APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 14
HCA/2021/135/XC

Lord Justice General
Lord Woolman
Lord Matthews

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in the

APPLICATION FOR AN EXTENSION OF TIME UNDER SECTION 111(2) OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

ROBERT GARDEN

Applicant

against

HIS MAJESTY'S ADVOCATE

Respondent

Applicant: Mackintosh KC; John Pryde & Co SSC (for Moir & Sweeney Litigation, Glasgow)
Respondent: CG McKenna (sol adv) AD; the Crown Agent

28 April 2023

Introduction

[1] This application is about the circumstances in which the court will allow an appeal to proceed late notwithstanding that it is marked almost two years after the conclusion of the trial. There is no issue about the general law. An extension of time requires there to be exceptional circumstances (Criminal Procedure (Scotland) Act 1995, s 111 (2ZA)).

The charges

[2] The applicant faced some 16 charges relative to two former partners. In due course, the Advocate depute withdrew some of these charges, which were evidential in nature, and the applicant was acquitted of others. Charges 4, 7, 8 and 9 all related to the complainer JM. Charge 4 libelled a significant number of physical assaults from October 2011 to February 2014. The applicant was convicted unanimously of this charge. Charges 7 and 8 libelled two incidents of rape. According to the trial judge's report to the Parole Board, the first involved the applicant seeking to placate the complainer, who had found compromising messages on his phone. Although she did not wish to engage in intimacy, the applicant pulled down her trousers and raped her. Charge 8 involved the couple having consensual sex when they were disturbed by the crying of their infant. The complainer attempted to go to his assistance, but the applicant would not permit her to do so without completing intercourse in the absence of her consent. Charge 9 was an assault of a bizarre nature, involving masturbating on the complainer's feet. The applicant was convicted of these three charges by majority.

[3] Charges 14 and 16 involved rapes of the other complainer, CD, in October and November 2017. The first of these involved the complainer having been so intoxicated that she could not consent to intercourse. Her memory was of waking up naked in the applicant's bedroom. Intercourse had occurred while the complainer had been asleep or otherwise incapable of consent. The second incident occurred perhaps a few weeks later, by which time she seems to have been prepared to overlook what had happened previously and to continue in some form of relationship with the applicant. An argument arose about the content of her social media exchanges. The applicant became violent, pushed her onto a

bed, pinned her down and raped her. The applicant was convicted of these charges by majority. He was acquitted of the remaining charge 15, which was of attempted rape of CD.

[4] In order to convict on the rape charges, the jury required to find mutual corroboration in the testimony of both complainers.

The procedure

[5] The procedure was lengthy. The applicant was indicted to a Preliminary Hearing on 21 October 2019. A trial diet had originally been scheduled for 30 March 2020, but Covid intervened. A further PH was held on 5 November 2020. It was not until Wednesday 24 February 2021 that the case called for trial. At that diet, defence counsel was Mr M. According to the applicant, as early as August 2020, he had provided his agents with 369 pages of Facebook entries, some of which were said to suggest that at least some sexual activity with CD in October 2017 had been consensual. The applicant's defence on charge 14 was that the sexual activity had been consensual, although he maintained that the incident libelled in charge 16 had not happened. Mr M declined to advise the lodging of the Facebook material as he did not intend to put it to CD. Exactly why he took that view is unknown, as he has not been asked about it, but there are a number of possible explanations. His instructing agent told the applicant that it was not possible to link the Facebook material to CD. This may have been because the exchange was with a person using a different name, although it is reasonably clear from her name being used by the applicant that it was with the complainer. Again according to the applicant, at the trial diet on 25 February, he withdrew the instructions to his agents and counsel because of their approach to the Facebook material. This was after the jury had been balloted.

[6] Another agent was instructed and new counsel, Mr McK, picked up the reins. The evidence commenced on Tuesday 2 March 2021. No application to lodge the Facebook material was made. Other than certain pages which the Crown had already lodged, it was not used in cross or spoken to by the applicant. Mr McK was unaware of the material because, according to the new agents as reported by the applicant, it had not been supplied by the old to the new agents.

[7] The jury returned their verdicts on 8 March. At the sentencing diet on 8 April, Mr McK's instructions were withdrawn because of his failure to use the Facebook material. At a continued sentencing diet on 21 April 2021, the applicant was made the subject of an extended sentence of 16 years, with 13 years as the custodial element.

