary of State so provide in the case of –

- (i) A remand in custody which is wholly or partly concurrent with the sentence of imprisonment or (ii) A sentence of imprisonment for consecutive terms or for terms which are wholly or partly concurrent, or
- (b) It is in the opinion of the court just in all the circumstances not to give a direction under that sub-section. (5) in open court – Where the court gives a direction under sub-section (3), it shall state
 - (a) The number of days for which the offender was remanded in custody, and
 - (b) The number of days in relation to which the direction is given. (6) Where the court does not give a direction under sub-section (3), or gives such a direction in relation to a number of days less than that for which the offender was remanded in custody, it shall state in open court –
 - (a) that its decision is in accordance with rules made under paragraph
 - (a) of sub-section (4), or
 - (b) that it is of the opinion mentioned in paragraph (b) of that subsection and what the circumstances are. (8) for the purposes of the references to sub-section (3), to the term of imprisonment to which the person has been sentenced (that is to say, the reference to his “sentence”), consecutive terms and terms which are wholly or partly concurrent are to be treated as a single term if –
 - (a) The sentences were passed on the same occasion, or
 - (b) Where they were passed on different occasions, the person has not been released under this Chapter at any time during the period beginning with the first and ending with the last of those occasions. This section applies to a determinate sentence of detention under (10) section 91 of the Sentencing Act or section 228 of this Act as it applies to an equivalent sentence to imprisonment.” Judgment Approved by the court for handing down (subject to editorial corrections) R -v- Shane Martin Norman & Ors
- 4. The rules referred to in sub-section (4) are contained in The Remand in Custody (Effect of Concurrent and Consecutive Sentences of Imprisonment) Rules 2005 (the 2005 Rules). These provide by Rule 2: “Section 240(3) of the 2003 Act does not apply in relation to a day for which an offender was remanded in custody –
 - (a) If on that day he was serving a sentence of imprisonment (and it was not a day one which he was on licence under Chapter 6 of Part 12 of the 2003 Act or Part 2 of the Criminal Justice Act 1991; or
 - (b) Where the term of imprisonment referred to in sub-section (1) of that section is ordered to be served consecutively on another term of imprisonment, if the length of that other term falls to be reduced by the same day by virtue of section 67 of the Criminal Justice Act 1967.”
- 5. It should be noted that section 240 of the 2003 Act applies only where a sentencing judge

imposes a determinate sentence in relation to an offence committed on or after the 4th April 2005. The judge, as we have already said, is under a duty under section 240(3) to give a direction as to the number of days which the offender was remanded in custody which are to count as time served by him as part of the sentence. That must be stated in open court. And if the number of days to count towards the sentence is less than the number of days for which he was remanded in custody, the judge must explain which of the provisions of Section 240(4) is being applied, and if it is section 240(4)(b) what the circumstances are which justify the conclusion that it would be just not to give a direction. 6. In December 2004 the Sentencing Guidelines Council issued a guideline entitled “New Sentences: Criminal Justice Act”, which in relation to Section 240 was summarised in the following terms: “The court should seek to give credit for time spent on remand in all cases. It should make clear when announcing sentence, whether or not credit for time on remand has been given and should explain its reasons for not giving credit when it considers that this is either not justified, would not be practical, would not be in the best interest of the offender.”

7. This obligation can only properly be met by the court if it is provided with reliable information. This task is undertaken by the Prison Service in accordance with Prison Service Order No 6650. The National Offender Management Information System will, it is hoped, ensure that the relevant information is available to the courts. And we understand that the Prison Service intend to have an Establishment Liaison Officer who will be a single point of contact for the courts and available at short notice by telephone. But it is likely that the problems will still arise. If inaccurate information has been given, the only express power which a court 8. has to correct any resulting mistake is under section 155 of the Powers of the Criminal Courts (Sentencing Act) 2000 (the 2000 Act) which provides: Judgment Approved by the court for handing down (subject to editorial corrections) R –v- Shane Martin Norman & Ors Subject to the following provisions of this section, a “(1) 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 twenty-eight days beginning with the day on which the sentence or other order was imposed or made or, where sub-section (2) below applies, within the time allowed by that sub-section. (4) The sentence or other order shall not be varied or rescinded under this section except by the court constituted as it was when the sentence or other order was imposed or made, or where that court comprised one or more justices of the peace, a court so constituted except for the omission of any one or more of those justices.”
9. The existence of this express power means, in general terms, that there is no room for a mistake to be remedied in any other way. We say generally speaking because the courts have recognised exceptions in very limited circumstances, one example is R –v- Saville (1980) 2 Cr App R (S) 26. In this case, the Crown Court having made a criminal bankruptcy order in the sum of £5,000 failed to identify how that was to be distributed between the offences. The judge subsequently, but after the 28 day period provided by section 11(2) of the Courts Act 1971, the predecessor to section 155, purported to rectify the court’s order. This court held that he was entitled to do so as it was “an adjustment of an inchoate order which at that

