

TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCRAP 2011/001

BETWEEN:

BEVERN SMITH

Applicant/Appellant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before:

The Hon. Mde. Ola Mae Edwards

Justice of Appeal

Appearances:

Mr. William Hare for the Applicant/Appellant

Director of Public Prosecutions for the Respondent

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2011: March 22.

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### JUDGMENT

[1] **EDWARDS, J.A.:** The applicant by his counsel has filed on 12<sup>th</sup> January 2011, a Notice of Application for leave to appeal against sentence out of time and Notice of Appeal against sentence. The application is not in accordance with Rule 46 of the **Criminal Appeal Rules 1968** which states that:

“An application to the Court for an extension of time within which notices [i.e. notices of application for extension of time within which a notice of application for leave to appeal shall be given under Rule 44] may be given shall be in Form 2 in Appendix C. Every person making an application for such extension of time, shall send to the Registrar together with the proper form of such application, a form duly filled up of notice of appeal, or of notice of application for leave to appeal, appropriate to the ground or grounds upon which he desires to question his conviction or sentence, as the case may be.”

- [2] The contents of the application present a very unusual situation in that the applicant wishes to appeal 2 different sentences for unrelated offences that were imposed in the High Court on 19<sup>th</sup> October 2000 and in the Magistrates' Court on 18<sup>th</sup> September 2002, after he has nearly completed serving the sentences.
- [3] The application, submissions and supporting affidavit of Jose Santos a solicitor, filed on 17<sup>th</sup> January 2011 discloses:
- (a) That the applicant was convicted for unlawful sexual intercourse with a minor and was sentenced to 12 years imprisonment passed on 19<sup>th</sup> October 2000, by Justice Neville Smith; and
  - (b) That while serving his sentence of 12 years imprisonment at Her Majesty's Prison at Balsum's Ghut, he was caught with cannabis whilst performing supervised work outside the prison, for which he was convicted for possession of cannabis with intent to supply, and sentenced by Magistrate Gail Charles on 18<sup>th</sup> September 2002 to 3 years imprisonment. The Magistrate ordered that the sentence of 3 years was to run consecutively to the sentence of 12 years.
- [4] The reason for the application is stated as follows: An application for habeas corpus was filed on 30<sup>th</sup> November 2010 and was heard on 7<sup>th</sup> January 2011.
- "7. Very shortly before the hearing, it became apparent that the Attorney General was going to contend that under the Prison Rules, the grant of remission was in the discretion of the Executive. Although the appellant's legal advisors believe that this argument is completely wrong, to seek judicial review of the decision would entail the appellant remaining in prison in the meantime. It is accepted that the merits of the Attorney General's arguments deserve the court's close attention, which it is believed they will receive from the Court of Appeal in the May sitting, in the case of a prisoner in a similar position who was released following the issue of a habeas corpus application 8. The application is urgent, because the Appellant is a prisoner who has in any event, it is submitted, served the equivalent of a 15 year prison sentence, but is being denied release from incarceration at the 'discretion' of the Executive."

[5] At paragraph 4 of the affidavit it is stated:

"...the purpose of the application is really to try to secure the appellant's immediate release ... The Ag. Attorney General claims that question of whether a prisoner is released after the release date computed under the Prison Rules 1999 is thereafter in the discretion of the Executive; in other words the 'release date' is advisory to the Executive, which thereafter makes the final decision. He has contended that because Mr. Smith's conduct has not been 'good' (the Ag. Attorney General citing the cannabis offence, despite the fact that Mr. Smith was separately punished for it) the Executive is not minded to release him – despite the fact that Mr. Smith has forfeited none of his remission under the Prison Rules."

[6] The principles applicable for granting an extension of time to appeal in criminal cases were considered by a single judge Barrow JA in **Dwight Liburd and The Queen**: (Unreported Judgment delivered on 28<sup>th</sup> July 2008) HCRAP 2008/003, Anguilla. I endorse and adopt the principles succinctly stated by Barrow JA at paragraphs 4 and 5 of his judgment where he observed:

"[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 days but equally he must know that if he does not appeal within that time he may no longer appeal, unless 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 ... [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."

[7] The reasons and purpose of the application previously mentioned at paragraphs 4 and 5 above are not good reasons for extending the time to appeal. The application for extension of time is in fact a tactical strategy employed to secure the release of the applicant other than by way of the proper process. This, in my view, is an abuse of the appeal process which should not be overlooked and or tolerated by the court.

[8] The applicant's application has no merit as it has failed to provide satisfactory reasons for the delay in making the application, I would dismiss this application without further ado.

**Order**

[9] The Notice of Application for leave to appeal against sentence out of time and Notice of Appeal against sentence is dismissed.

**Ola Mae Edwards**  
Justice of Appeal

24<sup>th</sup> March 2011