IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Application No. BBCR2015/007
BB Criminal Appeal No. 10 of 2008

BETWEEN

ANDREW LEROY LOVELL **APPLICANT**

AND

THE QUEEN **RESPONDENT**

Before the Honourables **Mr Justice Nelson**
Mr Justice Wit
Mr Justice Hayton

Appearances

Mr Bryan L Weekes for the Applicant

Mr Elwood Watts and Mr Oliver Thomas for the Respondent

REASONS FOR JUDGMENT

[1] On November 10, 2015 Andrew Lovell ("the Applicant") filed three applications: one to extend the time for applying for special leave to appeal against conviction and sentence, a second for special leave to appeal against conviction and sentence and a third for special leave to appeal as a poor person. On January 27, 2016 the Court dismissed all three applications before it. We now give our reasons for that decision. It bears note that applications in identical terms to the second and third applications were previously dismissed by this Court on December 8, 2014.

[2] On July 27, 2005 the Applicant was charged with the murder of an English visitor, Daniel May. On March 12, 2008 the Applicant was by majority verdict convicted of manslaughter. On April 7, 2008 he was sentenced to 22 years' imprisonment. The Applicant appealed to the Court of Appeal (Moore, Mason and Burgess JJA) which dismissed his appeal on October 23, 2013. Although Rule 10.12 of the Caribbean Court of Justice (Appellate Jurisdiction) Rules 2008 ("the Rules") required the Applicant to lodge an appeal within 42 days of the Court of Appeal judgment, his application for legal aid was not processed within that period for reasons beyond his control, thereby rendering him unable to file his application within the stipulated time frame.

[3] It was only on May 15, 2014 that attorneys-at-law for the Applicant filed an application for special leave to appeal and an application for leave to appeal as a poor person. No application for an extension of time to file such applications was sought. Furthermore after filing these applications, the Applicant failed to serve notices of the applications on the Crown within 7 days after filing i.e. May 26, 2014 as required by Rule 10.14(2) of the Rules.

[4] The Caribbean Court of Justice Registry Supervisor brought this omission to the attention of the Applicant's attorney-at-law by letter dated September 5, 2014. The Applicant's attorney-at-law gave instructions to his staff to serve notices of the applications on the Crown but no action was taken. The Registry Supervisor by a second letter dated October 7, 2014 again alerted the Applicant's attorney to the non-service of the applications on the Crown.

[5] Against that background on October 9, 2014 this Court issued a notice directing that the Applicant show cause why his applications of May 15, 2014 should not be dismissed for want of prosecution. The Court directed that the parties file written submissions and that the hearing be based on those written submissions, pursuant to Rule 8.1 and Rule 9.6(c) of the Rules, thereby dispensing with the need for an oral hearing. This Court (Saunders, Wit and Anderson JCCJ) ("hereinafter referred to as "the first panel") dismissed the Applicant's application for special leave and his poor person application for want of prosecution on December 8, 2014.[1] The first panel held as follows:

> (1) "In instances where the applicant is out of the time for filing an application for special leave to appeal, the applicant must seek an extension of time."[2]

[1] [2014] CCJ 19 (AJ).
[2] ibid at [5].

(2) In certain circumstances the Court might excuse delay but only to avert "a clear miscarriage of justice"[3] provided that a cogent explanation for the failure to comply with the Rules of Court was given.

(3) "Neither the Attorney's misapprehension about service on the State nor the attribution of blame to his staff"[4] represented a convincing explanation for some of the delay encountered in the present case. Additionally there was nothing to satisfy the Court of a possibility of a miscarriage of justice.

(4) There was no or little information to assist the Court to assess the merits of the appeal since counsel for the Applicant merely regurgitated the grounds of appeal rejected by the Court of Appeal as the projected grounds of appeal in this case.

[6] The first panel therefore dismissed the applications. As observed above the instant applications, apart from the extension of time application, duplicate those previously adjudicated upon and dismissed by the first panel.

