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Issue 51 | February 2021

Criminal Appeals Bulletin

Welcome


Farrhat Arshad

Welcome to the February 2021 edition of our monthly Criminal Appeals Bulletin.

The Bulletin aims to highlight recent changes in case law and procedure in England and Wales, Northern Ireland, and the Caribbean (with an occasional series on appeal cases from Scotland) and to provide practical guidance to those advising on appellate matters. Our monthly case summaries illustrate when an appellate court is likely to interfere with conviction or sentence, as well as looking at the courts' approach to procedural matters.

In this month's Bulletin, James Wood QC analyses recent sentence appeals concerning minimum terms in discretionary life sentence cases, Daniella Waddoup looks at an appeal against conviction concerning conspiracies and inconsistent verdicts and I look at an appeal by way of case stated, where the Divisional Court considers Twitter arguments and Article 10 of the ECHR.

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Farrhat Arshad
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Discretionary Life Sentences – Setting the minimum term – ½ or ⅔ of the notional determinate sentence

By James Wood QC

James Wood QC discusses recent sentence appeals on minimum terms in discretionary life sentences, He assesses the likely impact of the recent statutory changes increasing the minimum term to be served by some prisoners serving determinate sentences from ½ to ⅔. He identifies prosecutorial appeals to increase minimum terms in discretionary life sentences by the Attorney General, and warns that the judicial and statutory drift appears to be towards a similar lengthening from ½ to ⅔ of the minimum term to be served by those sentenced to discretionary life sentences on grounds of dangerousness.

Recent changes to the release provisions made by the *Terrorist Offenders (Restriction of Early Release) Act 2020* (passed in response to the London Bridge atrocity in January 2020) and the *Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020* (passed in April 2020) require prisoners serving fixed term sentences for terrorist offences or serious sexual or violent offences serve ⅔ of their sentence before being considered for release, have led to calls for a corresponding uplift in the minimum terms to be served by discretionary life prisoners.

The initial assumption upon the introduction of the statutory discretionary life sentence was that the minimum term to be served by such prisoners would be one half of the notional determinate save in exceptional circumstance (see *Szczerba [2002] EWCA Crim 440*). That was based upon the assumption that this was the norm for prisoners serving determinate terms.

The drift away from the one half assumption started in 2012 when the Legal Aid, Sentencing and Punishment Act amended the Criminal Justice Act of 2003 by creating the extended sentence regime in sections 226A and 226B for dangerous offenders. Prisoners sentenced to an extended sentence were required to serve ⅔ of their sentence before being considered for parole. It was argued in *A-G's Reference* (No 27 of 2013) (*R v Burinskas*) [2014] 2 Cr App R (S) 45 that this created an anomaly with discretionary life sentence prison ers, who habitually required to serve ½ of the notional determinate term fixed as their minimum time to serve, before being considered for parole. The suggestion by the defence in *Burinskas* was that the court should reduce the length of extended sentences to achieve parity. The Crown responded by saying that the minimum term for discretionary life sentence prisoners should (by contrast) be increased to remedy the disparity. This argument was roundly rejected by Lord Thomas the LCJ stating at para 36 and 37.

> *36. We understand the argument, but the position is more complex. A life prisoner is not entitled to release at the end of the minimum term. He must wait until the Parole Board consider that it is safe to release him. In some cases that date is years after the minimum term has expired. The prisoner serving an extended sentence is entitled to be released at the end of the custodial period without any further assessment of risk. Where the custodial term is less than 10 years the entitlement arises at the two-thirds point.*
> *37. There is an argument that if the alternative to a life sentence is an extended sentence rather than a determinate sentence then it is the extended sentence, with its longer time to serve, that should form the basis of the calculation of the minimum term in a life sentence. That would reduce the notional determinate sentence by one-third rather than one-half and would lead to an increase in the minimum term to be served in life cases of one-third. There are four difficulties with that approach:*
>
> *i) an extended sentence is not necessarily an alternative to a life sentence under s.225;*
> *ii) an extended sentence is not an alternative to a life sentence imposed under s.224A;*
> *iii) the sentencing judge must compare the early release provisions at s.244(1)—which are concerned with determinate sentences; and*
> *iv) a measure which increases minimum terms in life sentences by one-third is, in our judgment, a matter for Parliament*

The passage last year of the amending provisions requiring fixed term prisoners to serve ⅔ has led to a spate of recent litigation. Section 247A of the CJA 2003 was amended by the *Terrorist Offenders (Restriction of Early Release) Act 2020* to require terrorist offenders to serve ⅔ of their sentence before being considered for release, and the *Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020* made similar provisions for those sentenced to more than 7 years for serious sexual or violent offences. The courts have had to address the impact of these provisions on the minimum terms to be served by discretionary life prisoners.

