Cases and Comments

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Appeals

R. v McCook (Jason)

Court of Appeal (Criminal Division): Lord Thomas of Cwmgiedd CJ, Sir Brian Leveson P and Hallett LJ: April 10, 2014; [2014] EWCA Crim 734

Appeal against conviction—summary determination—counsel and solicitors advising defendant that no grounds for appeal—defendant instructing new legal representatives—whether appeal to be dismissed summarily as frivolous or vexatious—importance of consulting previous counsel and solicitors

LT Barristers' powers and duties; Change of solicitor; Criminal appeals; Grounds for appeal; Solicitors' powers and duties; Vexatious proceedings

The defendant was convicted of robbery, but the Court of Appeal quashed his conviction and ordered a retrial, at which he was again convicted. Counsel who had represented the defendant throughout advised that there were no grounds on which he could bring a further appeal and that view was endorsed by his solicitors. The defendant then instructed new solicitors, who applied for an extension of time and leave to appeal against conviction. An extension of legal aid was obtained. The papers served on the Court of Appeal showed that the solicitors had the advice of counsel and solicitors given after the retrial. The grounds of appeal, settled by counsel, were directed at the first trial and the papers contained the summing up from the first, but not the second, trial. After those matters were drawn to their attention, counsel returned the case on the basis that he had not been given the relevant information, and the grounds of appeal could not therefore be sustained, and the solicitors attempted to withdraw the appeal, but did not obtain the necessary forms. The Registrar of Criminal Appeals referred the application for leave to appeal to the Court of Appeal under s.20 of the Criminal Appeal Act 1968 on the basis that the court should consider whether it should summarily dismiss it as an appeal which was frivolous or vexatious and could be decided without a full hearing.

Held, dismissing the application, that it was plain from the facts that the appeal was frivolous and vexatious, and could be summarily dismissed without a hearing. The Court of Appeal had previously stated that it was necessary to consult those who had acted before in a case where fresh counsel and solicitors had been instructed where criticisms of previous advocates or solicitors were made or grounds

were to be put forward where there was no basis for doing so other than what the defendant said. However, it was clear that the court had to go further to prevent such elementary errors. Accordingly, in any case where fresh solicitors or fresh counsel were instructed, it would henceforth be necessary for those solicitors or counsel to go to the solicitors and/or counsel who had previously acted to ensure that the facts were correct, unless there were in exceptional circumstances good and compelling reasons not to do so. It was not necessary to enumerate such exceptional circumstances, but the court imagined that they would be very rare. The court would not comment in any way on the conduct of the solicitors concerned, but merely refer them to the Solicitors Regulation Authority. If, in the course of their investigations, it transpired that there were issues involving counsel, they would no doubt consider whether they should refer the matter to the Bar Standards Board.

Case considered: A [2014] EWC Crim 567; [2014] 2 Cr. pp. R. 7 (p.94).

Commentary

The court's concern in this case was that fresh appellate lawyers, who were not present at trial, should not rely solely on the applicant's instructions regarding the matters that formed the basis of the grounds of appeal. The required approach is that contact must now be made in *all* (other than exceptional) cases in which fresh lawyers are instructed on appeal—and not just those involving criticism of the trial lawyers. As a matter of fairness, and as an aid to assist their recollections, it may be best to send the original lawyers a copy of the proposed grounds, together with any supporting documents (such as the summing up transcript), with a request that they confirm or challenge the factual basis for the appeal. If the grounds involve matters that arose in the context of a discussion between the lawyers and the lay client it may also require a waiver of legal professional privilege (even if the grounds do not amount to criticism, see generally, Master Egan, "Getting an accurate picture—a fresh look at fresh representation" [2014] *Archbold Review* 7. See *https://www.archbolde-update.co.uk/PDF/2014/Archbold%208-2014%20v%20PRESS.pdf* [Accessed March 24, 2015] .

