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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

RAYMOND BROWNLEE

_____

Before: Morgan LCJ, Coghlin LJ and Gillen LJ

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MORGAN LCJ (giving the judgment of the court)

[1] This is an application pursuant to section 16(2) of the Criminal Appeal (NI) Act 1980 ("the 1980 Act") for an extension of time in which to lodge an application for leave to appeal against conviction. A considerable period of time has elapsed since the conviction and the applicant has been advised by counsel and solicitors previously retained that there was no merit in the pursuit of such an appeal. This case provides us with an opportunity to set out the principles which should apply in exercising the power to extend time under the 1980 Act. Mr Greene QC and Mr Toal appeared for the applicant and Mr Tannahill for the prosecution. We are grateful to all counsel for their helpful oral and written submissions.

Background

[2] By virtue of section 1 of the 1980 Act a person convicted on indictment may appeal to the Court of Appeal with the leave of that court. Section 16(1) provides that a person who wishes to obtain the court's leave to appeal shall give notice of his application within twenty-eight days from the date of the conviction. Section 16(2) provides for an extension of time but prescribes no criteria on the basis of which the power should be exercised. The vast majority of applications to extend time arise because the application for leave to appeal is only lodged after the passing of the sentence which in most cases is outside the 28 day time limit which begins to run from the date of conviction.

[3] The jurisprudence in England and Wales arose initially in relation to applications from co-accused made after successful appeals by others. R v Marsh [1936] 25 Cr. App. R. 49 was such a case where the convictions took place on 10 October 1934 and the applications for the extension of time were lodged on 14, 20 and 21 December 1934 respectively. The court rejected the applications in the following terms:

> "… it being the rule and practice of this court not to grant any considerable extension of time unless we are satisfied upon the application that there are such merits that the appeal would probably succeed, we are quite unable to say in this case that there was no evidence upon which these applicants could properly be convicted on some, at least, of the counts of this indictment. We, therefore, do not grant the applications for an extension of time."

[4] R v Hawkins [1997] 1 Cr. App. R. 234 was a case in which an appellant convicted of obtaining by deception sought leave to appeal seven months after the conviction. Lord Bingham approved counsel's description of the court's general practice:

> "He submits that while the Court of Appeal has power to extend the 28 day time limit for applying for leave to appeal, the court has traditionally been reluctant to do so save where the extension sought is relatively short and good reason is shown for the failure to apply in time. In the ordinary run of cases the extension sought is a matter of days and the application is usually made because of some mishap or misunderstanding or administrative delay in the settlement of documents. Such indulgence has not traditionally been shown where the defendant, acting on advice has pleaded guilty or where he has taken a conscious decision not to appeal. In our view the submission is well founded and the court should be satisfied that good reason exists for granting leave to appeal out of time in circumstances such as the present."

[5] The English Court of Appeal returned to this issue in R v Bestel and Others [2013] 2 Cr App R 30. Although the court primarily focused on appeals in change of law cases it set out the general experience at paragraph 9:

> "9. It is the experience of this court that an extension of time will generally be granted by the single judge under s.31 of the 1968 Act when the defendant provides a satisfactory explanation for missing the deadline by a narrow margin and there appears to be merit in the grounds of appeal. This may be because counsel or solicitors were at fault and the defendant, personally, was not. The court has been more likely in recent times to permit an extension of time where a co-accused's appeal has been allowed on grounds which apply equally to the defendant but the defendant was erroneously advised that no grounds existed. An extension of time is likely to be granted in cases where relevant and cogent fresh evidence admitted under s.23 of the 1968 Act has emerged for the first time well after conviction. Nonetheless, evidence as to the circumstances in which the fresh evidence emerged will be required and prompt action thereafter will be expected. Long periods of delay will require cogent explanation."

[6] In this jurisdiction Lord Lowry LCJ observed in R v Winchester [1978] 3 NIJB that an extension of time is not obtained for the asking. The most important point is that justice should not be sacrificed to procedure and convenience. The potential merits of an appeal are relevant but not paramount. Carswell J touched on the principles in R v Bell [1978] 5 NIJB giving the judgement of this court where he said:

> "The Court of Appeal has power to extend the time if it thinks fit, but substantial grounds must be given to account for the delay before it will exercise its power. One of the factors to be taken into account is the likelihood of success in the appeal if the extension is granted: see R v Marsh [1936] 25 Cr App Rep 49, where it was said to be the rule and practice not to grant any considerable extension of time unless the court was satisfied that there were such merits that the appeal would probably succeed."

