[2013] UKPC 7
Privy Council Appeal No 0004 of 2012

JUDGMENT

Aidan Richard Sherry (Appellant) *v* The Queen (Respondent)

From the Court of Appeal of Guernsey

before

Lord Neuberger
Lady Hale
Lord Kerr
Lord Wilson
Lord Sumption

JUDGMENT DELIVERED BY LADY HALE ON

4 MARCH 2013

Heard on 24 January 2013

Appellant
Christopher Jeyes

(Instructed by Bird and Co)

Respondent
Clair Dobbin

(Instructed by Alan Taylor & Co)

LADY HALE:

1. The principal events with which we are concerned happened a long time ago. On 29 February 1980, the appellant was convicted of assault by an Acting Magistrate in the Magistrate's Court in Guernsey and sentenced to three months' imprisonment. No credit was given for the ten days during which he had been remanded in custody awaiting trial. On 5 March 1980, he gave notice of appeal against his conviction but remained in custody until he was granted an open remand on 11 April. At that stage there were only 18 days of his sentence left to serve, taking account of the normal grant of one third remission. On 20 May 1980, his appeal was listed before the Royal Court but he failed to appear. His appeal was dismissed for want of prosecution and the Court ordered that when apprehended he should "serve the sentence of three months' imprisonment imposed upon him in the Magistrate's Court on 29 February 1980 less the period of 5 days already served". The appellant learned of this the following day, left the Island and has not returned since then.

2. It might be thought that the time for appealing against either of these orders has long gone by. But the appellant has a burning sense of injustice. The Acting Magistrate thought that the right term of imprisonment was three months, which with remission would have amounted to 61 days (Prison Administration (Guernsey) Ordinance 1959, section 31). Had account been taken of the ten days on remand before his trial, this would have come down to 51 days. Had account been taken of the further 33 days served before he was granted an open remand, this would have come down to 18 days. He does now accept that if he returns to the Island he is liable to serve that time. But the effect of the Royal Court's order is that he will have to serve a further 56 days, on top of the 43 already served, thus coming close to double the original punishment which the Acting Magistrate thought right. The effect is to prevent him from returning to the Island which, for personal reasons, he would like to do.

3. The appellant did not immediately appeal to this Board against the order of the Royal Court. In 1983, he issued a Requête Civile, petitioning the Royal Court to re-open the appeal on the ground that he was not given adequate notice of the hearing. On 19 June 1984, the Deputy Bailiff dismissed his petition. He held that notice of the hearing had been properly served upon the appellant at the address which he had nominated for service and the appellant had only himself to blame if he had not in fact received it. The appellant appealed to the Board against both the original order of the Royal Court of 20 May 1980 and the refusal to re-open it of 19 June 1984. The only ground advanced was that he had not in fact received notice of the hearing and service at the address which he had nominated was not valid. The Board dismissed his appeal

on 20 February 1989 (Privy Council Appeal No 3 of 1987) [1989] 1 WLR 341. The detailed legal argument is irrelevant to this appeal.

4. In 2011, the appellant tried again, explaining that in 2007 he learned that he has a grown up child living on the Island and so he is anxious to return to the Island in order to trace her. He applied (i) for leave to appeal against the sentence imposed by the Magistrate's Court on 29 February 1980, because it failed to take into account the ten days served before conviction; (ii) for a declaration that the Royal Court on 20 May 1980 had made an obvious error in recording that he had served only five days of his sentence, whereas he had served 43 days as a convicted person or 53 days since his arrest; and (iii) for relief under section 7 of the Human Rights (Bailiwick of Guernsey) Law, 2000.

5. On 10 November, Judge Finch dismissed all three applications. As to (i), the Crown conceded that the 1980 appeal had probably been against conviction only, so that an appeal against sentence remained possible. But Judge Finch held that the delay was "inordinate and largely unexplained. Nothing of any cogency has emerged that justifies the effluxion of 31 years and it would be wrong in the circumstances to take the exceptional step of granting leave to appeal out of time" (para 8). As to (ii), given that the period of five days accorded with the "clear and literal meaning" of section 5 of the Loi Par Rapport aux Appels des Sentences rendues en Police Correctionelle of 1939 (see para 10 below), it would appear that there was no obvious or glaring error by the Royal Court. As to (iii), it had not been shown that his rights under article 5 had been violated by the proceedings in 1980, and 2000 Law does not apply to violations taking place before it came into force: citing *In re McKerr* [2004] UKHL 12, [2004] 1 WLR 807.

