



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 28
HCA/2018/411/XC

Lord Justice General
Lord Brodie
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in the

APPLICATION FOR AN EXTENSION OF TIME IN WHICH TO LODGE A NOTE OF
APPEAL AGAINST CONVICTION AND SENTENCE

by

KENNETH SOLOMON

Applicant

against

HER MAJESTY'S ADVOCATE

Respondent

Applicant: A Ogg (sol adv); Paterson Bell (for John Kilcoyne, Glasgow)

Respondent: K Harper AD; the Crown Agent

2 May 2019

[1] Section 109 of the Criminal Procedure (Scotland) Act 1995 provides that a person who wishes to appeal against his conviction shall intimate that fact in writing within 2 weeks of sentence (final determination). Section 110 provides that he then requires to lodge a Note of Appeal within 8 weeks of his intimation of intention to appeal.

Section 111(2) provides that these time periods can be extended. The statute places no restriction on the grounds for such an extension and it may be granted “on cause shown” (*Alexander v HM Advocate* [2011] HCJAC 75, Lord Carloway at para 9; *Singh v HM Advocate* 2013 SCCR 337, LJC (Carloway) at para [6] (amendments)). Following continuing concerns about the need for finality in criminal cases, sub-section (2ZA), which was introduced by the Criminal Justice (Scotland) Act 2016 (s 90), provides that, where the application is received after the period for lodging the relevant documents has expired, the extension can only be allowed if the court is “satisfied that doing so is justified by exceptional circumstances”.

Section 111 continues:

“(2ZB) In considering whether there are exceptional circumstances ... the High Court must have regard to –

- (a) the length of time that has elapsed between the expiry of the period and the making of the application,
- (b) the reasons stated ...
- (c) the proposed grounds of appeal.”

[2] This application relates to a conviction dated 29 June 2018, when the applicant, who was then aged 46, was found guilty of the attempted rape of a 14 year old girl on 29 May 2017. He had been sentenced to 6 years on 3 August 2018. He lodged a notice of intimation of intention to appeal within the requisite 2 week period. He therefore required to lodge his Note of Appeal by 4 October. That period was extended on 1 October so that it expired on 1 November. No Note of Appeal was lodged.

[3] This application for a further extension of time was lodged on 15 March 2019; that is to say some 4½ months after the extended period for lodging had expired and almost 9 months since the conviction. The application states that, after sentence, the applicant had been given advice about an appeal against conviction and sentence, but the nature of that

advice was not stated in the application, nor was it stated at the hearing. The current agents were instructed prior to the expiry of the period for lodging an appeal on 3 October.

Because of “difficulties in obtaining papers” an extension was sought and granted. A consultation took place on 12 October, during which “potential sources of fresh evidence and further enquiries that might assist an appeal” were explored. A further consultation was held on 31 October; that is on the day before the relevant period expired. Presumably a conscious decision was taken not to seek a further extension at that time. The question of whether a reasonable jury could have returned a verdict was discussed. The applicant raised further issues regarding CCTV images and potential additional witnesses. On 28 January 2019, another consultation was held. By this time, notes from the trial had been obtained. Enquiries were said to have been concluded.

[4] Draft grounds of appeal have been lodged. These raised four grounds. The first was that no reasonable jury could have returned a guilty verdict, having regard to the complainer’s evidence and the discrepancies or contradictions between her account and her statement to the police and other evidence led. This ground refers to the evidence of a number of witnesses and to telephone messages which are said to undermine the credibility of the complainer. The second ground is that the trial judge erred in failing to direct the jury to ignore comments made by one witness during cross-examination that the applicant was a paedophile. The third ground was that the trial judge erred in directing the jury that evidence of distress could corroborate “lack of reasonable belief”. The fourth ground was that the judge erred in not directing the jury that there could be no reasonable belief in the absence of steps having been taken by the applicant to find out if the complainer had consented. The appeal against sentence was in relatively conventional form. The sentence was excessive, having regard to the applicant’s lack of previous criminal record. He had

been in full time employment, had mental health difficulties, but retained the support of his family and partner. He was assessed at low risk of re-offending.

[5] In refusing to allow a further extension of time in which to lodge a Note of Appeal, the judge at first instance commented that the application made a number of generalised statements about discussions with the applicant and enquiries which had been conducted in relation to fresh evidence. No specification of what was done or why such enquiries were not undertaken or completed at an earlier stage were given. By the time of the consultation in January 2019, the appeal had been deemed abandoned and no explanation for the passage of a further 6 weeks thereafter was provided.

[6] The grounds of appeal did not appear to identify anything which related to fresh evidence. The list of complaints about the evidence contained propositions of an ordinary sort in relation to conflicts of testimony. All of these had been the subject of discussion at trial and could have formed the basis for a timeous application. The remaining grounds related to the adequacy of the charge, but the transcript of that charge had been available since early October. The ground on sentence simply repeated matters which had been before the judge. The judge at first instance determined the application by concluding that:

“No substantial explanation has been provided for the failure to comply with the statutory time requirements. In light of this, the significant period of time which has now passed since the applicant was convicted and the content of the proposed grounds of appeal, I am not satisfied that there is anything by way of exceptional circumstances revealed in this application such as would justify it being granted”.

[7] The question for this court is whether the judge at first instance erred in his determination of the application. The court is unable to fault his reasoning. The applicant required to establish exceptional circumstances because the time within which a Note of Appeal could be lodged had expired unextended. No such circumstances exist. In relation

to all the grounds proffered in the draft Note of Appeal, there is no satisfactory explanation for these not being the subject of a timeous appeal, especially those alleging misdirections by the trial judge and those relating to sentence.

[8] This application is accordingly refused.