NCN: [2022] EWCA Crim 50

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 201503661/B2

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 21 January 2022

LADY JUSTICE CARR DBE
MR JUSTICE PICKEN
MR JUSTICE WALL

REGINA
V
ALEX SMITH

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MR J MANNING and MR H McCALLUM appeared on behalf of the Applicant

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J U D G M E N T

LADY JUSTICE CARR:

Introduction

1. This is a renewed application for leave to appeal against the applicant's convictions upon his guilty pleas to two counts of delivering a counterfeit of a protected coin without lawful authority, contrary to section 15(2) of the Forgery and Counterfeiting Act 1981. The applicant was sentenced to two concurrent terms of six months' imprisonment.

2. The convictions and sentences occurred as long ago as 1999 when the applicant was 23. He is now 46. The delay in the matter is immediately apparent. The applicant seeks an extension of time of approximately two years and 11 months in which to renew his application for an extension of time of approximately 16 years and five months in which to seek leave to appeal following refusal of leave by the Single Judge in May 2016. The reasons for the delay are variously said to be negative advice on the merits, a lack of understanding on the applicant's part of his right to renew, difficulties in funding and finding counsel. The matter was referred to the Criminal Cases Review Commission which, in 2018, declined to refer the case. The delays have meant, amongst other things, that witness statements, exhibits and transcripts from the hearings below are not available. The Single Judge justifiably referred to the delay as "extraordinary". He refused leave on this ground alone, although he also went on consider the substantive merits.

3. The applicant also seeks to introduce new grounds since refusal by the Single Judge, accompanied by leave pursuant to section 23 of the Criminal Appeal Act 1968 to introduce fresh evidence. This application was listed for a full court hearing on 6 May 2021. However, the applicant applied to vacate the hearing so that further information could be lodged. Several extensions of time have duly been afforded to the applicant in order to obtain the information that he wanted. He has lodged extensive documentation. The volume of material which we have considered for this application is vast. What is described as "the applicant's evidence bundle" runs to over 2,000 pages.

4. Despite all this, we can set out the reasons for our decisions briefly. That should not however mask the fact that in reaching our conclusions we have considered carefully all of the material advanced for the applicant. That is so even though some of that material could not conceivably be admissible on any appeal: for example, we have read large swathes of pleadings and witness statements (at least one of which is unsigned) from or in the context of the telephone hacking litigation against News Group Newspapers Ltd (“NGN”), excerpts from books, newspaper articles and transcripts of television programmes.

The facts

5. According to his grounds of appeal, the applicant worked as a circus performer, stage magician and television presenter. In the mid-1990s he worked as a "shock journalist" in which context he was associated with another journalist called Mr Alan Breeze. In or around March 1998, as part of their work, the applicant and Mr Breeze were in contact with a Mazher Mahmood, an investigative journalist then working at the News of the World newspaper. At the time he was using the name "Perry Khan".

6. During a meeting at a hotel on Thursday 2 April 1998, it was alleged that Mr Mahmood asked the applicant to procure escorts, drugs, guns and counterfeit money. The applicant was said to have boasted that he could supply those things and he gave Mr Mahmood three £1 coins which he said were forgeries. The applicant met with Mr Mahmood on Thursday 9 April 1998 and was provided with £400 in cash so that he could purchase the counterfeit money. The applicant then procured 1,000 forged £1 coins which he delivered to Mr Mahmood later that day.

7. Mr Mahmood subsequently wrote a story for the News of the World published on 12 April 1998 with the headline "Kiddies TV star is a drug dealing pimp - And he coins fortune with counterfeit cash". The applicant approached the local police on the same day and offered to provide a voluntary interview.

8. On 19 April 1998 Mr Mahmood provided the police with the counterfeit coins and covert recordings that he said that he had made during his meetings with the applicant. Thereafter the applicant was contacted by the police and surrendered himself for an interview under caution.

Grounds of appeal

9. Mr Manning, assisted by Mr McCallum, appear *pro bono* for the applicant. They seek to raise three entirely fresh grounds since refusal by the Single Judge and to revive a fourth ground relating to evidence from the Royal Mint Ltd ("Royal Mint").

10. Mr Manning emphasises the handicap facing the applicant, in particular as a litigant in person. He emphasises that the applicant's guilty pleas are not a bar to this appeal. In so far as there have been procedural failures as debated during the course of the hearing before us, he suggests that we should grant an adjournment and grant leave to appeal with a view to allowing the applicant to cure any defects. Such indulgence, it is submitted, would be fully justified given the delays in this matter already.