The appeal process

[8] A notice of intention to appeal was lodged timeously. The Note of Appeal was due by 18 June 2021. Meantime, a solicitor advocate (Mr P) had been instructed to provide an opinion. He did so on 14 June. The opinion is a lengthy document, but the part relating to the Facebook messages is in short compass. Mr P expressed the view that, even with the new messages, Mr M would not have changed his mind about the admissibility of the material. Mr P carried out his own evaluation of the messages. His view was that they would not have made a material difference to the case. Some of them might have been admissible, but no miscarriage of justice could be established. The messages could have been potentially detrimental to the defence case, although the applicant maintains that Mr P misunderstood who had sent particular communications.

[9] In the absence of a Note of Appeal, the appeal was deemed abandoned on 25 June 2021. The complainers, who had been somewhat anxious, were told that this is what had occurred.

[10] On 15 March 2023, the applicant sought an extension of time. His application explains that for a period of almost a year, from June 2021 until May 2022, another agent (Ms H) had been instructed. In due course, she said that senior counsel (unknown) had not been able to assist and junior counsel had died. Another junior had provided an opinion to the effect that there was no stateable ground of appeal.

[11] In May 2022, the applicant's family contacted their MSP, who suggested instructing the applicant's current agents, Messrs Moir & Sweeney. It took until November 2022 to obtain the papers from Ms H. Matters did not progress with junior counsel until January 2023, when senior counsel (Mr Mackintosh) was instructed. There were various communings until 13 March 2023 when the extension of time application and draft grounds of appeal were prepared and lodged.

The Facebook entries

[12] The Facebook entries consist of exchanges between the applicant and "LKS …", who, as already noted, appears to be the complainer CD. They start on 16 October. They mostly contain harmless streams of consciousness interspersed with multiple expletives and sundry vulgarities. At page 41 there is an exchange occurring on 23 October. This starts with the applicant explaining that his phone had run out of charge on the previous night and he had left it at home in the morning. There is a later reference to the complainer posting a video of the applicant and mention of what seems to be a dead cat. The applicant said that he did not know that the complainer was recording him. This then follows:

"COMP Hahaaaaa its nae that bad tho was a good laugh xxxxxxx

APP Aye I know it was good I liked it anyway and the sex was amazing lol I'm lucky I managed to do anything tbh xxxxxxxxx

COMP Hahaaa we had far to much sex ur a horny devil lol xxxxxxxxx

APP I honestly couldu f****d[1] you for hours and I'm not joking haha easy Xxxxxxxxx

COMP Hahaaaaaa xxxxxxxx".

[13] The chat on 23 October continued (p 63) as follows:

"APP Do you even <u>like</u> <u>me</u> lol xxxxxxxx

COMP Yeh trust me im not wasting ur time … Yeh I do from first impressions a was sound u was a bit full on wit the kissing n sex but if I didn't want it I would just have left !! …

APP … F**k sake was it? Sorry I can be a very passionate person … tbh I didn't mean to stick it in you yet it just sort of happened … ok well that's good to know and I'm sorry if it was too full on lol … if you said no I would have stopped it? Xxxxxxxxx …"

Moving on to 24 October, the exchanges refer to a third party who had a relationship with the complainer. The applicant said that he had messaged him as follows (p 79):

"I f****you bird lol

Ahahahahaha

Stop greeting ya fanny n man the f**k up! She want ti be with me nae you look at yourself".

The complainer replies:

"Hahaaaaa f**k him I want get know u now xxxxxx

Had more sex with u in one nighy than with him since June [emojis] xxxxx".

[14] So the romance continued into November. On 15 November the following occurs (p 252):

"APP Your needing a good f*****g!!!!! By me [devil emoji] …

COMP [laughing emojis] no your just a fanny that can't type hahaaa xxxxxxx

[1] The expletives have been redacted by the court.

APP	Your getting it next time I see you madam! Xxxxxxx
COMP	Not gonna lie not gonna complain hahahaaa xxxxxxxdd
APP	Its not gonna be nice lol your not meant to like it! …
COMP	Well that's not very nice then!!! …
APP	Your bums getting raped next time bby [emojis] hahahahaha!!!
COMP	Hahahaaa u can try it aint happening sex was good enough as it was hahaha [emojis] xxxxxxxx
APP	No bums needed yet you right its been ace! You got such a sexy body [C] your almost perfect [emojis] XXXXXXXXXX
COMP	Aw thank you!!! So are u your so fit and sexy and great company."

