IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2020] EWCA Crim 1086

No. 20193506 B3

Royal Courts of Justice

Thursday, 23 July 2020

Before:

LORD JUSTICE HCKINBOTTOM
MR JUSTICE SPENCER
HER HONOUR JUDGE MOLYNEUX

REGINA
V
SIMON JAMES COPE
(now known as Jonathan Cook)

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Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

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The Applicant appeared in person.

The Crown were not represented.

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J U D G M E N T

MR JUSTICE SPENCER:

1 This is a renewed application for a very lengthy extension of time in which to apply for leave to appeal against conviction following refusal by the single judge. The case is listed before us as a non-counsel application. However, the applicant Mr Jonathan Cooke, as he is now known, has taken the trouble to attend this morning in person, coming down from Northampton. We permitted him to address the court briefly, although he had no right to do so, and if we may say so, he has addressed us with moderation and sensitivity.

2 The background is this: as long ago as 18 August 2016 the applicant was convicted after a trial at Northampton Crown Court of a single offence of breach of a Sexual Harm Prevention Order, contrary to s.103(1)(a) of the Sexual Offences Act 2003, count 6 on the indictment. He was tried and convicted in the name Simon James Cope. He was sentenced to twelve months' imprisonment. The applicant was acquitted by the jury on counts1 to 5, which related to other alleged breaches of the same Sexual Harm Prevention Order. The extension of time required is three years and twelve days.

3 The reasons for the delay are bound up with the grounds of appeal. In short, nearly three years after his conviction the applicant obtained an expert's report from a digital forensic investigator which, it is suggested, undermines the safety of the conviction. The applicant seeks to adduce this report as fresh evidence in his appeal. He blames his solicitor for not following his instructions and pursuing other lines of enquiry, which he says would or might have afforded grounds of appeal.

4 There is a respondent's notice in which counsel for the prosecution at trial has helpfully set out the detail of the evidence on which the applicant was convicted.

5 This court would have to be persuaded that there was very good reason for such inordinate delay in lodging this appeal before such a long extension of time could be granted. Nevertheless, we have examined the grounds of appeal on their merit and with care.

6 The facts may be shortly stated. In September 2015 the applicant was made the subject of a Sexual Harm Prevention Order in the Crown Court at Northampton. He had previously been convicted of sexual offences against young boys in 1998 and 2005 and had breached a previous sexual offences prevention order. The new Sexual Harm Prevention Order included a prohibition in standard terms against "[...] using any device capable of accessing the internet unless: (1) it has capacity to retain and display the history of internal use, and (2) he makes the device available on request for inspection by a police officer." There was also a prohibition on "[...] deleting such history (i.e. of internet use)."

7 The allegation in count 6 was that between 10 September 2015 and 4 March 2016 without reasonable excuse he deleted internet history from a device capable of accessing the internet, in breach of the prohibition in the Sexual Harm Prevention Order. That allegation was based on an examination of the Samsung mobile phone seized from the applicant on 3 March 2016. Expert evidence was given by Linda Gibbs who has analysed the phone. Her evidence is summarised in the respondent's notice. Linda Gibbs produced two exhibits at court showing the relevant history of the internet use of the phone. The first exhibit was a five-page document AH1/LJG1/A (Exhibit 2 at trial), showing the web browsing history from the device. It demonstrated that some data was deleted while some was preserved in the history. The second exhibit she produced was a print-out of the deleted internet web history from the device AH1/LJG2/AH1. This was a 23-page document which listed the 176 deleted items of the total of 636 entries recovered. That was Exhibit 3 at trial.

8 In cross-examination Linda Gibbs said that Exhibit 2 showed the downloads from the generic browser in the android device, the phone, and that the deleted and non-deleted data came from a different internet application from that of Exhibit 3, which was recovered from the Google Chrome web browser. The pattern of items deleted included a mixture of pornographic and non-pornographic items. Thus, there were two different browsers in each exhibit. It was her opinion that the fact that there was deleted data interspersed with live data indicated that the user of the phone had carried out the deletion. In cross-examination, however, when asked directly, "You cannot say that for definite?", she agreed. The suggestion put to her was that there might have been some automatic deletion by the phone itself.

