IN THE COURT OF APPEAL
CRIMINAL DIVISION
CASE NO 202100525/A1

NCN [2022] EWCA Crim 44

Royal Courts of Justice

Strand

London

WC2A 2LL

Tuesday 18 January 2022

LORD JUSTICE HOLROYDE

MR JUSTICE LAVENDER

SIR NIGEL DAVIS

REGINA

v

GRAHAM JOHNSON

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Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

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MR L WALKER & MS J ROBINSON appeared on behalf of the Applicant.

MR T PROBERT-WOOD appeared on behalf of the Crown.

J U D G M E N T

1.
LORD JUSTICE HOLROYDE: In 2014 this applicant pleaded guilty to a phone hacking offence. He was sentenced to 2 months' imprisonment, suspended for 12 months, and ordered to carry out 100 hours of unpaid work. He now applies for an extension of time of more than 6 years to apply for leave to appeal against his sentence. His application has been referred by the single judge to the full court.

2.
We can summarise the relevant facts briefly. The applicant is a journalist and author. Between 1997 and 2006 he was employed by the Sunday Mirror newspaper, mainly reporting on crime. In 2001 he was required by his superiors to work on a story relating to a television actress who was thought to be having an affair with a criminal. He was shown by one of his superiors how to intercept the actress's voicemail communications. During a period of a few days in autumn 2001 he listened to between 10 and 30 of her messages each day. He was also required to monitor the actress at a hotel. He disliked being involved in that activity and ceased his work on the story. He was however credited as one of the authors when a story about the actress was later published by the newspaper.

3.
The applicant continued to be employed by the Sunday Mirror, though he says he was placed under considerable pressure by his superiors because he would not participate in any further phone hacking. He eventually left that employment and suffered what has been described as a mental breakdown, which resulted in his being unable to work for about 6 months.

4.
In the years which followed the applicant wrote a number of books. In one, entitled "Hack", he wrote about his experiences as a tabloid journalist and referred to incidents of phone hacking of which he was aware, though without naming those responsible.

5.
In 2012 the applicant provided assistance to a journalist who was investigating the phone hacking scandal. He did so not for financial reward but rather because he wanted to make amends for what he himself had done.

6.
On 14 March 2013 a number of persons were arrested on suspicion of being involved in phone hacking offences committed by employees of Mirror Group Newspapers. The applicant was not one of them. He was not at that stage suspected of involvement. However, he contacted the police on 15 March 2013 and confessed that he had taken part in phone hacking. Arrangements were made for him to be interviewed by the police. In preparation for that interview he gave to the police a very lengthy statement setting out what he knew.

7.
The applicant was charged with an offence of intentionally intercepting a communication in the course of its transmission by means of a public telecommunication system, contrary to section 1 of the Regulation of Investigatory Powers Act 2000. That offence carries a maximum sentence of 2 years' imprisonment. On 6 November 2014, at Westminster Magistrates' Court, he indicated a plea of guilty and was committed to the Crown Court for sentence. We are satisfied that the committal was ordered

pursuant to section 3 of the Powers of Criminal Courts (Sentencing) Act 2000, though it is wrongly recorded in some court documents as having been ordered under a different power.

8.
Having admitted his own role in phone hacking, the applicant provided a witness statement to the police later in November 2014. He subsequently provided information and assistance to claimants in civil proceedings whose phones had been hacked.

9.
On 18 December 2014 the applicant appeared at the Central Criminal Court before the Recorder of London, HH Judge Barker QC. The applicant was then aged 46. He had one previous conviction, long ago and for a different kind of offence, which was rightly viewed by the judge as having no bearing on the sentencing. A pre-sentence report had been prepared which put forward proposals for non-custodial disposals, and the judge had been provided with a number of supportive references.

10.
Counsel then appearing for the applicant invited the judge's attention to a schedule which had been prepared showing the sentences imposed earlier that year on a number of Mirror Group employees by Saunders J. Counsel pointed to the short duration of this applicant's offending; his voluntary withdrawal from work on the story and from further phone hacking; the fact that he voluntarily went to the police; the co-operation he had given, and was willing to give in future; the passage of some 21 months between his going to the police and the sentencing hearing; and his remorse. In relation to these features of the applicant's mitigation, counsel contrasted the positions of others, sentenced by Saunders J, who had been involved in much more phone hacking activity over much longer periods. Some of those persons had held senior positions.

