Neutral Citation Number: [2022] EWCA Crim 456

Case No: 202100314B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT NOTTINGHAM
Mr Justice Jeremy Baker
T20177126

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/04/2022

Before :

President of the Queen's Bench Division
Mrs Justice Cutts
and
Sir Nigel Davis

- -

Between :

Ian Paterson	**Applicant**
- and -	
Regina	**Respondent**

- -
- -

Mr Joel Bennathan QC (instructed by **Hadgkiss, Hughes and Beale**) for the **Applicant**

Hearing date: 23rd November 2021

- -

Approved Judgment

Dame Victoria Sharp P. :

1. The applicant, Ian Paterson, was a consultant general surgeon specialising in breast surgery.

2. On 28 April 2017, at the Crown Court at Nottingham the applicant was convicted after an eight-week trial before Jeremy Baker J and a jury, of 17 counts of wounding with intent, contrary to section 18 of the Offences Against the Person Act 1861, and 3 counts of inflicting grievous bodily harm contrary to section 20 of that Act. On 31 May 2017, he was sentenced to a total of 15 years' imprisonment (15 years' imprisonment on each of the section 18 offences, and 4 years' imprisonment on each of the section 20 offences, the sentences to run concurrently). On 3 Aug 2017, the sentences were quashed following a reference by the Attorney General under section 36 of the Criminal Justice Act 1988, and increased to one of 20 years' imprisonment on each count, concurrent (see *R v Paterson* [2017] EWCA Crim 1625 (Hallett LJ, VPCACD, Carr and Goss JJ)). The applicant now applies for an extension of time of 3 years and 9 months in which to apply for leave to appeal against conviction.

3. We refused leave at the conclusion of the hearing before us. These are our reasons.

Background

4. The applicant qualified as a doctor in 1981, and became a consultant in 1994. Between 1997 and 2011, during the years with which this case is concerned, he worked as a consultant at the Heart of England NHS Foundation Trust in Birmingham, and at two private Spire Healthcare hospitals in the Birmingham area, specialising in the diagnosis and treatment of breast conditions. He was regarded as the 'go to' specialist by many local general practitioners for patients they regarded as at risk of breast cancer, or who might have breast cancer.

5. In 2011, after concerns were raised, the applicant was suspended first from the NHS and then from the private hospitals. He was interviewed under caution on 8 January 2013. In a prepared statement he said that all the surgical procedures that he had undertaken were appropriate and necessary and he denied any allegations to the contrary. This was the stance he maintained at trial, including in evidence given in his own defence.

6. The prosecution case at trial however was that over a period of some 14 years, in respect of 10 patients, 9 women and one man, the applicant had deliberately misrepresented the contents of medical reports, exaggerated the complainants' risk of cancer, and advised and knowingly carried out unnecessary surgery including mastectomies. Further, that believing they had a potentially fatal illness, the complainants agreed to invasive procedures and then suffered from the physical pain, discomfort of surgery, and the subsequent physical and mental suffering that it had caused. The 20 counts related to individual operations which the applicant told the patients were necessary, usually, but not always on the basis they had or were at risk of developing breast cancer and all of which operations the prosecution alleged, were in fact, as the applicant knew, completely unnecessary.

7. In opening the case to the jury, the prosecution said that in medicine, as in many different professional fields, differences in opinion may arise between professional

people as to what the best course of action is in a particular situation, and knowledge and accepted practices can change over time. But none of that could explain or excuse what was seen in this case. Remarkably, and tragically, the prosecution said, these were operations which no reasonable surgeon at the time would have considered justified. Nor were they dealing with simple mistakes or incompetence. The jury could safely conclude that the applicant *knew* that these operations were unjustified, from the fact that he frequently misrepresented the results of various tests carried out.

