

*Neutral Citation Number: [2018] EWCA Crim 2574*

2015/00195/C1

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

The Strand

London

WC2A 2LL

Thursday 15<sup>th</sup> November 2018

B e f o r e:

LORD JUSTICE FLAUX

MR JUSTICE POPPLEWELL

and

HIS HONOUR JUDGE PICTON

(Sitting as a Judge of the Court of Appeal Criminal Division)

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**R E G I N A**

- v -

**MICHAEL FURNISS**

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Non-Counsel Application

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**LORD JUSTICE FLAUX:**

1. The applicant applies to treat his notice, dated 10<sup>th</sup> September 2015, of abandonment of his appeal against conviction as a nullity. He is not currently legally represented and we have dealt with the matter on the papers.

2. The circumstances of the case can be summarised as follows. The applicant with

two other men, Stacey and Hall, stood trial in the Crown Court at Nottingham before Haddon-Cave J and a jury for the murder of Andrew Dosiuk. On 10<sup>th</sup> December 2014 he was convicted by a majority of 10:2 by the jury. Stacey and Hall were acquitted. On 11<sup>th</sup> December 2014 he was sentenced by the judge to life imprisonment with a minimum term of 32 years and eleven months (395 days spent on remand in custody having been deducted).

3. An application for leave to appeal against conviction was received in the Criminal Appeal Office on 13<sup>th</sup> January 2015 with grounds of appeal settled by counsel, Icah Peart QC. Those grounds were: (1) that the Crown had failed to disclose relevant information as to who had provided the police with information which led to the applicant's arrest which, it was asserted, would have assisted him to establish who else was responsible for the killing in circumstances where he denied that he was responsible; and (2) the direction that the judge gave to the jury on day 40 of the trial, when they were in deadlock on reaching unanimous verdicts, had put undue pressure on them.

4. On 20<sup>th</sup> May 2015, in a comprehensive analysis which essentially demolished those grounds, the single judge refused leave to appeal.

5. It appears from a letter dated 24<sup>th</sup> May 2018, from Imran Khan and Partners (the applicant's then solicitors) to the Criminal Appeal Office, following the applicant's waiver of legal professional privilege, that they received the observations of the single judge on 25<sup>th</sup> June 2015. Counsel, Mr Peart QC and Mr Ahluwalia, provided a written Advice, dated 2<sup>nd</sup> July 2015, advising against the renewal of the application for leave to appeal to the full Court, which was provided to the applicant under cover of a letter from Imran Khan and Partners, dated 2<sup>nd</sup> July 2015.

6. Nonetheless, the applicant wished to renew his application for leave to appeal against conviction. A Notice was sent to the Criminal Appeal Office renewing the application on 8<sup>th</sup> July 2015. The application was listed for hearing on 13<sup>th</sup> October 2015. The applicant also wished to submit his own grounds. Some material was provided to the solicitors in July 2015, but the applicant then sent lengthy and detailed handwritten grounds, which did not include those prepared by counsel, under cover of a letter to the solicitors received by them on 4<sup>th</sup> September 2015. For the purposes of this application we need not say anything as to the merits or otherwise of those grounds.

7. The applicant was advised by the solicitors that if he wished to submit his own grounds of appeal, he would need to sign Form A, abandoning his current application for leave to appeal and resubmit the grounds of his own composition.

8. There is some dispute between the applicant and the solicitors as to the circumstances in which that advice came to be given. He asserts that he was not content with the original grounds and was told that he could perfect them after they had been considered by the single judge. The solicitors challenge that this was said, but, ultimately, this does not matter since it is accepted by the applicant that he was told that a Form A Notice of Abandonment would have to be served if he did not propose to pursue the grounds drafted by counsel but wanted to pursue grounds of his own composition.

9. In their letter of 24<sup>th</sup> May 2018, Imran Khan and Partners also say that the applicant was advised that there was no merit in his handwritten grounds and that if he wished to submit them, he would have to do so of his own accord.

10. The applicant disputes this assertion and points to a letter dated 27<sup>th</sup> April 2016 from Imran Khan and Partners in relation to the handwritten grounds, which apologises for delay in responding and deals with various pieces of fresh evidence on which the applicant wished to rely. It states that advice would need to be sought from leading counsel.

11. Again, it is not necessary to resolve that dispute as it is of no relevance as to whether the Notice of Abandonment was a nullity.

