



Neutral Citation Number: [2021] EWCA Crim 1542

Case No: 201702854 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
HHJ A Molyneux
T20167500

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/10/2021

Before :

LADY JUSTICE THIRLWALL DBE
MR JUSTICE GOSS
and
SIR RODERICK EVANS

Between :

DAVID JOHN HARRIS
- and -
REGINA

Applicant/Appellant

Respondent

Hugh Barton QC (instructed by **CFJ & Co Solicitors**) for the **Applicant/Appellant**
William Boyce QC (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing dates : 21.10.2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 4:40pm on Friday, 22 October 2021.

Lady Justice Thirlwall DBE :

1. David John Harris, the applicant is 72. This is his application for leave to treat as a nullity the abandonment of an appeal against conviction.
2. On 18th May 2017 following a trial before HHJ Molyneux and a jury at the CCC the applicant was convicted of three separate counts of soliciting the murder of his partner of 30 years, Hazel Allinson. On 14 July 2017, he was sentenced to 17 years imprisonment on each count to run concurrently.
3. Trial counsel advised on appeal against conviction and sentence and applications for leave to appeal both were filed.
4. On 12th December 2017 the single judge refused leave to appeal in respect of both conviction and sentence. The decision was communicated to the parties on 10th January 2018.
5. Renewed applications were served on the court on 30.1.18.
6. The two applications were listed before the full court presided over by Hallett VP on 27th June 2018. At the hearing of the renewed applications Mr Moloney QC, who had appeared at trial and who appeared pro bono on the renewed applications, abandoned the renewed application in respect of the conviction and pursued the renewed application for leave in respect of the sentence. The court refused leave in a judgment at [2018] EWCA 1577.
7. It is the applicant's case that the renewed application for permission to appeal conviction was abandoned without his knowledge. He did not agree to it being abandoned and would not have done so because he considered there were strong grounds of appeal. That is the basis of the application before us.
8. The facts of the case are set out in short form in the judgment of the court on the renewed application for leave to appeal sentence at paragraphs 3-10. In short, Hazel Allinson was his partner of some 30 years. They lived together. She assisted him financially. He was conducting an affair with a very much younger woman with whom he had become besotted. He used money received from his partner to look after the other woman and when his money began to run out he borrowed from friends on the basis of lies. During 2016 he met three men. To each of them he offered money so that they would kill his wife. The first of the three recorded their conversations, the second reported him to the police. The third was an undercover police officer who made audio and video recordings. The evidence of his conversations was chilling.
9. When arrested he said he was planning to write a novel and met contract killers so he would be able to describe their activities authentically. His relationship with the younger woman was for sex and he would never do anything to harm Hazel Allinson. He maintained his account at trial. He was disbelieved.

Evidence

10. This application turns on findings of fact about communications between the applicant and his representatives in the period between sentence and the hearing in the Court of Appeal.
11. In the light of the applicant's criticisms of his conduct the Court of Appeal office communicated with Mr Moloney QC who appeared for the applicant at trial and his instructing solicitor, Claudia Francois. Both responded promptly to the questions posed to them. It is not in dispute that Mr Moloney had advised the solicitors that if the renewed application for leave to appeal conviction was pursued the applicant was at risk of a loss of time order and that in his view that application should be abandoned. He was prepared to and subsequently did represent Mr Harris pro bono on the renewed application in respect of sentence.
12. Mr Moloney understood that Ms Francois, the applicant's solicitor, had explained his advice to Mr Harris and his advice had been accepted.
13. Edis LJ gave directions that both Ms Francois and Mr Harris attend by CVP to give evidence before us today. We are grateful to Ms Francois for attending at such short notice. We are also grateful to Mr Boyce QC, trial counsel for the prosecution who has attended to assist the court.
14. In her letter to the Court of Appeal office on 28 January 2021 Ms Francois wrote "Mr Harris was advised and fully accepted that he should abandon his appeal against conviction and was in complete agreement to proceed only with an appeal against sentence" Mr Harris denies this.
15. Before turning to the oral evidence, it is instructive first to read an email of 29th May 2018 which bears the applicant's name, but which was sent on his behalf by Ms Allison. The emphasis is ours:

Dear Claudia and Tim

I saw Hazel yesterday and spoke to her today on the phone and asked her to send this email to you both although we don't have an email address for Tim. I am concerned that with the Bank Holiday and the post it might not get to you for a while if I write to you by snail mail. **I wanted to thank both of you so much for working on the Appeal on DAVID 27th June Pro Bono. I am so grateful, and obviously so concerned as well, as this is my last chance to reduce my sentence. I am as I have always told you innocent of what I was charged with – but guilty of causing Hazel so much pain and ruining her life. It is something that I will never forgive myself for doing.** Both of us are approaching our 70th birthdays and our dreams of spending time together are rapidly diminishing as I will be 77 when released on licence. Claudia I understand from Hazel that you currently have no clients here at Belmarsh so you would have to make a special visit just to see me. I will understand if it is not possible to rearrange your diary but very much hope that you will be able to come as there are many things that I am unclear about. I am grateful to both you and Tim for all your hard work on my behalf. I do realise how stupid I have been but so desperately want to get out of prison and do some good in the community. I have had a lot of time on my hands which I have used to help others here and want to be able to

do more. I have also been told by my OMU Supervisor that he will be recategorizing me to a Cat C in June. With kind regards David (Harris).

16. Mr Harris said that his wife had drafted it in order to “take the heat out of the situation” because he was so displeased with the turn of events.
17. It is plain that the applicant understood at that stage, a month before the hearing, that only the appeal against sentence was being pursued.
18. Ms Francois told us that she and Mr Moloney were confident that the sentence would be reduced. She pointed out that Mr Harris had already spent a very long time on remand and was anxious to reduce his sentence if at all possible. Mr Harris told us repeatedly that sentence was irrelevant to him. We do not accept that. Sentence was important to him. The documentary evidence is all one way and we accept Ms Francois’ account.
19. In evidence before us this morning Mr Harris repeated what he has said in his statement to the court of March 9th, 2021 that until his new solicitor had used the expressions he had not even heard of abandonment or loss of time order. We do not accept his evidence.
20. In a letter dated 18.1.18 Ms Francois wrote to the applicant as follows: -

“Dear David

Re: Appeal against Conviction and Sentence.

I write with regard to your appeal against conviction and sentence. Please see enclosed notification from the Single Judge received at my offices on 16th January 2018. As you note unfortunately you have been refused leave (permission) to appeal against your conviction and sentence.

It is now your decision as to whether you wish to renew your application before the full court. I have spoken with Mr Tim Moloney QC and he is of the view that a renewed application should be made before the full Court in respect of your appeal against sentence. I can confirm he is currently drafting on a pro bono basis an advice in relation to this. However, you should note that although the single Judge did not an out of time order in relation to both aspects of your appeal, irrespective of Mr Moloney’s advice, if a renewed application before the full court is refused, the Court could still impose a loss of time order.

For your information, a loss of time order is if the Court of Appeal considers a renewed application to appeal to be based on meritless grounds it can order the period or part period of time already served by yourself not to be counted towards your sentence [bold in the original]

I do understand how disappointing this news will be for you however I can confirm I will be attending HMP Belmarsh on **Tuesday 30th January 2018 from 9.15-11.15am** to take your instructions and discuss a further application to the full court with you.

Yours sincerely”.

21. When he was asked about the letter he said he had not received it and then that he could not recall having received it. We are satisfied he did receive it since there is reference in the last paragraph to a meeting due to take place on Tuesday 30 January. The applicant had accepted earlier in his evidence that he had been expecting to see Ms Francois that day.
22. In the event Ms Francois was ill and could not attend the prison on 30 January. The applicant telephoned her from prison in February. Both Mr Harris and Mr Francois recall the conversation. Unfortunately, there is no note of it. Ms Francois says it probably took place while she was in the car (she described very vividly the life of a legal aid solicitor) and she forgot to make a note afterwards. Ms Francois is clear that there was a discussion about Mr Moloney's advice to which she had referred in the letter of 18th January. Mr Harris said Ms Francois told him that both appeals had been turned down by the single judge and that Mr Moloney was prepared to continue pro bono against the sentence. He said he was very annoyed to learn this. He said he had been told by both Mr Moloney and Ms Francois that because of what happened at trial we had a very good case for appealing conviction. He said the term abandonment was not used and there was no discussion about loss of time. He asserted, as we have recorded above, that the first time he learned about loss of time was when he had his new legal team and the term was used by Mr Moore as a result of which the letter of 18th January 2018 was put to him.
23. He said that he was upset by what was said and that he thought he would have made this clear. Ms Francois described him as very vexed and angry about what she had said about the conviction.
24. A passage from Ms Francois's letter to the Court of Appeal on 18th October 2021 was put by Mr Boyce to Mr Harris "that Mr Harris was advised and fully accepted that he should abandon his appeal against conviction and was in complete agreement to proceed only with an appeal against sentence" Mr Harris flatly denied this. He said such a conversation did not take place. He denied knowing anything about abandonment or loss of time. It was in the context of those answers that the letter to which we refer at paragraph above was put to him. Ms Francois repeated the account in her letter in evidence before us. We accept her evidence.
25. A further appointment was made for 22nd June 2018, shortly before the hearing of the application. Ms Francois attended at the prison, but the wrong David Harris was brought to the visiting area. She was told by the prison that there was insufficient time to bring down Mr Harris, so she went away again.
26. Mr Harris rang Ms Francois later that day. Mr Harris said he did not remember this call. The attendance note reads, after an explanation of the mix up the previous day as follows "David anxious – wants to have a lesser sentence. CF confirms hearing for sentence only. David agrees [these two words are above what follows] Avoid possibility of loss of time..."
27. The applicant denied this had been said. Ms Francois said it had and she informed Mr Moloney by email the next day, Saturday 23rd June 2018 that the applicant was aware the hearing was for sentence only.

