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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA Crim 202



CASE NO 202000170/B2

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 9 February 2021

LORD JUSTICE POPPLEWELL
MR JUSTICE SPENCER
THE RECORDER OF RICHMOND UPON THAMES
HIS HONOUR JUDGE LODDER QC
(Sitting as a Judge of the CACD)

REGINA
V
SHANNON RUSSEL DAR

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NON-COUNSEL APPLICATION

J U D G M E N T

1. MR JUSTICE SPENCER: On 8 June 2020 the applicant Shannon Russell Dar signed a Form A notice abandoning his appeal against conviction for arson. He now applies to set aside the notice of abandonment as a nullity and reinstate his application for leave to appeal against conviction. This is a non-counsel application.
2. It is necessary to set out the relevant chronology. On 17 July 2019 in the Crown Court at Nottingham, the applicant was convicted of arson being reckless as to endangering life. He was sentenced on 7 August 2019 to an extended sentence of 10 years' imprisonment, pursuant to section 226A of the Criminal Justice Act 2003, comprising a custodial term of five years and an extension period of five years.
3. On 19 December 2019, 105 days out of time, he applied for leave to appeal against that sentence, seeking an extension of time. On 9 January 2020, 147 days out of time, he applied for leave to appeal against conviction, seeking an extension of time.
4. On 29 January 2020 the applicant telephoned the Criminal Appeal Office to say that he wished to abandon his application for leave to appeal against conviction. By now that application was being processed but there were missing documents. The applicant was sent a new Easy Read Form NG (for his conviction appeal), a Form B (should he wish to apply for bail) and a Form A notice of abandonment (should he wish to abandon his conviction appeal).
5. On 16 March 2020 the Criminal Appeal Office received a letter from the applicant dated 9 March 2020 saying that he did not wish to abandon his conviction appeal. He sent back the completed Form B applying for bail. He did not return the completed Form NG and was chased for it by the office by letter dated 16 April 2020.
6. The applicant telephoned the Criminal Appeal Office on several occasions seeking an update. Regrettably a letter he had sent dated 9 April 2020 was overlooked owing to the difficult working conditions arising from the pandemic and was not reviewed by the Criminal Appeal Office lawyer until 29 May 2020. It was noted that the applicant had still not provided the completed Form NG or the waiver of privilege form he had been sent.
7. On 1 June 2020 the applicant informed the Criminal Appeal Office during a telephone call that he would not be responding to any further letters from the office and would be marking them "return to sender". He claims that he had been informed by the office in May 2020 that his application would be allocated to the single judge in two weeks, although there is no record of the applicant being given that information.
8. On 1 June 2020 the Criminal Appeal Office wrote again to the applicant enclosing their earlier letter of 8 April, together with a further Form NG and a further waiver of privilege form. On 2 June 2020 the prison confirmed that the documents had been received but that the applicant had refused to take them.
9. On 5 June 2020 the applicant telephoned the Criminal Appeal Office stating that he did not wish to proceed with his conviction application. He said that the case was taking too long to progress. Another Form A (notice of abandonment) was sent to him. On 8 June 2020 the applicant signed the form abandoning his application for leave to appeal against conviction. The completed Form A was received by the office on 11 June and processed by the casework team on 17 June.
10. We have examined the Form A (notice of abandonment) completed and signed by the applicant dated 8 June. The form requires an applicant to complete either Part 1 or Part 2 of the form. Part 1 must be completed where all the proceedings in the Court of

Appeal under the relevant reference number are abandoned. The applicant left this part blank. Part 2 of the form must be completed where the applicant is still continuing with any proceedings under that reference number. The applicant completed Part 2 stating that he abandoned his conviction application but did not abandon his sentence application.

