CASE NO SC/CRIM/04/17

IN THE SUPREME COURT
OF THE FALKLAND ISLANDS

Courts and Tribunal Service
Stanley
Falkland Islands

Date: 20th April 2018

Before:

JAMES LEWIS QC
(CHIEF JUSTICE OF THE FALKLAND ISLANDS)

- -

BETWEEN:

REGINA

-and-

GEORGE BUTLER

- -

Joseph Hart and Stewart Walker for the Crown

Cieran Rankin (instructed by Pinsent Masons LLP) for the Defendant

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SENTENCING RULING

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1. I am asked whether as a principle of sentencing in the Falkland Islands, when considering the Sentencing Council Guidelines of England and Wales I should take into account that a prisoner in the Falkland Islands serves two thirds of his sentence when the position in England and Wales is that a prisoner must be released from custody at the half way point of his sentence and he or she serves the remainder of his or her sentence on licence.

2. The position in the Falkland Islands is that a discount has been given by the Supreme Court to take account of this factor. In *R v Ford* SC/CRIM/03/16 Simon Bryant QC, as he then was, as the Chief Justice of the Falkland Islands said at paragraph 1.19:

> "The Sentencing Council's Sexual Offences Definitive Guidelines are regarded as of persuasive authority in the Falkland Islands but are in no way binding. I have had regard to them but what matters is what sentence is the appropriate sentence overall to reflect the seriousness of your offending on the Falkland Islands. I have also taken into account that in England and Wales release is after having served one half of the sentence, whereas here release is after serving two thirds, although here on release prisoners are not subject to the same supervision on licence."

3. And at paragraph 1.46:

> "In imposing the sentences I have, I have considered it appropriate to reduce your sentence to take into account that you will serve two-thirds, rather than half, of your sentence in prison, absent which I would have sentenced you to 13 years imprisonment."

4. I am told that this has been the approach in other cases before the Supreme Court and Magistrates Court, save that in the recent case of *R v Alfred* the position changed and the Acting Supreme Court Judge did not take into account the time to be served in custody when determining sentence. Unfortunately there does not appear to be an approved judgment or published sentencing remarks from the Acting Supreme Court Judge so other than the result no reasoning is before me. As this is an important issue I shall give a full judgment on the issue.

5. The prosecution say the approach taken in *R v Ford* and other like cases is in error. They rely on the recent St Helena case of *Thomas v R* (2017). The St Helena Court of Appeal in that case said:

> "Should the Judge have reduced the sentences to reflect the different early release provisions in England and Wales and St. Helena? The answer according to English law is clear. No court is permitted to take account of differing early release provisions. For example, under the new extended sentence provisions introduced in LASPO 2012, a prisoner is not eligible for release on licence until he has served two thirds of the period of imprisonment. If sentenced to an ordinary determinate sentence the prisoner would be automatically released at the half way stage. The Court of Appeal in the Attorney General's Reference (no. 27 of 2013) (R-v- Burinskas) [2014] EWCA Crim 334 said that that was not a matter which the Judge could take into account in fixing the appropriate term. The Court affirmed the decision of the Court of Appeal in R-v- Round and Dunn [2009] EWCA Crim 2667 where Hughes LJ said at para 44 'the general principle that early release, licence and their various ramifications should be left out of account upon sentencing is ……. a matter of principle of some importance'. We see no reason that the same principle should not apply to St. Helena. The legislature has determined that

> prisoners in St. Helena should serve two thirds of their sentence before being released and it is not for the courts to go behind that."

6. The St Helena Court of Appeal have held the answer according to English law is clear. From the Practice Direction set out below it may be that the answer is not as clear as the St Helena Court of Appeal have held and therefore requires some analysis.

7. Lord Taylor said in a Practice Direction, Practice Statement (Crime: Sentencing) [1992] 1 W.L.R. 948 when the licensing regime changed after the Criminal Justice act 1991:

> 6.It is therefore vital for all sentencers in the Crown Court to realise that sentences on the "old" scale would under the "new" Act result in many prisoners actually serving longer in custody than hitherto.
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> 7 It has been an axiomatic principle of sentencing policy until now that the court should decide the appropriate sentence in each case without reference to questions of remission or parole.
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> 8 I have consulted the Lords Justices presiding in the Court of Appeal (Criminal Division) and we have decided that a new approach is essential.
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> 9 Accordingly, from 1 October 1992, it will be necessary, when passing a custodial sentence in the Crown Court, to have regard to the actual period likely to be served, and as far as practicable to the risk of offenders serving substantially longer under the new regime than would have been normal under the old.
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> 10 Existing guideline judgments should be applied with these considerations in mind.
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> 11 I stress however that, having taken the above considerations into account, sentencers must, of course, exercise their individual judgment as to the appropriate sentence to be passed and nothing in this statement is intended to restrict that independence.

