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IN THE COURT OF APPEAL  
CRIMINAL DIVISION



CASE NO: 2014 03542 C4  
NCN [2022] EWCA Crim 1807

Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Thursday 13 October 2022

Before:

THE VICE-PRESIDENT OF COURT OF APPEAL, CRIMINAL DIVISION  
LORD JUSTICE HOLROYDE

MR JUSTICE SAINI

MR JUSTICE BOURNE

APPEAL AGAINST DECISION OF THE REGISTRAR

REX

v

JOSEPH LOWTHER

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MR TIMOTHY RAGGATT KC appeared on behalf of the Appellant  
MR SIMON MYERSON KC appeared on behalf of the Crown

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**J U D G M E N T**  
(Approved)

## THE VICE-PRESIDENT:

1. In June 2014 Joseph Lowther was convicted of murder and sentenced to life imprisonment. His application for leave to appeal against conviction was refused by the single judge in November 2014 and, on renewal, by the full court in July 2016. In 2019 he applied to the Criminal Cases Review Commission ("CCRC") to review his case. That application was refused in 2020, because the CCRC saw no prospect of a successful further appeal. In October 2021 he lodged a fresh notice of appeal against conviction and accompanying grounds. That application was treated by the Registrar as ineffective, on the basis that the applicant had exhausted his right of appeal to this court. Further correspondence ensued. The applicant remains aggrieved by the Registrar's decision and appeals against it. Pursuant to directions given by the former Vice-President of the Court of Appeal, Criminal Division, Fulford LJ, that appeal comes on for hearing before the present constitution of this court.
2. The issues in this application make it unnecessary to go into any detail about the circumstances of the murder and the associated offence of possessing a firearm with intent to endanger life of which the applicant was convicted. It suffices to say that there was a shooting incident on the night of 13 October 2013, followed by the murder of Barry Selby in the early hours of the following morning. The two incidents took place at different locations, but there was strong evidence, including ballistic evidence, that the same group of men had been involved in both. The issue in relation to this applicant was whether the evidence identified him as one of that group. Three persons gave evidence that they had seen and identified him at the first incident, and had subsequently picked him out at identification procedures. Two of those witnesses were granted anonymity by the trial judge and were referred to at trial by the pseudonyms Sam White and Charlie Wilson. The applicant had made no comment in interview, and did not give evidence at his trial.
3. The witness anonymity orders were made by the trial judge, Globe J, pursuant to section 86 of the Coroners and Justice Act 2009. The measures specified in the judge's order were

made to ensure that the identity of the witnesses was not disclosed "in or in connection with the proceedings". The orders have not subsequently been varied or discharged. They accordingly remain in force, and we emphasise that publication in any report of this hearing of anything which would identify either of the witnesses concerned would breach the order made by Globe J.

4. The applicant contends that fresh evidence, going beyond the fresh evidence which was the subject of his previous application to the CCRC, is now available, and that this additional fresh evidence arguably shows his convictions to be unsafe. It is said that it comprises social media correspondence, revealing the true names of Sam White and Charlie Wilson and showing that they may have colluded together in relation to their evidence at trial, and that some of their evidence may have been false. No detail has been given of the material concerned, and it is not clear when or how it came into the hands of the applicant or anyone associated with him.
5. The core submission of Mr Raggatt KC on behalf of the applicant is that an appeal against conviction based on fresh evidence may be brought by virtue of s23 of the Criminal Appeal Act 1968, notwithstanding that an unsuccessful appeal has already been brought pursuant to s1 of that Act, and that the fresh evidence is capable of satisfying the requirements of s23 of the Act and providing a successful ground of appeal. He submits that the effect of s23, properly construed, is that an application for leave to appeal against conviction based on material which has never previously been available for consideration by any court is, for all purposes, a fresh and distinct matter, and must be considered separately from any previous appeal proceedings in relation to the same conviction. In the present case, he submits, the fresh evidence has not yet been considered by any court, and the Registrar was therefore wrong in her view that the court had no jurisdiction to entertain a fresh appeal and that the notice of appeal was consequently ineffective.
6. In the alternative, and in the light of points raised in the course of correspondence with the Registrar, Mr Raggatt seeks to rely on the powers of this court under Crim PR r36.15. He invites us to "abridge any procedural failure" and deal with the fresh evidence on the basis

of the material currently before the court.