6. On 17 October 2012, Her Majesty in Council granted the appellant permission to appeal from the judgment of 10 November 2011. It is important to note that he does not have permission to appeal out of time against the order of the 20 May 1980. There is no formal application for such permission before the Board, but the Board is content to discuss the case on the basis that there is. Thus the issues before the Board are: (i) should the appellant be granted permission to appeal out of time against (a) the sentence imposed by the Magistrate's Court on 29 February 1980, and/or (b) the order made by the Royal Court on 20 May 1980 when dismissing his appeal; (ii) should the Royal Court on 10 November 2011 have exercised its inherent jurisdiction to correct the order of 20 May 1980; and (iii) would it now be a breach of the appellant's rights under the Human Rights (Bailiwick of Guernsey) Law, 2000 to imprison him for the period defined in that order?

Permission to appeal out of time?

7. In the course of his very full and able submissions, both oral and in writing, on behalf of the appellant, Mr Christopher Jeyes devotes very little space to the crucial question of whether the appellant should be permitted to appeal so long out of time against the outcome of the proceedings in 1980. He argues that Judge Finch was in error in concentrating upon the reasons for the delay. In *R (Birmingham City Council) v Crown Court at Birmingham* [2009] EWHC 3329 (Admin), [2010] 1 WLR 1287, paras 25 and 52, for example, the Divisional Court held that the relevant criteria for extending time were the merits of the appeal, the reasons for the delay and any prejudice to the respondent. The respondent does not suggest that there is any prejudice to the Crown in allowing the proposed appeals to be argued on the merits. The appellant therefore argues that the merits of the proposed appeals are so strong, and the injustice to the appellant so great, that this consideration should outweigh the consideration of the very long delay.

8. Mr Jeyes also devotes very little space to the merits of an appeal against the Acting Magistrate's sentence. He argues that the time spent on remand between arrest and trial should have been taken into account, even without a statutory provision to that effect, as this is now the general principle applied in other comparable jurisdictions: see *Callanchand v The State* [2008] UKPC 49, [2009] 4 LRC 777 (the Privy Council on appeal from Mauritius); *Romeo de Costa Hall v The Queen* [2011] CCJ 6 (AJ) (the Caribbean Court of Justice on appeal from Barbados); and *R v Gordon and others* [2007] EWCA Crim 165, [2007] 2 Cr App R (S) 400. As Sir Igor Judge P, there explained, "the imperative is that no prisoner should be detained for a day longer than the period justified by the sentence of the court" (para 31).

9. But his real complaint is against the failure of the Royal Court to take into account the totality of the time which the appellant had already spent in prison, thus making an order which results in his having to serve a further 56 days, making a total of 109 days in prison for a crime which was deemed to merit only 61 (assuming remission). The time spent in prison after conviction and pending appeal was at the relevant time governed by the Loi Par Rapport aux Appels des Sentences rendues en Police Correctionelle of 1939, otherwise known as the Police Court Appeals Law, 1939. As to this, Mr Jeyes wishes to put forward two arguments, one based upon section 5 and one based on section 9(10) of that Law.

10. Section 5 provided as follows:

> "Upon notice of appeal being given or being deemed to have been given by a convicted person and upon compliance by that person with the conditions contained in section 4 of this Law, the sentence pronounced

> upon that person shall be suspended until the disposal of the appeal and, if that sentence be a sentence of imprisonment with or without hard labour, without the option of a fine, that person shall be set at liberty unless the Police Court directs that he be retained in custody."

The appellant had served five days of the sentence imposed on 29 February 1980 when he gave notice of appeal on 5 March 1980. But on the reading of that section which was current at the time, his sentence was then suspended, and the remaining time he spent in custody was as a remand rather than a sentenced prisoner. Mr Jeyes now wishes to present an entirely new argument: that the words "unless the Police Court directs that he be retained in custody" govern, not only the immediately preceding words, "that person shall be set at liberty", but also the earlier words, "the sentence . . . shall be suspended until the disposal of the appeal". Thus the court could choose between suspension of the sentence combined with bail or retention in custody without suspension of sentence. This would produce a just and sensible result. But he accepts that this new construction requires one to imagine a comma after "set at liberty" and that it is contrary to the generally accepted meaning of the section throughout the period when it was in force.

11. Section 9(10) dealt with the position where none of the grounds for allowing an appeal applied:

> "In any other case the Appellate Court shall dismiss the appeal and thereupon the sentence of the Police Court shall stand and shall take effect as from such date as the Appellate Court shall appoint."