moment existed.” Essentially the court concluded that where an amendment was required which had no effect on the sentence or other orders made, but merely corrected an error, the court was entitled to do so. It also approved a decision of Judge Rubin in Michael [1976] QB 414, where he held that the court had an inherent jurisdiction to correct an order which was drawn up in a way which did not reflect what the judge had ordered. This essentially followed from the principle that the order of the court is the order pronounced by the judge in open court: see R –v- Kent 77 Cr App R 120.

10. With those preliminary remarks we turn to the individual appeals, each of which raises a slightly different practical problem, and in some of which there are other issues which we have to determine on the appeals. Norman
11. On the 25th November 2005, at the Crown Court at Teesside, the appellant was sentenced as follows:
 - i) On an indictment to which he had pleaded guilty, three years imprisonment for an offence of burglary, three months imprisonment concurrent for possessing amphetamine, and three months imprisonment concurrent for possessing cannabis; ii) On a committal for sentence, he having pleaded guilty in the Magistrates Court, to 18 months imprisonment for dangerous driving, to be served consecutively to the sentences imposed on the indictment and to three months Judgment Approved by the court for handing down (subject to editorial corrections) R –v- Shane Martin Norman & Ors imprisonment for failure to surrender to bail, to be served consecutively to the sentence for dangerous driving.
12. Having committed an offence before the expiry of the full term of an earlier sentence of imprisonment, he was ordered to be returned to custody to serve the remaining period of 388 days under section 116 of the Powers of Criminal Courts (Sentencing) Act 2000 to be served before the sentence for the offences on the indictment and committal for sentence. No direction was given under section 240 of the 2003 Act. On the 28th November 2005, the Court record was amended to the effect that a direction had been given under section 240 of the 2003 Act in respect of 136 days. The court clearly had no power to do so administratively. The matter then came back before the judge for variation of sentence pursuant to section 155 of the 2000 Act at which time it was submitted on behalf of the appellant that the correct direction should have been for 165 days. The judge adjourned the hearing for further enquiries to be made. When the matter came back before the judge on the 16 th January 2006, he concluded, as was the case, that he no longer had jurisdiction under section 155 to vary the order. The appeal comes before us by reason of a certificate of fitness to appeal granted by the trial judge, as to which the judge said: “The information given to me in respect of time on remand which I said he should have had credit for was incorrect. By the time the correct information came to hand more than 28 days had passed. I would have given him full credit.”

