No: 2004/07328/D1

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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday, 12 April 2005

B e f o r e:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
(The Lord Woolf of Barnes)

MR JUSTICE OUSELEY

MR JUSTICE TREACY

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R E G I N A

- v -

HERBERT K

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Computer Aided Transcription by
Smith Bernal, 190 Fleet Street, London EC4
Telephone 020-7421 4040
(Official Shorthand Writers to the Court)

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Non-Counsel Application

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J U D G M E N T
(As Approved by the Court)

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Tuesday, 12 April 2005

THE LORD CHIEF JUSTICE: I will ask Mr Justice Ouseley to give the judgment of the court in this application.

MR JUSTICE OUSELEY:

1. On 6 March 2003, in the Crown Court at Birmingham, before His Honour Judge Stanley and a jury, the applicant, who is now aged 38, was convicted of two counts of indecent assault on a female (his 10 year old niece). He was sentenced to five years' imprisonment on each count to run concurrently. He was acquitted of two further counts of attempted rape. He renews his application for an extension of time for lodging his application for leave to appeal and renews his application for leave to appeal following refusal of both by the single judge. The extension of time sought amounts to one year and eight months.

2. The facts briefly are these. The applicant, visiting from Zimbabwe to the complainant's family in May 2002, went on two separate occasions towards the end of May into the complainant's bedroom. The occasions were some days apart. On each occasion on entering the bedroom he pulled up the complainant's skirt and pulled down his trousers and underwear. He lay on top of her and pressed on to her vaginal area with his penis. In the first incident the complainant's underwear was left on, but not in the second incident.

3. The applicant denied that any such incident had occurred. The essential evidence before the jury and upon which they convicted was the complainant's evidence as to what had happened. They rejected the applicant's denials.

4. The allegations by the complainant as to the incidents in May 2002 were not made to anyone until July. It was not until September 2002 that the applicant was arrested and interviewed. Initially he was interviewed on the basis of a rape allegation.

5. The recurrent themes of the grounds of appeal which the applicant seeks to promote are principally that when the police began their investigation of him they took his underwear, his short trousers, the complainant's underwear and the blankets and sheets from the bed where the incidents occurred for forensic examination, in particular with a view to seeing whether there was any DNA on those items. Forensic examination revealed nothing. It is clear from the grounds of appeal that the applicant had then expected that the prosecution would be dropped; that later the absence of such evidence would produce success for him at half time; and that this factor would be emphasised by his counsel to the jury and by the judge to the jury. The applicant specifically complains about the absence of such matters being drawn explicitly and emphatically to the jury's attention, despite the investigation. In his summing-up the judge made comparatively brief reference to this point. He said that, apart from the evidence that had been given by the complainant and by the defendant, there was no other evidence.

This was not a case in which there was any scientific evidence. There were no pointers as to what had happened, although the judge referred to the fact that there are sometimes forms of scientific evidence produced as a result of forensic investigation.

6. In his grounds of appeal the applicant also refers to the fact that the complainant made an initial false rape allegation and that it was unfair for him to have been interviewed about it. He also complained of various peripheral issues being put before the jury, for example his purchase of gifts for the girl.

7. An extension of time of one year and eight months was sought because, said the applicant, the conviction had left him shocked and he had been unable to act in consequence. He had lost trust in his solicitors and counsel. As a foreigner unused to the ways of British justice, he needed time to adjust to the system and gather his thoughts.

8. The single judge dealt fully with the application for leave to appeal and the extension of time. It is important in the light of what we later say to point that out. The single judge observed that no sufficient grounds had been put forward for the delay of 20 months. If there were good medical grounds, medical evidence should have been produced; but there was none. Additionally, he pointed out that a telephone call to solicitors would have been enough to find out how to set about the process of appealing so that ignorance of the process did not explain the delay. As to the grounds of appeal, the single judge pointed out that although the applicant was initially questioned on a false basis as if the complaint was of rape rather than attempted rape or indecent assault, that did not affect the safety of the conviction. The judge had properly told the jury that they had to be sure that the complainant's evidence was correct and if they took the view that the applicant's evidence might be right, then he should be acquitted. It was plain that the judge had summed up properly. The jury had believed the complainant and disbelieved the applicant.

9. As to the DNA evidence about which the applicant speaks so much in his various documents, the single judge said this:

> "The absence of forensic evidence was irrelevant in the context of her description of what occurred. The events were investigated some while after they occurred and there was no suggestion of ejaculation in any event, so that the absence of forensic evidence in relation to clothes, underwear, sheets or blankets meant nothing. It was a point to which the defence was entitled to draw attention, if it was considered helpful, but the judge's summing-up on the point was correct.
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> Medical evidence was also irrelevant since there was no suggestion of penetration."

He said, therefore, that there were no grounds upon which the appeal could succeed.

10. So far as the renewed application for an extension of time is concerned, nothing has been put before us to add to that which was before the single judge in substance. There is no evidence in any medical form to show there was a medical condition which inhibited the applicant acting earlier. In any event there is no material which would or could justify an extension of 20 months, which is the length of time necessary for this application to be lodged.