There are no formal time limits within which the trial lawyers are required to respond. However, the request for clarification of the facts should stress that it should be dealt with expeditiously. In the absence of a timely response, it may assist to send the Registrar draft grounds of appeal together with the correspondence to the trial lawyers and a request for assistance. Ultimately the court may be able to require the trial lawyers to attend the court to give evidence under the Criminal Appeal Act 1968 s.23(1)(b):

> "(1) For the purposes of an appeal or an application for leave to appeal, under this Part of this Act the Court of Appeal may, if they think it necessary or expedient in the interests of justice …(b) order any witness to attend for examination and be examined before the court (whether or not he was called in the proceedings from which the appeal lies); …"

It seems likely that delays caused by compliance with the procedure in the present case will be relevant factors taken into account by the court when deciding whether to grant an extension of time, although not necessarily determinative. However, if there is other material available that supports the draft grounds it may be appropriate to lodge these with the Criminal Appeal Office as soon as possible together with a

covering note explaining that the procedure in this case is being followed and that the grounds will be perfected, amended or abandoned in light of the response.

There does not appear to be any provision for the Registrar to grant funding for the trial representatives to prepare a response. The powers to grant a representation order appear limited to the legal representative of the appellant and not to a third party lawyer who is not instructed in the proceedings (Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.16).

Report by Jill Sutherland, Barrister
Commentary by Paul Taylor, Doughty Street Chambers

R. v Gray (Dean); R. v Ridley (John); R. v Crawford (Mark); R. v Harris (Nigel); R. v Udu (Ashley)

Court of Appeal (Criminal Division): Hallett LJ, Sweeney and Warby LJJ: October 7, 2014; [2014] EWCA Crim 2372

Appeal against conviction or sentence—permission to appeal refused—unmeritorious renewal application—power to order part of time spent in custody pending appeal not to count towards sentence—when order appropriate—Criminal Appeal Act 1968 s.29

Appeals against conviction; Loss of time directions; Permission to appeal; Proportionality; Unmeritorious appeals

In five separate cases, the defendants were convicted of criminal offences and were refused leave to appeal against conviction and also, in some cases, sentence by the single judge. On renewing their applications before the full court, the issue arose as to when it was appropriate, on refusal of a renewal application, to make an order, pursuant to s.29 of the Criminal Appeal Act 1968, that part of the time that the defendant had spent in custody pending appeal should not count towards his sentence ("a loss of time order").

Held, dismissing the application and making a loss of time order in each case, that unmeritorious renewal applications took up a wholly disproportionate amount of staff and judicial resources in preparation and hearing time. They also wasted significant sums of public money. The more time the Court of Appeal Office and the judges spent on unmeritorious cases, the longer the waiting times were likely to be. The only means the court had of discouraging unmeritorious applications was by using its powers to make a loss of time order under s.29 of the Criminal Appeal Act 1968, or in the case of a single judge under s.31(2)(h), or a costs order under s.18 of the Prosecution of Offences Act 1985. The power to award costs was used infrequently and the single judge's power to make an order for loss of time had not been exercised since 2007. Single judges faced with what they considered to be a totally unmeritorious application generally preferred to initial a box on the form refusing permission to appeal to indicate that, if the application was renewed, the full court would consider the making of a loss of time order. Previous authority had made clear that the fact that the single judge had not

initialled that box did not deprive the full court of the power to make a loss of time order, nor did the fact that counsel had advised that there were grounds of appeal, and those warnings were repeated in the Criminal Practice Directions paras 68E.1 and 2. The figures suggested that some applicants who might otherwise pursue hopeless applications heeded those warnings. Nevertheless, a very large number seemed to consider that they had nothing to lose in renewing their application, often sending yet more voluminous documentation for the attention of the full court. Accordingly, in every case where the court was presented with an unmeritorious application, consideration should be given to exercising the court's powers. The single judge should consider whether to initial the box, and if the application was renewed, the full court—be it a two or three-judge court—should consider whether or not to make a loss of time order or a costs order. If it decided to exercise the power, a statement to the following effect would suffice:

> "Despite being warned of the court's power to make a loss of time order, the applicant chose to pursue a totally unmeritorious application which has wasted the time of the court. Such applications hamper the court's ability to process meritorious applications in a timely fashion."