Submissions

Applicant

[15] The ground of appeal is defective representation by the original defence agents in relation to the handling of the Facebook material. The applicant maintains that some of the messages amount to previous inconsistent statements which, if they had been put to CD, would have caused the jury to doubt her credibility and reliability on her level of intoxication and lack of consent in respect of charge 14. First, the original agents had incorrectly concluded that it was not possible to identify CD as one of the persons sending the messages. This was clearly wrong. Secondly, they had not passed on the complete record of messages to the new agents. That meant that the applicant's defence "was not put". Although this is not in the draft grounds, it was also argued that Mr M ought to have used the messages.

[16] The Crown opposed the application. Due regard had to be made to the principles of finality and certainty (*Toal* v *HM Advocate* 2012 SCCR 735 at para [108]). A reasonable explanation was a prerequisite for the court in determining where the interests of justice lay (*Graham* v *HM Advocate* [2013] HCJAC 149 at para [9]). There had been significant periods of

inaction after the appeal had been deemed to be abandoned in June 2021. Although some messages may have been advantageous to the defence, others were not. The most difficult issue concerned admissibility. So far as they evidenced a general consensual relationship, the messages were collateral and inadmissible (*CH* v *HM Advocate* 2020 SCCR 410). Any messages suggesting that CD would have welcomed sexual intercourse in the future would also have been inadmissible (*GW* v *HM Advocate* 2019 JC 109 at para [27]). It was difficult to identify any messages specifically relating to the incidents libelled. The messages, in so far as bearing upon credibility and reliability, would have been inadmissible in terms of section 274(1)(c) of the 1995 Act as "other behaviour" not occurring immediately before or after the events libelled. The prospects of a successful section 275 application would have been low. It was understandable why Mr M, looking at matters in the round, had concluded that it should not be used.

The Judge at First Instance

[17] The judge at first instance reasoned that:

> "The application to extend the time for lodging a Note of Appeal is beset by a number of substantial and … ultimately overwhelming difficulties. Obviously, it comes very late, some two years after the conclusion of the trial. In itself, that is a powerful factor for disallowing a late appeal. The principle of finality in criminal proceedings is one of cardinal importance.
>
> There are further difficulties for the applicant. Fundamental to the proposed appeal is the proposition that the small pieces of evidence now said to be critical would have been admissible at the trial. I consider this to be doubtful. The messages appear to have been created in the course of a continuing or developing relationship and it is far from clear what conduct between the applicant and the [complainer] they were referring to … the whole question of what the passages in the messages were truly referring to is clouded by uncertainty.
>
> At least some parts of the messages are likely to have been considered as collateral to the real issues in the case and simply inadmissible for that reason; for example there is reference to an ongoing sexual relationship. … other aspects are likely to have required an application under section 275; for example the reference by

> the applicant to raping the [complainer] anally 'next time'. In so far as the messages might be read as suggesting that the victim consented to sex on other occasions … a section 275 application would have had to be made. I consider it unlikely that any such application would have been granted. The reality is that the issues surrounding the admissibility of the messages are speculative and impossible to address with any reasonable degree of certainty so long after the trial.
>
> A further substantial difficulty is that there is no detailed information as to whether … counsel who conducted the trial would have chosen to try to introduce the messages into the evidence. …
>
> Any application under section 275 would by the stage of the trial have been late. It is entirely speculative as to whether it would have been or even might have been granted.
>
> It is clear from the judge's charge that the applicant's defence of consent was fairly and squarely put before the jury and that the credibility of the victim was challenged. The applicant gave evidence. The jury must have rejected his account. …
>
> Overall, the messages … are … of marginal significance in the context of the issues that arose at the trial. It is impossible to conclude that even if they had been used at the trial the outcome would have been different.
>
> The application is fatally undermined by the very lengthy periods of delay which have occurred since the conclusion of the trial. … Between June 2021 and November 2022 no substantial progress … was made. … the only reasonable conclusion that can be drawn is that the proposed appeal has not been progressed with reasonable speed.
>
> Looking at the totality of the circumstances … the application falls well short of meeting the test of exceptionality. It comes far too late. The proposed grounds of appeal are unconvincing. An appeal based on defective representation would be likely to fail."

[18] Since then Mr McK has produced a Note, agreeing that the admissibility of the messages was speculative so long after the trial. Some of the messages could be characterised as prior inconsistent statements. If he had had access to them, he would have sought to lodge some of the pages. Establishing special cause for lodging this material late would have been problematic.

Decision

[19] The applicant requires to demonstrate exceptional circumstances before the court will entertain a late appeal. Such circumstances must involve, first, a consideration of the level of tardiness when set against the generous statutory time limit, within which to lodge a Note of Appeal, of eight weeks from the lodging of the notice of intention. In a case such as this, where there was a deferral for sentence, the convicted person will have at least three months from the jury's verdict in which to consider and frame the Note.

