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Case NO: 2019 /4/MTS

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/11/2019

Before :

MR JUSTICE WILLIAM DAVIS

IN THE MATTER OF OSBOURNE DOUGLAS

Approved Judgment

Decision upon a Reference under Section 273 of the Criminal Justice Act 2003

Mr Justice William Davis:

Introduction

1. This is a reference by the Home Secretary under Section 273 of the Criminal Justice Act 2003 (“the 2003 Act”) of the case of Osbourne Douglas, a transferred life prisoner within the meaning of that term in the 2003 Act, for the making of an order determining the minimum term following which the early release provisions referred to in Section 269(2) of the 2003 Act are to apply to him.
2. For the purpose of this decision I have read and considered the following material:
 - The PNC record of Osbourne Douglas.

- The sentence judgment dated 19 December 2016 of the Honourable Mr Justice Charles Quin QC in the Grand Court of the Cayman Islands.
- The judgment of the Cayman Islands Court of Appeal dated 7 December 2018 delivered by the Right Honourable Sir John Goldring.
- The judgment of Mr Justice Stanley Burnton (as he then was) in the matter of *Adbur Rashid Khan* [2006] EWHC 2826 (QB).
- The judgment of Mrs Justice Simler (as she then was) in *R (on the application of Richards) v SSHD* [2015] EWHC 4280 (Admin).
- Written representations on behalf of Osbourne Douglas dated 27 June 2019 from Charles Miskin QC.
- The Council of Europe Convention on the Transfer of Sentenced Persons dated 21 March 1983.

I have also been provided with two admissibility decisions of the ECHR dating from 1992 and 1993. Having reviewed those decisions I am satisfied that they take the matter no further than the materials to which I have referred above.

The Offences

3. Osbourne Douglas was convicted on 26 May 2016 of murder and possession of an unlicensed firearm. The offences were committed on 1 July 2015. On the evening of that day Douglas and a man named Justin Ramoon travelled together in a Honda car to an area close to a shop called the Alpha Outlet Store in George Town, Grand Cayman. Ramoon was driving the car. On arrival Douglas got out of the car and went to the Globe Bar which was close by. The eventual victim, Jason Powery, was in the Globe Bar. Douglas spent a minute or two encouraging young people in the bar who were close to Powery to move away. As he was doing that, Ramoon moved the Honda car closer to the Globe Bar. Ramoon then left the car and went to the Globe Bar. He there met Douglas who gave him a handgun which up to that point had been in Douglas's waistband. Douglas then left the Globe Bar and got into the Honda car. As Douglas was moving the car a short distance, Ramoon went up to Powery and shot him once in the head at close range. Having done that, he aimed the gun at a witness who was standing close by but the gun did not fire. He then went to where the Honda now was parked. He got into the car. Douglas drove the car away with Ramoon as a passenger. The two men had been in and around the Globe Bar for no more than 10 minutes. The sentencing judge concluded that the two men had not visited the area for social or innocent reasons. Rather, they had gone to the Globe Bar to carry out a pre-arranged plan.

The statutory provisions in the Cayman Islands

4. As in England and Wales, the mandatory sentence for the offence of murder in the Cayman Islands is imprisonment for life. The sentencing judge in the Grand Court of the Cayman Islands was required to apply the Conditional Release Law 2014 and the Conditional Release of Prisoners Regulations 2016 made pursuant to Section 21 of that Act. Section 14(1) of the Act is in these terms:

(1) Notwithstanding any other Law to the contrary, when sentencing a prisoner to a term of imprisonment for life, the court shall specify the period of incarceration the prisoner shall serve before the prisoner is eligible to be considered for conditional release on licence, the period being such as the court considers appropriate to satisfy requirements of retribution, deterrence and rehabilitation, but for murder, the period shall be thirty years before the prisoner is eligible for conditional release unless there are —

(a) extenuating circumstances, exceptional in nature, in which case the court may impose a lower period of incarceration; or

(b) aggravating circumstances, exceptional in nature, in which case the court may impose a longer period of incarceration.

5. Regulation 14 of the Regulations taken together with the matters set out in Schedule 12 of the Regulations deals with extenuating and aggravating circumstances. Regulation 14 reads as follows:

For the purposes of determining the earliest possible conditional release date in relation to a prisoner on a term of imprisonment for life, the circumstances set out in Schedule 12 shall be considered.