[7] These authorities were relied upon by the Court of Appeal in R v McBride and others [2014] NICA 45. It was submitted in that case that the court should also take into account the practice in the Republic of Ireland on such an extension set out by O'Higgins CJ in The People v Kelly [1982] IR 90:

> "In my view, the matters to be considered are the requirements of justice on the particular facts of the

> case before the court. A late and stale complaint of irregularity with nothing to support it can be disposed of easily. Where there appears to be a possibility of injustice, of a mistrial or of evidence having been wrongly admitted or excluded, the absence of an earlier intention to appeal or delay in making the application or the conduct of the appellant should not prevent the court from acting. This seems to me to be the practical result of considering what the 'justice of the case may require'."

In McBride two applicants sought an extension of time to apply for leave to appeal some months after their sentencing on the basis of a disparity argument arising from the sentence imposed on another of those involved in a blackmail offence who was dealt with on a separate indictment. The court examined the merits of the cases and dismissed the appeals.

[8] From this examination of the authorities we consider that the following principles governing the exercise of the discretion to extend time to apply for leave to appeal can be derived:

(i) Where the defendant misses the deadline by a narrow margin and there appears to be merit in the grounds of appeal an extension will usually be granted. This occurs most frequently when the application to extend time for a conviction appeal is lodged immediately after sentencing.

(ii) Where there has been considerable delay substantial grounds must be provided to explain the entire period. Where such an explanation is provided an extension will usually be granted if there appears to be merit in the grounds of appeal.

(iii) The fact that a person involved in the crime subsequently receives a more lenient sentence will generally not be a satisfactory explanation for any delay in an appeal against sentence. A defendant should take a view about his attitude to the sentence at the time that it is imposed.

(iv) A convicted defendant will usually get advice on any grounds for appeal from his legal representatives at the end of the trial. It will normally not be an adequate explanation for considerable delay that the defendant has sought further advice from alternative legal representatives.

(v) Where the application is based upon an application to introduce fresh evidence the court may extend time even where a considerable period has elapsed as long as the evidence has first emerged after the conviction, the

circumstances in which the evidence emerged are satisfactorily explained, the applicant has moved expeditiously thereafter to pursue the appeal and the evidence is relevant and cogent.

(vi) Even where there has been considerable delay or a defendant had initially taken the decision not to appeal, an extension of time could well be granted where the merits of the appeal were such that it would probably succeed.

The background to this case

[9] On 5 September 2011 the applicant was committed for trial in the Crown Court on a total of nine counts comprising one count of false imprisonment, two counts of malicious wounding with intent, five counts of common assault and one count of threats to kill. At his arraignment on 21 October 2011 he pleaded not guilty to seven of the counts. He further pleaded not guilty to the remaining two counts on 10 November 2011. He did, however, on 28 May 2012 change his plea to guilty on one count of common assault. The applicant's trial commenced on that date before Judge Miller QC sitting with a jury.

[10] The evidence at trial was that on Sunday 3 October 2010, Miss Hunter, the complainant, was drinking outside the British Home Stores in the city centre in the company of other homeless people. At some point the applicant passed by and invited her to join him at his flat. She agreed after some initial reluctance in order to make up and chat as they had previously fallen out. Both the applicant and the complainant consumed large amounts of alcohol over the next three or four days during which the complainant said that the applicant subjected her to verbal and physical abuse. This included the applicant slapping her once in the face, punching and head-butting her, throwing a bottle at her which hit her in the right temple but did not break, biting her left ear, not allowing her to leave the bedroom to use the bathroom, telling her "you're not leaving this place alive", urinating over her while she was in the bathroom and pulling her hair. The complainant said that she escaped by running out of the back door of the apartment wearing only a jumper. The applicant ran after her, assaulted her again and only stopped when a bystander intervened. The trial judge described the injuries to the victim as:

> "A small cut to her left eyebrow approximately half an inch long, bruising and swelling to both eyes and also chin, swelling and bruising to cheekbone just below the right eye and generalised complaints of pain to right wrist, lower back and neck."