8. The prosecution case was that a sufficiently consistent picture emerged for any realistic possibility that this was incompetence, or genuine difference of professional opinion, or innocent misrepresentation of the findings of reports to be rejected. Shocking though it may seem, so the prosecution said, the applicant was lying to patients and to their GPs, and in some instances to a colleague as well, about the patients' condition, exaggerating or quite simply inventing risks of cancer in order to justify carrying out serious operations which were quite unnecessary. As a result, the patients and their families lived for many years with the belief that they could be very ill, and underwent extensive, life changing operations for no medically justifiable reason. Amongst the similarities in the evidence supporting the various counts, relied on by the prosecution were the fact that the applicant explained their risk of developing cancer in a way which involved a greater degree of risk than was justified by the radiology and histology reports; evidence from the patients that the applicant failed to advise them about alternative medical treatment apart from the surgical procedures that he carried out; evidence from letters the applicant wrote to the patients' GPs which did not accurately reflect the radiology and histology reports and which described their risk of developing cancer as greater than was justified by those reports; and the absence of the patients' names from the agendas of MDT meetings at which the applicant claimed their diagnosis and treatment had been discussed.

9. The prosecution called the complainants who gave evidence of their various conversations with the applicant, the advice he had given them and their decisions to undergo surgery based on that advice; as well as from their family members who had accompanied them to these various consultations. Amongst the other evidence relied on were documentary evidence, medical records, notes etc, reports obtained into the complainants' condition, and correspondence between the applicant and the complainants' GPs. The prosecution further called evidence from 3 experts, each of whom were or had been consultants and experts in breast surgery; from one expert breast pathologist and from two employees at the hospitals at which the applicant had worked.

10. At trial, the applicant was represented by Mr Nicholas Johnson QC and Mr Alaric Walmsley (both of whom also represented him at the hearing of the AG's reference). The applicant did not rely on any expert evidence. In his own evidence, the applicant said, in summary, that each of the patients had consented to the surgery, after receiving appropriate medical advice or advice which he honestly believed was appropriate medical advice. Amongst other things the applicant said that some of the differences between what he had said to GPs in letters to them and the reports available, could have been an error on his part, or because he had spoken to other professionals or conducted his own examination of ultrasound images. In certain critical respects he further challenged the complainants' accounts of what they had been told, alleging in relation

to one of them (Dr Rosemary Platt), that she had lied, or in relation to others, that they had been coached as to what to say.

11. Mr Bennathan QC, fresh counsel instructed on behalf of the applicant, made it clear in the course of his submissions, that it was no part of this renewed application to challenge the conviction by reference to the underlying facts. We are bound to say however, that is clear from the judge's careful and fair presentation of the evidence that the case for the prosecution, as outlined above, was a strong one.

12. A summary of the factual case in relation to each complainant was set out in the judgment of the Court on the Attorney General's reference in *R v Paterson*. It is convenient to repeat it here.

13. In 1997 Dr Rosemary Platt was referred to the applicant for a lump on her right breast. The initial biopsy was unclear as to the presence of lobular carcinoma in situ (LCIS), that is abnormal cell growth, which is an indication of increased risk of cancer. A second opinion was sought. The applicant failed to tell Dr Platt about the outstanding second opinion. He falsely described the lump as malignant. On his advice Dr Platt underwent a wide local excision, an axillary node clearance on 5th August 1997 (Count 1, an offence under section 18). Despite the fact that neither the second opinion nor post-operative analysis confirmed the presence of LCIS the applicant told Dr Platt that it was present. Further surgical biopsies were carried out in May 2000 and May 2001. None of the histology revealed evidence of malignancy, yet the applicant advised a mastectomy. This was carried out on 25th June 2002 (Count 2, an offence contrary to section 18). Subsequently the applicant advised Dr Platt she may have a similar condition in her left breast. He recommended a four-quadrant biopsy which was carried out in October 2001 (Count 3, section 20). Thereafter Dr Platt remained under the applicant's regular supervision for the next 8 years, continuing to believe that she had cancer in her right breast and fearful of it occurring in her left breast.