6. The relevant part of Schedule 12 is in these terms:

Aggravating circumstances and extenuating circumstances

- (1) Detailed consideration of aggravating or mitigating circumstances may result in a minimum term of any length.*
- (2) Aggravating circumstances that may be relevant to the offence of murder include —*
- (a) a significant degree of planning or premeditation;*
- (b) the fact that the victim was particularly vulnerable because of age or disability;*
- (c) mental or physical suffering inflicted on the victim before death,*
- (d) the abuse of a position of trust;*
- (e) the use of duress or threats against another person to facilitate the commission of the offence;*

(f) the fact that the victim was providing a public service or performing a public duty;

(g) concealment, destruction or dismemberment of the body;

(h) previous convictions;

(i) abduction and sexual or sadistic conduct; and

(j) any other circumstances which may be considered relevant.

(3) Extenuating circumstances that may be relevant to the offence of murder include -

(a) an intention to cause serious bodily harm rather than to kill;

(b) lack of premeditation;

(c) the fact that the offender suffered from any mental disorder or mental disability which (although not falling within section 185(1) of the Penal Code (2013 Revision)), lowered the offender's degree of culpability;

(d) the fact that the offender was provoked (for example, by prolonged stress);

(e) the fact that the offender acted to any extent in self-defence or in fear of violence;

(f) a belief by the offender that the murder was an act of mercy;

(g) the age of the offender; and

(h) any other circumstances which may be considered relevant.

7. Thus, the minimum term for the offence of murder in the Cayman Islands is 30 years imprisonment subject to mitigating and extenuating circumstances. This single minimum term as provided for in the Regulations is to be contrasted with the different minimum terms in England and Wales for which provision is made in Schedule 21 of the Criminal Justice Act 2003.

The sentence in the Cayman Islands

8. Before the sentencing judge it was conceded on behalf of Douglas that there were no extenuating circumstances sufficient to reduce the minimum term below 30 years. The sentencing judge found that there were aggravating circumstances of an exceptional nature: pre-possession of an illegal firearm; the separate roles of the defendants before, at the time of and after the shooting; significant planning and premeditation; potential use of the gun to shoot at a witness. In Douglas's case he set the minimum term at 34 years. The minimum term in the case of Ramoon was 35

years. The extra year was added because Ramoon had a previous conviction for possession of an imitation firearm.

9. The Cayman Islands Court of Appeal upheld the minimum terms imposed by the sentencing judge. The principal ground of appeal argued by Ramoon and Douglas was that the sentencing judge was in error when he concluded that the aggravating circumstances were exceptional in nature as required by the Conditional Release Law 2014. In particular, the judge should not have relied on the possession and use of an illegal firearm as constituting exceptional circumstances. It was said that the possession and use of firearms in cases of murder was commonplace in the Cayman Islands. Thus, this feature could not be considered to be exceptional. The Court of Appeal rejected this argument. The term “exceptional in nature” was intended to be a qualitative rather than a quantitative judgment. It was not a question of how often particular circumstances occurred. Rather, the issue was how serious the circumstances were.

The statutory provisions to be applied in this decision

10. Douglas has been removed from Grand Cayman and is now serving his sentence within the prison establishment in England and Wales. He was transferred under Section 2 of the Colonial Prisoners Removal Act 1884. The validity of Douglas’s removal currently is under challenge in judicial review proceedings in the Grand Court (Civil Division) of the Cayman Islands. This is of no relevance to my decision. I must proceed on the basis that Douglas now will serve his sentence in this jurisdiction.
 11. Section 273 of the 2003 Act (insofar as is relevant) is in these terms:
 - (1) *The Secretary of State must refer the case of any transferred life prisoner to the High Court for the making of one or more relevant orders.*
 - (2) *In subsection (1) “transferred life prisoner” means a person—*
 - (a) *on whom a court in a country or territory outside the British Islands has imposed one or more sentences of imprisonment or detention for an indeterminate period, and*
 - (b) *who has been transferred to England and Wales after the commencement of this section in pursuance of—*
 - (i) *an order made by the Secretary of State under [section 2](#) of the [Colonial Prisoners Removal Act 1884 \(c. 31\)](#)*
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- there to serve his sentence or sentences or the remainder of his sentence or sentences.*
- (3) *In subsection (1) “a relevant order” means—*

(a) in the case of an offence which appears to the court to be an offence for which, if it had been committed in England and Wales, the sentence would have been fixed by law, an order under [subsection \(2\)](#) or [\(4\) of section 269](#).....