7. Mr Myerson KC, for the respondent, opposes those submissions. He argues that, in general, only one appeal is permitted under Part 1 of the 1968 Act. In principle, he submits, the applicant might be able to invoke the powers of this court under Crim PR r36.15; but in the circumstances of this case, no such application has been made and, Mr Myerson submits, none could successfully be made.
8. We begin by referring to the relevant statutory provisions and case law.
9. Part 1 of the 1968 Act contains provisions for appeals to the Court of Appeal in criminal cases. So far as is material for present purposes, section 1 provides:

"(1) ... a person convicted of an offence on indictment may appeal to the Court of Appeal against his conviction.

(2) An appeal under this section lies only –  
(a) with the leave of the Court of Appeal ..."

10. Section 23 provides:

"(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 –

...  
(c) receive any evidence which was not adduced in the proceedings from which the appeal lies.

(2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to -

- (a) whether the evidence appears to the Court to be capable of belief;
- (b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;
- (c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and
- (d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings. ... "

11. Crim PR r36.15 provides:

"(1) This rule applies where -

- (a) a party wants the court to reopen a decision which determines an appeal or reference to which this Part applies (including a decision on an application for permission to appeal or refer);
- (b) the Registrar refers such a decision to the court for the court to consider reopening it.

- (2) Such a party must -
  - (a) apply in writing for permission to reopen that decision, as soon as practicable after becoming aware of the grounds for doing so; and
  - (b) serve the application on the Registrar.
  
- (3) The application must -
  - (a) specify the decision which the applicant wants the court to reopen; and
  - (b) explain –
    - (i) why it is necessary for the court to reopen that decision in order to avoid real injustice.
    - (ii) how the circumstances are exceptional and make it appropriate to reopen the decision notwithstanding the rights and interests of other participants and the importance of finality,
    - (iii) why there is no alternative effective remedy among any potentially available, and
    - (iv) any delay in making the application.
  
- (4) The Registrar -
  - (a) may invite a party's representations on –
    - (i) an application to reopen a decision, or
    - (ii) a decision that the Registrar has referred, or intends to refer, to the court; and
  - (b) must do so if the court so directs.
  
- (5) A party invited to make representations must serve them on the Registrar within such period as the Registrar directs.
  
- (6) The court must not reopen a decision to which this rule applies unless each other party has had an opportunity to make representations."

12. In **R v Pinfold** [1988] QB 462 the appellant had appealed unsuccessfully against his conviction for murder. He later sought leave to apply out of time for leave to appeal against conviction on the basis of fresh evidence. The application was refused, on the ground that the court had no jurisdiction to entertain it, because ss 1 and 23 of the 1968 Act provided for only one appeal against conviction. The court rejected a submission that s23 permitted a new appeal to be brought, despite the dismissal of an earlier appeal, if a fresh point was raised. It held that s23 could not come into operation unless the applicant could bring himself within s1. In this regard the court followed the earlier decision in **R v Grantham** [1969] 2 QB 574, which was concerned with the provisions of s28 of the earlier relevant

legislation, now to be found in s23 of the Criminal Appeal Act 1968. In **Grantham**, Widgery LJ said at page 580 that:

"... section 28 presupposes the existence of a competent appeal or application and is concerned only with the procedure thereon."