[11] The applicant did not give evidence but evidence was called on his behalf. This established that he had been in custody for part of the period during which it was alleged these offences occurred. The case proceeded on the basis that all of the

allegations were denied other than the common assault to which he pleaded guilty at the start of the trial.

[12] On the morning of 31 May 2012 all of the evidence had concluded. Senior counsel retained under the applicant's legal aid certificate advised the learned trial judge that he and junior counsel felt that they could not continue in the case. The solicitor was not present at that stage but he arrived shortly afterwards. The solicitor had a short consultation with the client and indicated that the respondent was concerned in particular in relation to some documentary evidence that he felt should have been put before the court. The solicitor also informed the judge that the applicant said that there was a person who could provide evidence on his behalf to say that a witness had made false allegations of rape in the past. Thirdly, the applicant indicated concern about the way in which an issue in the trial relating to padlocks and the connection to the false imprisonment charge had been dealt with. The solicitor indicated that the applicant had lost a degree of faith and confidence in his legal team because of those issues and he also indicated his intention to withdraw.

[13] The learned trial judge noted that the issue of the padlocks was fully explored with the police witness during cross-examination and noted that the false imprisonment charge related to other matters such as locks on doors. The judge explained to the applicant that his senior counsel felt professionally compromised and unable to further represent him. The applicant indicated that that was not his wish. He thought that things had been taken up the wrong way. In those circumstances the solicitor indicated that the position might be retrievable and that there may well have been misunderstandings. The judge noted that it would be in the interests of the respondent that he should continue to have the services of counsel and the solicitor who had served him and his interests in a proper fashion. On the basis of the circumstances explained to him he said that he would be "loath to conclude" that there was a proper ground for withdrawing instructions. If it turned out to be the position that the applicant had no legal representation he did not consider it appropriate to transfer the legal aid certificate to other representatives but would deny the Crown the opportunity to address the jury. The case was adjourned over lunchtime.

[14] After lunch the applicant indicated that he had dispensed with the services of his legal representatives. The judge explained that the basis upon which he had dispensed with the services of his lawyers was such that he did not believe that it would be appropriate to transfer the certificate of legal aid. With the agreement of the parties the learned trial judge thereafter proceeded to charge the jury. On 31 May 2012 the jury returned verdicts of guilty of false imprisonment, two counts of malicious wounding with intent and a common assault, not guilty of two further counts of common assault and not guilty by direction on one count of common assault. It was directed by the court that the offence of threats to kill was to remain on the books not to be proceeded with without the leave of the court.

[15] Following his conviction the applicant sought to instruct new legal representation. An issue, however, arose in relation to the legal aid fees payable to the new representatives and culminated in a judicial review before the Supreme Court. For this reason the sentencing of the applicant did not take place until 14 February 2014. On that date the learned trial judge imposed an Extended Custodial Sentence comprising 6 years' imprisonment and 4 years' extension period. The applicant lodged a Notice of Appeal, dated 25 February 2014, seeking leave to appeal his sentence only. He accepts in his skeleton argument that counsel gave him an oral opinion advising that there was no merit in an appeal against conviction. Leave to appeal sentence was refused by Maguire J, acting as the Single Judge, on 9 October 2014.

[16] In or around the end of September or start of October 2014 the applicant again sought new legal representation. His new solicitors received papers from the existing solicitors on 7 October 2014. A brief was sent to senior counsel on 21 October 2014 and, during the course of a consultation on 23 October 2014, the applicant requested consideration be given to an appeal against sentence. The relevant form to renew his application for leave to appeal sentence to the full Court of Appeal was lodged. At the same time the solicitors also informed the Court Office that the applicant wished to appeal his conviction and to obtain counsel's opinion. His solicitors received the transcript of the trial on 4 November 2014 and, following a series of consultations, the applicant lodged a Notice of Appeal, dated 27 January 2015, applying for leave to appeal conviction and an extension of time in which to lodge the application.