In each of the five cases, the defendant had chosen to pursue a totally unmeritorious application which had wasted the time of the court. The defendant had either been warned by the single judge of the court's power to make a loss of time order or had been well aware of that power. Accordingly, a loss of time order—of two months in the first case and of three months in the other cases—would be made.

Hart [2006] EWCA Crim 3239; [2007] 1 Cr. App. R. 31 (p.412) and *Fortean* [2009] EWCA Crim 437; [2009] Crim. L.R. 798 applied.

T. Pedro for the defendant Gray.

Commentary

Whilst the loss of time order procedure has been held to comply with the European Convention on Human Rights arts 5 and 6 in *Monell v United Kingdom* (1988) 10 E.H.R.R. 205, the way in which the Court of Appeal currently exercises this discretionary power raises several questions. In *Ali v Trinidad and Tobago* [2005] UKPC 41; [2006] 1 W.L.R. 269 (see also *Young v Trinidad & Tobago* [2008] UKPC 27), the Privy Council considered a similar statutory provision and set out the approach that appellate courts should adopt when exercising their discretion. In summary:

(a) such orders should not be restricted to exceptional cases;

(b) it is wrong in principle to take into account the heinousness of the original offence or lack of remorse, these being relevant only to the original sentence;

(c) the direction for loss of time should be proportionate, that is it should impose a penalty for bringing or persisting with a frivolous application which fairly reflects the need to discourage wasting the court's time without inflicting an unfairly long extension of imprisonment upon the applicant. Whilst the length of such orders was a matter for each appellate court in each individual case, the Board would not expect them to exceed a few weeks in the large majority of cases. (*Ali* at [16]

> and [17]. There is no reference in the judgment in the present case to the Board's judgment in *Ali*).

It is the issue of proportionality that warrants a closer analysis in the context of the Court of Appeal's current approach.

The order is clearly a penalty or punishment for continuing with an application that has been deemed by the single judge to be unmeritorious and which is hampering the appeals system generally. (In *Monell* (1988) 10 E.H.R.R. 205 at [42], [43] the court recognised that the effect of the order was not a mere direction as to the mode of execution of the original sentence. The order was seen as imposing a later date of release.) The length of the order must be proportionate to this wrong. It is also arguable that it must be proportionate to the length of the original sentence and not an apparently arbitrary figure, applied irrespective of the impact on the individual offender.

The general length of the orders imposed has varied considerably. In *Monell* at [32], the Government stated that at that time (1988) the orders in practice specified a maximum loss of 64 days. In 1997 the then Registrar of Criminal Appeals, Master Mackenzie CB QC, stated that "a maximum of 28 days" was imposed (*Rules of Court: Criminal Court Procedure* (1997), p.I/24). As stated above, in 2006 the Privy Council, considering similar provisions in Trinidad, did not expect them to exceed a few weeks in most cases (*Ali*). More recently in England and Wales the orders can amount to around two or three months, and there is no stated maximum. Such orders can amount to the imposition of a significant period of additional detention. On the basis that the period of time ordered to be "lost" has already been served in full, an equivalent sentence passed by a court at first instance would be double that period. (This is on the basis that an offender serves half the length of sentence actually imposed.) For example, a three-month loss of time order is the equivalent of an additional six-month term passed at first instance. (See *Monnell* the joint dissenting opinion of Judges Pettiti and Spielmann (unofficial translation) where they found a violation of arts 5 and 6. The judges stated that "… it is inconceivable that the demands of the administration of the courts (shortage of judges, personnel etc) should be given pre-eminence in a system of penalties involving deprivation of liberty".) This is a relatively lengthy sentence for pursuing an unmeritorious appeal, particularly when compared to offences for which a similar sentence would be passed.