Jurisdiction to re-open a decision of a final appellate court

[7] The first issue on the present applications is whether the Applicant can properly make these three applications after his earlier applications for special leave to appeal and to appeal as a poor person had been dismissed for want of prosecution.

[8] In *Clyde Browne v Moore-Griffith and others* (No. 2)[5] and *Clyde Browne v Moore-Griffith and others* (No. 3)[6] this Court had to consider whether it could set aside its own order on a special leave application and entertain a second hearing of the application for special leave. In both cases, the answer of this Court was not contingent upon whether the previous proceedings were interlocutory in nature or a substantive appeal. In *Clyde Browne* (No. 2) this Court ruled that "[a]s a matter of principle, the CCJ as a final court of appeal must have unfettered power to correct any injustice caused by an earlier order it has made."[7] This Court also further admonished that "such power would be used only in exceptional circumstances

[3] ibid at [5].
[4] ibid at [6].
[5] (2013) 84 WIR 76
[6] [2014] CCJ 4 (AJ)
[7] Clyde Brown (No.2) (n 5) at [7].

for the important principle of finality in litigation must be fully respected."[8] This Court emphasized that the invocation of the exercise of such a power was not an appellate process in itself.[9]

[9] There was a suggestion in the Applicant's submissions that a second special leave application might be permitted where the first hearing had only been on the papers without an oral hearing. The submission was based on the Canadian case of *Reekie v Messervey.*[10] In *Reekie* the applicant applied for leave to vary an earlier order of the court refusing leave to appeal. This order was made on the basis of written submissions only and there was no oral hearing. In that case there was a clear miscarriage of justice but it was argued that rule 51(12) of the Rules of the Supreme Court of Canada precluded a rehearing of an application for leave. The Supreme Court of Canada held that rule 51(12) applied only to oral hearings and not to applications disposed of on the papers.

[10] In this Court's view, the Applicant's reliance on *Reekie* is misplaced. In *Clyde Browne* (No. 2) this Court heard the application on the papers pursuant to Rule 8.1 and Rule 9.6(c) of the (Appellate Jurisdiction) Rules 2005 as amended. On the basis of this precedent, *Reekie v Messervey* (supra) does not apply in the case now before the Court.

[11] On the basis of the *Clyde Browne* cases and the rules above mentioned, this Court considers that it has jurisdiction to entertain this application and that the first panel properly heard the earlier applications without an oral hearing.

A second special leave application out of time

[12] The Applicant correctly asserts that there is no specific provision in the Rules which preclude a second application for special leave to appeal. This should not be taken to mean that in exercising its discretion on a second application, the Court's discretion is at large. It is important to note that although the *Clyde Browne* case concerned a rehearing of a special leave application rather than a fresh second application for special leave, in our view the same principles apply.

[8] ibid at [6].
[9] ibid at [12].
[10] [1990] 1 SCR 219

[13] In order to successfully advance a second special leave application, the Applicant must overcome the finding of the first panel that there was no cogent explanation for the delay in prosecuting the application for special leave and that there was no material before the first panel pointing to an arguable case on the merits of the proposed appeal. In so doing it would be necessary to show that (a) the Applicant was denied some component of natural justice (for example, failure to examine and consider the written submissions) or (b) new facts or circumstances supervened since the hearing before the first panel that pointed to a potential miscarriage of justice. Such facts and circumstances would not simply consist of new arguments or grounds of appeal which could have been placed before the first panel. Rather it must be based on new events or circumstances which were not available or could not be readily obtained at the time of the first hearing such as the discovery of DNA evidence that would have impacted on the earlier decision. In the case of co-offenders sentenced at different times, a relevant consideration in bolstering the argument for either a rehearing or a second hearing would be a supervening marked disparity in sentencing. None of the material presented to the Court in this second application can be so categorised.

