

[2024 Gib LR 270]

**R. (RUDGE) v. PAROLE BOARD
(MINISTER FOR JUSTICE as interested party)**

SUPREME COURT (Dudley, C.J.): May 29th, 2024

2024/GSC/017

Prisons—parole—spent convictions—prisoner’s previous convictions, including spent convictions, properly considered by Parole Board

The claimant sought judicial review of a decision by the Parole Board.

The claimant had been sentenced to 8 years’ imprisonment for rape of a 15 year old. When dealing with aggravating features, the sentencing judge had referred to the claimant’s numerous previous convictions, including for ABH, assault, threats to kill, robbery, disorderly conduct or indecent conduct whilst intoxicated, and being drunk and disorderly, and that the relevant previous conviction was in 2014 for unlawful sexual intercourse with a girl under the age of 16.

The claimant applied to the Parole Board to be released on licence. His application was refused. The reasons for decision were set out in a letter on behalf of the Minister (“the decision letter”), which stated that the judge’s sentencing pronouncement and the claimant’s convictions, including spent convictions, were relevant factors which the Parole Board had taken into account.

The claimant was granted permission to apply for judicial review on the ground alleging wrongful reliance by the Parole Board on spent convictions.

Schedule 1 to the Prison Act 2011 set out the matters to be taken into consideration by the Parole Board when dealing with applications before it. In relation to prisoners serving a sentence for a determinate period, Schedule 1 provided:

“1.(1) In deciding whether or not to advise the Minister to release a prisoner on licence, the Parole Board shall—

- (a) consider primarily the risk to the public of a further offence being committed at a time when the prisoner would otherwise be in prison . . .”

Part 25 of the Criminal Procedure and Evidence Act 2011 dealt with the rehabilitation of offenders. Section 611(1) provided:

“Subject to sections 615 to 618, a person who has become a rehabilitated person for the purposes of this Part in respect of a conviction is to be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of

or sentenced for the offence or offences which were the subject of that conviction.”

Section 611(4) provided:

“Subject to the exceptions provided for by section 616—

- (a) any obligation imposed on any person by any rule of law or by the provisions of any agreement or arrangement to disclose any matters to any other person does not extend to requiring him to disclose a spent conviction or any circumstances ancillary to a spent conviction (whether the conviction is his own or another’s); and
- (b) a conviction which has become spent or any circumstances ancillary thereto, or any failure to disclose a spent conviction or any such circumstances, is not a proper ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing him in any way in any occupation or employment.”

Section 616(9) provided:

“Section 611(4) does not apply in relation to any proceedings specified in Part 6 of Schedule 12 to the extent that a decision needs to be taken in those proceedings relating to a person’s spent conviction or to circumstances ancillary to a conviction.”

Schedule 12 dealt with exceptions to rehabilitation and Part 6, which was entitled “Excepted Proceedings,” included: “10. Proceedings before the Parole Board.”

The claimant submitted that (a) s.616(9) when read together with s.611(4) created only a limited exception to the general principle of rehabilitation created by s.611(1); (b) for the purposes of the determination by the Parole Board as to whether or not the claimant should be released on licence, there was no exception to the general provision that a person whose conviction was spent was to be treated in law as a rehabilitated person; (c) the exceptions to the rehabilitation provisions in the context of proceedings before the Parole Board were limited to (i) the non-obligations of disclosure of spent convictions or any circumstances ancillary to a spent conviction, and (ii) that any failure to disclose spent convictions could not be relied on as a ground for dismissing or excluding any person from any office, profession, occupation or employment, or from prejudicing the person in any way in any occupation or employment; and (d) therefore, the relevance of spent convictions to the Parole Board was limited to the imposition of licence conditions pursuant to Schedule 2 of the Prison Act restricting any prospective employment on release.

The defendant submitted that Parliament could not have intended that s.616(9) created only a narrow exception which related to a person’s occupation or employment. To interpret s.616(9) and s.611(4) in this way would lead to the anomalous, illogical or absurd result that Parliament listed proceedings before the Parole Board as “Excepted Proceedings” but the Parole Board could not take spent convictions into account in

considering the risk to the public of a further offence being committed at a time when the prisoner would otherwise be in prison.