9 The prosecution case was that the two exhibits showed data from two different sources, i.e. the generic browser within the android phone and the Google Chrome browser. The internet history could not, therefore, have been coincidentally deleted from two different sources in a random fashion.

10 The applicant's case was, and remains to this day, that he did not delete the internet history. He accepted that some of it was deleted but he did not do it. He would not even know how to do it. The stark issue for the jury, therefore, which was left squarely for them to decide, was whether they could be sure that the applicant had deliberately deleted the internet history.

11 We should explain that counts 1 to 5 on the indictment, on which the applicant was acquitted, alleged breaches of a different prohibition in the Sexual Harm Prevention Order by having contact with two boys without revealing to their parents the fact of his previous convictions. The issue on those counts was whether he had sufficiently disclosed that background.

12 In the summing-up the judge reminded the jury of the evidence of Linda Gibbs. The jury had copies of the two exhibits containing the relevant material. The judge reminded the jury that Linda Gibbs had said she could not say for definite whether or not the deletion had been done automatically but that in her opinion it had been deleted by the user, "[...] but I cannot say for definite."

13 The prosecution also relied upon lies told by the applicant when he handed over his phone to the police on 3 March. He had suggested that he had been seen by another police officer in December 2015, whom he named, and that this officer had interrogated the phone previously. In fact, the position as it emerged in the evidence at trial, was that the officer he named could not have seen him in December because he was no longer in that role; moreover, the mobile phone could not be plugged into a laptop because it did not have a USB connecting port.

14 The applicant gave evidence to the jury and the jury had the opportunity to assess him. It is important to note that in the applicant's defence statement dated 7 July 2016, some five weeks before the trial, it was said that the defence were awaiting an expert's report, funding having only recently been granted, and that if the report was to be relied on it would be served as soon as possible. No such report was ever served. It is now clear, however, that the applicant's solicitors had indeed obtained such a report, because it is referred to in the new report from the digital forensic examiner Mr Watts.

15 No appeal against conviction was lodged at the time. The applicant served his sentence and would have been released early in 2017. The applicant has explained to us that on his release he repeatedly phoned his solicitor asking him to pursue an appeal, but the solicitor

put him off by saying he was seeking counsel's advice. The applicant has listed the names of three separate counsel, who were asked to advise and provided negative advice between January and August 2019. In the end, he took matters into his own hands. He contacted the Hi-Tech Crime Unit of Northamptonshire Police, who advised him to obtain an independent analysis of the phone, and even recommended the Griffin laboratory where Mr Watts (who produced the report) is based. The applicant explains that the expert then took 18 months to complete the analysis report for which the applicant paid him the sum of £1,000.

16 In his grounds of appeal the applicant asserts that this new report undermines the conviction because it shows that the phone accessed shopping websites on the internet on a number of occasions after the date on which it was seized by the police. He submits that there were or may have been failings in preserving the security of the phone as an exhibit. He asserts that the new report indicates that the evidence at trial was unreliable as a result of the actions of the police and that if any internet history was deleted, it may be that the police deleted it themselves.

17 The applicant also asserts that the ground of appeal he really wanted to pursue, which his solicitor failed to follow-up, was that the phone was not lawfully seized because the person to whom he handed the phone, Amanda Holmes, was not a police officer. She was in fact a civilian police employee. He suggests that she or someone else in the police may have deleted the material, in effect saying that he has been set-up.

18 We say at once that the fact it was a civilian employee who seized the phone is irrelevant to the charge he faced. The offence of which he was convicted was deleting material from the phone, not failing to make the phone available to a police officer, in which event the identity of the person to whom it was given would have been material.

