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IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2022] EWCA Crim 984



No.202101913 B4

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 23 June 2022

Before:

LORD JUSTICE WILLIAM DAVIS

MR JUSTICE FRASER

MRS JUSTICE MAY

B E T W E E N :

REGINA

v

JOSE ERNESTO REAL

REPORTING RESTRICTIONS APPLY:

Section 1 of the Sexual Offences (Amendment) Act 1992 applies in this case. No matter relating to any complainants shall be included in any publication during their lifetimes if it is likely to lead members of the public to identify them as the persons against whom offences were committed.

Reporting restrictions therefore apply in this case.

The Applicant and Respondent were not present and were not represented

J U D G M E N T

MR JUSTICE FRASER:

- 1 This is a renewed application for permission to appeal against conviction, an application for an extension of time to appeal and an application for an extension of time to renew the application for permission.
- 2 The applicant applied earlier this week to have today's hearing adjourned. That application was refused, but he was granted permission to attend to make oral submissions and for that reason an interpreter, Mis Kostaparkin, the language being Portuguese, was organised by the court. In the event, the applicant has not attended and the case has been called on twice, and delayed this morning during the list, just in case the applicant had, in fact, been delayed. It is, therefore, proceeding without the applicant present.
- 3 The period of extension required by the applicant in order to appeal is five years and one month. The applicant has already served his sentence and has now been released.
- 4 On 21 March 2016, after a trial in the Crown Court at Woolwich, the applicant, who was then aged 43, was convicted of one count of rape and one of assault by penetration. He was sentenced that day by the trial judge, HHJ Hehir, to a term of six years' imprisonment on account of rape and two years' imprisonment to run concurrently on account of assault by penetration. The relevant associated orders were made, including the notification provisions.
- 5 The facts related to an incident on 18 July 2014 when the applicant had met a woman for the first time in the morning, who was making her way back to her house from the shops having bought alcohol. He offered to carry her bags, and accompanied her to the house, where she invited him in in order to have a drink with her. He then made sexual moves towards her and she told him she was not interested in any sort of sexual contact. In fact, she told him to "fuck off" and said she had a boyfriend. He put his head on to her breast, pulled off her trousers, and at this point she was shouting and screaming for him to stop. He pulled her trousers down, penetrated her with his fingers and then raped her until he ejaculated. She told the applicant to leave, which he did, and she very rapidly reported the attack to the police.
- 6 The trial at which the applicant was convicted was, in fact, the third trial that he had faced. The first trial was ineffective and at the second trial the jury were unable to agree. At the second trial the applicant had been provided with the assistance of an intermediary, having been assessed in 2015, in relevant reports by both a psychologist and an intermediary, as requiring an intermediary. However, at the conclusion of the second trial, the judge, who had conducted that trial, and had, therefore, had the benefit of observing the applicant throughout the trial, concluded no intermediary was required. He stated that, if the applicant were to continue to seek one, a further application backed up with a further psychologist's report was required. No such report was obtained and no such application was made. The third trial, therefore, took place without an intermediary acting to assist the applicant and it is that that forms the crux of the appeal against conviction in respect of which this application is renewed.
- 7 However, given this conviction was in March 2016, a very lengthy extension of time is required, as we have observed, being in excess of five years. The explanation by the applicant for the delay is that he did not know that he could appeal until the year of 2020 and that he was not advised of his right to do so by his trial counsel upon his conviction and sentence in 2016.

- 8 A waiver of rights has been signed by the applicant and we, therefore, have the benefit of the response of his trial counsel to these criticisms made of him of failure to advise, as well as regarding the situation concerning the intermediary and the third trial. His counsel has explained that the applicant was not only told of his right to appeal after he was convicted and was told that his trial counsel considered that he had no such grounds, but also that he was entitled to seek a second opinion and that there was a time limit upon the application to appeal being made to the court. We are satisfied that this advice was given to the applicant. We reject the explanation for the extraordinary delay in bringing this application.
- 9 In any event, given the fact that the applicant was sent straight to prison in March 2016, upon being sentenced, we find it a surprising suggestion that it was not until 2020 that the applicant would have realised that he had the right to appeal, in any event, given that as a prisoner he would be serving a term of imprisonment measured in years.
- 10 However, even if that were right, which we consider to be contrary to common sense and also in this case contrary to the specific advice which we have accepted was given in that respect from the applicant's own trial counsel, the relevant forms to mount an appeal were not submitted by the applicant until September 2021, which is itself nearly nine months after the end of the year, which, on the applicant's own explanation, was when he discovered he had the right to appeal.
- 11 This further and, in our judgment, lengthy delay is not explained adequately and the reason given for delay, namely difficulty in obtaining documents and the underlying merits of his appeal, are not sufficient.
- 12 Finally, after refusal of his application by the single judge, who carefully explained the written document, the renewal application itself was then also itself lodged late and a further extension of time of a month is also required in that respect. We do not consider the underlying appeal has any merit, in any event. However, the exceptional delay is sufficient to justify a refusal of the application.
- 13 We agree with the careful reasoning of the single judge and refuse the application for the reasons given. We, therefore, refuse the renewed application in all respects, including the two for extensions of time and this application is, therefore, dismissed.
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CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.