Held, dismissing the claim:

The claimant's previous convictions, including his spent convictions, were properly before the Parole Board. Although, on a literal interpretation, the claimant's argument could be made out, there was a presumption that Parliament did not intend to act in a manner that led to anomalous, illogical or absurd consequences. Parliament could not have intended that s.616(6) created only a narrow exception which related to a person's occupation or employment. Interpreting s.616(9) and s.611(4) in this way would lead to the anomalous, illogical or absurd result that Parliament listed proceedings before the Parole Board as "Excepted Proceedings" but that the Parole Board could not take spent convictions into account in exercising its statutory function to "consider primarily the risk to the public of a further offence being committed at a time when the prisoner would otherwise be in prison." In the absence of clear language, the court was unable to accept the proposition that Parliament envisaged affording rights to offenders which undermined the ability of the Parole Board to consider highly relevant information when assessing risk to the public and to in effect undertake any such assessment on a false premise. It was of note that s.611(4)(a) and (b) were disjunctive. It was also instructive that s.611(4) was disapplied both by s.616(9) in relation to the "Excepted Proceedings" and by s.616(8), which provided: "Section 611(4) does not apply in relation to any action taken for the purpose of safeguarding the security of Gibraltar." Safeguarding the security of Gibraltar necessarily included the risk assessment undertaken by the Parole Board when determining whether or not a prisoner should be released on licence. Two considerations strengthened the court's view. First, the claimant's submissions failed to take account of s.611(4)(a). Essentially that provision allowed a person not to disclose a spent conviction, whether the conviction was his own or another's. Even if it were not disapplied, it did not prevent such disclosure. In any event, given that it was disapplied to "Excepted Proceedings" it was evident that the person preparing the report for the Parole Board could properly provide details of spent convictions. Secondly, the disapplication on "security" grounds must amount to an implicit derogation of the right conferred by s.611(1) such that the legislative ambiguity fell to be resolved in favour of the Parole Board which could properly rely upon spent convictions when assessing the risk of reoffending of a prisoner. The claimant's claim would be dismissed (paras. 13–17).

Case cited:

- (1) *R. (Edison First Power Ltd.) v. Central Valuation Officer*, [2003] UKHL 20; [2003] 4 All E.R. 209; [2003] 16 EGCS 101; [2003] 2 EGLR 133, considered.

Legislation construed:

Criminal Procedure and Evidence Act 2011, s.611(1): The relevant terms of this subsection are set out at para. 7.

s.611(4): The relevant terms of this subsection are set out at para. 8.

s.616(8): The relevant terms of this subsection are set out at para. 15.

s.616(9): The relevant terms of this subsection are set out at para. 9.

Schedule 12, part 6: The relevant terms of this part are set out at para. 10.

Prison Act 2011, s.53(2): The relevant terms of this subsection are set out at para. 6.

Schedule 1: The relevant terms of this schedule are set out at para. 6.

S. Danino (instructed by TSN) for the claimant;

G. Licudi, K.C. (instructed by Hassans) for the defendant;

J. Fernandez (instructed by Office of Criminal Prosecutions & Litigation) for the interested party.

1 **DUDLEY, C.J.:** Following a hearing held on February 19th, 2024 I dismissed the claimant's claim for judicial review arising from a decision by the defendant ("the Parole Board"). These are my reasons for that decision.

2 The claim arises from a recommendation by the Parole Board to the Minister for Justice ("the Minister") that the claimant ("Mr. Rudge") should be refused release on licence pursuant to an application made by him before the Parole Board on July 3rd, 2023. The Minister is joined to the claim as an interested party as the recommendation of the Parole Board took effect through her decision. It is not in dispute that in circumstances in which the recommendation was for Mr. Rudge not to be released on licence, the Minister was required to follow the recommendation of the Parole Board.

Background

3 Following a trial Mr. Rudge was found guilty of one count of rape and one count of attempted rape. The victim was 15 years old at the time of the offence. In respect of the rape the court imposed a custodial sentence of 8 years and no separate penalty was imposed in respect of the count of attempted rape. In her sentencing remarks Mrs. Justice Ramage Prescott dealing with aggravating features of the offences made reference to Mr. Rudge's previous convictions and said:

"You have numerous previous convictions including ABH, assault, threats to kill, robbery, disorderly conduct or indecent conduct whilst intoxicated, and being drunk and disorderly. The relevant previous conviction is in 2014 for unlawful sexual intercourse with a girl under the age of 16."

4 Applications by Mr. Rudge in August 2021 and July 2022 to be released on licence were refused. Mr. Rudge again applied and appeared before the Parole Board in June 2023. The application was again refused. The reasons for that decision were set out in a letter dated July 12th, 2023 from Mr. K. Warwick, Senior Crown Counsel (on behalf of the Minister) to Mr. Rudge (“the decision letter”). It is of relevance to the present claim that the Parole Board had before it the judge’s sentencing pronouncement and Mr. Rudge’s convictions, including spent convictions, when considering what advice to tender to the Minister. Those matters were set out in the decision letter as relevant factors which the Parole Board had taken account of, as follows:

“The Board remains concerned as to the numerous previous convictions including ABH, assault, threats to kill, robbery, disorderly conduct or indecent conduct whilst intoxicated and being drunk and disorderly. Also noted of great concern, were the breaches of SOPOs designed to reduce the risk of further offending, the Board is concerned that there is a significant risk that history may repeat itself.”