(4) In [section 34\(1\)](#) of the [Crime \(Sentences\) Act 1997 \(c. 43\)](#) (meaning of “life prisoner” in [Chapter 2 of Part 2](#) of that Act) at the end there is inserted “and includes a transferred life prisoner as defined by section 273 of the Criminal Justice Act 2003”.

It follows that, pursuant to Section 273(3)(a), I must make an order under Section 269 of the 2003 Act.

12. Section 269 of the 2003 Act (insofar as is relevant) is in these terms:

(1) This section applies where after the commencement of this section a court passes a life sentence in circumstances where the sentence is fixed by law.

(2) The court must, unless it makes an order under subsection (4), order that the provisions of [section 28\(5\) to \(8\)](#) of the [Crime \(Sentences\) Act 1997](#) (referred to in this Chapter as “the early release provisions”) are to apply to the offender as soon as he has served the part of his sentence which is specified in the order.

(3) The part of his sentence is to be such as the court considers appropriate taking into account—

(a) the seriousness of the offence, or of the combination of the offence and any one or more offences associated with it, and

(b) the effect of [[section 240ZA](#) (crediting periods of remand in custody) or of any direction which it would have given under [section 240A](#) (crediting periods of remand on certain types of bail)]¹ if it had sentenced him to a term of imprisonment.

.....

(4) If the offender was 21 or over when he committed the offence and the court is of the opinion that, because of the seriousness of the offence, or of the combination of the offence and one or more offences associated with it, no order should be made under subsection (2), the court must order that the early release provisions are not to apply to the offender.

(5) In considering under subsection (3) or (4) the seriousness of an offence (or of the combination of an offence and one or more offences associated with it), the court must have regard to—

(a) the general principles set out in [Schedule 21](#), and

(b) any guidelines relating to offences in general which are relevant to the case and are not incompatible with the provisions of [Schedule 21](#).

Thus, I am required to consider whether Section 269(4) applies such that the early release provisions are not to apply to Douglas. If that is not the position, pursuant to Section 269(2) I must determine the minimum term to be served before any early release.

Discussion

13. There is little by way of authority to indicate the proper approach to the exercise of the jurisdiction provided by Section 273 of the 2003 Act. In *Abdur Rashid Khan* the court considered the impact of the Council of Europe Convention in cases of transferred prisoners. Article 10.1 of the Convention states:

In the case of continued enforcement, the administering State shall be bound by the legal nature and duration of the sentence as determined by the sentencing State.

The sentence imposed in the Cayman Islands was life imprisonment. That is the sentence which will follow in this jurisdiction. Thus, Article 10.1 gives rise to no issue.

14. Article 11 of the Convention reads as follows:

In the case of conversion of sentence, the procedures provided for by the law of the administering State apply. When converting the sentence, the competent authority: a) shall be bound by the findings as to the facts insofar as they appear explicitly or implicitly from the judgment imposed in the sentencing State; b) may not convert a sanction involving deprivation of liberty to a pecuniary sanction; c) shall deduct the full period of deprivation of liberty served by the sentenced person; d) shall not aggravate the penal position of the sentenced person, and shall not be bound by any minimum which the law of the administering State may provide for the offence or offences committed.

In *Abdur Rashid Khan* the court concluded that paragraph (d) of Article 11 prohibited an increase in the minimum term from that imposed in the transferring state and that any exercise of discretion under the 2003 Act should ensure compliance with the Convention. In that case the preliminary view of the court was that the appropriate minimum term pursuant to the 2003 Act would have been 10 to 12 years. The judge in the transferring state (in that instance Canada) had set a minimum term of 10 years. It was determined that to apply a minimum term in excess of 10 years would aggravate the penal position of the transferred person. Therefore, the minimum term to be served in this jurisdiction was set at 10 years. The court in *Khan* further concluded that paragraph (c) of Article 11 required the time spent on remand to be taken into account in setting the minimum term whatever the position might be in the transferring state. In fact, it is apparent from the sentence judgment that in the Cayman Islands time on remand is taken into account.