11. As to the merits of the renewed application, for the reasons given by the single judge they are wholly lacking. Although the court has had, and considered, over 40 pages of handwritten material prepared by the applicant himself, they are somewhat repetitive and ignore the crucial basis for the jury's adverse conclusion. This, as the single judge pointed out, was that they accepted that they were sure that what the complainant had said was right and they were sure that what the applicant had said about the two incidents was untrue. The claimant's evidence sufficed for his conviction. The absence of additional evidence against him in the form of DNA produced as a result of a forensic examination of the clothing and bedding simply means that the case against him was not stronger. It does not amount to positive evidence in his favour that the incident did not occur as described by the complainant, without ejaculation, and especially with examination taking place so long after the events. As the single judge pointed out, the trial judge dealt properly with the matter in his summing-up.

12. Accordingly, there is nothing in the application for either an extension of time or in the renewed grounds which has any merit at all.

13. But that is not the end of the matter. The case is before this constitution because, in view of the lack of merits in the applications, it gives rise to the question of whether a Loss of Time Order should be made. We point out that the Notice and Grounds of Appeal Form says -- and applicants sign it and sign it again on renewal -- that they understand that if the court is of the opinion that an application for leave to appeal is without merit, an order may be made that time spent in custody shall not count towards sentence. That applies both to the original and to any renewed application.

14. In section 29 of the Criminal Appeal Act 1968 the power is given for that direction as to loss of time to be made. When a renewed application is sought, the same warning is given. All applicants are entitled to advice and assistance on appeal, for which provision is made by the Crown Court Representation Order. An applicant who has not had the benefit of such advice will be granted legal assistance by the Registrar. Applicants, as here, who rely solely on grounds which they have drafted themselves therefore do so after they have received negative advice from counsel. Where an application is lodged by an applicant in person, a letter is sent to the trial solicitor reminding them of the entitlement to advice on appeal and also, and importantly, of the need in such an advice to warn applicants about the court's power to make a Loss of Time Order.

15. In this case a notice was sent to the applicant on 23 March 2005 specifically asking for any submissions that he might wish to make in view of the warnings that he had been given about the risk of a Loss of Time Order were he to persist in meritless applications. The applicant has produced a response to that. It is a lengthy response, but it adds nothing other than a repetition in different language of the reasons which he had put forward as to why time should be extended and as to why leave to appeal should be granted. As we have said, both aspects of the application are without merit.

16. Against that background we turn to consider whether a Loss of Time Order should be made in this case. A Practice Direction [1970] 1 WLR 663 had been issued as long ago as 1970 by Lord Parker CJ. The response to that Practice Direction had been significant. It was necessary for a further Practice Direction [1980] 1 WLR 270 to be issued by Lord Widgery CJ. It said that a Loss of Time Order would normally be made by the single judge where grounds of appeal were not settled by counsel and supported by a written opinion.

17. Lord Woolf CJ set out extracts from those earlier directions in the Consolidated Criminal Practice Direction [2002] 1 WLR 2870. The Practice Directions warns of the powers which the court and single judge have to direct that part of the time during which an applicant is in custody after putting in his notice of application for leave to appeal should not count towards sentence. Those who contemplate putting in such a notice, and their legal advisers, should bear this in mind. It points out that it is useless to appeal without grounds and that the effect of an application devoid of merit means that if a renewal is made, the full court can direct that time shall be lost if it thinks it right to do so in its discretion in all the circumstances of the case.

18. However, it has become the case that over time Loss of Time Orders have been used very sparingly. Indeed, very few have been made in recent years. For example, it appears that four were made in 1998, two in 1999, none in 2000, and two in 2001. In R v Gorman in 2001 Kay LJ observed that Loss of Time Orders should be made because a lack of merit in an appeal which is nonetheless persisted in delays the hearing of meritorious appeals and that the court had to take some action to explain that to people and to get the message across that such conduct would not be tolerated.

19. The compatibility of a Loss of Time Order has also been considered by the European Court of Human Rights in Monearl and Morris v UK [1988] 10 EHRR 205. An additional period of imprisonment aimed to discourage abuse and to avoid delay in the hearing of meritorious appeals was an inherent part of an appeal process.

20. We point out that the applicant in this case, as applicants generally would have done, has had the opportunity for legal advice on the grounds. That opportunity would have included the obligation on his legal adviser to warn about the risk of a Loss of Time Order being made. There are real problems with delays in the hearing of meritorious appeals as the courts become clogged with unmeritorious applications. This power is

there to reduce the number of unmeritorious applications and unmeritorious renewed applications. It is a power which, as the figures which we have cited show, has become too little used.

21. We take this opportunity to remind applicants and practitioners of the discretionary power which this court has. We encourage them to take note of the judicious use of the power which the court has. Here there was a very long delay in the lodging of the grounds for leave to appeal. There has been no arguably adequate explanation given. The grounds of appeal are hopeless. The single judge dealt carefully with both of those matters. The applicant was warned appropriately as to the consequences of persisting. For those reasons this court takes the view that a Loss of Time Order would be appropriate. We make an order that this applicant should lose fourteen days in consequence. These applications are dismissed.