And:

“The Board took particular note of the inmate’s previous convictions, in particular, the previous conviction for unlawful sexual intercourse with a girl under the age of 16, together with his propensity to offend, despite sanctions imposed, or soon after release from custody and that this creates an unacceptable risk to the public.”

The challenge

5 The only ground in respect of which permission to apply for judicial review was granted was that alleging wrongful reliance by the Parole Board on spent convictions.

The statutory framework of the Parole Board under the Prison Act

6 The Parole Board is established under s.52(1) of the Prison Act with s.53 setting out its functions and s.53(2) providing:

“(2) The Parole Board shall deal with each case on consideration of any documents given to it by the Superintendent and of any reports it has called for and any information, whether oral or in writing, that it has obtained.”

Schedule 1 to the Prison Act sets out the matters to be taken into consideration by the Parole Board when dealing with applications before it. In relation to prisoners serving a sentence for a determinate period (as was the case with Mr. Rudge) Schedule 1 provides:

“1.(1) In deciding whether or not to advise the Minister to release a prisoner on licence, the Parole Board shall—

- (a) consider primarily the risk to the public of a further offence being committed at a time when the prisoner would otherwise be in prison and whether any such risk is acceptable and this must be balanced against the benefit, both to the public and the prisoner, of early release back into the community under a degree of supervision and which might help rehabilitation and so lessen the risk of re-offending in the future; and
- (b) take into account that safeguarding the public may often outweigh the benefits to the prisoner of early release.

(2) Before advising the Minister to release a prisoner on licence, the Parole Board shall consider the following factors and information, where relevant and available, recognising that the weight and relevance attached to particular information may vary according to circumstances—

- (a) whether the safety of the public would be placed unacceptably at risk and in assessing such risk the Board shall take into account—
 - ...
 - (ii) the prisoner’s background, including the nature, circumstances and pattern of any previous offending;
 - ...
 - (vii) any risk to other persons, including the victim, their family and friends . . .”

It is evident from these provisions that the Parole Board is required to consider primarily the risk of a further offence being committed by the prisoner and, in so considering, is required to take into account the nature, circumstances and pattern of any previous offending by the prisoner and any risk to other persons.

The statutory framework on rehabilitation of offenders

7 Part 25 (ss. 610–620) of the Criminal Procedure and Evidence Act 2011 (“the Act”) deals with the rehabilitation of offenders. In essence, once the rehabilitation period ends in respect of a particular conviction, the offender is, subject to certain exceptions, to be treated as rehabilitated for the purposes of that conviction and the conviction is to be treated as spent. In particular s.611(1) provides:

“Subject to sections 615 to 618, a person who has become a rehabilitated person for the purposes of this Part in respect of a

conviction is to be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction.”

8 Engaged in the submissions advanced by Mr. Danino is s.611(4), which provides:

“(4) Subject to the exceptions provided for by section 616—

- (a) any obligation imposed on any person by any rule of law or by the provisions of any agreement or arrangement to disclose any matters to any other person does not extend to requiring him to disclose a spent conviction or any circumstances ancillary to a spent conviction (whether the conviction is his own or another’s); and
- (b) a conviction which has become spent or any circumstances ancillary thereto, or any failure to disclose a spent conviction or any such circumstances, is not a proper ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing him in any way in any occupation or employment.”

9 Sections 615–618 deal with various exceptions and limitations to the right which accrues by virtue of s.611. In particular, s.616(9) provides that—

“Section 611(4) does not apply in relation to any proceedings specified in Part 6 of Schedule 12 to the extent that a decision needs to be taken in those proceedings relating to a person’s spent conviction or to circumstances ancillary to a conviction.”

10 Schedule 12 deals with “Exceptions to Rehabilitation” and Part 6 which is entitled “Excepted Proceedings” provides for the following:

- “1. Proceedings in respect of a person’s admission to, or disciplinary proceedings against a member of, any profession specified in Part 1 of this Schedule.
- 2. Disciplinary proceedings against a police officer.
- 3. Proceedings under or arising out of the Gambling Act 2005.
- 4. Proceedings at any hearing conducted pursuant to, or before any tribunal established under, the financial services legislation.
- 5. Proceedings under the Mental Health Act 2016 before any tribunal.
- 6. Proceedings under the Firearms Act in respect of—
 - (a) the registration of a person as a firearms dealer;

- (b) the grant, renewal, variation or revocation of a certificate or permit.
- 7. Proceedings in respect of an application for, or cancellation of registration in respect of a nursing home under the Medical and Health Act.
- 8. Proceedings on an application to the Commissioner of Police for an explosives certificate pursuant to the Explosives Regulations as to the fitness of the applicant to acquire or acquire and keep explosives.
- 9. Proceedings relating to a road service licence.
- 10. Proceedings before the Parole Board.
- 11. Proceedings under Part IV of the Drug Trafficking Offences Act.
- 12. Proceedings by way of appeal against, or review of, any decision taken, by virtue of any of the provisions of this Schedule, on consideration of a spent conviction.
- 13. Proceedings held for the receipt of evidence affecting the determination of any question arising in any proceedings specified in this Schedule.”