In *R v Khan [2020] EWHC 2084 (Admin)*, in rejecting an human rights compatibility challenge to the ⅔ release regime introduced by *Terrorist Offenders (Restriction of Early Release) Act 2020*, the court (Fulford LJ and Garnham J) were persuaded in July 2020 to rely fairly exetensively upon a *"helpful account provided in her witness statement by Mrs Niranda Wilkinson, Head of Counter-Terrorism and Strategic Projects at the Ministry of Justice"*[1] in summarising generally "Sentencing for Terrorist Offenders" the court stated (obiter):

"30. In the context of discretionary life sentences, except where a whole life order is made, the court must take account of the seriousness of the offence or offences and the provisions with respect to crediting time spent on remand: Powers of the Criminal Courts (Sentencing) Act 2000, s.82A. Pursuant to s.82A(3)(c), the minimum custodial term shall also be set "such as the court considers appropriate taking into account… the early release provisions as compared with section 244(1) of the Criminal Justice Act 2003". In Attorney General's Reference (No. 27 of 2013) [2014] 1 WLR 4209, the Court of Appeal held that the effect of s.82A is to "require the sentencing judge to identify the sentence that would have been appropriate had a life sentence not been justified and to reduce that notional sentence to take account of the fact that had a determinate sentence been passed the offender would have been entitled to early release" [33]. The application of s.82A(3)(c) will ordinarily, but not always, result in a reduction of the notional determinate sentence by half, but there may be exceptional circumstances in which more than half may be appropriate: R v Sczerba [2002] EWCA Crim 440; [2002] 2 Cr App R (S) 86, [33]; R v Jarvis [2006] EWCA Crim 1985, [19]. There is, therefore, no rule requiring that the custodial term for a discretionary life sentence is set at half of the actual or notional determinate term: R v Rossi [2015] 1 Cr App R (S) 15, [20-22].

31. Since 1 April 2020, under the 2020 Order, sexual and violent offenders are not entitled to automatic release until the two-thirds point of their sentences. A court will be entitled to take this into account under s.82A(3)(c) when setting the minimum tariff period in respect of a discretionary life sentence."

This assessment was promptly leapt upon by prosecutors, and attempts were made to increase (under the slip rule) cases in which ½ tariffs had been imposed by Sweeney J and have them increased to ⅔. These attempts were rejected.[2]

At the instance of the AG, the Court of Appeal came back to the issue in conjoined appeals in *AG's Reference No 688 of 2019 (Joseph McCann and Sinaga)* [2020] EWCA Crim 1676 in December of 2020 the Lord Chief Justice, together with the President of the QBD and Fulford LJ in a 5 judge court examined the sentencing regime, cited para 31 of Khan above, and noted at para 62 that from the 1st April 2020:

"a defendant serving a fixed-term sentence of seven years or more for a relevant violent or sexual offence (an offence listed in Part 1 or 2 of schedule 15 to the 2003 Act for which a sentence of life imprisonment may be imposed) which was imposed on or after that date, the requisite custodial period is two thirds (not a half) (see the Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020 SI 2020/158"

The court then went on to say at para 66

"The position, therefore, is that the significant changes to the release provisions which have either been recently implemented or are awaiting implementation will have a considerable impact on the position of individuals convicted of a wide range of serious offences."

The court then proceeded to use ⅔ of determinate terms as the approach for assessing the minimum terms, whilst rejecting the Solicitor General's appeal to increase the minimum terms to whole life, on grounds that the campaigns of rape involved in both cases were so egregious. Reviewing the authorities they concluded at para 88

"The effect of these decisions is to leave open the possibility that a whole life term could be attached to a discretionary life sentence, but there is a principled reason for reserving the most serious sentences to cases of murder, save in the most exceptional circumstances."