8. This indicates it is possible for a sentencing court to take account of the actual period likely to be served involving questions of remission and parole.

9. In *R. v Michael John Bright* [2008] 2 Cr. App. R. (S.) 102 the Court of Appeal held that when the trial judge had originally, before correction, said in open court that the defendant would serve three and a half years (half his sentence) of his seven year sentence, he was not intending the defendant to serve three and a half years, simply doing his duty in explaining the custodial element albeit erroneously. So where the Court of Appeal said in *Bright*:

> "The release provisions did not and should not have affected the Judge's sentencing decision."

The comments must be seen in that light.

10. In *R. v Terence Round* [2010] 2 Cr. App. R. (S.) 45 Hughes L.J. as he then was said:

> 44 Our third reason is that the general principle that early release, licence and their various ramifications should be left out of account upon sentencing is, as it seems to us, a matter of principle of some importance. The existence of the varied regimes which we have attempted to summarise at [23] and [24] above confirm us in that view. Above all, the HDC regime is entirely in the discretion of the Secretary of State. Whatever the statute may say about eligibility, there is no way of knowing in advance what decision may be made about HDC release.

11. The reference he made to paragraphs 23 and 24 are important. They read:

> 23 After the decisions in the Administrative Court and the Court of Appeal in Noone , the Senior Presiding Judge circulated to Crown Courts a brief letter referring to the case and enclosing a note from the Prison Service explaining how consecutive CJA 1991 and CJA 2003 sentences are in fact dealt with. The Senior Presiding Judge's letter, properly, gave information but not advice. Beyond saying that sentencers may wish to bear the implications in mind, the note similarly (and properly) did not purport to give advice.
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> 24 There are in fact not merely two regimes for early release and licence, but several, some of which have subsets of differing rules. They include the following.
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> i) Where all sentences are 12 months or over and relate to offences post-April 4, 2005, the rules of the CJA 2003 apply without qualification. The prisoner is entitled to release at half, may perhaps be granted discretionary HDC up to 135 days earlier, and will be on licence until the end of the full term of the sentence.
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> ii) Sentences of under 12 months, whenever the offence was committed, are governed by CJA 1991 . The prisoner is entitled to release at half, may perhaps be released on HDC but under the different rules in s.34A CJA 1991 ; there is otherwise no licence period at all: s.33(1)(a) .
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> iii) Sentences of 12 months or more but less than four years for offences before April 4, 2005 are governed by the CJA 1991 but the rules are slightly different from (ii). The prisoner is entitled to release at half, but this time will be on licence until the three-quarter mark; he may perhaps be released on HDC under the rules in s.34A CJA 1991 and if so will be on licence until the three-quarter mark less the HDC period: ss.33(1)(b) , 37(1) and 37(1B) . ***304**
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> iv) Sentences of four years or more for offences before April 4, 2005, where no offence is within Sch.15 CJA 2003 . The prisoner is entitled to release at half; there is no possibility of HDC (s.34A(1) CJA 1991), he will be on licence until the end of the full term of his sentence: s.33(1A) and s.37ZA(1) .
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> v) Sentences of four years or more for offences before April 4, 2005, where any one offence is within Sch.15 CJA 2003 . The prisoner may be released on licence at half, is not entitled to release on licence until two-thirds, and there can be no HDC; if he is released on ordinary licence, his licence will run not to the full term but to the three-quarter mark, but if he is released on HDC it will run to the three-quarter mark less any HDC period: s.33(1B) , 37(1) and 37(1B) .
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> There are in addition entirely separate rules for prisoners who are initially released, under either Act, then recalled, and then re-released. Save to note their existence, it is not necessary to complicate this analysis further by reference to them.
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> 25 To these propositions, already more than sufficiently complex, must be added this further consideration. If a defendant is not only eligible for HDC but is actually granted it, then if the sentence is governed by the CJA 1991 there is an adjustment to his period of licence, but if it is governed by the CJA 2003 there is none.

