[2018] QCA 50

COURT OF APPEAL

GOTTERSON JA
DOUGLAS J
FLANAGAN J

CA No 218 of 2017
DC No 306 of 2016

THE QUEEN

v

GBB **Applicant**

BRISBANE

FRIDAY, 23 MARCH 2018

JUDGMENT

FLANAGAN J: After a trial in the District Court at Townsville, the applicant was convicted on 2 August 2016 of three counts of rape and three counts of indecent treatment of a child under 16 years. Each charge was a domestic violence offence. The applicant was acquitted of a further count of rape (Count 4).

On 4 August 2016, he was sentenced to imprisonment for 12 months for Count 1 (indecent treatment), and for each of the remaining counts (Counts 2, 3, 5, 6 and 7) he was sentenced to imprisonment for nine years. Pre-sentence custody of one day was declared and a parole eligibility date was set at 3 February 2021.

On 19 September 2017, the applicant filed a notice of appeal, seeking to appeal his convictions of 2 August 2016 and the sentence imposed on 4 August 2016. The notice of appeal identifies the following grounds:

(a) the verdict is unreasonable or cannot be supported having regard to the evidence; and

(b) the sentence imposed was, in all of the circumstances, manifestly excessive.

On 29 September 2017, the applicant also filed an application for an extension of time in which to appeal. There is no affidavit filed in support of the application for an extension of time which provides any explanation for the considerable delay of over 12 months. Any notice of appeal was required to be given within one calendar month of the date of conviction and sentence.

The applicant, who is self-represented, has, however, filed submissions with the Registrar of the Court of Appeal dated 19 February 2018. The applicant in late August 2016 instructed the Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd to lodge an appeal on his behalf. The applicant believed that the Service had lodged an appeal within the required timeframe. While this belief is not sworn to, the applicant has attached a letter dated 9 January 2018 from the Service which confirms an "understanding that [the Service] lodged appeal documents before the Court of Appeal in 2016" after which material was forwarded by the Service to Legal Aid Queensland to conduct the appeal. Believing that an appeal had been lodged on his behalf, the applicant waited for the matter to come on for hearing.

On 25 August 2017, he engaged in a video conference with Legal Aid Queensland in relation to his appeal. Legal Aid could not confirm that an appeal had, in fact, been lodged. As a result on 19 September 2017 the applicant lodged the present notice of appeal and subsequently filed a notice of application for an extension of time within which to appeal.

The respondent accepts that there is apparent foundation for the applicant's belief that an appeal notice was filed and filed within time. In *R v Tait* [1999] 2 Qd R 667 at [5] this Court

stated the relevant test in considering an application for an extension of time within which to appeal:

> "…the Court will examine whether there is any good reason shown to account for the delay and consider overall whether it is in the interests of justice to grant the extension. That may involve some assessment of whether the appeal seems to be a viable one. It is not to be expected that in all such cases the Court will be able to assess whether the prospective appeal is viable or not, but when it is feasible to do so, the Court will often find it appropriate to make some provisional assessment of the strength of the applicant's appeal, and take that into account in deciding whether it is a fit case for granting the extension."

There is, in my view, good reason shown by the applicant to account for the delay. This is, in effect, conceded by the respondent. The application for an extension of time is resisted by the respondent, however, on the basis that there is nothing available or asserted that suggests any miscarriage of justice would result in refusing to grant an extension of time.

No record has been prepared in this appeal. The only material before the Court apart from the notice of appeal and the application to extend time, is the transcripts of the summing-up, redirections and sentencing remarks of the learned trial judge. The present ground of appeal against conviction, namely that the verdict is unreasonable or cannot be supported having regard to the evidence, requires this Court to perform an independent examination of the whole of the evidence to determine whether it was open to the jury to be satisfied of the guilt of the applicant on all or any counts, beyond reasonable doubt. Without an appeal record, this Court is not in a position (even on a preliminary basis) to assess whether any miscarriage of justice would result in refusing to grant an extension of time. Such an exercise cannot be performed by reference to the summing up alone.

In light of the applicant's belief that his instructions to lodge an appeal within time had been followed, which belief is supported by the letter from the Aboriginal and Torres Strait Islander Legal Service dated 9 January 2018, I would order that:

1. The application for an extension of time within which to appeal is granted.
2. The time for giving a notice of appeal or application for leave to appeal against sentence be extended to 19 September 2017; and

3. The appeal against conviction and application for leave to appeal against sentence be adjourned to a date to be fixed.

DOUGLAS J: I agree.

GOTTERSON JA: I agree. The orders of the Court are:

1. The application for an extension of time within which to appeal is granted.
2. The time for giving a notice of appeal or application for leave to appeal against sentence is extended to the 19th of September 2017.
3. The appeal against conviction and application for leave to appeal against sentence are adjourned to a date to be fixed.

Adjourn the Court.