Application for extension of time and leave to appeal against sentence, concerning an appeal against the extended sentence licence element of the sentence.

[2022]GCA005

IN THE COURT OF APPEAL OF GUERNSEY

CRIMINAL DIVISION

Between: **NEIL DAVID CAMPBELL HASTIE** **Applicant**

-v-

THE LAW OFFICERS OF THE CROWN **Respondent**

APPLICATION FOR EXTENSION OF TIME AND LEAVE TO APPEAL AGAINST SENTENCE

Decision on the Papers

Decision of Richard James McMahon, Esq., Bailiff

Date of Decision: 28 January 2022

Counsel for the Applicant: **Advocate C J Green**

1. The Applicant, Neil Hastie, was sentenced by the Royal Court on 1 August 2014 to a total of 12 years' imprisonment, running from 13 June 2014, plus an extended sentence licence of five years imposed pursuant to section 3 of the Criminal Justice (Supervision of Offenders) (Bailiwick of Guernsey) Law, 2004 because all six Counts for which the Applicant was sentenced were sexual offences. He appealed his conviction and sentence to the Court of Appeal. Those appeals were dismissed in a judgment given on 29 September 2015 ([2016] GLR 60). That judgment sets out the offending in question.

2. By an Application dated 25 January 2022, the Applicant, acting through Advocate Christopher Green, seeks an extension of time in which to appeal the extended sentence licence element of the sentence only. This Application is founded on the contention that it was wrong in law to impose any extended sentence licence because the offences for which the Applicant was sentenced were committed well before the 2004 entered into force on 8 July 2005. The contention is that the imposition of the extended sentence licence is contrary to Article 7 of the European Convention on Human Rights, which provides: "*Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.*"

3. In the Application, the reason given for the delay in addressing this matter is that the Applicant has "*only recently [become] aware of the potential with the Court imposing an extended sentence licence in his matter; his previous lawyers did not advise him about these issues; and, since he became aware of the issues with the order, he has acted promptly in taking further legal advice which has led to this application.*" It further appears that the Applicant was released from prison on parole on 10 May 2021 but then recalled approximately one month

later. He is going to be eligible for release from prison on or around 10 June 2022, at which time the terms of the extended licence would become operative.

4. In my judgment, there are reasons why I should not, as a single judge, grant the application for an extension of time.

5. The first is that there has already been an appeal against sentence. Whilst is appears from the previous judgment of the Court of appeal that the sentence appeal focused on whether the sentence of 12 years' imprisonment was manifestly excessive, without referring at all to the extended sentence licence in the portion of the judgment dealing with the appeal against sentence (although it was referred to in para. 1), the fact that there has already been an appeal, which was dismissed, means that the Court of Appeal is *functus officio*. I take the view that it is not open to someone who has already pursued an appeal against sentence to seek to bring a second appeal against sentence.

6. What happened in 2015 can be regarded as a concession by the Applicant that there was no realistic scope to invite the Court of Appeal to interfere with the five-year extended sentence licence, otherwise it would have formed part of that appeal. Further, if the Judges of Appeal had thought that there was something wrong in law with the imposition of the extended sentence licence, I think it is inevitable that it would have been raised. The absence of comment in that judgment of any comment on this topic leads me to conclude that the opportunity to appeal to this Court in respect of the entirety of the sentence was taken and cannot be pursued a second time.

7. In Guernsey, we do not have a statutory mechanism by which some other body, such as the Criminal Cases Review Commission is empowered to refer matters to the appellate court. Accordingly, the only basis on which an appeal can be entertained is where an Appellant exercises the right, with leave of this Court, to appeal against the sentence pursuant to Part III of the Court of Appeal (Guernsey) Law, 1961. Section 25(3) of that Law provides that:

> "*On an appeal against sentence, the Court of Appeal shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as it thinks ought to have been passed, and in any other case shall dismiss the appeal.*"

The Applicant's appeal was dismissed and that means that he cannot seek to challenged the sentence imposed on him by the Royal Court before this Court.

8. However, if I am wrong to reach that conclusion, then I am not persuaded that the ground of appeal the Applicant wishes to advance is meritorious, so he does not have an arguable case.

9. The policy letter leading to the introduction in the 2004 Law of the power to impose extended sentence licences referred to the provisions found in section 58 of the Crime and Disorder Act 1998. That policy letter was considered by the States of Deliberation in 1999. By the time the 2004 Law was enacted, the provisions in section 58 of the 1998 Act had been moved into section 85 of the Powers of Criminal Courts (Sentencing) Act 2000. However, in subsection (1)(a), additional words had been added to what is found in section 3(1)(a) of the 2004 Law limiting the availability of an extended sentence licence: "*committed on or after 30th September 1998*". In respect of sexual offences committed before 30 September 1998, section 86 made different provision for how to deal with extensions of licence periods. 30 September 1998 was the date on which section 58 of the 1998 Act came into force (SI 1998 No. 2327).

10. For the purpose of Article 7, ECHR, the concept of a "penalty" is autonomous. As explained in *Welch v UK* (1995) 20 EHRR 247, a court may assess for itself whether a measure amounts in substance to a penalty. These principles were considered by the Court of Appeal in England and Wales in *R v R* [2004] 1 WLR 490. Although this case related to section 86 of the 2000 Act, what matters in relation to this Application is that the Court indicated (at para. 29) that "*an order for an extended licence is preventive not punitive*". Further, in the same paragraph, it stated: "*Adding such an order to a sentence of imprisonment for an offence committed before 1 October 1991 is not to impose a heavier penalty than was available when the offence was committed and does not violate article 7.*" The reference to 1 October 1991 is a reference to when the Criminal Justice Act 1991 entered into force, which is where the licence provisions introduced by the 1998 Act and carried into the 2000 Act need to be placed into context.

11. As a result of that case, whilst recognising that it is not binding in Guernsey law, but being of the view that it is so highly persuasive that it also represents the approach that would be taken to Article 7, ECHR in respect of this Application, I am satisfied that this Court would similarly conclude that Article 7, ECHR is not engaged as suggested in the Application. It follows, therefore, that including in the sentence imposed on the Applicant an extended sentence licence does not operate as part of the penalty but is a preventive measure and that the fact that the offences for which he was sentenced in 2014 were committed many years earlier does not affect the lawfulness of that sentence.

12. Where the arguments that would be deployed on an appeal brought many years out of time are without merit, there is no justification for granting the Applicant the extension of time he seeks pursuant to rule 4 of the Court of Appeal (Criminal Division) (Guernsey) Rules, 1964. Even if the time were to be extended, this would be the primary reason for refusing to grant the Applicant leave to appeal.

13. In any event, the explanation of the time taken by the Applicant to raise this point does not adequately explain why it has only been raised now. I have noted that the Applicant was first released from prison on the terms of this licence last year. It appears that he did not wish to extricate himself from the terms of the licence at that time. He was recalled shortly thereafter and it now appears that it has taken roughly six months since then for this Application to be made. Where the period of delay in seeking to bring an appeal is inordinate and, at least in part, unexplained, if the appeal has merit then granting the extension of time required can still follow. Conversely where, as I have found, the ground of appeal to be advanced is without merit, that is why the discretion to grant an extension of time should not be exercised in the Applicant's favour.

14. For the reasons I have given, the Application for an extension of time in which to institute this appeal is refused and so there is no need for me to consider whether leave to appeal should be granted, but it would also have been refused.

15. It follows that I will also decline to grant the Applicant legal aid. Pursuant to section 40 of the 1961 Law, the Applicant is entitled to renew the terms of his Application before the plenary Court.

Richard McMahon
Bailiff