11.
The judge in his sentencing remarks described the applicant's offending as "an intense but short period" of phone hacking. He observed that the public, quite properly, regarded such offences as very serious. He referred to the matters of mitigation which had been put forward, noting that the background of the case had been gone through in considerable detail and he was aware of it. He indicated that the applicant was in a different category. He noted that the applicant had written a full letter of apology to the victim of the particular hacking in which he was involved, and had made an offer to assist her in any other steps that she might take. The judge then said this:

"Simply put, you abused your professional position for that short period. Nevertheless, I am in a position -- this court is in a position -- to deal with this case in an unusual way because of your unique individual circumstances. In my view, this must be marked by a custodial sentence, but it will be suspended and it will be as short as I can properly make in the circumstances. That will be one of two months but it will be suspended for twelve months. I think the original starting point would have been three months and I reduce it to two months on the basis of the fact that you reported yourself and you cooperated in every way, and I do underline that it seems to me from all I have read that you have assisted and cooperated."

12.
The judge imposed the suspended sentence and unpaid work requirement to which we have referred. He ordered the applicant to pay £300 prosecution costs and also made an order for "whatever the appropriate victim surcharge is".

13.

Because the offence was committed prior to 1 April 2007, no surcharge was applicable. Thus "the appropriate surcharge" as ordered by the judge was nil. The court subsequently drew up an order purporting to show a surcharge of £80. That was wrong, and did not accord with the sentence pronounced by the judge. The record must be corrected to show that no surcharge was payable. The clerical error does not render the sentence unlawful.

14.
The applicant was entitled to be advised by his legal representatives as to whether there were any arguable grounds of appeal against his sentence. Such advice was offered, but he declined it. He took no steps to commence an appeal.

15.
In the years which followed, the applicant's career was badly affected by his actions and by his conviction and sentence. Despite his ability as a journalist he found it difficult to obtain work.

16.
On 22 February 2021 the applicant gave notice of his application for leave to appeal against sentence. He sought a long extension of time on the basis that his mental health had been adversely affected by his prosecution and conviction, to the extent that he could not apply his mind to the issue of a possible appeal.

17.
In July 2021 the single judge, as we have said, referred the applications to the full court. After she had done so, in September 2021, Mr Walker (counsel now representing the applicant) provided the court with a revised version of his grounds of appeal. Although referred to as "Amended Grounds of Appeal" it seems to us that it contained no change of substance from the original, and is more properly to be regarded as perfected Grounds of Appeal. Thus the requirement in Criminal Procedure Rules rule 36.14(5), applicable to an application to vary grounds of appeal, does not apply in this case.

18.
In December 2021 a report dated 14 December 2021 by Dr Michael Watts, a consultant clinical neuropsychologist, was submitted in support of the application for an extension of time.

19.
If granted the extension of time and leave to appeal, the applicant puts forward a number of grounds of appeal. He submits that the imposition of a custodial sentence was wrong in principle, arguing that a non-custodial sentence was appropriate and that the very short length of the prison term shows that a community order would have been sufficient. He further submits that the judge failed to give sufficient weight to the various matters of personal mitigation, in particular arguing that the judge's failure to refer to the assistance given to the police investigation into the hacking showed that the judge had not taken that factor into account. He also submits that there was unjust disparity between the sentence imposed on this applicant and the sentences on others dealt with by Saunders J. Finally, he submits that the applicant should have been treated as a whistleblower not a criminal, and that the sentence imposed on him was wrong in principle because it deterred others from reporting crimes.

20.
Mr Walker has expanded upon his written grounds in his oral submissions to us this morning. We have also heard oral submissions from Mr Probert-Wood on behalf of the respondent. We are grateful to both counsel for their assistance.

21.
Before considering the merits, we must refer to the important procedural aspect of this application. This court does of course have power to extend the 28-day time limit for serving a notice of appeal against sentence (see Criminal Procedure Rules rule 36.3). Rule 36.4 requires a person who wants an extension of time to make an application giving the reasons for it. That requirement is not satisfied merely by explaining why notice of appeal could not be given within 28 days: the applicant must also explain, particularly if a long extension of time is sought, why the notice was not filed sooner that it was.