28. No explanation was given in evidence about what Mr Harris thought was happening to the appeal against conviction. We are quite satisfied on the evidence that he knew it was not being pursued by Mr Moloney or Ms Francois. He knew it was up to him whether to pursue it. The letter of 18th January 2018 made that plain, and we are satisfied that the applicant knew this throughout. He decided not to proceed with the appeal against conviction before the court. In evidence when asked why he did not seek fresh legal representation on the appeal he had no explanation other than that he was not experienced in these things.
29. We do not accept his account that he was the passive recipient of advice and direction throughout. Even in the short hearing of the application he was highly articulate and quick thinking. We accept Ms Francois' evidence that he was well able to express his views as to the conduct of his case and the conduct of the appeal. We are satisfied that he did not want to risk a loss of time order in the pursuit of the application for permission to appeal the conviction. He had been reassured that there was merit in the renewed application for permission to appeal sentence. In the event the application did not succeed but there was no question of the making of a loss of time order in that regard.
30. We are quite satisfied that the applicant was content to and did abandon the appeal against conviction. The application to treat the abandonment as a nullity is refused.

The Grounds of Appeal against Conviction

31. We had indicated before this hearing that had we considered it appropriate to treat the abandonment as a nullity we would have gone on to consider the renewed application for permission to appeal as this court would have done in 2018 absent the abandonment. In the event that was not necessary, and we heard no submissions on the point.
32. Had this court considered the application in June 2018 on the papers we are quite satisfied that any renewed application for permission to appeal against conviction would have been dismissed. The Single Judge had dealt in detail with the ground of appeal based on what was said to be impermissible cross examination of the applicant which should have led to the discharge of the jury. We can see no error in his approach.
33. The question in every appeal is: is the conviction safe. Here it is are these convictions safe? It is important not to lose sight of that in the hurly burly of allegation and counter allegation about later conversations.
34. We take the following passage from the sentencing remarks: "On 28 February you believed that Mr May was in Amberley and would murder Ms Allinson that day. He had all the information he needed to do so. At 10.16 that morning, he sent you a text saying "what's the Church called? We passed one, don't if it is the right one". You replied at 10.26 saying "St Michael's Amberley Village, 12th Century church". Believing the murder to be imminent you text again at 10.34, "when shall I destroy this phone" and at 10.37 "she is leaving now". Mr May was not in Amberley. Ms Allinson came home from church alive and well and your frustration is apparent in your text to Mr May at 13.23, "she's back. What the fuck happened? She is dog walking this afternoon. Where are you?" At 14.08 you sent a text saying "Chris,

what is happening? I keep asking if this is going down and you keep saying yes. You promised it would be done today. Please text me and let me know what the hell is happening I have done all you asked of me.” You had expected that Ms Allinson would die that day.

35. In his final paragraph dismissing the application for permission to appeal against conviction the single judge said, “Safety of the convictions. This was an overwhelming case. If May had carried out the applicant’s instructions HS would have been murdered on 28th February. His frustrated text that afternoon when he found she was still alive speaks volumes. There is no doubt about the safety of the convictions. There is no merit in this application.”
36. We agree. Had the application been considered by the full court it is overwhelmingly likely that a loss of time order would have been made.