And at para 89

"A whole life order is the severest sentence available….We see no reason to depart from the longstanding approach approved over decades by this court not to attach a whole life tariff to a discretionary life sentence save in wholly exceptional circumstances."

The court though upheld (in McCann) and imposed (in Sanaga) a tariff of ⅔ of the notional determinate sentences of 60 years stating at para 95

"These two cases are paradigms of the circumstances which justify a departure from the usual position of fixing the requisite custodial period at a half of the determinate term. We agree with Edis J in McCann's case that a custodial period of two-thirds is necessary, but we express this step as being required for both offenders to ensure that the proper requirements of punishment are met for these unique crimes rather than by reference to the release provisions for an extended sentence."

Shortly after passing judgment in McCann, Fulford LJ and Edis J together with Foxton J heard argument in *Attorney General's References (R v Safiyyah Shaikh and R v Fatah Abdullah)* [2021] EWCA Crim 45, in which the Solicitor General sought to review the taking of a minimum term of ½ by an experienced trial judge (Sweeney J), seeking to contend that by reason of the *Terrorist Offenders (Restriction of Early Release) Act 2020* and the *Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020* the starting point should now habitually be ⅔. Both defendants were convicted under s5 of the Terrorism Act, and both had been given discretionary life terms, and each had a minimum term to serve of one half of the notional determinate sentence had they not been found to be dangerous. The Court of Appeal rejected the argument of statutory interpretation (see para 50) relied upon by the Solicitor General, that s 247 of the CJA 2003 meant that the *Terrorist Offenders (Restriction of Early Release) Act 2020* required the court to have regard to the length of time served by those serving determinate sentences. But it stated (obiter at para 52) that its

"conclusion entails that the legislative structure

of the 2020 Act (creating a new early release regime in section 247A and then removing those subject to that regime from the operation of section 244(1)) has a different effect so far as the setting of minimum terms is concerned to that adopted by the 2020 Order (which amended the definition of "relevant custodial period" in section 244(1) itself).

At paragraph 53 the court

"also accept that our conclusion gives rise to the anomaly identified in Burinskas that the minimum term for a prisoner sentenced to a life sentence to which the 2020 Act applies may in some cases be lower than the requisite custodial period for a prisoner sentenced to a determinate sentence for the same offence, and that, for the same reason, there is an anomaly when comparing the minimum terms with the requisite custodial period for the determinate sentences in the Guideline

The troubling outcome is that whilst courts sentencing terrorist prisoners to discretionary life sentences should take ½ of the determinate equivalent in assessing the minimum term, courts sentencing dangerous sexual and violent offenders to discretionary life sentences, are likely now to be justified in taking ⅔. The sun, it would appear, is rapidly setting upon the assumption that the taking of ½ is the norm. Should sentencing practice not change, legislation is likely soon to follow. Those representing defendants likely to receive discretionary life sentences would be wise to move rapidly to secure a sentencing hearing, for it would appear the days of receiving by way of tariff only ½ of the notional determinate sentence are rapidly fading, and likely to shortly be extinguished by legislative or judicial changes requiring the minimum term to be assessed at ⅔ of the fixed term sentence.

[1] Judgment Para 18

[2] See R v Fatah Abdulah and R v Shaik CCC July 2020

If you would like to speak to James Wood QC about this case, please click here.

About James Wood QC

From historic and celebrated miscarriages of justice to complex forensic science cases and fresh evidence appeals, throughout his long career James has been involved in numerous appeal cases in the UK and abroad. Determination, persistence and hard work are, he believes, the ultimate keys to his success. This has recently been illustrated by the CCRC referral back to the Court of Appeal, after almost 15 years of work by all involved, of the murder case of his long standing and still, he believes, wrongly convicted client, Lee Firkins.

To see Jame's full profile, click here.

Appeals against Conviction; England and Wales

Conviction in respect of an "open" conspiracy does not require the conviction of named alleged co-conspirators

By Daniella Waddoup

R v Darren Paul Gates
[2021] EWCA Crim 66

The single issue in this case was described by the court (Green LJ, Garnham and Fordham JJ) as "one of logic based upon inconsistency" [34]. The question was whether the appellant's conviction for conspiracy to supply Class A drugs was safe despite the fact that none of the other named defendants were convicted of conspiracy.