22.
In the present case, the evidence of Dr Watts is that the applicant has unfortunately suffered from periods of depression and anxiety throughout his adult life, both before and after his prosecution and conviction. His general practitioner had prescribed antidepressant medication before the sentencing hearing, and it seems that the applicant continued to take such medication until about 2017 or 2018. Dr Watts gave his opinion that it was likely that the applicant "was suffering from a major depressive episode in the months prior to and after the sentencing hearing" and further expressed the opinion that the depression may have contributed to the applicant feeling unable to make a proper decision about appeal "in the period after sentencing".

23.
We are sympathetic to the applicant's mental health problems, and we can readily accept that he has gone through difficult periods when he has suffered episodes of depression. It is however clear that, despite those episodes, he has been capable of working for most of the last 6 years, and has been able to contribute significantly to assisting the civil litigants who were the victims of hacking. If his application for an extension of time only required him to satisfy the court that he could not realistically commence his appeal within 28 days, he could do so. But, as we have noted, he also needs to explain why no action was taken for more than 6 years. We are not persuaded that any satisfactory explanation has been put forward in relation to much of that period. In our view the applicant, if he wanted to seek leave to appeal, could and should have made his application long before he did.

24.
We have nonetheless considered whether the merits of the appeal are sufficiently strong to assist the applicant to overcome that obstacle. Our conclusions are as follows.

25.
First, we reject the submission that a custodial sentence was wrong in principle. Phone hacking, even for a short period, is a serious offence. The judge, having considered all the many mitigating factors which were fully put before him, was entitled to conclude that the offence was so serious that neither a fine alone nor a community sentence could be justified for it. We would observe that although the Sentencing Council's Imposition guideline was not in effect at the time of the sentencing hearing, the judge's approach was consistent with the approach now required by that guideline.

26.
Secondly, and with all respect to counsel, the submission that the length of the prison sentence is in itself a clear indication that a community sentence would suffice is untenable. The Crown Court may impose on an adult offender an immediate prison sentence of as little as one day, as is recognised by the early release provisions in section 243A of the Criminal Justice Act 2003. Imprisonment for between 14 days and 2 years may be suspended (see section 277(2) of the Sentencing Code). That statutory provision is in itself sufficient to show that this particular submission cannot succeed. The

judge was satisfied that the offence was so serious that nothing less than a custodial sentence could be justified. He then had to consider what the shortest term was consistent with its seriousness. His conclusion, that a term of 2 months was appropriate, does not of itself indicate that a custodial sentence was wrong in principle.

27.
Thirdly, we are unable to accept the submission that the judge failed to give appropriate weight to the mitigating factors. We accept that there was indeed considerable mitigation. But it is clear that the judge took it all into account, and he was entitled to conclude that its overall effect was to enable him to limit the term of imprisonment to 2 months and to suspend it.

28.
Lastly, the test in cases of suggested disparity, as laid down in R v Fawcett (1972) 56 Cr App R(S) 391, requires this court to consider whether right-thinking members of the public would consider that something had gone wrong with the administration of justice, such that this sentence should be reduced. Submissions were made to the judge as to the sentences passed in other phone hacking cases. He clearly took the view that although those other cases were more serious, the present offence merited a sentence of 2 months' imprisonment. Numerous decisions of this Court show that the Fawcett test is not easily satisfied, especially when an appellant seeks to rely on a comparison with sentences imposed by a different judge on a different occasion. As was made clear in R v Anderson (David Brian) [2018] EWCA Crim 482, this court must consider, in accordance with the statutory test, whether the present sentence was either wrong in principle or manifestly excessive in length.

29.
Having reflected on the submissions made to us, we can see no basis on which it could be argued that this sentence fails either limb of that test. We understand why the applicant may feel that he was treated more severely than others, and we recognise that his admission of guilt has brought heavy consequences upon him, quite apart from the sentence of the court. It is much to his credit that he volunteered his admissions and provided assistance as he did. We think that the judge was right to distinguish him from others by placing him into a different category and by referring to his unique case. But even giving as much weight as we can to all those matters, we can see no basis on which this short suspended sentence can be challenged.

30.
For those reasons, even if the applicant could overcome the procedural obstacle which he faces, an appeal could not succeed. This application accordingly fails and is refused.