13. The offences of burglary, possession of cannabis and amphetamine were all committed before the 4th April 2005. The sentences of imprisonment imposed for those offences fall to be dealt with, so far as the remand period is concerned, under section 67 of the 1967 Act. No direction under section 240 of the 2003 Act could therefore be given in relation to these offences. As the sentences for dangerous driving and failure to surrender to bail were to be served consecutively to these sentences, the provisions of Rule 2(b) of the Remand in Custody (Effect of Concurrent and Consecutive Sentences of Imprisonment) Rules 2005 (the 2005 Rules) apply. As the remand period will be taken into account fully under section 67 of the 1967 Act, there is no period to which section 240 of the 2003 Act can apply. The purported direction added administratively must be rescinded as the Court had no power to make it. For the purpose of this judgment, it is assumed that period to be credited under the 1967 Act is 136 days or more.
14. The appellant further submits that so far as the totality of the sentence is concerned, the judge failed to appreciate that by ordering the appellant's return to prison for 388 days, the consequence was a sentence in excess of 5 years and 9 months. It is submitted on his behalf that the judge does not appear to have approached the matter as recommended by this court in *R –v- Taylor* [1997] EWCA Crim 2020. In that case Rose LJ indicted that a sentencing tribunal should first decide what the appropriate sentence was for the new offence or offences and then the question of return to prison and if so for what period. In his sentencing remarks the judge started by directing his return to prison and then turned to the sentences for the offence in question. There is no doubt that the practice suggested by the Vice President helps a sentencing tribunal to ensure that it has the totality of the sentence in mind, when deciding if and to what extent it should exercise its power to order a return to prison. The question that we have to ask at the end of the day is whether the Judgment Approved by the court for handing down (subject to editorial corrections) *R –v- Shane Martin Norman & Ors* sentence in the present case was manifestly excessive. Despite the fact that the judge did not deal with the matter as indicated in *Taylor*, we do not consider that it was.
15. The consequence is that we extend time, and allow the appeal to the extent that the purported order under Section 240(3) of the 2003 Act is rescinded, on the basis that 136 days or more will be credited under section 67 of the 1967 Act. Hussain
16. On the 13th December 2005 in the Crown Court at Wolverhampton the appellant pleaded guilty on re-arraignment and on the 10th January 2006, was sentenced to imprisonment for public protection on a count of attempted robbery; and in relation to two counts of racially aggravated fear or provocation of violence, the Recorder imposed no separate penalty. In relation to the sentence of imprisonment for public protection, the period of three years six months was specified. The Recorder took as a starting point a determinate sentence of seven years taking into account his plea. In determining that three and a half years was the minimum term, he said: "In coming to that minimum term I, of course, have taken note of the time spent in custody, which is 152 days, and I have taken that into account in coming to

the broad sentence.”

17. There is some uncertainty as to whether or not, at a later stage, the court record was amended so as to direct that the 152 days should be deducted from the minimum term of 3 and a half years. If that indeed did happen, it should not have done. The order as made by the Recorder, should have provided expressly for the 152 days; but that could not be remedied administratively. It would have to be done under section 155 of the 2000 Act. The purported amendment therefore did not reflect what the judge had said. The only point in relation to section 240 of the 2003 Act which arises in this case is that it does not apply to cases of indeterminate sentences. As we have indicated the only proper way to carry out the relevant calculations for indeterminate sentences is set out by Rose LJ in R –v- Lang [2005] EWCA Crim 2864 at paragraph
10. It is also relevant to point out that the Recorder was also wrong to have imposed no separate penalty in relation to the two counts of racially aggravated fear or provocation of violence. On the basis that he was correct in imposing a sentence of imprisonment for public protection, he must have concluded that the applicant was a dangerous offender. Accordingly concurrent extended sentences should have been imposed: Lang paragraph 20.
18. But the real issue in this appeal is whether or not a sentence of imprisonment for public protection was justified on the facts. The incidents which gave rise to the charges that the applicant faced took place in the early hours of the morning of the 11th August 2005. The complainant had just left a restaurant and was going back to his car which was parked in an alley way near by. As he was preparing to start the car, the applicant got into the front passenger seat and demanded that the complainant gave him a lift round the corner. The complainant refused. The applicant assaulted him and demanded the car keys from him. A struggle ensued. The complainant got out of the car and tried to run away; but the applicant caught up with him, knocked him to the ground, kicked him, and then tried to prise the car keys from his hand by twisting his fingers back. Judgment Approved by the court for handing down (subject to editorial corrections) R –v- Shane Martin Norman & Ors
19. By then the police had arrived. He tried to run away, but was stopped and held against the bonnet of a police car. He became violent and verbally abusive to the officers; and to one of them he said in no uncertain terms “Paki bastard. I am going to fuck you up Park Lane. The Taliban are going to fuck you up. You don’t know who you are fucking with.” To the other officer he said “White boy bastard” and threatened him. He also struck that officer in the head and mouth with his knee while trying to free himself.
20. The applicant had a number of relevant previous convictions. In 1998, he was convicted of robbery and given a 12 months supervision order. In July 2002 he was fined for an offence of assault occasioning actual bodily harm. In 2004 he was given a Community Rehabilitation Order for two years for an offence of assault occasioning actual bodily harm and religious harassment by use of words. In February 2005 for using threatening, abusive or insulting words he was sentenced to a Community Punishment Order for 120 hours. In April 2005 for

using threatening abusive or insulting words he was sentenced to imprisonment for two months. The pre-sentence report recorded that he had obviously been drinking at the time of these offences and because of his previous convictions stated: “There appears to be a notable risk of violence towards the public at large.”

