IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2022/02810/B1, 2022/02811/B1
[2023] EWCA Crim 350

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 15th March 2023

B e f o r e:

VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE HILLIARD

MR JUSTICE CHAMBERLAIN

R E X

- v -

JOSEPH TSANG

Computer Aided Transcription of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Mr N Beechey appeared on behalf of the Appellant

Ms C Brown appeared on behalf of the Crown

J U D G M E N T
(Approved)

Wednesday 15th March 2023

LORD JUSTICE HOLROYDE:

1. This case concerns sexual offences against girls aged 15 and 14. Each of them is entitled to the lifelong protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during their respective lifetimes no matter may be included in any publication if it is likely to lead members of the public to identify either of them as a victim of these offences.

2. On 22nd January 2015, following a trial in the Crown Court at Oxford before His Honour Judge Eccles KC and a jury ("the first trial"), the appellant was convicted of three offences of sexual activity with a child, two offences of causing or inciting a child to engage in sexual activity and one of making indecent photographs of children.

3. On 25th August 2015, after a further trial ("the second trial"), the appellant was convicted of two offences of rape and two of assault by penetration. The second trial was conducted in the appellant's absence, because on 10th August 2015 he had fled to Hong Kong in breach of his bail. He had contrived to do so, despite the fact that the conditions of his bail had required him to surrender his passport.

4. On 20th October 2015, the judge sentenced the appellant in his absence to a total of 15 years' imprisonment for the sexual offences. The appellant was at that time in custody in Hong Kong. He later consented to his extradition and was returned to the United Kingdom. On 1st March 2016 he admitted his failure to surrender to custody and was sentenced to a further six months' imprisonment, to run consecutively to his other sentences.

5. On 26th August 2016 an appeal against sentence was allowed by this court, differently constituted, only to the very limited extent of correcting some errors in the pronouncement of

the sentences, leaving the total term of 15 years six months' imprisonment unaltered.

6. The appellant's case now comes back before this court by way of a reference by the Criminal Cases Review Commission ("CCRC").

7. For reasons which will quickly become apparent, it is unnecessary to go into any detail about the offences. It suffices to say that the appellant used his position as a prominent and well-known ice-skater to meet and take sexual advantage of two teenage girls who were trainee ice-skaters. The first group of offences, which were the subject of the second trial, were committed in January 2012 against a girl aged 15. The second group off offences, the subject of the first trial, were committed against a 14 year old girl in November 2012. During the police investigation of these offences, the appellant was found to have indecent images of children on his computer.

8. The CCRC, for whose work we are grateful, has set out three grounds for the referral to this court. They take effect as grounds of appeal against conviction and sentence. They raise first an issue as to the jurisdiction of the Crown Court to deal with the appellant for his Bail Act offence of failing to surrender, following his extradition from Hong Kong on other charges. Secondly, if the Crown Court had jurisdiction to deal with him for that offence, there is an issue as to whether he is entitled to credit against the sentence for that offence for the days he had spent in custody in Hong Kong awaiting his extradition. Thirdly, and in any event, there is an issue as to the appellant's entitlement to credit in relation to time spent on bail subject to a qualifying curfew during the period between the first trial and the appellant's absconding.

9. These grounds have been the subject of written and oral submissions by Mr Beechey for the appellant and Miss Brown for the respondent, to both of whom we are also grateful. There is a good deal of common ground between them, and we can take matters shortly.

10. The appellant's extradition was sought in relation to the sexual offences. Hong Kong is a category 2 territory for the purposes of the Extradition Act 2003, and the powers of courts in this country to deal with any other offence were therefore limited by section 150 of that Act. So far as is material in the circumstances of this case, that section provides as follows in relation to an extradited person:

> "(2) The person may be dealt with in the United Kingdom for an offence committed before his extradition only if —
>
> (a) the offence is one falling within subsection (3) …
>
> (3) The offences are —
>
> (a) the offence in respect of which the person is extradited;
>
> (b) a lesser offence disclosed by the information provided to the category 2 territory in respect of that offence;
>
> (c) an offence in respect of which consent to the person being dealt with is given by or on behalf of the relevant authority.
>
> (4) An offence is a lesser offence in relation to another offence if the maximum punishment for it is less severe than the maximum punishment for the other offence."

11. It is common ground between the parties, and we agree, that the appellant's case does not fall within either paragraph (a) or paragraph (c) of subsection (3). Although the request submitted to the Hong Kong authorities mentioned that the judge had issued a warrant for the appellant's arrest, it is very fairly accepted by Miss Brown that that was no more than a passing reference to a matter which was wholly extraneous to the offences for which extradition was requested. It is therefore conceded, on the authority of *R v Sedden* [2009] 2 Cr App R 9 and *R v Shepherd* [2019] 2 Cr App R 26, that the Bail Act offence cannot properly be treated as a

lesser offence disclosed by the information provided to Hong Kong.

12. We are satisfied that that concession is properly made. The Crown Court accordingly had no power to deal with the appellant for his Bail Act offence. His purported conviction for that offence is a nullity and must be set aside. It will be a matter for the Crown Prosecution Service to decide whether to take any further action in relation to what was, on the face of it, a serious offence of its kind.

13. The second issue raised by the grounds of appeal, in relation to the sentence for the Bail Act offence, falls away with the quashing of that conviction. We therefore say nothing about the difficult questions raised by that ground of appeal.

14. We turn to the final ground of appeal. The relevant statutory provision in force at the time of sentencing for the sexual offences was section 240A of the Criminal Justice Act 2003, which applied to an offender sentenced to a term of imprisonment who had in the course of the proceedings been remanded on bail, subject to a qualifying curfew. In such a case, subject only to qualifications which are not applicable here, subsection (2) provided that:

> "… the court must direct that the credit period is to count as time served by the offender as part of the sentence."

15. It is common ground that the credit period in the appellant's case was 100 days. It is also common ground that, regrettably, the judge did not give the direction which he was required to give, and, so far as we are aware, neither counsel then appearing reminded him that he should do so. Mr Beechey may well be correct in his suggestion that it was the absence of the appellant from those proceedings which caused all concerned to lose sight of that point. This ground of appeal must, in those circumstances, succeed, and the appropriate direction must be given.

16. The failure to give the necessary direction should, of course, have been raised when the appeal against sentence came before this court in August 2018. However, in deciding to refer this issue, notwithstanding that in other circumstances a long extension of time would be necessary, the CCRC rightly took into account the fact that the Crown Court Judge was under a duty to give the appropriate direction, and that it was through no fault of the appellant that it was not given.

17. In the result, we allow the appeal against conviction for the Bail Act offence and set that conviction aside as a nullity. We allow the appeal against sentence for the sexual offences to this extent. We make a direction, pursuant to section 240A(2) of the Criminal Justice Act 2003 that 100 days shall count towards the sentence.

18. The effect of our orders from the appellant's point of view is that his total sentence is now 15 years' imprisonment, with 100 days to count towards that sentence in respect of the period when he was on bail, subject to a qualifying curfew.