15. The sentence in the Cayman Islands was the subject of a detailed judgment by the sentencing judge. Further, the sentence was considered in detail by the Cayman Islands Court of Appeal. Irrespective of the Convention I would regard myself as bound by the findings of fact apparent from the judgments delivered in the Cayman Islands. I have no proper basis upon which to depart from those findings which were made by the judge who presided over the trial and heard the evidence. In fact paragraph (a) of Article 11 deals explicitly with the position and provides for the same outcome.
16. I first must consider what the outcome would have been had Douglas been sentenced in this jurisdiction. The judge would have considered Schedule 21 of the 2003 Act in order to determine (a) whether Section 269(4) applied and, if it did not, (b) the appropriate minimum term to be served before the early release provisions were to apply. I am satisfied that Section 269(4) would not have applied in this case. This was not an offence the seriousness of which was exceptionally high. Thus, this is not a case in which a whole life term would have been appropriate. However, I am equally satisfied that it was an offence the seriousness of which was particularly high. It was a murder involving the use of a firearm. Thus, the appropriate starting point would have been a minimum term of 30 years. Applying the findings of fact made in the courts of the transferring state, this was a case involving a significant degree of planning and premeditation. Douglas and his co-accused went to the Globe Bar for but a few minutes. In that time Douglas cleared the area in which the shooting was to take place and then handed the gun to his co-accused before moving the car in which the two men were to make their getaway to a point more easily accessible to the co-accused. The shooting was a public execution. The Court of Appeal noted Douglas and his co-accused wore no disguise and had a gun in open view despite the fact that there were not unknown to many of those in the Globe Bar. The conclusion was that they did not believe that anyone would give evidence against them. As was said in the judgment on appeal “that says much about these appellants”.
17. Taking all of those matters into account, had I been sentencing Douglas after a trial in this jurisdiction I would have set a minimum term significantly in excess of 30 years. There were no mitigating factors. Although Douglas (unlike his co-accused) had no previous convictions involving guns or violence, he had been convicted of serious offences of dishonesty in 2006 which had resulted in a sentence of five years’ imprisonment. Mr Miskin in his written submissions argues that the planning was not particularly sophisticated, and that Douglas could not be implicated directly in the aiming of the gun at a witness after Powery had been shot. These propositions amount to an absence of further aggravating factors rather than mitigation. I acknowledge that it is difficult to engage in the process required under Section 269 when one has not heard the trial. It is also necessary to guard against applying the test applicable when considering an appeal against the length of a minimum term. My task is to engage afresh in the exercise of setting the minimum term. It is not a question of assessing the term set in the transferring state, determining whether it was manifestly excessive and, if it was not, setting the same term in this jurisdiction. Taking all of that into account, had I been sentencing in this jurisdiction someone who had committed the offences committed by Douglas, I would have imposed a minimum term of 34 years. This is the appropriate term taking into account the aggravating factors. I am confident in that conclusion based on similar cases with which I have dealt in the last ten years sitting in the Crown Court.

18. However, that is not the end of the matter. Douglas was not sentenced in this jurisdiction. He committed the offences in the Cayman Islands which is where he lived at that time. He has been transferred to this jurisdiction because there apparently is no suitable prison in the Cayman Islands in which he could be housed. He now is thousands of miles from his home with little prospect of visits – other than on a very occasional basis – from family and friends. The effect on Douglas of his transfer was discussed by the Cayman Islands Court of Appeal. Having referred to the fact that the length of the minimum term would be determined by this court, Sir John Goldring said this:

“...the Court will, we anticipate, take into account, among other things, why the decision was taken to remove them from the Cayman Islands to England, the fact, as Mr Perry put it, that the Cayman Islands is a small island community with its particular issues as far as serious crime is concerned, as well as the undoubted additional hardship of serving lengthy prison sentences a very long way from home.”

It was not Douglas’s choice to be transferred to this jurisdiction. He has no connection to this country. Serving a very long sentence in an English prison will be a hardship additional to the mere fact of the length of the sentence. This must be of significance in determining the appropriate minimum term and the order pursuant to Section 273 of the 2003 Act. The minimum term is intended to reflect punishment and retribution. The punitive effect of serving a prison sentence, particularly one of the length involved in this case, is all the greater if it is to be served in a country far from the offender’s home. I am satisfied that the length of the minimum term should be reduced to take account of that fact. The reduction will not be substantial. The seriousness of the crime committed by Douglas is the same wherever he may serve his sentence with the retributive element remaining the same. But the nature of the punishment is significantly greater given the circumstances in which he now finds himself. For those reasons I determine the minimum term to be served by Douglas as 31 years.

19. The whole of the period thus far spent in custody must be taken into account in setting the minimum term. That period commenced on 15 July 2015. Therefore, the minimum term will be 31 years less 1,582 days (assuming that this judgment takes effect from 15 November 2019).