

ANGUILLA

IN THE COURT OF APPEAL

HCRAP 2008/003

BETWEEN:

DWIGHT LIBURD

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Denys Barrow, SC

Justice of Appeal

Appearances:

Mr. Clyde Williams and Mr. Michael Bourne for the Appellant

2008: July 28.

Criminal Appeal-Application for extension of time within which to appeal-reasons for delay in filing appeal-circumstances in which Court may grant extension of time although delay inordinate or unexplained-avoidance of injustice-court will have regard to proposed grounds of appeal

The applicant/intended appellant applied for an extension of time within which to appeal his conviction on counts of causing grievous bodily harm with intent, possession of a firearm without a licence and possession of ammunition without a licence. Although the application was made some two and a half years after he was convicted, the applicant failed to provide the court with reason for the delay. The proposed appeal was based on the ground that the conviction was unsafe or unsatisfactory. The applicant/ intended appellant contended that he had been denied a fair trial due to his assertion that his defence was badly conducted by trial counsel. The main issue before the court was whether and on what grounds an extension of time within which to appeal should be granted, given the absence of explanation and taking into account the length of the delay and the merits of the proposed appeal.

Held, refusing the application for an extension of time within which to appeal, that:

- (1) A court would not grant an extension of time within which to appeal except for very good reason. A consideration of reasons begins with reasons for delay. Because of

the grave considerations involved in an application to extend time within which to appeal, a court must be keen in its examination of reasons for delay ;

- (2) In an appropriate case however, an extension may be granted even where there has been inordinate or unexplained delay. Where, for example, significant injustice would result if the proposed appeal were not heard the court may nonetheless grant the extension.
- (3) Having regard to the proposed ground of appeal and the assertions made in support thereof, the court is satisfied that the applicant/intended appellant would suffer no injustice if an extension of time within which to appeal was refused.

JUDGMENT

- [1] **BARROW, J.A.:** Some two and a half years after he was convicted, on 24th October 2005, on two counts of causing grievous bodily harm with intent, possession of a firearm without a licence and possession of ammunition without a licence the applicant applied, on 21st May 2008, for an extension of time within which to appeal.
- [2] It is settled law that an extension of time for appealing will not be granted unless there are very good reasons; see **Archbold 2005**, at 7-182.
- [3] In considering an application for an extension of time for appealing a court generally looks at the length of delay, the reasons for delay and the merits of the proposed appeal. The court's consideration begins with the principle that time limits for appealing must be obeyed. The court will not be inflexible and unyielding in its application of the principle but it has a duty to hold an applicant to strict compliance.
- [4] Time limits for appealing are established to ensure that there is certainty in the conduct of litigation. Certainty is of overriding importance, especially in criminal litigation, so that all persons interested in litigation and members of society generally may know where matters stand. An appellant must know that he may appeal at any time within 14 days¹ but equally he must know that if he does not appeal within that time he may no longer appeal, unless

¹ Section 44(1) Eastern Caribbean Supreme Court Act, Ch. E15, Revised Laws of Anguilla, 2000

he has satisfactory grounds to persuade the court to make an exception and extend time. Similarly, the prosecution must be able to rely on time limits and to know and conduct the affairs of that branch of the administration of justice on the basis that if there is no appeal within the time limited then there will be no appeal, save in an exceptional case. As important, the victims of crime, their families and friends, as well as witnesses must be able to rely on the certainty of the time limits imposed by the law and to believe that if no appeal is filed before time expires there is closure.

- [5] Because there are such grave considerations involved in an application to extend time for appealing the court must be keen in its examination of reasons for delay. The explanations for delay were presented mainly by the appellant's mother. She deposed that immediately after her son's conviction she explored the matter of appealing, at his request. The mother deposed that she met with counsel who had represented the applicant at trial and counsel advised that it made no sense to appeal because there was no hope of success. I note that counsel who so advised is a very senior and experienced practitioner at the criminal bar.
- [6] The mother told the applicant of this advice but, she stated, "as he insisted I later approached [counsel from another island] in or around August 2006 in an attempt to retain her to conduct the appeal." That counsel directed the mother to a local firm. The mother met an attorney from that firm but she did not retain that attorney. Thereafter the mother said she "made several attempts to assist in initiating the appeal personally." These attempts were to get "papers" concerning the trial. On two occasions, the mother stated, she got the depositions from the preliminary inquiry, which she said were useless.
- [7] In or around September 2007 the mother met one of the two counsel who now make this application for the son. At their first meeting counsel indicated he would need to see the transcript of the trial. It took the overburdened court reporting unit until January 2008 to produce the transcript. Counsel had prior commitments and were unable, their litigation clerk deposed, to attend to the intended appeal until late April 2008. The applicant also

swore an affidavit but this focused on his proposed ground of appeal and not on reasons for delay.