The basis of the proposed appeal

[17] It was submitted that there were various ways in which the fairness of the trial was affected by the issues surrounding the withdrawal of counsel. The issue first arose on the intimation by senior and junior counsel that they felt professionally compromised. The learned trial judge properly explored the basis for that suggestion before lunch on 27 February 2013. Having done so he indicated that he did not consider that the matters of complaint were well founded and that he would, therefore, be loath to conclude that there were proper grounds for withdrawing instructions or transferring the legal aid certificate.

[18] We accept that where such an application is made, particularly at such a late stage, the court should carefully explore the basis for the withdrawal of legal representatives in order to avoid, where possible, prejudice to the defendant and prevent manipulation of the system. In this instance the learned trial judge properly explored the basis for criticism of defence counsel and found it unsubstantiated. He alerted the defendant to the consequences of proceeding without legal representatives and made it clear in open court that it would be in the interests of the applicant that he should continue to have the services of counsel and solicitor who

had served him in a proper fashion. Despite those observations and the opportunity for the solicitor to discuss them with his client the applicant chose to dismiss his legal representatives. He was given every opportunity to understand the consequences of his actions. We do not consider that there is any substance in the suggestion that because the learned trial judge did not take further steps after lunch to try to recover the situation there was any unfairness in the trial.

[19] When the applicant dismissed his legal team the learned trial judge explained to him that, as he had already indicated, he did not believe that it would be appropriate at that stage to transfer the certificate of legal aid having regard to what he had been told. He explained that he proposed to give the jury a legal charge in the case but would not permit the prosecution to have a closing speech. He indicated that the applicant could address the jury if he wished but that the judge would deal with matters that were raised on his behalf in the course of cross-examination. He told the applicant that he was entitled to seek alternative representation. The applicant elected to proceed without addressing the jury. The judge had explained to the applicant before lunch that it was his intention to proceed with the case and in our view there was no obligation on him to discharge the jury in circumstances where it was accepted that the applicant had shown no justifiable reason for dispensing with the services of his lawyers. In light of the course proposed by the learned trial judge the applicant was not unfairly disadvantaged in terms of preparation.

[20] There were two points specifically developed in the oral argument on behalf of the applicant. First it was contended that despite his indication that he would put the defence case the learned trial judge failed to do so adequately. We do not accept that there is substance in that submission. At an early stage in the charge the learned trial judge referred to the fact that the complainant's evidence that she was with the applicant in the applicant's flat from the evening of 3 October until 7 October 2010 was plainly wrong since the applicant had been held at Strandtown Police Station between 4 and 5 October. He correctly indicated to the jury that as a result the complainant's reliability in terms of the accuracy of her recollection of events, times and places was highly questionable.

[21] He then moved on to deal with the fact that on two occasions she had made an allegation of rape against the applicant but subsequently withdrawn the allegations. In fact there was evidence that she had made upwards of 100 complaints to police many of which she had subsequently withdrawn. The judge took the jury through her criminal record and gave appropriate direction about the effect of those convictions. He dealt with the fact that the defence had demonstrated that the allegation that her memory was affected because she had been in a coma in hospital for a period of up to two months was wrong. All of this was couched in language designed to warn the jury about the danger of convicting on the complainant's evidence in light of her inconsistencies. Having put the prosecution case in relation to the various counts he reminded the jury that the defence case during interview

was that none of this happened, that such physical contact as they had was in the form of having sexual intercourse and that the jury needed to bear in mind the frailties in her character and her capacity to give accurate evidence.

[22] In respect of the allegation of false imprisonment there was an issue about whether there were padlocks on the door of his flat as alleged by the complainant. The applicant provided information at an early stage in the course of his interviews that there were no such padlocks but no action was taken by police to investigate the matter. The judge reminded the jury that the applicant and the complainant had gone out to get drink together and had also gone out to get a Chinese meal. Mr Greene submitted that the elements of the defence case could have been better brought together in a comprehensive manner but we are satisfied that the charge included a succinct but accurate summary of the issues of fact as to which a decision was required, a correct but concise summary of the evidence and arguments on both sides and a correct statement of the inferences which the jury were entitled to draw from their conclusions about the primary facts (see R v Lawrence [1982] AC 510). There were further points made about the leaving of alternative counts and the direction on wounding but there was no issue of safety of the conviction arising on either.