14. Carole Johnson was referred to the applicant in 1998. By 2002 she had undergone a serious of radiological tests, none of which revealed anything suspicious. Despite this the applicant falsely described Mrs Johnson's condition as "dangerous and difficult". He recommended removing a lump and an excision biopsy was carried out on her right breast in April 2002 (Count 9, section 20). Further unnecessary operations were carried out in 2004 and 2005. Mrs Johnson's insurers queried the need for the continuing treatment. In response the applicant falsely stated that the latest histology had shown there to be pre-malignant potential in Mrs Johnson's breast. Notwithstanding the applicant's claim the insurers refused to fund further treatment. Such was Mrs Johnson's trust in the applicant that she and her husband decided to pay for the treatment themselves. In 2006 the applicant falsely stated that radiology tests had disclosed a suspicious growth and a wide local excision was carried out in July (Count 10, section 18). A further unnecessary excision biopsy was carried out in 2007.

15. John Ingram was referred to the applicant in 2006 in relation to a lump under his right nipple. Tests revealed he had a common benign condition that did not require surgery. The applicant did not reveal the true diagnosis. He falsely stated that Mr Ingram had pre-cancer and needed to have the lump removed. Mr Ingram followed the applicant's advice notwithstanding he suffered from a phobia of undergoing a general anaesthetic. On the day scheduled for the operation he had a panic attack and could not go through with the surgery, but a further date was arranged in May 2006 when he underwent a

breast excision (Count 11, section 18). Following that operation a second opinion was sought. Before it was obtained the applicant told Mr Ingram that unless he had a bilateral mastectomy it was inevitable that he would develop cancer. This operation was carried out in June 2006 (Count 12, section 18). The second opinion subsequently revealed the operation was unnecessary. The surgery left Mr Ingram with pain in his chest which required further treatment and remains unresolved.

16. Leanne Joseph had a consultation with the applicant in 2006 after she experienced discharge from her left nipple. An ultrasound scan was carried out which disclosed that the breast appeared normal. Despite this the applicant told Mrs Joseph she had pre-cancerous cells in her milk ducts and needed to have them removed. He offered to carry out the operation the following week. Mrs Joseph was devastated but she trusted the applicant and agreed to the surgery. She took out a loan to pay for the procedure, which was carried out on 23rd October 2006 (Count 13, section 18). In the post operative follow up the applicant falsely told Mrs Joseph it would be necessary for her to undergo the same procedure on her right breast. This was carried out in December 2006 (Count 14, section 18). The second operation caused Mrs Joseph to suffer a significant amount of pain and further surgery was required to excise scar tissue. In 2007 Mrs Joseph became pregnant. On the suggestion of a midwife she consulted the applicant as to whether she would be able to breastfeed. The applicant displayed annoyance that his authority was being questioned by a midwife and confirmed that Mrs Joseph would not be able to breastfeed. When a subsequent scan showed that in fact many of the ducts on her breasts were still connected he hid this fact from Mrs Joseph and recommended that she took medication to prevent milk production. She found her inability to breastfeed particularly distressing.

17. Frances Perks was under the applicant's care between 1994 and 2008. When he first saw her the applicant told Mrs Perks that because of her family history she was at risk of developing cancer and she would require review on a regular basis. In fact Mrs Perks' risk of developing cancer was no higher than normal. Following unnecessary biopsies on the left breast in 2003 and 2007 the applicant falsely stated that Mrs Perks was likely to require a mastectomy. A biopsy on a further lump in 2008 revealed it was benign. However the applicant stated that some ductal atypia had been discovered and went on to carry out an unnecessary biopsy in July 2008 (Count 15, section 20). The applicant sought to persuade Mrs Perks and her insurers that mastectomies of the left and right breast were required. In the event the applicant carried out multiple core biopsies on the right breast in October 2008, notwithstanding the fact that until that time she had experienced no problems with her right breast (Count 16, section 18). On 15th November 2008 the applicant carried out an unnecessary left breast mastectomy followed by reconstructive surgery (Count 17, section 18).