21. The Recorder, having noted that attempted robbery was a serious offence for the purpose of the Criminal Justice Act 2003 stated: “I am quite satisfied, for two reasons, that in your case until you can sort yourself out, you pose to the public a significant risk to members of the public of severe harm, ... of serious harm by the commission of various specified offences, in other words I am quite satisfied that you have crossed the threshold of dangerousness within the 2003 Act. The two reasons that lead me to that conclusion are these. You have a previous conviction for robbery albeit in 1998, and you have two later convictions for assault causing actual bodily harm amongst other convictions but those are the three which I am entitled to take into account to presume that you pose that risk to the public. Secondly, the pre sentence report quite specifically makes the point, and I will just quote it “there appears to be a notable risk of violence towards the public at large.””
22. The Recorder was undoubtedly correct in approaching the matter on the basis that pursuant to section 229(3) of the 2003 Act there was a presumption that the applicant presented a risk to the public of serious harm occasioned by the commission by him or further specified offences to use the words of section 225(1)(b). The question raised by the applicant’s counsel is whether or not it would be reasonable to apply the presumption in the circumstances of this case. Counsel points out that the specified offences do not indicate that there was any risk of serious harm within the meaning of Judgment Approved by the court for handing down (subject to editorial corrections) R –v- Shane Martin Norman & Ors Egan the relevant sections, which is defined by section 224(3) of the 2003 Act as “death or serious personal injury, whether physical or psychological.” He points out that the only evidence of injury as a result of his previous conviction was of grazing and bruising to one complainant in the offences in August 2004, and a cut and back pains to the other. Otherwise there was nothing to suggest that any of the three specified offences carried with them the risk of his having caused serious harm. He submits that the injuries received by the victims in the present case fall into a similar category. In our judgment there is force in these submissions. As has been acknowledged, the Recorder was right to conclude that there was a presumption of dangerousness; but the facts of the previous offences, together with the facts of the present offence, make it in our view, unreasonable to conclude that the presumption should apply. Clearly there is a real risk of the applicant once again resorting to violence. That is acknowledged in the pre-sentence report. But his background does not suggest that there is a real risk of his causing death or really serious injury.
23. It follows that we grant him leave to appeal against his sentence and allow the appeal. In our view the Recorder was entitled to take the view that a determinate sentence of seven years was appropriate. Accordingly we substitute a sentence of seven years imprisonment for the charge of attempted robbery. In relation to the two counts of racially aggravated fear or

provocation of violence, there will be sentences of two years imprisonment concurrent with each other and concurrent to the sentence in respect of the attempted robbery. We direct under section 240 of the 2003 Act that 152 days should count as time served by him as part of the sentence.

24. This case presented the sentencer with a complex sentencing problem. The applicant seeks leave to appeal against a total sentence of 30 months imprisonment imposed on him on the 23rd January 2006. At the Crown Court at Middlesex Guildhall the judge directed that 142 days spent on remand was to count towards the sentence. The grounds of appeal are that the judge should have directed that a further 26 days should count towards his sentence and that, in any event, some of the sentences imposed upon him were unlawful.
25. The first offences for which he was sentenced were committed in January 2005. They were an offence of taking a motor vehicle without consent and possessing a bladed article. The appellant took a BMW motor car whilst its owner went to close her garage door. Police officers spotted the vehicle later and saw the applicant and another man approach the vehicle. The officers challenged them but they ran off. The applicant was ultimately caught and found to have a lock knife with a four inch blade in his possession. For reasons which do not appear in the papers before us, these offences were not dealt with by the courts until 10th January 2006, when having pleaded guilty to them, he was committed for sentence pursuant to section 3 of the 2000 Act in respect of the offence of possessing the bladed article and pursuant to section 6 of the 2000 Act in respect of the offence of taking a motor vehicle without consent.
26. The next offences for which he was sentenced arose out of events on the 29th April 2005 when police spotted the applicant driving a Peugeot motor car which had been reported stolen. When they approached him, the applicant attempted to drive away but the vehicle stalled and the officers seized the key. He was ultimately on the Judgment Approved by the court for handing down (subject to editorial corrections) R –v- Shane Martin Norman & Ors 10th January 2006 committed for sentence pursuant to section 6 of the 2000 Act for offences of using a vehicle without insurance, taking a vehicle without consent and, subsequently, failing to surrender in that he failed to appear in relation to those offences at the Brent Magistrates Court on the 28th November 2005.
27. On the 17th May 2005, the applicant walked into a flat above a public house through an unsecured door and was found there by one of the residents as he was searching a room. He was arrested and ultimately sentenced on the 7th October 2005 in the Crown Court at Middlesex Guildhall to a 12 month Community Sentence Order with a Drug Rehabilitation Requirement and a Supervision Requirement. In relation to this offence he had been in custody on remand for 142 days.
28. He remained at liberty from the date of that sentence until the 28 th December