Delay in prosecuting the appeal

[14] Where a second special leave application is filed out of time, it goes without saying that it must be preceded by an application for an extension of time. It bears note that the first special leave application was dismissed for want of prosecution without conditions on the basis that there had been no convincing explanation for the delay.[11]

[15] Since the dismissal of the application for special leave to appeal on December 8, 2014 the Applicant contends that the delay in filing the second application was due to his incarceration since July 2005. He also explains his inaction by reference to the advice of his previous attorney that nothing more could be done in his matter and that at most he could file a constitutional motion regarding sentence. In our view, the matters relied on to explain the further delay of 10 months in making the present applications are far from cogent, especially against the backdrop of the first special leave application which was dismissed for want of prosecution. The first panel was apparently satisfied that the delay in prosecuting the special

[11] *Lovell v R* (n 1) at [6].

leave application was inordinate and inexcusable: see by way of analogy *Allen v Sir Alfred McAlpine & Sons Ltd.*[12]

[16] In the absence of any cogent grounds to excuse the delay both before December 8, 2014 and continuing thereafter up to November 10, 2015, the second special leave application which has been filed out of time faces the gargantuan task of pointing to a clear miscarriage of justice that would give the Applicant a realistic chance of success on appeal: see *Somrah v A.G.*[13] This the Applicant has failed to do.

New facts and circumstances, not new arguments

[17] The first panel was faced with the same grounds as those placed before the Court of Appeal. Although the written submissions before the first panel did not fully explain the grounds relied on, the first panel had the benefit of the Court of Appeal's judgment.

[18] The grounds of the application before the first panel of the CCJ replicated the grounds of appeal before the Court of Appeal with the addition of an introductory clause: "The Justices of Appeal erred in law by failing to accept." The only minor change was that the Applicant omitted grounds 1 and 5 which had previously been deployed before the Court of Appeal. By and large, the Court of Appeal examined and rejected each of the grounds later repeated before the first panel. With this state of affairs, it followed that the first panel felt obliged to accept the Court of Appeal's findings. It should be emphasised that the present proceedings are not an appeal from the first panel. Therefore in the absence of credible new evidence which would impact on the Court of Appeal's findings, the Applicant cannot re-open the decision of the first panel which found that there was no merit in the grounds of appeal.

[19] Before the present panel of this Court the Applicant sought to raise "grounds of appeal not argued before the Court of Appeal." A party must, in the interests of the administration of justice, bring forward its whole case in proceedings before the court and not serve up its menu of grounds and arguments piecemeal before several courts in the hope that eventually the court will find a particular course more appetizing: see *Henderson v Henderson*[14] as explained in *Johnson v Gore Wood*[15] by Lord Bingham of Cornhill and *Edwards v A.G.*[16] In

[12] [1968] 2 QB 229 at p. 268 per Salmon LJ.
[13] [2009] CCJ 5 (AJ) at [15].
[14] (1843) 3 Hare 100.
[15] [2002] 2 AC 1, 30H – 31F.
[16] [2008] CCJ 10(AJ); See also *Somrah v A.G* (n 13) at [25].

the instant applications the proposed new grounds of appeal including the one relying on the incompetence of counsel are in effect a rehash of the grounds of appeal rejected by both the trial judge and the Court of Appeal.

[20] The Applicant had every opportunity to put his case through his previous counsel who is said to have been associated with senior counsel. In such circumstances the Applicant should have placed his whole case before the first panel. The Court therefore holds that in special leave proceedings of the same kind as those which the first panel considered, the Applicant cannot re-litigate the grounds which were before the first panel and the Court of Appeal. Further, we hold that on the facts of this case the new grounds now being advanced are matters which should have been placed before the first panel. It would be an abuse of process to allow them to be advanced at a second special leave application.

[21] For the reasons set out above, these three applications seeking in substance the hearing of a second application for special leave must fail because no cogent explanation of the delay in seeking an extension of time to apply for special leave to appeal has been advanced and no new facts and circumstances since the applications to the first panel have been advanced which would cause an independent observer to conclude that there might be a clear miscarriage of justice. We proceed nonetheless out of deference to counsel to examine the new arguments which the Applicant submits justify allowing a second application for special leave.