Thus it is argued that the Royal Court should have exercised this power in such a way as to take account of the time spent on remand pending both conviction and appeal, or at least pending appeal, as well as the five days served of the sentence. A search of the records of the Royal Court between 1979 and 1983 does not reveal a consistent recorded approach to the treatment of time spent in custody pending appeals. An analysis of eight such cases revealed five in which only the time between conviction and notice of appeal was deducted, two in which the whole time in prison after conviction was deducted, and one case in which the time deducted related to neither.

12. The modern approach is that all such time should be usually deducted and an unsuccessful appellant should not be penalised further by having to serve additional time, unless this is to "impose a penalty for bringing or persisting with a frivolous application which fairly reflects the need to discourage wasting the court's time without inflicting an unfairly long extension of imprisonment upon the applicant": see *Ali v The State* [2006] 1 WLR 269, para 17 (the Privy Council on appeal from Trinidad and Tobago). The general rule under the Court of Appeal (Guernsey) Law,

1961, governing appeals from the Royal Court, is that the sentence runs from the date when it was imposed, rather than the date of the appeal: section 37(4).

13. As to the reasons for the delay, Mr Jeyes submits that this is understandable rather than culpable, given the complexity of the issues, the difficulty of accessing advice in England as to the law in Guernsey, and the appellant's lack of funds; that he is entitled to rely upon a change in circumstances; and that the Crown's delay in failing to take any steps to enforce the sentence, as could easily be done by issuing a warrant which would be executed in England under section 13 of the Indictable Offences Act 1848, is at least equally culpable.

14. The Board accepts that the merits of any proposed appeal are relevant to an application to extend time. At the very least, it must be shown that there is some merit in the proposed appeal before a court will consider whether the delay can be excused. If the appeal has no prospect of success, then it is in no-one's interests to allow it to proceed, however short or understandable the delay. Conversely, if the appeal is bound to succeed, the court may look more kindly upon the reasons for the delay. But even in such a case it is by no means inevitable that permission will be granted. It is in the interests of everyone that there be an end to litigation, both civil and criminal. The longer the delay, the better the explanation must be.

15. The appellant has permission to appeal against Judge's Finch's refusal to grant him permission to appeal out of time against the sentence imposed upon him by the Acting Magistrate. He does not seek to argue now that the sentence was excessive in itself, merely that the Magistrate should have given him credit for the time spent on remand. Nor does he suggest that this was the general practice at the time. The Board cannot begin to speculate what the sentence would have been had the practice been otherwise. It certainly cannot be said that the merits of the proposed appeal are so overwhelming as to counteract some 33 years of, as Judge Finch put it, largely unexplained delay. Many defendants, whether through lack of funds or lack of thorough legal advice or for lack of enthusiasm, fail to pursue an appeal at the proper time. The system would rapidly grind to a halt if they were permitted to re-open matters long after the event because they now had a reason to do so. The Board sees no reason to disagree with Judge Finch's decision.

16. The appellant does not have permission to appeal against the Royal Court's order of 20 May 1980. He faces the immediate difficulty that he did have such permission in 1989, when his case first came before the Board, but chose only to argue the notice point. The points about loss of time and the proper construction of section 5 would have been available then had anyone thought to make them. It is not open to an appellant to have a second bite at the cherry simply because someone has thought of a new argument to raise. The circumstances in which it is possible to make a second appeal to the same court are very limited indeed: see *Taylor v Lawrence*

[2002] EWCA Civ 90, [2003] QB 528. Were it otherwise, there would indeed be no end to litigation. Even supposing that there were jurisdiction to allow a second appeal, therefore, this Board could not advise Her Majesty to permit it.

Was the order of the Royal Court made in error?

17. An appeal to this Board is, of course, to be distinguished from the jurisdiction of the Royal Court to correct its own orders if there is a manifest error – that is, if the order as drawn does not accurately reflect what the court in fact intended. This is the basis of the inherent jurisdiction to correct errors – generally known as the "slip rule". Express powers apart, there is no general jurisdiction to interfere with the orders of the same court simply because they are wrong in law or otherwise unjust. That is the function of an appeal court. So even if Mr Jeyes' ingenious new interpretation of section 5 were accepted, it would not be a reason for Judge Finch to correct the order of 20 May 1980 unless he was satisfied that the Royal Court had meant to insert a number other than five into its order. This it clearly did not mean to do. The number five accords with the meaning of section 5 as it was understood at the time, a meaning which Judge Finch regarded as "clear and literal". There was no error for him to correct.