12. As we have said, the applicant was advised that a Notice of Abandonment would have to be served if he were not pursuing the grounds drafted by counsel, but wanted to pursue grounds of his own composition.

13. On 9<sup>th</sup> September 2015, the applicant signed a handwritten note which reads:

"I, Michael Furniss, wish to withdraw my appeal and put in fresh grounds which I have drafted.

I have been advised that the existing grounds will not assist me and that I need the new grounds."

This confirms the advice that he had been given, that he would have to abandon the existing appeal before filing fresh grounds.

14. In accordance with those wishes, Imran Khan and Partners signed Form A Notice of Abandonment of all proceedings on 10<sup>th</sup> September 2015. This was received by the Criminal Appeal Office on 15<sup>th</sup> September 2015. The Notice did not indicate anywhere that the applicant wished to continue his appeal on fresh grounds of his own composition, although the note he had signed made clear that he did wish to pursue the grounds which he had drafted.

15. The law is clear that a Notice of Abandonment cannot be withdrawn unless I can be treated as a nullity. The principle was stated by the Court of Appeal (Lord Widgery CJ, Stephenson J, O'Connor J, Lawson J and Jupp J) in *R v Medway* [1976] QB 779 at 798 G-H in these terms:

"In our judgment the kernel of what has been described as the 'nullity test' is that the court is satisfied that the abandonment was not the result of a deliberate and informed decision, in other words that the mind of the applicant did not go with his act of abandonment. In the nature of things it is impossible to foresee when and how such a state of affairs may come about; therefore it would be quite wrong to make a list, under such headings as mistake, fraud, wrong advice, misapprehension and such like, which purports to be exhaustive of the types of case where this jurisdiction can be exercised. Such headings can only be regarded as guidelines, the presence of which may justify its exercise."

16. That case, and subsequent authorities in this area, were reviewed by this court in *R v Paul Smith* [2013] EWCA Crim 2388, which stated the applicable principles at [58]:

"From this review of the law we derive four propositions which are relevant to the present case:

- i) A notice of abandonment of appeal is irrevocable, unless the Court of Appeal treats that notice as a nullity.

ii) A notice of abandonment is a nullity if the applicant's mind does not go with the notice which he signs.

iii) If the applicant abandons his appeal after and because of receiving incorrect legal advice, then his mind may not go with the notice which he signs. Whether this is the case will depend upon the circumstances.

iv) Incorrect legal advice for this purpose means advice which is positively wrong. It does not mean the expression of opinion on a difficult point, with which some may agree and others may disagree."

17. Applying those principles, the question is whether the advice which the applicant was given that if he wished to pursue his own grounds, rather than those originally drafted by counsel on his renewed application for leave to appeal, he would have to serve a Notice of Abandonment, was wrong. In our judgment, that advice was wrong. As the first proposition set out in *Smith* at [58] makes clear, a Notice of Abandonment is irrevocable. It brings the appeal proceedings to an end: see also [91]-[93] of that judgment.

18. Given that the applicant wished to pursue his own grounds on the renewed application, he did not wish or intend to bring his appeal proceedings to an end. The correct advice would have been that a letter should be written to the Criminal Appeal Office explaining that the applicant did not wish to renew his application on the original grounds, but wished to do so on fresh grounds and enclosing those grounds which he had composed. He would have needed to apply to the court to vary the Notice of Appeal: see *R v James* [2018] EWCA Crim 285 ; but at least he would not have abandoned his appeal. At the very least, the solicitors should have advised him that if a Notice of Abandonment was to be served, Part 2 of that Notice should be completed, rather than Part 1, and the fresh grounds enclosed, so that it was made clear that he was not abandoning the whole appeal, but only any renewed application on the grounds drafted by counsel.

19. In our judgment, if the correct advice had been given by one or other of those routes, it would have been made clear to the Criminal Appeal Office that the applicant did wish to pursue a renewed application for leave to appeal on the basis of fresh grounds which he had composed. In the circumstances, we do not think that his mind went with the Notice signed on his behalf and therefore we consider that the Notice was a nullity.

20. We adjourn the case for there to be an application filed to vary the Notice of Appeal and advance the fresh grounds and for there to be a hearing before the full court, for which the Crown may wish to file a Respondent's Notice and be represented at that hearing.

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