11. The proposed first ground of appeal, supported by a proposed fourth ground, is to the effect that the applicant was deprived, through non-disclosure on the part of the prosecution, of a good application to stay the proceedings against the applicant as an abuse of process. In particular, this was a case of entrapment by Mr Mahmood as part of his investigation on behalf of the News of the World. Mr Mahmood is said to have been the newspaper's so-called "fake Sheikh". Had the manner of Mr Mahmood's entrapment been made known to the applicant at the time, he would have had grounds to apply for a stay. Mr Mahmood had acted as an *agent provocateur*; he had entrapped the applicant to commit the offences. He had, it is suggested, pressured, induced and threatened the applicant to procure the counterfeit currency. Mr Mahmood or his associates provided the details of individuals from whom the applicant could procure the currency. He undertook covert surveillance of the applicant which he edited prior to providing a copy to the police. Reference is made to documents said to show that Mr Mahmood misled the police.

12. The proposed fourth ground of appeal is said to be the strongest of the proposed grounds and to support the first. It is to the effect that there was a significant failure by the

prosecution to comply with its duty of disclosure. There was material in the possession of the prosecution at the time of the applicant's prosecution which seriously undermined Mr Mahmood's credibility, none of which was disclosed. It is said this information has only recently come to the applicant's attention, as a result of the applicant being contacted by new witnesses in the context of other litigation involving NGN. Reference is made to the fact that the applicant cannot adduce that material due to legal restrictions. In that context there is an application for third party disclosure against NGN under Criminal Procedure Rule 39.7(3). It is an application which we are told was submitted in September 2021. It is not entirely clear to us to what extent, if at all, NGN was put on any notice of the application at that time, but it is clear to us that there is no solid basis upon which we can conclude that NGN is properly on notice for today's purposes, either of the application itself, its jurisdictional basis or today's hearing. It is also said that there has been a non-disclosure by the prosecution in particular of a case referred to R v Shepherd and Norman, a case that collapsed, as have (it is said) many others, in the light of Mr Mahmood's allegedly dishonest activities.

13. The second proposed ground of appeal is related to the first and fourth proposed grounds. The suggestion is that the subsequent conviction of Mr Mahmood in 2016 for offences of conspiracy to pervert the course of justice in respect of similar investigations calls into question the reliability of his evidence. It is said that Mr Mahmood's *modus operandi* involved using unlawful methods to obtain evidence, acting outside the proper disclosure regime and presenting edited, partial or falsified evidence. It is said that, in a similar vein, Mr Mahmood manipulated and intimidated the applicant into obtaining and providing the coins that formed the basis of the second count against him. The covert recordings of the meetings between the two men are also said to have been heavily edited by Mr Mahmood.

14. The final proposed (third) ground is a suggestion that fresh evidence obtained from the Royal Mint calls into question the basis for the prosecution and conviction. The evidence is an email from the Legal Counsel and Data Protection Officer at the Royal Mint Limited indicating that there is no record at the Royal Mint of any authentication exercise being carried out in the applicant's case. It is said to be therefore unclear whether or not the police or prosecution had evidentially confirmed the authenticity or otherwise of the coins in respect of which the applicant was convicted.

Discussion and analysis

15. It is clear that in addition to requiring extensions of time, the applicant's case rests heavily on applications to vary and adduce extensive fresh evidence. That evidence ranges from matters relating to the trial of the singer Tulisa Contostavlos, the Leveson Inquiry, the telephone hacking litigation involving the News of the World and the Beckham kidnap trial.

16. Given the exceptional extent of the delay in question and the lack of any properly particularised explanation for it, the merits overall would have to be compelling indeed for any extension of time of the extent in question to be seriously countenanced. There have been no adequate details as to what happened procedurally between 1999 and 2014. There are significant gaps of apparent total inactivity after that as well, including for

example between August 2018 and April 2019. The prejudice is very significant: the CPS retains no papers, the police retain no papers, prosecution counsel has no recollection of the case.

17. As for variation of grounds, the relevant principles are well-known and set out in particular in R v James and others [2018] EWCA Crim 285, [2018] 1 WLR 2749 at [38]. The hurdle for an applicant to amend after refusal by the Single Judge is high.

18. As for the admission of fresh evidence under section 23 of the Criminal Appeal Act 1968, the over-arching test is whether the interests of justice require the fresh evidence to be admitted, but the specific factors identified in section 23(2) require particular consideration. In principle, fresh evidence may be admitted on the issue of whether a conviction, even if based on an unequivocal guilty plea, as here, is safe: see R v LZ [2012] EWCA Crim 1867. But the fact that the applicant fully advised entered guilty pleas is of course highly material: see R v Asiedu [2015] EWCA Crim 714 at [16]. Ordinarily, once a person has unambiguously and deliberately pleaded guilty, there cannot be an appeal against his conviction for the simple reason that there is nothing unsafe about a conviction based on the defendant's own voluntary confession in open court. There are exceptions to the rule, including where there is a legal obstacle to being tried for the offence.

