



THE COURT OF APPEAL

[209/2017]

Edwards J.
Baker J.
Kennedy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

SEAN CRANE

APPLICANT

JUDGMENT of the Court (ex tempore) delivered on the 5th day of February 2019 by Ms. Justice Kennedy

1. This is an application to extend time within which to bring an appeal against conviction in circumstances where the applicant in fact, pleaded guilty in the court below and he did so in 2011.
2. The application to enlarge time is dated the 23rd July 2017. This application was originally heard by this court and an *ex tempore* judgment delivered on the 1st June 2018, refusing the application to extend time. It then transpired that an affidavit, that being the substantive affidavit, of the applicant which was sworn on the 13th December 2017, had not in fact been filed and following on from that, a further application was brought before the court which was an unusual application. Such application was by way of notice of motion seeking to re-enter the application to enlarge time. This was granted by the Court. Consequently, we have now heard the application again in its entirety and considered the papers which have been filed to include of course the substantive affidavit of the applicant which as I have said is dated the 13th December 2017.
3. By way of background to this matter; on the 6th October 2011, the applicant, having pleaded guilty to an offence, which I will deal with in a moment, was sentenced to a period of nine months' imprisonment. The offence was one of theft contrary to s. 4 of The Criminal Justice (Theft and Fraud Offences) Act, 2001. The offence to which the applicant pleaded guilty is dated the 18th August 2007. Therefore, it can clearly be seen that there is a very substantial period of delay between the date of sentence and the date when the application to enlarge the time was lodged, that is the 23rd July 2017.
4. The notice of the application to enlarge time contains the following grounds:-
 - (i) that the applicant was erroneously arrested in 2007 for the offence;
 - (ii) that there was a bank error;
 - (iii) that he was under duress in pleading guilty in 2011;
 - (iv) the applicant, further contends for malicious misinformation and collusion and that the bank had apologised for the error.
5. The relevant dates are as follows:
 - The date of the offence is the 18th August 2007.
 - The date of the sentence and the sentence hearing was the 6th October 2011.
 - The notice of application to enlarge time is the 23rd July 2017.
 - The final date of relevance is the date when the applicant obtained a copy of the transcript which was in 2015.
6. It appears from the applicant's affidavit that he grounds his application on the evidence which was given by the prosecuting Garda in the course of the summary of the evidence in his sentence hearing. It seems that Mr Crane had moved to Loughrea in March 2007. He opened a bank account with the Bank of Ireland and lodged cheques to this account. As regards this particular offence, he lodged a cheque from an account held by him in the United Kingdom and then immediately proceeded to withdraw a sum of money from a bank teller. He left the bank and on his return sought to withdraw a sum of money from another bank teller. It transpired that he did not have the funds in the United Kingdom account to meet the amount which was sought by him on foot of the two withdrawals. He was subsequently arrested. Admissions were made by him and he ultimately, as I have stated, pleaded guilty.
7. However, on affidavit filed by the applicant dated the 16th October 2017, he says *inter alia*, by way of summary, that he had an authorised overdraft facility which was countermanded but when he went to withdraw monies from an ATM machine, up to date instructions had not been communicated regarding the overdraft facility. This was a bank error. These are two utterly irreconcilable accounts. In any event, notwithstanding that he pleaded guilty to the offence, he is now seeking to appeal against conviction and is looking for an enlargement of time to enable him to do so.
8. As the court has already stated on a number of occasions, the law is well settled in respect of applications for an enlargement of time. Firstly, the onus is on an applicant to provide an explanation for the delay in filing a notice of appeal and, in the instant case I think it is fair to say, that the delay is quite an extraordinary; that is a period in excess of some seven years.

9. Secondly, an applicant must engage with the facts in order to demonstrate at least an arguable case as regards the grounds which an applicant would ultimately seek to rely upon and then in the final analysis a court must consider whether it is in the interest of justice to enlarge the time within which to appeal.

10. In relation to the applicant's application, we have examined all the material which has been filed and of course we have carefully considered the affidavit of the 13th December 2017. I am now going to refer to that particular affidavit wherein the applicant states that he was advised by his solicitor that he must be plead guilty and that any failure to do so would result in him spending eighteen months in custody awaiting trial and that he was advised that if he pleaded guilty he would walk free.

11. That in effect is the thrust of the particular affidavit. In addition to that the court has also considered a Psychological report which was before the court and in our view it does not add to the applicant's application. It is clear, however, from the report that Dr Randall is of the opinion, having assessed the applicant, that he is an intelligent and articulate man.

12. As regards the applicant's grounds of appeal, it is evident even from the affidavit which was not before the court on the last occasion and from his further affidavits that the material upon which he now seeks to move this application to enlarge time was within his knowledge at the time when he was in fact sentenced by the court. In particular, when one looks at the affidavit at para 2 wherein he states:-

"...that upon conviction and sentence in Galway Circuit Court on the 6th October 2011, my then solicitor advised me that no appeal was open to me. This was the same solicitor who advised me that I must plead guilty and that failure to do so would result in my spending 18 months in custody awaiting trial. He also advised me on a guilty plea I would walk free."

Therefore, any element of duress, as contended for by the applicant, was something which was within the applicant's knowledge at the time when he was in fact sentenced before the Circuit Criminal Court.

13. Regarding the evidence as given by the prosecuting Garda, of which the applicant said he did not become aware, until in fact he received the transcript of evidence in 2015; again this was something which was known to the applicant immediately upon him being sentenced and in the course of the sentence hearing for which he was present and was legally represented.

14. Therefore, as regards the first limb of the test for consideration by this court as to whether there has been an explanation offered for the period of delay; we are satisfied that no satisfactory explanation whatsoever has been offered by the applicant for the period of the delay. The delay, as I have stated is, in the region of seven years and on any assessment, that is an extraordinary period of delay which in the mind of this court calls for an extraordinary explanation.

15. As regards the second aspect of the test, that is the appellant's engagement with the evidence; we are satisfied that he has not made out an arguable ground on appeal. An arguable ground must have some substance. We are not satisfied that the applicant in this instance has made out even an arguable ground at a most basic level. We are aware in considering the matter that the Court's approach is a flexible one and that we must consider whether an extension of time in the instant case would serve the interest of justice.

16. Having considered the entirety of the material and of course, as I have stated the affidavit which was not before the court on the last occasion, we have no hesitation whatsoever in concluding that the interest of justice would not be served in this instance by the extension of time and so we refuse the application.

17. In so deciding, I should say in addition, that, the applicant is seeking to appeal against conviction where the sentence was imposed in 2011. A period in excess of some seven years has passed since the date of sentence. That calls for an extraordinary explanation which is not present in this case. We also take into account that in excess of eleven years has passed since the date of the offence itself and further, as Mr Crane says in his affidavit, where the intention to appeal against conviction and sentence was not formed by him until the receipt of the transcript in 2015. There is then a further period of delay until the notice of application for an enlargement of time was filed which is dated the 23rd July 2017.

18. So in all of those circumstances the application stands refused.