Human Rights

18. Under section 6(1) of the Human Rights (Bailiwick of Guernsey) Law, 2000, it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Under section 7(1) of the Law, a person who claims that a public authority has acted - or proposes to act - in a way which is made unlawful by section 6(1) may bring proceedings against the authority or rely on the Convention right in any legal proceedings. The Convention right in question is the right to liberty and security of person protected by article 5. Under section 18(3) of the Law, the remedy in section 7(1) does not apply to an "act" committed before the Law came into force.

19. The argument developed before the Board by Mr Jeyes is that the public authorities in Guernsey propose to deprive the appellant of his liberty should he return to the Island. This will be an act which is incompatible with his Convention rights if and when it happens. So he is not attempting to have the Convention applied retrospectively to events which took place before the Law came into force. His complaint is about the imprisonment which he will suffer if the sentence is put into effect. He accepts that if the 1980 sentence had been implemented before the Human Rights Law came into effect his only remedy would have been to apply to the European Court of Human Rights in Strasbourg. But it was not, and so he can now complain about an act which will take place while the Law is in force. Nor is the risk a hypothetical one. The Guernsey authorities have made it clear that they would seek to

detain him were he to enter Guernsey. Furthermore, although they have not so far done so, they could easily obtain a warrant and enforce it on the United Kingdom mainland should they so wish.

20. He acknowledges, of course, that imprisonment is permissible under article 5(1)(a) if it is "the lawful detention of a person after conviction by a competent court" and effected "in accordance with a procedure prescribed by law". But it is not enough that the imprisonment be lawful under the law of Guernsey, as it clearly would be. The Guernsey law under which it is imposed must comply with the Convention standards of legality. The object of article 5 is to protect people from arbitrary imprisonment: see *Winterwerp v The Netherlands* (1979) 2 EHRR 387. Thus, not only must the detention have a legal basis in domestic law, but also that law "must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness": see *Gusinskiy v Russia* (2004) 41 EHRR 281, para 62.

21. He relies also on the well-known passage from *Sunday Times v United Kingdom* (1979) 2 EHRR 245, para 49:

> "In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."

22. So, he argues, section 9(10) of the 1939 Law gave the Royal Court an open-ended discretion to decide upon the date from which the sentence imposed by the Magistrate's Court should run. The result could well be, especially in combination with section 5, that an unsuccessful appellant would have to serve considerably longer than he would have had to serve had he not appealed. This was a penalty for appealing which was not sufficiently foreseeable to enable a would-be appellant to decide whether it was worth his while to take the risk. It was not explained to him in the way that the possible consequences of an unsuccessful appeal in England are now spelled out. The inconsistent approaches revealed by the study reported at para 11 above confirm this. Requiring him now to serve the extra time resulting from his appeal would be arbitrary.

23. Despite the attractive way in which this argument was deployed, the Board cannot accept it. In the *Sunday Times* case, the court continued:

> "Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."

24. Anyone contemplating an appeal against the order of a Magistrate's Court under the 1939 Law could be informed that if he did not succeed, the Royal Court could decide the date from which his sentence was to run, whether from the date of its own order or from the date when it was imposed, or from some other date which would take into account the time already served. Unless this was a case in which the Royal Court thought that the sentence should be increased (as it had power to do under section 9(8) of the 1939 Law), it appears to have been the usual practice to give credit for the portion of the sentence already served, but in most cases not for any time spent in custody after the notice of appeal was given. The risk was clearly there to be appreciated and taken into account by anyone contemplating an appeal against a magistrate's decision. These standards may seem harsh by comparison to the modern approach to time spent on remand or pending appeal and to penalising people who bring unsuccessful appeals. But they cannot be said to be any more arbitrary or uncertain than many other sentencing standards, whether then or now. Traditionally, there has always been a large measure of discretion in sentencing, because of the infinite variety of circumstances in which such decisions have to be made.

25. In the Board's view, therefore, it would not be incompatible with the appellant's Convention rights for the authorities in Guernsey to implement the Royal Court's order of the 20 May 1980.

Conclusion

26. For these reasons, the Board will humbly advise Her Majesty that this appeal should be dismissed. In so far as the Board has deemed the appellant also to have applied for permission to make a second appeal out of time against the Act of the Royal Court dated 20 May 1980, that too should be dismissed.