19. Before turning to the proposed grounds themselves, we set the context for the consideration of these applications. That context is, as Mr Manning fairly accepted, that the relevant ingredients of the offences with which the applicant was charged were of very narrow compass, being limited to i) the applicant's knowledge as to whether the coins were counterfeit; and ii) whether or not the coins were in fact counterfeit.

20. The thrust of the proposed first, second and fourth grounds is that the applicant was deprived of the opportunity to make a meaningful application for stay based on abuse of process arising out of alleged entrapment on the part of Mr Mahmood. However, it was always the applicant's case, below and at least at an earlier stage on appeal, that it was he who had set out to entrap Mr Mahmood. He knew that Mr Mahmood was an undercover journalist and it was he who engineered the situation, it was said, to expose Mr Mahmood. It was the applicant who intended to expose Mr Mahmood. The suggestion now on his part that it was he who was the victim of an entrapment and in some way pressured, induced and threatened to procure the counterfeit currency is at total odds with this case.

21. The relevant principles relating to entrapment by the state through its agents are set out in Looseley (AG Reference No 3 of 2000) [2001] UKHL 53; [2002] 1 Cr.App.R 92. The principles there identified apply to journalists as to police, although not with the same force: see R v Hardwicke and Thwaites [2001] Crim.LR 220. When considering entrapment by a private citizen, which is what is suggested here, a starting point is to ask whether the same or similar conduct by a police officer would result in a stay, although a precise comparison may be difficult. What is and is not acceptable is highly fact-specific and there is no single determinative principle.

22. Even if it were to be permissible now to seek to advance a case by reference to alleged entrapment as a matter of principle, there simply are no particulars of any of the alleged pressure, inducement or threat said to have been exercised upon the applicant. The suggestion, belatedly, that Mr Mahmood in some way spiked the applicant's drinks can be said to be no more than purely speculative. There is no prospect of establishing it at this distance in time. There is simply no reliable factual basis on which to conclude that it could even arguably be said that the applicant was entrapped such that any abuse of process argument would "probably have succeeded" had it been raised at trial. It is not arguable, in our judgment, that the applicant's convictions are rendered unsafe accordingly.

23. As already indicated, the fourth proposed ground relates to two categories of material. The original ground related to material in the hands of the Metropolitan Police. As the Respondent's Notice identifies, however, there is no identification of if, when or how that material was ever provided to the Greater Manchester Police or the Crown Prosecution Service at any material time. Schedules of unused material are no longer in existence due to the delays in this matter and the prosecution is therefore simply unable to say whether it was aware of the material or not.

24. In any event, a continuing theme of the application, namely that in some way Mr Mahmood's dishonesty would have been relevant to and/or have given rise to a material basis for an application to stay, simply does not make any sense. As the Single Judge said below, whether or not Mr Mahmood was dishonest was nothing to the issue. The issues in the case were whether or not the applicant knew that he was handing over counterfeit coins. That was something which he was pre-eminently in a position to know himself and unaffected by any dishonesty on the part of Mr Mahmood.

25. The application for an order for disclosure against NGN is not one that we would countenance even considering in the absence of NGN being put properly on notice and having a full and proper opportunity to respond. The prospect of a yet further delay in this matter is not one that we would countenance, not least given the history that we have previously outlined.

26. That leaves the third proposed ground relating to the fresh evidence from Royal Mint. That cannot arguably give rise to a concern about the safety of the applicant's convictions. The prosecution is again severely prejudiced in responding to this ground, since the evidence in the case is no longer available. It is wholly unarguable, as the Single Judge said, to seek to advance an appeal based on a supposed factual position in 1998 when that position cannot be tested. In any event, the evidence referred to is at most equivocal. Royal Mint simply says it has no record any longer of any examination. That record may have been misplaced or lost, or the examination may have been undertaken by a third party.

27. But in any event, this demonstrates the total artificiality of the position now being presented before us. The applicant's own case was that he purchased the coins for £400. If true, that indicates that the coins must have been counterfeit. It is entirely consistent with his guilty pleas, accepting knowledge of the fact that the coins were counterfeit.

The newspaper report of the mitigation put forward on behalf of the applicant confirms that he accepted that the coins were counterfeit and that he knew this. His position was that he simply did not expect the coins to enter circulation. This position was one maintained by him for the purpose of this appeal, at least originally. His self-prepared grounds of appeal in January 2015 say as much, as does material which he posted on his website. It would also be surprising, to say the least, if the various legal professionals involved in the case at the time did not notice that there was insufficient evidence in relation to the issue of whether or not the coins were counterfeit. Fundamentally, standing back, this was a case where the applicant pleaded guilty with personal direct knowledge on the relevant issues the subject of the ingredients of the offence.

28. In the absence of any merit in an appeal, we would refuse the applications to extend time, to vary the grounds and to adduce fresh evidence. We dismiss the renewed application.

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