19 We have studied the report from Mr Watts of Griffin Forensics. We note that the report is undated, but Mr Cooke has confirmed that it was, indeed, not received until 18 August 2019, a matter of only weeks before he lodged this appeal. The report states that Mr Watts's instructions were to review the findings of prosecution and defence experts in the case. The report refers at paragraph13 to reports (plural) from Emmerson Associates which:

> "[...] indicate that the web history had been deleted by the user and were grouped together. This was explained as possibly deleting the previous day's history at the same time rather than selective deletions."

The report continues at paragraph14:

> "The configuration on the device is not set to automatically delete web history, and there is no automatic deletion function".

20 At paragraph19 of the report Mr Watts says that it is concluded that any web history that was marked as deleted had to have been deleted by a user of the mobile device. Whether that was Mr Watts's own conclusion or part of his summary of the report of the previous experts, Emmerson Associates, is not entirely clear.

21 Later in the report, Mr Watts does indeed refer to several "cookies" created on the mobile phone after 08:54 hours on 3 March, six of which related to Amazon shopping. He says that this indicated that the phone was connected to the internet after it had been seized by the police, and apparently, after it had been examined by Linda Gibbs. He said that his own

examination of the phone demonstrates that the device was accessed on 7 March 2016. He produces various exhibits which have not been provided to us, not that this matters. Mr Watts expresses no conclusion at the end of his report.

22 What the evidence of Mr Watts comes to is that there are concerns raised in the report about the handling of the phone by the police. There is, we note, no assertion by Mr Watts that the deletions could have been made automatically, rather than by someone's deliberate act. In the respondent's notice there is a detailed analysis of Mr Watts's report. It is pointed out that Mr Watts has not gone so far as to suggest that the internet history was or might have been deliberately deleted only at the time the police were in possession of the phone. In effect, says the respondent, the applicant's case now seems to be that he was set up by the police.

23 It is submitted in the respondent's notice that the pre-conditions for the receipt by the Court of Appeal of fresh evidence under s.23 of the Criminal Appeal Act 1968 cannot conceivably be met in this case.

24 We have considered all these matters carefully and the additional matters raised by the applicant in his address to us this morning, which in essence rehearsed what was set out very clearly already in his documents. We fully understand how strongly he feels about the matter. However, we are quite satisfied that the fresh evidence from Mr Watts does not even arguably cast doubt on the safety of the applicant's conviction. By reference to the provisions of s.23 of the Criminal Appeal Act, the fresh evidence does not afford any ground for allowing the appeal. Nor is there any reasonable explanation for the failure to produce this or any other expert evidence at trial. It is clear that the applicant did have an expert's report at the time of trial but chose not to reply upon it, presumably because it was recognised that it did not assist his defence. Only very rarely will this court entertain an application to admit fresh evidence from a new expert in such circumstances. This is not such a case.

25 In refusing leave to appeal, the single judge said this:

> "This application is way out of time and you have given no proper explanation for the delay. The fact that you instructed three barristers to advise you is not a point in your favour, particularly in circumstances where each one of them gave you negative advice and expert evidence was available to you at your trial. I refuse permission to appeal on this basis alone. In any case, you do not have arguable grounds of appeal.
>
> The Crown's expert accepted the possibility that the user had not deleted internet data. However, you were cross-examined at trial as to your use of your phone and the pattern of deletions, and the jury was in a good position to judge whether your evidence was true. It was not (see paras.9-11 of the Respondent's Notice). It is far too late for you to seek to apply to call fresh evidence, particularly in circumstances where your solicitors had instructed an expert at your trial and his evidence did not help you.
>
> Further, paras.13-19 of Mr Watts's report, taken in isolation, do not help you at all either. Mr Watts comments on the police handling of your phone, but in this respect he is travelling beyond the bounds of expert evidence, properly so called, into the area of speculation. Overall, the fresh evidence is not sufficiently strong to be admissible so long after the event - or, put in legal language, the conditions in s.23 of the Criminal Appeal Act 1968 have

not been fulfilled."

26 We entirely agree with those observations of the single judge, and this proposed appeal is wholly without merit, in our view. We therefore refuse the extension of time required to bring the appeal and we refuse leave.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

This transcript has been approved by the Judge.