2005. During that time, on the 22nd November 2005, he was seen to try to force the rear off-side window of a Toyota motor car and was arrested. He failed to appear at Horseferry Road Magistrates Court on the 29th November 2005 in relation to that offence for which he was ultimately committed for sentence again on the 10 th January 2006 pursuant to section 6 of the Powers of 2000 Act for offences of interfering with a vehicle and failing to surrender.
29. Finally on the 28th December 2005 he was recognised by a police officer as a passenger in a vehicle, was arrested whereupon he resisted and had to be forcibly restrained. He was remanded in custody after that incident from the 29 th December 2005 until he was ultimately sentenced. As far as the incident on the 28th December was concerned, he was charged with an offence of resisting a constable in the execution of his duty, and was again committed on the 10th January 2006 for sentence pursuant to the provisions of section 6 of the 2000 Act.
30. The ultimate sentence of 30 months imprisonment imposed by the judge was constructed as follows:
- i) Burglary – 18 months imprisonment ii) Possession of a bladed article 4 - months imprisonment iii) The two offences of taking vehicles without consent - 6 months imprisonment to be served concurrently with each other and concurrently with the offence of possession of a bladed article but consecutive to the sentence for burglary. iv) Interfering with a motor vehicle - three months imprisonment to be served consecutively to the other sentences.
 - v) The two failures to surrender - 1 month imprisonment concurrent to each other but consecutive to the other offences vi) Resisting a constable - two months imprisonment, again consecutive to all the other sentences.
31. As we have said, the judge gave a direction pursuant to section 240 of the 2003 Act in respect of the period of 142 days prior to the applicant's sentence for burglary Judgment Approved by the court for handing down (subject to editorial corrections) R –v- Shane Martin Norman & Ors in October 2005. But he declined to make any direction in relation to the 26 days from the 29th December 2005 to the date of sentence. As to the latter he said: "Well, I am not concerned with giving credit for his being in custody after breaching the order and then committing further offences, he deserved to be there."
32. As far as the 26 days are concerned, the judge was right not to direct that they should count towards the serving of the sentence. The offence of burglary was committed before the 4th April 2005; and as we have said before, as a result of the sentences being served consecutively, section 240(3) does not apply by reason of the provisions of Rule 2(b) of the 2005 Rules. It should be noted that the direction given in relation to the 142 days reflects a change from the position under section 67 of the 1967 Act under which time spent on remand prior to the imposition of a community order did not count towards the serving of any sentence imposed after its breach.