The appeal was disposed of without the need for any recourse to authority: it was sufficient to consider how the Crown had put its case. It had opened its case explicitly on the basis that the appellant and the other named defendants had conspired *"together with others unknown"* to supply the drugs. This was, in other words, an "open" conspiracy. The mere fact that there was no clear evidence that the appellant had conspired with another indicted but acquitted defendant did not render the verdict of the jury illogical or inconsistent:

"Provided the possibility is put to the jury that the defendant in issue conspired with another defendant or with a person unknown, it remains proper for a jury to be sure that the conspiracy was with that person or persons unknown" [29].

The judge in his legal directions to the jury made this clear on three separate occasions.

It was only as a postscript that the court noted that the evidence in the case (including the appellant being found in possession of large amounts of cash contaminated with abnormal traces of cocaine immediately after meeting with a person whom he refused to identity, as well as the fact of the appellant's possession of actual cocaine, latex gloves and an encrypted telephone) amounted to inculpatory evidence upon which a jury could be sure that the appellant conspired with *"someone"* [35]. This postscript reflects the fact that proof of the existence of a conspiracy is often a matter of proving circumstances from which the jury may infer the necessary agreement (*Parsons* (1763) 1 W.Bl. 392; *Brisac* (1803) 4 East 164, 171).

Although the proper interpretation of s.1 of the Criminal Law Act 1977 has not always proved easy, this case raised no controversial or difficult issue of principle. It is well established that one person alone may be tried for a conspiracy, provided that the indictment charges him with conspiring with others who have not appeared (*Plummer* [1902] 2 K.B. 339); or who have since died (*Nicholls* (1742) 2 Str. 1227)); or whose names are unknown. The appellant's conviction in the face of the acquittal of the named alleged co-conspirators is an illustration or, at its highest, an extension of this principle.

As a result, it was not necessary for the court to engage in any discussion of the principles that apply where verdicts are said to be inconsistent and illogical. Here, too, the law is settled: it must be shown not only that the verdicts are inconsistent, but that they are so inconsistent as to call for interference by an appellate court. Such interference will be called for where the court is satisfied that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion which was reached (*Durante* (1972) 56 Cr. App. R. 708; *Fanning*; *Kerner*; *Osianikovas*; *De Jesus* [2016] EWCA Crim 550, [2016] 2 Cr. App. R. 19).

If you would like to speak to Daniella Waddoup about this case, please click here.

About Daniella Waddoup

Daniella has a keen interest and fast developing practice in criminal appeals, particularly those involving appellants with mental disorder and children and young people. As well as being involved in appeals against conviction and sentence to the Court of Appeal, she has appeared before the Supreme Court, Privy Council and European Court of Human Rights. She was junior counsel for the intervener Just for Kids Law in R v Jogee; R v Ruddock. Daniella acted as judicial assistant to Lord Mance JSC and was led by Edward Fitzgerald QC in Pitman & Hernandez v The State, an appeal concerning the constitutionality of sentences of death imposed on those suffering from intellectual disability. Daniella also has experience of making applications to the Criminal Cases Review Commission.

To see Daniella's full profile, click here.

Appeal by way of Case Stated

Twitter; Messages "causing annoyance, inconvenience or needless anxiety" - s. 127(2)(c) Communications Act 2003, Article 10 ECHR;

By Farrhat Arshad

Scottow v Crown Prosecution Service [2020] EWHC 3421 (Admin)

S appealed by way of case stated against her conviction at the Magistrates' Court for improper use of a public communications network, contrary to s. 127(2)(c) of the Communications Act 2003. S had been prosecuted for a series of tweets that she had posted on Twitter. The tweets concerned H, a trans woman, who had a public profile as an activist and advocate on transgender rights. It was accepted that the messages had been sent over a "public electronic telecommunications network". The issue was whether S had "persistently" used such a network "for the purpose of causing annoyance, inconvenience or needless anxiety" to H within the meaning of s.127(2)(c) and the interplay between the offence and Article 10 ECHR.