12. It follows in *Round* the Court were concerned that the varied regimes including discretion and Home Defence Curfew ("HDC") which underlined that it was wrong for the judge to try and calculate these periods; and accordingly should leave them out of his sentencing exercise.

13. In *Regina v Burinskas (Attorney General's Reference (No 27 of 2013))* [2014] 1 W.L.R. 4209, the Court of Appeal said without grappling with the *ratio* of *Round* dealing with the complexities of HDC:

> 38 Other than when fixing the minimum term in life cases in the way we have just described, a sentencing judge may not, when sentencing, take account of the early release provisions: see R v Round [2009] 2 Cr App R (S) 292 , para 44. Hughes LJ said: "the general principle that early release, licence and their various ramifications should be left out of account on sentencing is … a matter of principle of some importance."

14. It appears to me much of the principle is based on pragmatic considerations of the complexity and discretion in the executive. In the Falkland Islands the situation appears less confused.

15. Importantly the prosecution point out that the requirement for this court to take account of the English sentencing guidelines is mandated by section 482(4) of the Criminal Procedure and Evidence Ordinance 2014. This predates section 47 of the Prison Ordinance 2017 which says:

> 47. Release of prisoner under licence
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> (1) Subject to this section and section 31, a prisoner sentenced to a period of imprisonment may, in such manner as may be prescribed, and subject to good conduct, be released on licence after expiry of not less than two-thirds of the time which they are sentenced to spend in prison.

16. It follows a prisoner will normally be released after serving two thirds of his sentence. However, this again is discretional and subject to good conduct.

17. The prosecution point out that the legislature does not enact provisions in a vacuum and therefore the requirement set out in section 47 of the Prison Ordinance 2017 was enacted in the knowledge of the requirement in the Criminal Procedure and Evidence Ordinance 2014 to consider the sentencing guidelines.

18. The question therefore arises as to whether I should depart from the previous practice of this court in taking into consideration the fact that prisoners in the Falkland Islands serve more time in custody than those prisoners subject to the Sentencing Guidelines in England and Wales. Mr Rankin for the defence does not disagree with the prosecution's analysis, saying the situation is unsatisfactory but clear. Notwithstanding the agreement of counsel on this issue it is right I come to my own conclusions.

19. A sentence passed in England and Wales consists of a custodial period and a licence period. However, the overall length of the combined periods is the 'sentence'. Section 244 of the UK Criminal Justice Act 2003 ("CJA 2003") provides:

> 244 Duty to release prisoners
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> (1) As soon as a fixed-term prisoner, other than a prisoner to whom section 243A [certain sentences of less than 12 months], 244A [sentences imposed for specified terrorism or sexual offences], 246A [extended sentences] or 247 [extended sentences] applies, has served the requisite custodial period for the purposes of this section, it is the duty of the Secretary of State to release him on licence under this section.

20. Where a prisoner is only serving one sentence, the "requisite custodial period" means one-half of his sentence (s.244(3)(a)). Where a prisoner is serving two or more

consecutive or concurrent sentences, the "requisite custodial period" is defined by sections 263(2) and 264(2) of the CJA 2003 (s.244(3)(d)).

21. Likewise in the Falkland Islands a 'sentence' consists of a custodial period and a licence period as the provisions set out in paragraphs [15] and [16] demonstrate.

22. The licence period is not the end of the sentence and prisoners remain subject to recall until the sentence has been served in full. Both in England and Wales (Section 254(1) of the CJA 2003) and in the Falkland Islands (Section 583(1) of the CP & E 2014).

23. I am satisfied that the correct approach is that set out in *R v Thomas* and for the purposes of determining sentence in the Falkland Islands no additional discount should be given for the fact that the custodial period differs from that in England and Wales. The sentencer should pass the correct sentence according to law and the circumstances of the case and ignore the separate components of custodial and licensing periods which are discretionary. While a prisoner in the Falkland Islands may be released from custody at the two thirds period that is contingent upon his good behaviour and the Advisory Committee. If Sentencing Guidelines are published in the Falklands it will be up to that body to consider whether the Falkland Island guidelines are affected by the custodial element of any sentence that is passed.

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