33. However, there are considerable difficulties about the structure of the sentences that the judge chose in arriving at the overall sentence of 30 months imprisonment. The committals pursuant to section 6 of the 2000 Act carried with them a maximum sentence, in total, of 6 months imprisonment, being the maximum which the Magistrates' Court could impose. In relation to the possession of the bladed article and interfering with a motor vehicle, both carried a statutory maximum of three months imprisonment; and as far as taking and driving away is concerned that carried a maximum of 6 months imprisonment. It follows that the judge imposed the maximum in relation to those charges. And finally, the maximum sentence for resisting a police constable in the execution of his duty is one month imprisonment, so that the judge, in imposing a sentence of two months imprisonment exceeded that maximum.
34. It follows that the maximum sentence available to the judge in relation to the offences for which the applicant was committed for sentence was nine months imprisonment being six months for the offences committed pursuant to section 6 of the 2000 Act and 3 months for the possession of the bladed article. If the sentence for the burglary remains at 18 months, the total would therefore be 27 months imprisonment. Whilst we would have the power to increase the sentence imposed for the burglary, if we felt that the overall sentence of thirty months imprisonment was not manifestly excessive, we consider that it would not be right for us to interfere with the sentence for the burglary in all the circumstances of this case.
35. We therefore give the applicant leave to appeal against sentence. We allow the appeal to this extent, namely that the sentence for possession of a bladed article should be one of two months imprisonment to reflect credit for the plea of guilty, to be served consecutively to the 18 months imprisonment for the burglary. As far as the offences of taking vehicles without consent are concerned, four months imprisonment on each to be served concurrently; as far as interfering with a motor vehicle is concerned two months imprisonment concurrently; as far as the two offences of failing to surrender are concerned one month imprisonment concurrent but consecutive to the other offences committed under section 6 of the 2000 Act; finally for resisting a constable, one month imprisonment again consecutive to the other sentences for the committals under section 6. The result is a total sentence of 6 months imprisonment in respect of those committals to be served consecutively to the Judgment Approved by the court for handing down (subject to editorial corrections) R –v- Shane Martin Norman & Ors other sentences. The total is accordingly 26 months imprisonment; and we direct that the 142 days for which the offender was remanded in custody as we have identified above is to count as time served by him as part of the sentence. For the reasons that we have given in paragraph 32 above no direction is made in respect of the 26 days from the 29th December 2005 to the date of sentence. Walton
36. This appellant, who is now 18 years of age, was sentenced on the 17 th February 2006 to three years seven months detention under section 91 of the Act 2000 Act and a direction was given that a period of 182 days spent on remand would count towards his sentence. On the 13th March 2006 the matter was brought back before the sentencing judge, HHJ Van der

Werff, because the prison service had then recalculated the number of days spent on remand as a result of the fact that a part of the remand period included a period whilst he was serving a Detention and Training Order. If that period was deducted from the overall period, the number of days spent on remand would be 86 days. The judge does not appear to have made a substantive order deducting that period, but granted a certificate of fitness for appeal pursuant to section 11 of the Criminal Appeal Act 1968 in the following terms: “When calculating the number of days credited to the offender and therefore to count as time served by him as part of his sentence (under section 240 of the Criminal Justice Act 2003) should any custodial period which would have been deducted from another sentence under the early release provisions but which was not so deducted because he was in custody for the incident offences be added to the days to be credited?”

37. The appellant further seeks to appeal the sentence on the grounds that the sentence was manifestly excessive.
38. The facts are as follows. The appellant, who was 17 years old at the time, and his friend Dean Rees, who was then 18 years old, lived in the same area of London as the complainant. In that area there were rumours that the complainant had indecently assaulted a young girl. As a result the complainant had left the area for some months. He returned on the 6th April 2005 and was alighting from a bus in the early hours of the morning when he saw the appellant and Rees who were on bicycles. He was frightened and ran off; but they pursued him. Rees knocked him to the ground and took a £10 note and a mobile phone from his trouser pocket. Rees then lifted him up and said “If you tell anyone I will burn your house down”. Whilst he was being held by Rees the appellant punched him to the side of the head before they both made off.
39. The main ground of appeal in relation to the substantive sentence is disparity. Rees was sentenced to 2 years 3 months detention in a Young Offenders Institution. It is submitted that the part he played in the robbery was the major part; and accordingly the appellant, it is said, has a genuine sense of grievance that he has been treated more severely.
40. The judge explained the difference in sentencing quite clearly. He described the appellant as a persistent young offender with a truly appalling and dreadful record, to the extent that he had considered whether or not a sentence of detention for public Judgment Approved by the court for handing down (subject to editorial corrections) R –v- Shane Martin Norman & Ors protection should be imposed. He had been sentenced to four previous detention and training orders, the first for motoring offences including taking a motor vehicle without consent and aggravated vehicle taking, the second for burglary and theft, the third for causing grievous bodily harm with intent, and the fourth for a serious offence of aggravated vehicle taking. Rees on the other hand, had significantly fewer and less serious previous convictions. In all the circumstances, whilst we accept that the sentence was a severe one, we do not consider that it was manifestly excessive nor that the disparity between it and the sentence imposed on Rees meant that it was wrong in principle, bearing in mind the very real difference between their respective records.