[20] There are good reasons for imposing time limits in terms of finality and certainty as integral parts of the justice system. The expeditious disposal of appeals is in the interests not only of appellants, but also victims of crime and the public in general (*Toal* v *HM Advocate* 2012 SCCR 735, LJC (Gill) at para [108]). When the complainers in this case were told of the deemed abandonment of the appeal, they ought to be able to rely on that statement other than, as the statute says, in exceptional circumstances.

[21] As the judge at first instance observed, the fact that the application comes some two years after the jury's verdict is in itself a powerful factor pointing towards refusal. The applicant has had several changes of agents and counsel, but this does not provide him with some form of advantage. Prior to the expiry of the period for lodging a Note of Appeal in June 2021, the applicant had received an opinion from a solicitor advocate advising that the Facebook material, even if admissible, did not demonstrate a miscarriage of justice. Thereafter, nothing concrete happened until May 2022 when the applicant was directed to Messrs Moir & Sweeney. Again nothing occurred until Mr Mackintosh received the papers in January 2023. Given these significant delays, the applicant would have to present a very strong case on the substantial merits before leave to appeal would be given. This is what the applicant submitted; at least to the extent of showing that the Facebook material would have

been likely to have affected the jury's view on CD's credibility or reliability and hence, because of the necessity to find mutual corroboration, on all of the jury's verdicts on the rape charges.

[22] Accepting that the Facebook material did record exchanges between the applicant and CD and had been given to his law agents in August 2020, the next question becomes one of whether the decision of the applicant's counsel and/or agent not to lodge or deploy the material in cross amounted to defective representation. The test is a high one. The circumstances in which the conduct of a defence will constitute defective representation are narrowly defined. They must have led to a miscarriage of justice; that is, deprived the accused of a fair trial. That occurs only when the conduct was such that the accused's defence was not presented to the court. That can happen when counsel acts contrary to his instructions on what the defence is or because his defence was not presented to the court (*Guthrie* v *HM Advocate* 2022 JC 201, LJG (Carloway) delivering the opinion of the court, at para [39]). An appeal could not succeed where all that was said is that the defence would have had a better prospect of success if a certain line of evidence or a difference strategy had been pursued (*DS* v *HM Advocate* 2008 SCCR 929, Lord Carloway, delivering the opinion of the court, at para [43]).

[23] The critical time in relation to the potential use of the Facebook material was (at the latest) the Preliminary Hearing on 5 November 2020. Although the applicant sought to categorise the material as consisting of prior inconsistent statements (see *DS* v *HM Advocate* 2007 SC (PC) 1, Lord Hope at para {46], Lord Rodger at para [76], cf *CJM* v *HM Advocate* 2013 SCCR 215, LJC (Carloway) at para [45]), much of what is contained in the material would have required an application under section 275 of the 1975 Act in advance of the PH. In any event, the material ought to have been lodged before the PH (1995 Act, s 78(4)(a)(ii)). The

court may have allowed such applications to be lodged late, but it is highly unlikely to have allowed this mass of material to be lodged at the trial diet. That would almost inevitably have led to an application to adjourn the diet; a matter which the court is unlikely to have countenanced.

[24] One question is whether Mr M, or his instructing agents, can be faulted in not lodging the Facebook material in the sense that no competent counsel or agents could have adopted that course. The answer is firmly in the negative. It was a matter for counsel's professional judgement whether to lodge or use the material. No doubt some counsel would have attempted to use it, but others would have taken a more cautious view. First, it is not at all clear that the material relates to the particular October incident to which the complainer spoke. Secondly, whether the complainer was accepting in her messages that the sexual intercourse was consensual is dubious. Thirdly, from what the applicant said in his messages, he may have been accepting that it was not consensual (eg "I didn't mean to stick it in you yet it just sort of happened … I'm sorry if it was too full on …"). Fourthly, the tone and content of the conversation may not have reflected well on the complainer but it does the same in relation to the applicant. The reference to anal rape would have been unlikely to have assisted his cause.

[25] It may be that the applicant's original agent was at fault in not passing on a complete record of the Facebook messages. However, the court is not, for the reasons given, convinced that this amounted to defective representation resulting in a miscarriage of justice. The applicant's case was put to the jury. The complainers' testimony was challenged in cross-examination. The applicant gave evidence in support of his defence. The use of the Facebook material was fraught with danger even if the trial judge could have been persuaded to admit the material at such a late stage in the process.

[26] The application for an extension of time in which to lodge a Note of Appeal is refused.