18. Joanne Lowson was referred to the applicant in 2009 in relation to a lump on her left breast. Initial tests showed nothing suspicious. The applicant falsely stated that unstable abnormal cells had been found and that it could not be guaranteed they would remain non-cancerous. The applicant said that the only way to deal with the situation was through surgery and an operation to excise the lump was carried out in April 2009 (Count 18, section 18). In 2010 Mrs Lowson discovered a new lump on her left breast. Initial tests again revealed there were no suspicious features. The applicant again falsely stated that the tests were suspicious and recommended removal. A second excision procedure was carried on 8th September 2010 (Count 19, section 18).

19. Rachel Butler was referred to the applicant in 2005 in relation to a lump on her left breast. The applicant said that although he was not worried about the lump he was concerned about discharge from the nipple. He advised that she needed surgery straightaway. Pre-operative radiology revealed nothing of concern, but Mrs Butler accepted the applicant's advice and he excised part of her left breast. She returned for a consultation in 2011. Further tests were carried out in relation to discharge from the left breast and revealed no abnormality. Instead of telling Mrs Butler the true position the applicant told her she was at high risk of developing cancer and needed surgery immediately. Mrs Butler again accepted his advice and in January 2011 the applicant carried out a procedure (Count 20, section 18). Following this operation Mrs Butler was ill for a long time.

The Grounds of Appeal

20. The judge's directions of law were discussed and agreed in advance with counsel for the crown and for the defence. The first objection to them was raised in the Grounds of Appeal settled by Mr Bennathan, and lodged, as we have said, some 3 years and 9 months after the applicant's conviction. Those grounds take issue with the agreed directions given on consent and mens rea. In those directions, the judge said in summary, that before the jury could convict the applicant on each count they had to be sure:

    i) That the patient's consent was based upon advice which no responsible body of duly qualified and experienced breast surgeons would have given to the patient;

    ii) That the applicant knew that that no responsible body of duly qualified and experienced breast surgeons would have given that advice to the patient;

    iii) That at the time he carried out the surgical operation he intended to cause the patient grievous bodily harm.

21. The new argument advanced for the applicant is that the judge's directions on the issues of consent and mens rea were wrong in law. There is an established legal exemption that protects a qualified doctor carrying out a recognised medical treatment with the patient's consent, from the laws of assault, and that consent is only vitiated by fraud in respect of certain fundamental details, namely the identity of the doctor or as to the nature and purpose of the act. Since none of the complainants was deceived as to the applicant's identity (as a doctor) or as to the nature of the surgery to be carried out, the failure to inform them that other doctors would have taken a different view of their condition or treatment, or the (lack of) reasonableness of their treatment, did not vitiate their consent. The judge's directions engaged with consent, but directed the jury to have regard to reasonableness in a legal test that was more akin to that for an action in negligence than that for a criminal offence under either ss18 or 20 of the Offences Against the Persons Act 1861.

Discussion

22. We address first the application for the extension of time. We have carefully examined the reasons given for the delay, and have concluded they are wholly inadequate, both

as to substance and in their particulars. We are not satisfied therefore that they justify the lengthy extension of time that is sought, nor do we consider that injustice would be caused by the refusal of an extension.

23. The application for an extension of time was supported by the witness statement of Maslen Merchant, a partner of the solicitors' firm now acting for the applicant. The witness statement provided only a sketchy account of events between the date of conviction and the date when the Grounds and application for an extension were lodged. The bald chronology however which emerges from Mr Merchant's statement is as follows. The applicant was convicted in April 2017. He instructed fresh solicitors in November 2018. Though the question of an appeal was then discussed, his fresh solicitors were not instructed to concentrate on that issue until November 2019. The Grounds of Appeal and request for extension were not then lodged until the end of January 2021.