The Divisional Court (Bean LJ, Warby J) allowed the appeal and quashed the conviction. The judgement (by Warby J) dealt with the scope of s. 127 of the Communications Act 2003. It was noted that the prosecution had not charged S with malicious communication or harassment, but presented the charge under s.127(2) as if it were "harassment-lite", in which it was enough to prove an intent to cause offence of at least one of the kinds mentioned in s.127(2)(c). The District Judge erred in also treating the matter in this way. Section 127 was not aimed at the communication of information or ideas that offended the recipient, even if offence was the purpose of those messages. The purpose of s. 127 was to "prohibit the abuse of the facilities afforded by a publicly-funded network by repeatedly exploiting them to communicate with another for no other purpose than to annoy, cause inconvenience, or cause needless anxiety" [at para 23 of judgment]. The focus was not on the content of any communication, but rather its purpose and the way in which that purpose was put into effect. Examples of the kinds of behaviour that would fall within the scope of s.127(2)(c) were repeated instances of prank calls, silent calls, heavy breathing, and other common forms of nuisance phone call containing no meaningful content. There was no offence under s.127(2)(c) of posting annoying tweets [paras 27, 29, 32, 54 of judgment). The judgment also considered the meaning of "persistently" in s.127(2)(c) - A series of communications had to have an element of frequency, but there were gaps of two or three months between some of S's messages. There also had to be a connecting theme or factor if the messages were to count as "persistent" and it was not enough that they all related to the same individual. In this case, the subject matter of the messages was different, there were at least two separate courses of conduct, engaged in at different periods of time and of a different character. The messages were not part of a single course of "persistent" conduct. The 2019 messages had to be viewed in isolation from the 2018 messages, and could not be regarded as a "persistent" use of the public network [at paras 38-39 of judgment].

The District judge erred in law in her approach to making findings about S's purpose. She did not consider whether the messages were "for the purpose" of causing annoyance, anxiety or inconvenience. Her reasons suggested that she considered it enough that causing annoyance, anxiety or inconvenience was "a" purpose. She also misdirected herself by indicating that whether S tagged or blocked H did not have much bearing on her purpose. If S had blocked H and did not tag her in messages, that was logically relevant to the question of whether her aim was one of the prohibited purposes. The judge also erred in regarding H's evidence as to the actual effect of the messages on her as relevant. Further, the judge did not identify which of the three prohibited purposes under s.127(2) she found proved [at para 41 of judgment].

ECHR art.10 - A court asked to convict a person of an offence under s.127 on the basis of the content of something they had said or written was obliged to have in mind the right to freedom of expression, guaranteed by Article 10 of the ECHR, and the requirement of s.3 of the Human Rights Act 1998 that, so far as possible, primary legislation had to be read and given effect in a way which was compatible with ECHR rights, **Connolly v DPP [2007] EWHC 237 (Admin)** applied. The prosecution argument failed to acknowledge the well-established proposition that free speech encompassed the right to offend, and indeed to abuse, another. The judge appeared to have considered that a criminal conviction was merited for acts of unkindness and calling others names, and that such acts could only be justified if they contributed to a "proper debate". It was not the law that individuals were only allowed to make personal remarks about others online if they did so as part of a "proper debate".

The judge had not adequately carried out an ECHR assessment. Testing the prosecution against the requirements of art.10(2) in relation to the 2019 messages, the stated aim of the prosecution (to protect H from persistent and unacceptable offence) was a legitimate aim, but a prosecution could not be justified as necessary in a democratic society. A prosecution and conviction on those facts would represent a grossly disproportionate and unjustified state interference with free speech [at paras 33-47 of judgment].

If you would like to speak to Farrhat Arshad about this case, please click here.

About Farrhat Arshad

Farrhat defends in serious criminal cases and is an experienced appellate barrister. Farrhat is recommended in Legal 500, 2021 as: *"the consummate appeals barrister, with an instinctive feel for the shape of an appeal. She is a leader in this field."* Her appellate practice includes both conviction and sentence appeals to the Court of Appeal, the Privy Council and applications to the Criminal Cases Review Commission. Farrhat authored two of the chapters in the 2nd edition of Taylor on Criminal Appeals, (OUP, March 2012): Appeals to the Divisional Court by way of Case Stated and Appeal to the Supreme Court and is Co Vice-Chair of the Criminal Appeal Lawyers Association.

To see Farrhat's full profile, click here.