

SUPREME COURT OF QUEENSLAND

CITATION: *R v Kaye* [2010] QCA 11

PARTIES: **R**
v
KAYE, Christian William Thomas
(applicant/appellant)

FILE NO/S: CA No 302 of 2009
DC No 1 of 2009

DIVISION: Court of Appeal

PROCEEDING: Application for Extension (Conviction)

ORIGINATING COURT: District Court at Maryborough

DELIVERED EX TEMPORE ON: 10 February 2010

DELIVERED AT: Brisbane

HEARING DATE: 10 February 2010

JUDGES: McMurdo P and Muir and Fraser JJA
Separate reasons for judgment of each member of the Court each concurring as to the order made

ORDER: **Application to extend the time within which to appeal against convictions is granted**
The time for filing the applicant's notice of appeal against convictions is extended to 2 December 2009

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where the applicant was convicted of four offences of rape and was sentenced to eight years imprisonment to be served cumulatively upon an existing term of imprisonment– where the applicant was five weeks out of time and applied for an extension of time within which to appeal his convictions – where the applicant was illiterate – whether the interests of justice warrant granting an extension

R v GV [\[2006\] QCA 394](#), cited
R v Tait [1999] 2 Qd R 667; [\[1998\] QCA 304](#), cited
R v Witsen [\[2008\] QCA 31](#), cited

COUNSEL: The appellant appeared on his own behalf
M B Lehane for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondents

FRASER JA: On 1 December 2009 the applicant filed an application for extension of the time within which to appeal and a notice of appeal against his conviction on 22 September 2009 of four offences of rape. The applicant was sentenced to eight years imprisonment with a declaration that the offences were serious violent offences. That imprisonment must be served cumulatively upon a term of imprisonment that the applicant was already serving.

In considering whether to grant the necessary extension of time, the Court considers whether there is good reason to account for the delay in appealing and whether it is in the interests of justice to grant the extension: *R v Tait* [1999] 2 Qd R 667. The Court may make an assessment of the viability of the appeal if that is possible upon the materials available and the Court may extend time even in the absence of a satisfactory explanation for the delay where refusal to do so would result in a miscarriage of justice: see *R v GV* [2006] QCA 394 at [3] and *R v Witsen* [2008] QCA 31 at [3].

The applicant's proposed appeal is some five weeks out of time. By way of explanation for that delay he refers to periods of time during which he was held in different watch houses and during which he had no contact with any legal representative. He also asserts that there were failures within the prison system to respond to his requests for information about mounting his intended appeal. He states that it was not until another prisoner put him into contact with Legal Aid that he was able to obtain the appropriate forms on 27 November 2009. This explanation is not especially compelling and nor is it supported by any evidence, but on the other hand it is not contradicted and the delay is not especially marked. These features provide some support for the proposed extension. It must also be noted that the applicant has the disadvantage that, so he told the Court today, he cannot read or write. His application and notice of appeal were prepared by another prisoner.

It is necessary briefly to summarise the case so far as it appears from the limited material available on this application, which relevantly comprises the transcript of the summing up

and the sentencing remarks. The prosecution case was that the applicant sodomised the seriously disabled complainant, a fellow prisoner in the Maryborough Correctional Centre, on four different occasions. Although other inmates must have been nearby, there was no suggestion that any saw or heard the applicant committing any of the four offences. The complainant's acquiescence in the offences was alleged to have been procured by threats. The prosecution alleged that the applicant threatened the complainant's safety and in relation to the last three counts, also the well-being of the complainant's wife and perhaps also his daughter and his mother. On the prosecution case these threats, and a prison culture against prisoners complaining about fellow inmates, explained why the complainant had not complained to prison authorities about the rapes. The offences came to light only some weeks after the last offence when the complainant told his wife of them. She then complained anonymously to the authorities.

There was some surveillance evidence admitted at the trial about the applicant's movements within the prison but none of the alleged offences was recorded. The medical evidence did not advance the prosecution case. There were no witnesses to the offences. The prosecution case hinged upon the complainant's evidence. The trial judge made it clear to the jury that each count depended on the truthfulness and reliability of the complainant's oral evidence. The applicant did not give or call evidence.

It is not practicable to form a clear view of the strength of the prosecution case on the very limited material now available but it seems not to have been overpowering, given the absence of contemporaneous complaint, the absence of any witness who saw or heard any of the events, and the absence of any medical or surveillance evidence directly corroborating the complainant's version of events. Defence counsel also argued that the medical evidence that the complainant bore no injury when he was examined damaged the prosecution case. Accordingly, on the evidence now available this is not a case in which an extension should be refused on the footing that the prosecution case was apparently overwhelming.

The transcript of the summing up reveals that the applicant's counsel sought one redirection after the summing up and that redirection was given. There was no further request for redirections. The applicant, who represented himself in this application, was unable to articulate any arguable error in the directions given by the trial judge or more generally in relation to the trial. The applicant's notice of appeal does not include any ground of appeal in the space provided for that purpose but this is perhaps explicable by reason of his illiteracy. The application for an extension of time does complain about the applicant's lawyers' conduct of the trial. The applicant states that the start of the trial was moved forward from 26 October to 14 September 2009 and that this did not help because he had written to his legal representatives on 13 September 2009 asking them to look into things. He also states that he did not speak to his legal representatives until the day of the trial and that his counsel was briefed only the night before the trial. These assertions are not supported by any evidence or anything in the transcript of the summing up or the sentencing remarks, but unsurprisingly they are not now contradicted in evidence. The application does not identify any particular respect in which any of the asserted shortcomings and preparation for trial disadvantaged the applicant at the trial or might have contributed to any miscarriage of justice, but if the applicant's complaints about deficiencies in his legal representation have any substance - a matter which cannot be determined on the present state of the material - they had the potential to contribute to a miscarriage of justice. Furthermore, the applicant's own inability to articulate a reasonably arguable error in the conduct of the trial is not, in the particular circumstances here, a reliable indication that there was no such error.

The application for an extension of time then seems rather finely balanced, but weighing up the various considerations mentioned earlier my view is that it is in the interests of justice that the applicant be allowed the opportunity to commence his proposed appeal. It will be necessary for the notice of appeal to be amended to include the grounds upon which the applicant would rely, but that should occur as soon as may be practicable after the applicant has had the opportunity of obtaining legal advice from a lawyer who will

have the benefit of perusing the record of the trial.

I would grant the application.

THE PRESIDENT: I agree.

MUIR JA: I agree.

THE PRESIDENT: The order is the application is granted and time to appeal is extended to 2 December 2009.

Now, Mr Kaye, you should immediately apply for legal aid and you should understand that if legal aid is not granted when the matter is next listed for hearing, that is, if you are not able to obtain any other legal advice, you will be expected to conduct the appeal on your own as best you can at that time, as you are unlikely to be granted a further adjournment unless there are very compelling reasons.

I direct that a transcript be prepared of today's hearing.