24. A number of things should be noted. First, the delay of 19 months (after conviction, and before the applicant contacted his fresh solicitors) is unexplained. Secondly, the further delay of 12 months that ensued before the applicant's fresh solicitors "concentrated on the issue of an appeal" was deliberate, as the applicant, so we are told, chose to focus his attention during that period on his submission to a public inquiry arising out of his conviction. Thirdly, there was then a further 14-month delay before the Grounds of Appeal were lodged. Fourthly, it was only during this latter period in 2020 (no specific dates are given) that a transcript of the judge's summing-up was obtained, and fresh counsel instructed. Fifthly, no blame for any part of the delay can be laid at the door of the applicant's former solicitors or the Crown Prosecution Service who were, according to Mr Merchant, extremely helpful and cooperative nor is it suggested there were any difficulties faced by fresh counsel as can sometimes happen after a complex trial - because of the need for example to examine extensive documentation or to obtain fresh evidence or to examine the underlying facts in detail. Sixthly, whilst reference is made to the pandemic and some of the logistical difficulties it caused, self evidently these had no bearing on what happened prior to March 2020, and in our judgment do not excuse more than a minimal amount of the substantial delay that occurred thereafter. Seventhly, brief reference was made by Mr Bennathan in his written argument to some mental health difficulties the applicant may have had, but these matters are not referred to in Mr Marchant's witness statement, and are not therefore grounded in any evidence put before the court. We were told by Mr Bennathan that an application was made that the applicant was unfit to stand trial. That application was however obviously rejected, and whatever the basis for it, it formed no part of the application for leave to appeal or for an extension of time before us.

25. The statutory framework for appeals to the Court of Appeal, Criminal Division is contained in the Criminal Appeal Act 1968. Section 18 (1) of the Criminal Appeal Act 1968 provides that a person who wishes to appeal to the Court of Appeal, Criminal Division or to obtain leave to appeal against conviction should give notice of appeal or notice of application for leave to appeal. Notice and grounds of appeal should be lodged within 28 days from the date of conviction, sentence, verdict, finding or decision that is being appealed: see section 18(2) of the Criminal Appeal Act 1968 and Crim PR 39.2(1)). Section 18(3) provides that the time for giving notice under this section may be extended, either before or after it expires, by the Court of Appeal. Further, an extension of time application should be made at the time of service of the notice and

grounds of appeal, and give the reasons for the application: see Crim PR 36.4 and 39.3(1)(e)(ii).

26. The court is asked to exercise its power under section 18(3) to grant an extension of time in many different circumstances and neither the Criminal Appeal Act 1968 nor the Criminal Procedure Rules limit the discretion of the court on the issue whether an extension of time should be granted: see *R v Thorsby and ors* [2015] EWCS Crim 1, 1 Cr App R(S) 63 (Pitchford LJ, Popplewell and Edis JJ)

27. It is not the case however that an arguable case on the merits is simply a trump card without more. If that were to be the position, the legislative scheme, providing as it does for time limits for appeals with a discretionary power to extend, would be rendered nugatory. So would the requirement in the Rules for the applicant to give reasons for the delay in applying.

28. In *Thorsby* the defendants appealed the failure to give them credit, under section 240A of the Criminal Justice Act 2003, for half of the time they had spent on a qualifying curfew. Their appeals were out of time, but the responsibility for this lay with the court and the legal representatives, not the defendants. At paras 13 to 15, Pitchford LJ addressed the general approach that is taken to extensions of time. Having said, as already mentioned, that neither the Criminal Appeal Act 1968 nor the Criminal Procedure Rules limit the discretion of the Court on the issue whether an extension of time should be granted, Pitchford LJ said that the principled approach to extensions of time is that the court will grant an extension if it is in the interests of justice to do so. There are, however, several components that contribute to the interests of justice. The court will have in mind finality, the interests of the parties, the efficient use of resources and good administration. The public interest also critically embraces the justice of the case and the liberty of the individual. Where there is no good reason why the time limits were not complied with, the court is unlikely to grant an extension unless injustice would be caused in consequence. The merits of the underlying grounds will be examined. The judgment is judicial and not merely administrative. The court will be more likely closely to examine the merits of an out of time appeal when it is argued that some principle of law or legal requirement has been ignored or overlooked.