[8] On the facts stated by the mother, having been advised by counsel immediately after the conviction that an appeal was hopeless, the applicant had clear choices. He could have chosen to accept trial counsel's advice and abandon thoughts of appealing, or reject that advice and proceed with an appeal, either in person or with the assistance of other counsel. Had there been some short delay in pursuing this latter course this application would have been on a different footing. Instead, this application is made on the footing that it was not until August 2006, about 10 months after the conviction and perhaps 9 months after counsel advised that an appeal would be hopeless, that the mother contacted another attorney. She does not say that she or the applicant took any other step.² No explanation has been given for this delay. The further delays that occurred thereafter simply compounded the matter and do not call for consideration. The basic fact is the applicant has given no reason for delay.

[9] It does not follow from this conclusion that the application for an extension of time must automatically be dismissed, because in an appropriate case an extension of time for appealing may be granted even if there has been inordinate and unexplained delay.³ Where, for example, significant injustice would result if the proposed appeal were not heard the court may nonetheless grant the extension. Consideration as to whether it would be unjust to refuse an extension will normally begin by having regard to the merits of the proposed appeal. To enable the court to form a preliminary view of the merits an applicant for an extension of time should put before the court a draft notice of appeal, as was done in this case.

² The applicant deposed that on at least two occasions "between January 2006 and August 2007" he wrote to the Registrar in Anguilla requesting a copy of the transcripts. Obviously, that does not say when the applicant first wrote to request the transcripts and is hardly of assistance. The letter from the Registrar that the applicant exhibited makes the point that if the applicant had filed a notice of appeal the transcripts would automatically have been prepared, as a matter of priority.

³ See *R v King* [2000] Crim. L.R. 835, C.A.

[10] The draft notice of appeal contains a single ground of appeal, even though it was elaborated over a number of paragraphs. The proposed ground of appeal is that the conviction is unsafe or unsatisfactory. The essence of this contention is that trial counsel presented inconsistent defences to the jury and did not revisit an initial decision that the appellant would not testify, and as a result the appellant was denied a fair trial.

[11] The alleged inconsistent defences presented were that the applicant was not in possession of a firearm and that if he was in possession of a firearm, the firearm was discharged accidentally when the virtual complainant knocked the gun from his face where, according to the testimony of the virtual complainant, the applicant was holding it. In my view this does not amount to presenting inconsistent defences. It was the applicant's case that he did not have a gun. That was his defence. That, as I understand it, was his sole defence. The case that trial counsel presented, as one gleans from the extracts that counsel placed before this court, was to challenge the truthfulness of the testimony for the Crown that the applicant had a gun. However, trial counsel very sensibly also cross-examined the prosecution witnesses on their version of events (presumably without accepting it to be true) to show that even on that version there was no deliberate shooting. That was made clear in the closing address trial counsel made to the jury, when he stated that:

"... what happened was accidental; assuming that their account is truthful. **But** we are saying that my client never had a gun. We are saying that my client never shot anyone."⁴ (Emphases added.)

[12] I consider it was perfectly normal and appropriate for trial counsel to conduct the defence as he did and he should be commended rather than condemned for doing so.

[13] The other aspect of the alleged denial of a fair trial was the failure of trial counsel to revisit the applicant's decision, made shortly before trial commenced, that he would not testify. The applicant's affidavit acknowledges that it was his decision and there is no suggestion that either counsel pressed him to make that decision or even initiated the idea, although both counsel apparently thought it a good idea. The stated premise of this proposed

⁴ Reproduced at page 16 of the "record of appeal" prepared for this application.

complaint is that the applicant should have been advised by trial counsel, at the close of the prosecution's case, "that this was an unwise course to maintain given the evidence that had been led against me by the Crown. Had I been made aware that in light of the Crown's case it was important and in my best interest to give evidence, I would have abandoned my previous position and given evidence."⁵

[14] This court has not been told what made the decision not to testify "an unwise course to maintain" or why it was in the applicant's "best interest" to reverse that decision. The bald statements are meaningless. It would have taken, perhaps, an affidavit from a lawyer to give substance to the imputation that trial counsel had erred in the judgment call that the applicant should maintain his silence. The applicant's present legal team apparently felt sufficiently inhibited not to take that course. I need not go on to consider how egregious must be counsel's conduct of the case of an accused before it can provide a ground of appeal.⁶ It is sufficient to say that there is simply no basis for criticising the decision of trial counsel and I reject the notion that the criticism can provide any basis for an appeal.

[15] The appellant has failed to advance sufficiently good reasons for the inordinate delay in seeking to appeal his conviction and having regard to the merits of the proposed appeal it cannot be said that significant injustice would result if the proposed appeal was not heard. In the result, the application for an extension of time within which to appeal is denied.

Denys Barrow, SC
Justice of Appeal

⁵ Affidavit of Dwight Liburd, paragraph 15.

⁶ See, for an example, the speech of Lord Judge in *Doherty and Mc Gregor* [1997] 2 Cr App R 218 at 220 para. D: "Unless in the particular circumstances it can be demonstrated that, in the light of information available to him at the time, no reasonably competent counsel would sensibly have adopted the course taken by him at the time when he took it, these grounds of appeal [based on criticisms of former counsel] should not be advanced."