



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 75
HCA/2019/415/XC

Lord Justice General
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST SENTENCE

by

ALEXANDER MCKINLAY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: CM Mitchell QC, S Collins (sol adv); Collins & Co (for Virgil M Crawford, Stirling)

Respondent: Prentice QC AD (sol adv); the Crown Agent

7 November 2019

[1] The appellant was tried at the High Court in Edinburgh on an indictment containing two charges. The first was one of rape (Sexual Offences (Scotland) Act 2009, s 1) on

6 November 2016 in Doune. The second was that:

“on 17 August 2018, you ... being an accused person indicted ... with a contravention of Section 1 of [the 2009 Act], did without reasonable excuse, fail to appear at a diet at the High Court of Justiciary at Glasgow, being a diet in respect of solemn

proceedings of which you had been given due notice: CONTRARY to the Criminal Procedure (Scotland) Act 1995, Section 102A(1)(a).”

The jury acquitted the appellant of the substantive charge, but convicted him of failing to appear, at what was a Preliminary Hearing, in terms of charge 2.

[2] The circumstances of the appellant’s failure to appear at the Preliminary Hearing were that he had first appeared on petition at Stirling Sheriff Court on 18 September 2017, when he made no plea or declaration and was granted bail. The indictment was served on 17 July 2018 at the appellant’s law agent’s office, citing the appellant to appear at a Preliminary Hearing at the High Court in Glasgow on 17 August 2018. The appellant was not present at that diet. He was in Ibiza. He was arrested on a European Arrest Warrant on 16 January 2019 and extradited unopposed. He appeared at the High Court on 31 January 2019, when he was remanded in custody. When in Ibiza, the appellant had made no contact with those representing him. He could not be contacted because he had put a Spanish SIM card in his phone.

[3] The appellant was sentenced to 3 years imprisonment, on the basis that his failure to appear in court on 17 August had delayed the trial and incurred considerable public expense in the extradition process. The appellant was aged 32. He had a substantial criminal record, although none involving prosecution at solemn level, which involved sentences of imprisonment on four occasions. He had breached Community Payback Orders on two occasions and Bail Orders on five.

[4] It is important to recognise that the diet under consideration was not a trial diet, but a Preliminary Hearing. Even taking into account the expense of the extradition process and the appellant’s previous convictions, notably the breaches of bail, the court is persuaded that

the sentence is excessive. It will quash the sentence of 3 years imprisonment and substitute one of 18 months.