The proposed new arguments

[22] The first additional ground was that because of the contradictory evidence given by the police officers on the *voir dire* as to the date of the accused's confession statement and the accused's challenge to the voluntariness of the statement, the judge should have excluded the confession statement and declared a mistrial if necessary.

[23] In so far as this submission challenges the trial judge's decision on admissibility it must be borne in mind that the judge has a duty to decide whether the confession is admissible. The trial judge must make a determination as to fairness on the *voir dire*. Once the judge ruled the statement voluntary, both the issues as to the police evidence and the circumstances of the making of the confession were matters which the jury would have had to consider in the context of the weight and value, if any, to be attached to the evidence: see *Ajodha v The*

State[17] per Lord Bridge. Since these issues are issues of fact for the jury, they do not present arguable grounds of appeal. Nor can the mere categorization of confession evidence as prejudicial be a ground for reversing the judge's decision not to exercise her residual discretion to exclude admissible evidence. Evidence is not unfairly prejudicial merely because it makes it more likely that the defendant will be convicted. As such, this first additional argument advanced by the Applicant would in any event have failed.

[24] The second argument related to the judge leaving the issue of manslaughter to the jury when the foreman asked for further clarification on the approach which the jury should take in dealing with the confession statement. The Applicant's contention was that no issue of manslaughter arose on the facts. The deceased was shot twice in the back during a robbery. Therefore the only possible conviction was for murder or nothing. In our view, based on the evidence before the jury, the judge was entitled to leave the verdict of manslaughter to the jury. The learned judge carefully directed the jury that they were not to bring in a verdict of manslaughter if the victim, Daniel May, was shot by accident. Her direction was: "So manslaughter arises if you find that the accused shot Daniel May, but when he did so he did not intend to kill Daniel May or to cause him serious bodily harm …" On the evidence the judge properly left that issue to the jury. It is impossible to speculate what conclusion the jury would have arrived at if manslaughter were not left to them.

[25] The third submission related to the failure to cross-examine the police officers as to the inconsistencies in their evidence as to the date of the statement and as to who discovered the error in the confession statement. This point formed the basis of a submission that counsel who conducted the application before the first panel was incompetent. It was contended that the first panel's criticism that little or no information was provided to enable the court to assess the merits of the application suggested that counsel then appearing for the Applicant was incompetent.

[26] It is clear that the credibility of the police officers was a major issue before the jury. The then counsel for the Applicant could have cross-examined the police officers as to the alterations of the date on the confession statement but he chose not to do so. Where deliberate tactical decisions are made by counsel as to the cross-examination of a witness,

[17] [1982] AC 204, 220H.

there is nothing unfair and there is no miscarriage of justice in holding the accused to such decisions of counsel properly instructed. At the end of the day the issue was as to the credibility of the officers turned upon the totality of the evidence. The jury clearly rejected the submission that the statements were fabricated and believed the officers. This proposed argument does not suggest any miscarriage of justice.

Conclusion

[27] The Court has jurisdiction to entertain a second special leave application but will do so only in exceptional circumstances, such as where evidence or circumstances not available to the first panel have since come to light. The Court will not re-open matters decided by the first panel on the basis of the same or new arguments on the principle that there must be finality of litigation and the need to secure confidence in the administration of justice as explained in *Henderson v Henderson* (supra), *Johnson v Gore Wood* (supra) and *Somrah v A.G.* (supra). These principles apply with even greater force where no new facts and circumstances are relied on and the new arguments are a rehash of the arguments before the first panel.

[28] Where, as here, an application was dismissed for want of prosecution unconditionally for non-compliance with time limits in the Rules, the first hurdle is to demonstrate why a second special leave application was being made out of time. The Applicant has demonstrably failed to do so in this case. Nor has he shown that the first panel denied him natural justice. In any event, the proposed additional grounds essentially cover the same ground as that before the first panel and do not suggest any possible miscarriage of justice. The applications are therefore dismissed.

/s/ R. Nelson
The Hon Mr Justice Nelson

/s/ J. Wit
The Hon Mr. Justice Wit

/s/ D. Hayton
The Hon Mr Justice Hayton