Moreover, if the order is set without taking into account the length of the initial sentence, it is arguable that it may be arbitrary and disproportionate. This is because the impact on the individual offender will vary considerably for what is effectively the same level of culpability. For example, an additional three months may have greater impact on an offender who received an initial nine-month sentence—with a release date only weeks away—than an offender serving a 10-year sentence. This point can be demonstrated by reference to the individual penalties assessed as a percentage of the original sentence that would be actually served by each applicant in these cases. (There was no reference in the judgment to the length of the original sentence passed in relation to the applicant Gray):

(a) In *Udu* the three-month order amounted to a penalty of 1.83 per cent of the actual custodial period of the original sentence.
(b) In *Ridley* the three-month order amounted to a 3.33 per cent penalty.
(c) In *Crawford* the three-month order amounted to a penalty of 6.25 per cent.
(d) In *Harris* the three-month order amounted to a penalty of 10 per cent.

This extensive variation in the level of the penalties is also reflected in other recent cases. Whilst the Court of Appeal does not routinely produce detailed statistics relating to loss of time orders, the author conducted a search on Casetrack for recent cases in which the court made such orders (the search covered the period between January 23, 2014 and January 22, 2015. The search term was "Loss of time"). The orders generally varied between 0.82 per cent and 10.2 per cent of the initial periods of custody to be actually served. (*Williams* [2014] EWCA Crim 2482 (10.2%); *McGinn* [2014] EWCA Crim 923 (6.25%); *Matulevicius* [2014] EWCA Crim 2820 (8.33%); *Fogo* [2014] EWCA Crim 1462 (5.75%); *Crow* [2014] EWCA Crim 1571 (5.55%); *Deabat* [2014] EWCA Crim 2037 (3.7%); *Kanu* [2014] EWCA Crim 67 (3.29%); *Stevens* [2014] EWCA Crim 2458 (2.12%); *Shah* [2014] EWCA Crim 2739 (2.19%); *Jambu* [2014] EWCA Crim 1726 (2.19%); *Still* [2014] EWCA Crim 2725 (2.09%); *Barclay* [2014] EWCA Crim 1277 (2.08%); *Hussain* [2014] EWCA Crim 2458 (1.64%); *Naveed* [2014] EWCA Crim 2501 (1.43%); *CD* [2014] EWCA Crim 2604 (0.82%)). In one case involving a nine-month sentence—and thus a four and a half-month actual period of detention—an order for loss of six weeks amounted to 33.3 per cent penalty: *Ndinidamahina* [2014] EWCA Crim 2692.

In percentage terms it is difficult to see how such a vast range of penalties can be justified. The discrepancies appear arbitrary, and some at the upper end of the scale appear disproportionate both in terms of the targeted wrong (unmeritorious appeals) and in the context of the length of the original sentence. Moreover, it is difficult to discern any significant variations in the level of culpability in each case.

One solution to these concerns may be for the Court of Appeal to add a fixed percentage of the original sentence term, with a maximum of one month. As stated above, this would be the equivalent of a two-month sentence of imprisonment, although even this may be seen as a particularly harsh sentence for pursuing an unmeritorious appeal. However, such an approach would appear less arbitrary and would also be in keeping with the comments of the Board in *Ali*. Having noted the above concerns, the lead on this must come from the Court of Appeal itself, as there is a very limited scope for challenging the length of these orders. There is no possibility of a point being certified for the Supreme Court because there has not been an "appeal", only an unsuccessful application for leave to appeal (see the Criminal Appeal Act 1968 s.33(1)), and an application to the European Court of Human Rights is unlikely to be heard in time to make any difference to the time served unless the initial sentence was of a very significant length.

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