11. In fact the applicant completed and returned both copies of the Form A he had been sent, one dated 27 April 2020 (which would be the original form he was sent on 4 February); the other dated 8 June 2020 (the copy he had been sent on 5 June 2020). Both copies were completed identically.
12. Thereafter the Criminal Appeal Office processed his application for leave to appeal against sentence only. That application was allocated to the single judge who refused it on 24 July 2020. The applicant renewed the application on 13 August 2020. It was heard as a non-counsel application by the full court on 4 November 2020 and refused.
13. We are sure that it is no coincidence that two days later on 6 November the applicant wrote to the Criminal Appeal Office saying he wished now to pursue his application for leave to appeal against conviction. We observe that the applicant had written to the Criminal Appeal Office, just after the single judge refused the sentence application, and had given no indication at that stage that he wished to reinstate his conviction application. However he did telephone the office on 10 September 2020 saying that he wished to set aside the abandonment as a nullity. He was informed that he would need to lodge reasons. On 14 September he telephoned the office again saying he no longer wished to make the application to set aside. That was before the full court refused his renewed sentence application on 4 November. He clearly changed his mind yet again after that setback.
14. In his letter dated 6 November 2020 the applicant said that he had "tried tremendously to avoid sending Form A over a period of six months". He said he had written to and telephoned the office many times enquiring how a conviction appeal might affect his sentence appeal. He received no advice other than the fact that the conviction appeal would cause a delay, but staff "were not able or allowed to give a time frame". The applicant said that after six months of this and "given the content of the spurious letters" from the office, he "began to interpret what they were saying as threats". He said that when he telephoned the office it was "frequently implied that if I did not complete the Form A those delays would continue and could continue indefinitely". He said: "The ongoing threat was if I did not abandon my conviction application I would be subject to further imprisonment."
15. On receipt of his letter dated 6 November, the Criminal Appeal Office lawyer wrote to the applicant in order to assist him in presenting this application by advising how the formal application should be set out. She pointed out that he would need to provide the court with clear submissions as to the alleged ongoing threat that he should abandon his conviction application, specifying who said this and when it was said.
16. The applicant has written a further letter to the Registrar dated 6 January (but not received until 22 January 2021). He confirms that his reasons for the application were set out in his letter of 6 November. He gave no further details of the alleged threat that he should abandon his conviction appeal; instead he describes having only recently discovered that he has Asperger's. He writes that the actions of the criminal justice system over the last two years and four months have breached his human rights. He

- complains that the Criminal Appeal Office has "abused, exploited and remained intolerant" to his mental condition throughout and indicates his intention to send a copy of the letter to the Supreme Court and to the European Court of Human Rights.
17. The legal principles in relation to reinstating an appeal after it has been abandoned are clear. Notice of abandonment of an appeal is irrevocable unless it falls to be treated as a nullity. It will be a nullity if the defendant's mind does not go with the notice which he signs. If he abandons his appeal after and because of receiving incorrect legal advice then his mind may not go with the notice. Whether this is the case will depend upon the circumstances. Incorrect legal advice for this purpose means advice that is positively wrong. The kernel of the "nullity test" is that the court must be satisfied that the abandonment was not the result of a deliberate and informed decision, so that the mind of the applicant did not go with his act of abandonment: see R v Smith [2013] EWCA Crim 2388, [2014] 2 Cr.App.R 1.
 18. We have considered very carefully the history of this matter as set out in the chronology we have outlined. We are in no doubt whatsoever that the applicant's mind did go with the notice of abandonment which he signed on 8 June 2020. At that stage he was clearly more concerned with pursuing his appeal against sentence, no doubt because he thought it had more prospect of success. That is why he completed Part 2 of the notice of abandonment in the way he did, making it clear that although he abandoned his conviction appeal he was still pursuing his sentence appeal. This in itself demonstrates that his mind went with the act of abandonment.
 19. His decision to abandon the conviction appeal was made before his sentence application had even been considered by the single judge. It is true that in September, after the single judge had refused his sentence application, the applicant reconsidered the position briefly, indicating that he now wished to reinstate his conviction appeal. However, within a matter of days he again changed his mind. It was only when the full court refused his renewed sentence application on 4 November that he decided to pursue his current application to treat the notice of abandonment as a nullity. He did so, we are quite satisfied, because he realised it was the only avenue of appeal now left open to him. None of this chopping and changing can affect the unequivocal decision he had previously made in June 2020 to abandon his conviction appeal.
 20. We reject any suggestion that there was any kind of threat made to the applicant that he must abandon his conviction application. He has never particularised such an allegation; indeed he suggests only that this was the "interpretation" he put upon his dealings with the Criminal Appeal Office. The same goes for the alleged "ongoing threat" that if he did not abandon his conviction application he would have to serve longer in prison.
 21. We are quite satisfied that the applicant has shown no grounds on which the court could properly set aside his notice of abandonment as a nullity and reinstate his application for leave to appeal against conviction. Accordingly, this application is refused.

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