29. For cases involving a failure to provide a defendant with a statutory entitlement, as Pitchford LJ made clear at para 29, applicants would be expected to demonstrate - with particularity - when and in what circumstances they became aware of the entitlement for the first time; that no further delay had occurred after then; and if there had been delay by the applicant himself, the court would be likely to refuse the extension of time.

30. In coming to the view that the application for an extension should be refused, we have in mind that were the application to be successful, one potential outcome could be a retrial, some 5 or more years after the conclusion of the original trial, and many years after the events in question. In that context, we reiterate the point made in *Thorsby*, that the interests of justice include a number of components, including finality, the interests of the parties (including here, those of the complainants as well as those of the applicant) and the public interest in the efficient use of resources and good administration. We note that the applicant had access to expert advice and assistance from leading and junior counsel at trial. He had access to fresh legal representatives when he chose to instruct them at a later stage. He made a conscious decision not to pursue an appeal. The points now made on his behalf did not involve any lengthy

investigation or difficulty. The appeal grounds when they were eventually produced turned on a legal issue arising from a short passage in the directions of law given by the judge in the summing up, which was itself conspicuously thorough and fair. Further, the account given to the court in support of the extension application lacked particularity and left much unexplained. This was the position even though it is well settled that the court requires details of the delay in lodging grounds of appeal and the reasons for it; and where it is clear that the longer the delay, the more convincing and weighty the explanation for any delay will need to be.

31. The underlying merits of the application do not persuade us to take a different view.

32. Extensive submissions were made in writing by reference to cases in which the issue of the effect of consent on criminal liability for certain types of offences, including assault, has been considered. The cases to which we were referred included *R v Brown* [1994] 1 A.C. 212, *R v Richardson (Diane)* [1998] 2 Cr. App. R. 200, *R v Naveed Tassum* [2000] 2 Cr. App. R. 328, *R v Dica* [2004] 2 Cr. App. R. 467, *R. v B* [2006] EWCA Crim 2945, *R v M(B)* [2018] EWCA Crim 560 and *R v Lawrance* [2020] EWCA Crim 971. A full discussion of those authorities and the principles to be derived from them must await a case other than this one, and which is dealt with by way of an appeal. In brief however, Mr Bennathan suggested, by reference to at least some of these cases, that because the act causing serious harm to each complainant was a medical procedure to which each complainant consented and the applicant was a registered doctor, there has been no assault. However, none of the cases cited to us have determined that in circumstances such as those of this case (i.e. where the patients were not told the true facts about their "medical condition", where the medical procedure was not for a proper medical purpose – and thus not a proper medical treatment - and where the doctor concerned knew this) that the "medical exemption" applies, and a doctor can act with impunity from the criminal law.

33. We would add that in any event, in a number of respects, the arguments presented seem to us to be somewhat hypothetical and detached from the real issues the jury had to resolve. As can be seen from the nature of the prosecution case to which we have already referred, this case was not, as was suggested in argument, akin to a trial of clinical negligence wrongly transplanted into the criminal forum, and did not turn on the issue of the reasonableness of the treatment provided. The case for the prosecution, as it was opened and ultimately summed up, was not that the applicant's treatment was unreasonable such that this vitiated his patients' apparent consent. The essence of the case against the applicant, and what the jury had to be sure of before they could convict, was that no responsible body of qualified breast surgeons would have advised those patients to have the treatment he advised them to have (advice they clearly relied on in consenting to that treatment); and the applicant *knew* this. Thus in substance, the patients were deceived about the true position by the applicant, who dishonestly and for an improper collateral purpose misrepresented the position to them, thus vitiating their purported consent to the procedures he then carried out. On the unusual facts of this case, we are not persuaded that the directions given by the judge were arguably contrary to authority, or otherwise erroneous.

34. For these reasons, and in agreement with the single judge, the applications for an extension of time and for leave to appeal against conviction were refused.