41. Turning then to the question certified by the judge, the direction that he gave in the first instance was one which was entirely correct unless he intended to exercise his power under section 240(4)(b) of the 2003 Act on the basis that it would be just in all the circumstances not to give a direction. The position, as is agreed before us, is that for the period that the appellant was subject to a Detention and Training Order, he was also on remand in custody for this offence. A detention and training order is not a sentence of imprisonment for the purposes of section 240(4)(a)(i), so that it remains a period which is required to be taken into account unless the judge exercises his discretion, as we have said, under section 240(4)(b). And if he exercises such a discretion, he must state what the circumstances are justifying that exercise of the discretion pursuant to section 214(6)(b). There is nothing to suggest that the judge considered the exercise of the discretion. The Prison Service had, in effect, asserted that the mere fact that he was serving a Detention and Training Order was in itself the justification for not counting those days. For the reason that we have given above, that is not a sufficient reason in itself. Counsel for the appellant has also raised a subsidiary issue. Twenty-eight days of the period that the appellant spent subject to the Detention and Training Order, was a period as to which he had been notified that he would be released on early release. But that could not be effected because of his continuing remand in custody. Clearly if the judge had considered exercising his discretion under section 240(4)(b) in relation to the Detention and Training Order, a relevant consideration would have been whether the whole of that period should have been excluded in the circumstances of the case.
42. In those circumstances, the right order was the original order made by the Judge namely a direction that 182 days should count towards the serving of his sentence, in the absence of any proper exercise of his discretion under section 240(4)(b). The documents before us suggest that the order drawn up by the court is in the form of the judge's original order, in which case the appeal is dismissed. If we are wrong, and the order was varied on the 13th March to substitute 86 days, then the appeal should be allowed so as to restore the original figure of 182 days. Igbanoi
43. In this case, the applicant was sentenced to 3 years imprisonment on the 26th October 2005, with a direction under section 240(3) of the 2003 Act that 114 days was to count towards the sentence. In fact that was inaccurate. As the judge himself identified earlier in his sentencing remarks, the whole of the period that the appellant had spent on remand "since 3rd June" was to count towards the sentence. The proper calculation for that period should have been 146 days. This is, in our view, a classic example of a situation in which the matter should be dealt with by an amendment of Judgment Approved by the court for handing down (subject to editorial corrections) R –v- Shane Martin Norman & Ors the court record to show the true effect of the judge's order. But as the matter is before us we extend time within which to appeal, we give leave to appeal, and we substitute 146 days for the 114 days directed by the judge to count towards his sentence. Cory & Miller

44. On the 3rd March 2006 the appellant Cory and the applicant Miller were sentenced to three years imprisonment each for conspiracy to supply a class C drug, cannabis. As far as Miller was concerned, the judge directed that the period of 98 days spent on remand should count towards his sentence. On the 3rd March 2006, the judge purported to vary that sentence so as to direct that only two days spent on remand would count towards the sentence. Cory appeals against his sentence with leave of the single judge. The Registrar has referred Miller's application for leave to appeal direct to the full court.
45. The facts were that on the afternoon of the 1st July 2005, police officers saw Miller drive a co-defendant to a block of flats where Cory lived. Both men got out and went inside. About 15 minutes later they re-emerged together with Cory and his girlfriend. They drove to another block of flats where Cory and his girlfriend left them for a short time, Cory returning with a rucksack which he handed to Rees and returned to the flats. Miller and Rees then drove away. Their car was followed and stopped. The rucksack was found to contain 17 bars of cannabis resin weighing a total of 4.25 kilograms. Forensic evidence showed that the material found in Cory's home was consistent with the wrappings round the cannabis. When interviewed Cory declined to comment. Miller said that following his release from a previous sentence for possession of drugs with intent to supply he had been told that he had a drug debt which would be wiped out if he collected the drugs in question.
46. Each put forward a basis of plea which was accepted. Cory said that he was a custodian of the drugs for which he would receive £300. Miller confirmed the account he gave in his interview, namely that he had agreed to collect these drugs and money on this occasion in order to extinguish what was said to be a drug debt.
47. The judge concluded that they were involved in a large scale drug trafficking enterprise and both had previous convictions for drug trafficking. He noted that both of them were on licence, Miller for a similar offence. He considered they were in the middle of the supply line from a major supplier to street vendors. He did not consider that there was any reason to distinguish between them.
48. Dealing first with the sentence of three years imprisonment in respect of both of them, it seems to us that the part they played in the supply of drugs was significant. A custodian plays a central role in the distribution of drugs, as does a courier. Bearing in mind the substantial amount of drugs in question, and the fact that both had previous convictions for supplying drugs, Cory in 1995 and Miller, as was clear from his own basis of plea, in 2004, three years imprisonment cannot be said to be manifestly excessive. It follows that as far as the appeal of Cory is concerned, it is dismissed.
49. In relation to Miller, the point is a simple one. The judge purported to vary the original order directing that 98 days spent on remand should count towards his sentence. Approved by the court for handing down (subject to editorial corrections) R –v- Shane Martin Norman & Ors sentence to an order that only 2 days should count, more than 28 days after the sentence had been imposed. In other words he had no power under section 155 to make that