13. In **R v Yasain** [2016] QB 146 the court emphasised the importance of finality in proceedings but accepted that it had a residual jurisdiction to reopen a concluded appeal where there had been a defect in procedure which might have resulted in real injustice. Lord Thomas CJ said at [40] that the jurisdiction "is probably confined to procedural errors, particularly as there are alternative remedies for fresh evidence cases through the Criminal Cases Review Commission".
14. Observations by the court in that case as to the desirability of the Criminal Procedure Rules Committee formulating rules to set out the factors relevant to the exercise of that limited jurisdiction led to the introduction of r36.15.
15. In **R v Gohil** [2018] 1 Cr App R 30 the court held, at [98] ff, that the court has no general jurisdiction to rehear an appeal but could do so in two situations: where a previous order was a nullity, or where there had been some defect in procedure which may have led to some real injustice. It was held that this court will not reopen a final determination of an appeal unless (i) it was necessary to do so in order to avoid real injustice; (ii) the circumstances were exceptional and made it appropriate to reopen the appeal; and (iii) there was no alternative remedy. At [128] of the judgment of the court, Gross LJ said that although the jurisdiction to reopen proceedings was not removed by the availability of recourse to the CCRC, an application to that body was "almost invariably" the appropriate course on a fresh evidence case. That statement was endorsed by the court in the later case of **R v CC** [2020] 1 Cr App R 15 at [32].
16. The effect of this case law was summarised as follows by Andrew Baker J, giving the judgment of the court in **R v Holland** [2021] EWCA Crim 1056 at [42]:

"... it is well established that a desire to raise a new ground of appeal (or resurrect a previous ground of appeal) on the basis of new evidence that will

require an application under s23 of the Criminal Appeal Act 1968 is not a ground for reopening an unsuccessful appeal. It is a desire to be pursued by approaching the CCRC pursuant to the Criminal Appeal Act 1995."

17. In the recent case of **R v Zuman** [2021] EWCA Crim 399 the court referred to what had been said in **R v Yasain**, **R v Gohil** and **R v CC** about the ambit of the jurisdiction to reopen an appeal under r36.15, and concluded at [72]:

"... the jurisdiction is not rigorously confined to cases involving procedural errors but ... it is likely to be confined to exceptional circumstances when the lack of an alternative effective remedy (or some other reason) would or might otherwise lead to manifest injustice."

18. We turn to the application of the law to the circumstances of this appeal.

19. The case law from **R v Pinfold** onwards is flatly against the applicant's submission that a fresh appeal may be commenced whenever evidence becomes available which is said to be arguably capable of meeting the criteria in s23. The Registrar was correct in her ruling that this court had no jurisdiction to entertain the notice and grounds of appeal lodged in October 2021 and accordingly to treat it as ineffective. The appeal against that ruling by the Registrar accordingly fails.

20. The circumstances of this case fall outside the two categories identified in **R v Gohil**, in which the limited jurisdiction to reopen an appeal under r36.15 is generally exercised. We acknowledge that the door is not absolutely closed to invoking the r36.15 procedure in other circumstances in an exceptional case, though such a case will be very rare. It is, however, unnecessary for us to explore the precise ambit of the jurisdiction, for the simple reason that no application under r36.15 has been made in this case. There has been some equivocation, in the correspondence and submissions on behalf of the applicant, as to whether such an application would be made as an alternative to the primary submission erroneously based on s23 of the 1986 Act. The inescapable fact is, however, that no written application has been made as r36.15(2)(a) requires, and there has been no attempt to comply with the requirements of such an application. There is, in our view, no good reason why the applicant should be excused from complying with the requirements of the rule if indeed he wished to make an application.

21. In those circumstances, it would not be appropriate for us to say anything about the possible merits of such an application. We merely draw attention to the matters which r36.15(3)(b) requires to be explained and to the difficulties faced by any such application in circumstances where an alternative effective remedy is on the face of it available through the CCRC.
22. For those reasons, the appeal against the Registrar's ruling is dismissed. Her ruling accordingly stands, with the result that the purported notice and grounds of appeal lodged in October 2021 must be treated as ineffective. No other application is before the court.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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