Submissions, discussion and conclusion

11 In short, Mr. Danino submits that s.616(9) when read together with s.611(4) creates what is only a limited exception to the general principle of rehabilitation created by s.611(1). He submits that for the purposes of the determination by the Parole Board as to whether or not Mr. Rudge should be released on licence, there is no exception to the general provision that a person whose conviction is spent is to be treated in law as a rehabilitated person. That the exceptions to the rehabilitation provisions in the context of proceedings before the Parole Board are limited to (i) the non-obligations of disclosure of spent convictions or any circumstances ancillary to a spent conviction, and (ii) that any failure to disclose spent convictions cannot be relied on as a ground for dismissing or excluding any person from any office, profession, occupation or employment, or from prejudicing the person in any way in any occupation or employment. That therefore, the relevance of spent convictions to the Parole Board is limited to the imposition of licence conditions pursuant to Schedule 2 of the Prison Act restricting any prospective employment on release.

12 Viewed from the perspective of s.611(4)(b), the self-evident proposition is that Mr. Danino’s analysis must apply equally not only to proceedings before the Parole Board but also to all the excepted proceedings set out in Part 6. By way of example the question of being prejudiced in any office, profession, occupation or employment would likely be wholly irrelevant for the purposes of exempted proceedings under

the Mental Health Act, the Firearms Act or under the Explosives Regulations. On his analysis making certain proceedings exempt would therefore be of no effect. This runs counter to the presumption that Parliament does not legislate in vain.

13 Moreover, although on a literal interpretation the argument advanced on behalf of Mr. Rudge can be made out, there is a presumption that Parliament does not intend to act in a manner that leads to anomalous, illogical or absurd consequences. As Lord Millett put it in *R. (Edison First Power Ltd.) v. Central Valuation Officer* (1) ([2003] UKHL 20, at paras. 116–117):

“The Courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless . . . The more unreasonable a result, the less likely it is that Parliament intended it.”

14 I adopt Mr. Licudi’s analysis that Parliament cannot have intended that s.616(9) create only a narrow exception which relates to a person’s occupation or employment. Interpreting s.616(9) and s.611(4) in this way would lead to the anomalous, illogical or absurd result that Parliament listed proceedings before the Parole Board as “Excepted Proceedings” but that the Parole Board could not take spent convictions into account in exercising its statutory function to “consider primarily the risk to the public of a further offence being committed at a time when the prisoner would otherwise be in prison.” In my judgment in the absence of clear language I am unable to accept the proposition that Parliament envisaged affording rights to offenders which undermined the ability of the Parole Board to consider highly relevant information when assessing risk to the public and to in effect undertake any such assessment on a false premise.

15 Also of note that as I read them, s.611(4)(a) and (b) are disjunctive. And instructive that s.611(4) is disapplied both by s.616(9) in relation to the “Excepted Proceedings” and by s.616(8), which provides: “Section 611(4) does not apply in relation to any action taken for the purpose of safeguarding the security of Gibraltar.” As regards s.616(8), in my judgment “safeguarding the security of Gibraltar” necessarily includes the risk assessment undertaken by the Parole Board when determining whether or not a prisoner should be released on licence.

16 Two considerations which fortify my view arise from this. The first is that Mr. Danino’s submissions fail to take account of s.611(4)(a). Essentially that provision allows a person not to disclose a spent conviction, whether the conviction is his own or another’s. Even if it were not disapplied it does not prevent such disclosure. In any event, given that it is disapplied to “Excepted Proceedings” it is evident that the Superintendent of Prison or the Probation Officer when preparing his/her

report for the Parole Board, can properly provide details of spent convictions. The second is that the disapplication on “security” grounds in my judgment must amount to an implicit derogation of the right conferred by s.611(1) such that the legislative ambiguity falls to be resolved in favour of the Parole Board which can properly rely upon spent convictions when assessing the risk of reoffending of a prisoner.

17 It follows that Mr. Rudge’s previous convictions including his spent convictions were properly before the Parole Board.

18 To the extent that there may be a lingering ambiguity in relation to “Excepted Proceedings” which do not touch upon “the security of Gibraltar” it may be that an order by the Minister pursuant to s.615(5) excluding the application of s.611(1) in relation to any such proceedings set out in Schedule 12 or otherwise would remove any uncertainty.

19 For these reasons the claim was dismissed. If necessary, I shall hear the parties as to costs.

Claim dismissed.