variation. It follows that it must be quashed. The effective order is the one which was made on the 30th March 2006 directing that 98 days spent on remand should count towards his sentence. His application for leave to appeal is accordingly granted and the appeal is allowed, restoring the direction that 98 days should count towards his sentence. Generally

50. The following points of general application arise out of these appeals.

- i) It is vital that the court is provided with accurate information as to the number of days which are said to have been spent on remand. We hope that the National Offender Management Information System, referred to in paragraph 7 above will obviate many of the current difficulties. ii) If the information provided subsequently turns out to be incorrect, the sentencing court can only correct the mistake within 28 days (or the extended period in section 155(2) of the 2000 Act), unless the judge's order has identified the period in question, but the order as drafted has simply miscalculated the number of days. In that case, the court record can be amended. iii) The procedure under section 240 of the 2003 Act is mandatory in regard to determinate sentences of imprisonment or detention imposed for offences committed on or after the 4th April 2005, unless the sentencing judge exercises his discretion under sub-section (4) in which case, pursuant to sub-section (6) the judge must identify which of the provisions of sub-section (4) apply, and in the event of the court exercising its power under sub-section (4)(b), the circumstances which have led the judge to make the order that he has. iv) Care must be taken to apply the 2005 Rules, whenever a defendant falls to be sentenced for offences committed both before and after the 4th April 2005.
- v) Care must also be taken in the case of young offenders to note that, if a Detention and Training Order has intervened between arrest and sentence, the 2005 Rules, do not apply. If the court wishes to disapply the period in question, it must give reasons for so doing. vi) If the period for which the direction has been given is wrong, and both parties agree, but more than 28 days have elapsed since the sentence was imposed, the application for leave to appeal should so state, in which event, on receipt of confirmation of that agreement from both the prosecution and the defence, the matter will be remitted by the Registrar direct to the Court for it to correct the mistake. He will not normally make a representation order for that purpose. The court will then hear the application as the appeal; and the appellant will be informed that as no purpose would be saved by his attendance the Court will assume that he does not intend to exercise his right to do so unless informed to the contrary within 28 days. But that will only apply where the mistake has been to the detriment of the appellant. Judgment Approved by the court for handing down (subject to editorial corrections) R –v- Shane Martin Norman & Ors There may well be cases where the judge fails to give a direction. It vii) should be the responsibility of counsel to bring the matter to the attention of the judge. But where that has not occurred, the same procedural mechanism, as set out in (vi) above should be used in order to correct such a mistake.

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51. The suggestion by Rose LJ in *Oosthuizen* that a non-direction under section 240(3) will not normally be a ground of appeal if the sentence is otherwise appropriate was not the subject of argument in that case. Bearing in mind that the period spent on remand could be a significant proportion of the sentence, we consider that a failure to identify, or identify correctly the period which should be treated as served pursuant to section 240 means that a sentence is wrong in principle. The defendant is entitled to have a direction; and an appeal is the only route available if section 155 of the 2000 Act, or an administrative correction, is not available.
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