[23] The final point advanced on behalf of the applicant related to a portion of the learned trial judge's charge dealing with bad character evidence where he said:

> "In order to convict the defendant you must be satisfied beyond reasonable doubt that he committed the offences as alleged by the complainant. When considering that you may consider it relevant that the defendant has been convicted of a multiplicity of offences including several for assaults of various kinds and that he also has convictions for dishonesty in the manner that you have heard outlined. The prosecution say that the defendant has a tendency to use violence *and to be untruthful*. And that this supports the prosecution case that he used violence on this occasion.
>
> The defendant says that whatever he did in the past, these allegations are untrue. It is for you to decide the extent to which if at all the defendant's previous convictions assist you in deciding whether he committed each of these offences.
>
> Now of course it is equally a matter of some considerable relevance … on the facts of the present case that the complainant Ms Hunter who is the

> primary witness against the defendant does herself have a considerable record for offences of dishonesty, public disorder and petty violence. You will recall that she was cross-examined extensively out of her record and you will recall the manner in which she dealt with those convictions. You are entitled to consider whether that record of hers calls into question the veracity of her claims in the present case."

[24] The bad character evidence had been introduced by agreement between the prosecution and the defence. There had been a perfunctory discussion about it between the judge and counsel at the end of the evidence when preparing for closing speeches. We consider that it is particularly important where bad character evidence is introduced by agreement to ensure that the use to which the evidence can be put is discussed before speeches to the jury. When admitting bad character evidence pursuant to any of the gateways it is, of course, always a good discipline to identify how the jury are to be directed in respect of it.

[25] The agreed evidence disclosed a Magistrates' Court record largely influenced by alcohol comprising offences of violence, dishonesty and public disorder. There was one recent conviction for Assault Occasioning Actual Bodily Harm but three other convictions for the same offence were more than 10 years old. It was accepted that the convictions for violence were capable of constituting material upon which the jury could consider whether the applicant had a propensity to commit offences of violence.

[26] The criticism that Mr Greene developed concerned the assertion in the charge that convictions for offences of dishonesty could give rise to a propensity to untruthfulness. The distinction between a propensity to untruthfulness and a propensity to dishonesty was considered in R v Hanson [2005] EWCA Crim 824 at paragraph 13. Previous convictions for dishonesty are only likely to be capable of showing a propensity to be untruthful where truthfulness is in issue. In R v Campbell [2007] EWCA Crim 1472 the court concluded at paragraph 31 that the only circumstance in which there is likely to be an important issue as to whether a defendant has a propensity to tell lies is where telling lies is an element of the offence charged.

[27] We accept that this was not a case where propensity to untruthfulness arose. It was, however, a case in which there was a real issue about the competing credibility of the complainant and the applicant. The applicant's case was that the complainant had falsely invented these allegations and the issue for the jury was whether they were satisfied beyond reasonable doubt that the complainant's account on each of the counts was reliable.

[28] Although the evidence of previous convictions was admitted by agreement, it is clear that much of this evidence would in any event have been admissible under Article 6(1)(g) of the Criminal Justice (Evidence) (NI) Order 2004 by reason of the attack made by the applicant on the complainant's character. In such a case the purpose of this gateway is to enable the jury to know from what sort of source allegations against the witness have come. Where the issue is one of credibility it is important that the jury in assessing the reliability and truthfulness of the competing accounts should see the full background of the applicant as well as the complainant (see R v Singh [2007] EWCA Crim 2140).

[29] We consider that it is plain from the latter part of the passage set out at paragraph 23 above that the learned trial judge was directing the jury to carry out precisely that exercise when assessing the credibility of the account given by the applicant at the interview and the evidence of the complainant. We accept that the direction should not have been couched in the language of untruthfulness but we do not consider that the direction diverted the jury from the task in hand.

Conclusion

[30] This is a case in which the applicant was convicted on 31 May 2012. His application to extend time to appeal against conviction was lodged on 27 January 2015. In the highly unusual circumstances of this case he has an explanation for the period until February 2014 but no adequate explanation for the period thereafter. This is, therefore, a case where there has been considerable delay. For the reasons given we do not consider that the arguments which it is proposed to make on appeal are likely to succeed in undermining the safety of the conviction. Accordingly we refuse leave to appeal.